

REPUBLIC OF SOUTH AFRICA



**NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

Case no: 11874/11

DATE: 28/2/2014

In the matter between:

LEON WOUTER BAASDEN

PLAINTIFF

AND

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

- [1] In this matter the plaintiff, Mr Leon Wouter Baasden, an adult male residing at V..... L... M..... No 1...., W.... Street, R...., is suing the defendant, who is the Minister of Safety and Security for wrongful arrest and detention as a result of which he suffered damages in the sum of R420,520,00.
- [2] The defendant is being sued in his capacity as the Head of the South African Police Services.
- [3] The action arises out of the detention of the plaintiff on 14 August 2010 at OR Tambo International Airport, Johannesburg allegedly without a warrant by members of the South African Police Services.
- [4] Defendant has pleaded to plaintiff's particulars of claim admitting the place and time of arrest and the fact that at the relevant time the police were acting in their capacity as members of the Police Services.
- [5] Defendant denies that the arrest and detention of plaintiff was unlawful and pleads that Detective Sergeant Mashile who is a Peace Officer as defined in section 1 of the Criminal Procedure Act 51 of 1977 arrested the plaintiff and that he was doing so on the strength of a warrant of arrest issued against the plaintiff in Garsfontein Cas number 485/07/2002.

- [6] The defendant called the evidence of three witnesses. The first witness was Warrant Officer Cloete who was the initial Investigating Officer in a case which had been opened by Wesbank against the plaintiff in terms of the Hire Purchase Act. In that matter it was alleged that the plaintiff had entered into an agreement with Wesbank after which he disappeared without paying for the goods in question, namely a motor vehicle.
- [7] Cloete testified how he visited one of the addresses reflected in the Instalment Sale Agreement namely S.... P.... 2..... W..... Pretoria to look for the plaintiff. He was informed that plaintiff no longer lived there after which he applied on form J50 for the issuing of a warrant of arrest which was duly granted.
- [8] He thereafter applied on form SAPS 55 for circulation of the name of the plaintiff as a 'wanted' person at the Local Criminal Records Centre (LCRC). This was duly effected and the docket was stored away to await the result of the circulation.
- [9] On the day of the arrest, namely 14 August 2010 plaintiff was an incoming passenger from New Zealand when his passport triggered a response in a computer of the Movement Control System indicating that something was amiss. This led to plaintiff's arrest by Sergeant Mashile who confirmed telephonically with Captain Makhubele of Garsfontein Police Station that there was still a valid warrant in the docket for the arrest of plaintiff. As a result, plaintiff was arrested and temporarily detained at OR Tambo after which he was transferred to Garsfontein Police Station for further detention. He was detained there until released after an urgent application to the high Court at about 17h00 on 15 August 2010.

- [10] Plaintiff also gave evidence and the sequence of events as narrated by him largely coincides with the version given by defendant's witnesses.
- [11] He also called the evidence of Advocates Gerber and Neukircher S.C. Both these advocates testified to what can be summarised as lack of co-operation experienced at Garsfontein Police Station from some of the officials who included Captain Makhubele and the standby prosecutor, One Lebo Mokalaka. After a series of events, during which the advocates were trying to obtain the release of plaintiff, bailed was denied by the standby prosecutor.
- [12] Advocate Neukircher S.C thereafter brought a bail appeal on an urgent basis before my brother Justice Mavundla. Before the matter could be finally adjudicated, the prosecutor conceded bail in the some of R2,000.00 leading to the release of the plaintiff.
- [13] The critical difference between the plaintiff and defendant's versions concerns what happened post the arrest and the information given to him at that time by the members who arrested and detained him. He testified that he was neither informed the reason for his arrest nor shown the warrant of arrest in terms of which he was detained. Whilst Sergeant Mashile admits that he did not show plaintiff any warrant, he states that he informed him about the existence of the warrant and that it was in regard to the crime of theft. Similarly, Captain Makhubele states that he duly informed plaintiff that he was arrested for the crime of alienation of goods which amounted to theft and that he showed him the warrant of arrest.
- [14] As stated above, defendant claims that the arrest was lawful because of the existence of a validly issued warrant of arrest. This is the crux of defendant's defence. What is amazing however is that whilst there are documents emanating from the relevant docket which have been referred to during the

evidence led by the defendant, there is no warrant of arrest of the plaintiff. Warrant Officer Cloete testified that after completing the **proforma** J50 form for the issue of the warrant of arrest he also completed the SAPS 55 for circulation for 'wanted' person. The originals of both these documents were then forwarded to the LCRC for processing.

Cloete also testified that in the event of a warrant of arrest disappearing, another warrant has to be applied for. What this means is that the appearance of the information regarding the existence of a warrant of arrest on any other document or electronic data or system does not constitute a warrant but merely evidences that a warrant had been issued. A warrant must exist in real terms as a document that can be exhibited when necessary hence the need to re-apply for one when the original goes missing.

[15] While Captain Makhubele testified that the warrant was taken to court with the docket, this does not in my view explain the absence of a copy of the warrant of arrest on which the defendant has relied for his defence. The Local Criminal Records Centre is what it says it is, namely a place where criminal records are kept. One would imagine that records of documents submitted, such as warrants of arrest are also kept and stored at the LCRC. Yet no one has been called by the defendant to testify in this regard,

[16] Right upfront, defendant admitted that he bears the onus of proving the lawfulness of the arrest. Prima facie, he has done so by proving the existence of Cas number 485/7/02 and the relevant docket. Whilst Warrant Officer Cloete and Captain Makhubele testify about the existence of a warrant of arrest none has been included in the documents before me. It is not for me to infer the existence of a warrant of arrest or to assume that it did exist. There has been no explanation why the assistance of the LCRC was not sought to furnish even a copy of the warrant in question. It should have been not just a logical but the easiest thing for the defendant to access this critical detail in

order to prove its case. Proof on a balance of probabilities by the defendant cannot be achieved by drawing inferences in favour of his case. It has to be done on the weight of evidence presented by the defendant. This, the defendant has failed to do. I accordingly find that defendant has failed to prove the lawfulness of the arrest.

- [17] Regarding quantum of plaintiff's damages, it is common cause that plaintiff was detained for one night and in this regard I have to be guided not only by the personal circumstances of the plaintiff but also by the relevant case law.

The Constitution

- [18] In the matter of **Minister of Safety and Security v Sekhoto (131/10) [2010] ZASCA 141 (19 November 2010)** Harms (DP) stated as follows:

"16 The Bill of Rights guarantees the right of security and freedom of the person which includes the right 'not to be deprived of freedom arbitrarily or without just cause'(s12(1)(a)). This right although previously not entrenched, is not something new in our law. That is why, as stated at the outset of this judgment, any deprivation of freedom has always been regarded as prima facie unlawful and required justification by the arresting officer. This explains the rule that a plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification."

- [19] **In casu** it is common cause that plaintiff was deprived of his freedom from the 14th to the afternoon of 15 August 2010. I have found that though defendant pleaded justification he has failed to prove such justification on a balance of probabilities. This entitles plaintiff to compensation for the damages suffered.

[20] Whilst it is useful to have regard to awards made in previous cases, regard must be had to the facts of each case to determine the quantum of damages.

[21] The plaintiff was detained from the afternoon of 14 August 2010 and released on the afternoon of 15 August 2010, a period of approximately twenty four hours. Needless to say, deprivation of freedom is a humiliating experience to any individual. Mr Baasden is a professional landscaper and he incurred legal expenses in the process of procuring his freedom by employing the services of Advocate Neukircher.

[22] As Van Rensburg J said in **Thandani v Minister of Law and Order 1999(1)SA 702(E) at 707B**

“...Sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a men in a free society which should be zealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual.”

See also in this regard

22.1. Olivier v Minister of Safety and Security 2008(2) SACR 387

22.2. Seymore v Minister of Safety and Security 2006(5) SA495

22.3. Gellman v Minister of Safety and Security 2008(1) SACR 446

[23] In the result, judgment is given in favour of the plaintiff and the following order is made:

23.1. In regard to the wrongful arrest and unlawful detention the defendant shall pay the plaintiff the sum of R120,000.00 with costs which shall include the costs incurred on 24 August 2012.

23.2. In regard to the legal expenses, defendant shall pay the plaintiff the sum of R20,520.00.

S.A.M BAQWA
(JUDGE OF THE HIGH
COURT)

Counsel for the plaintiff:

Adv M Olivier

Instructed by:

De Meyer Attorneys

Counsel for the respondent:

Adv M.S Phaswane

Instructed by:

The State Attorney