




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
21/11/14	
<u>DATE:</u>	<u>SIGNATURE</u>

CASE NO: 54744/2011

DATE: 21/11/2014

IN THE MATTER BETWEEN

MONYABA THOMAS MAKGAE

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

BEATSON, AJ

[1] This is an action brought against the Minister of Safety and Security in which the plaintiff seeks payment of damages for alleged unlawful /wrongful alternatively malicious arrest and detention of the plaintiff by members of the South African Police Force acting within the course and scope of their employment with the Defendant.

[2] At the commencement of the trial the issue of merits and quantum were not separated in terms of the provision of Rule 33 (4) of the Uniform rules of court. The trial proceeded therefore in respect of merits and quantum.

The onus to justify the lawfulness of the arrest was on the defendant. The plaintiff led evidence in the matter first.

[3] In essence the plaintiff's case is that he was unlawfully arrested on the 12th of October 2010 when he attended the Jeppe Police Station. He was called in by the investigating officer in his own hijacking complaint and upon arrival was shown a warrant of arrest in respect of a fraud matter dating back to 2007, that he claimed to have no knowledge of .

[4] The defendant maintained that they believed that the warrant was intended for the plaintiff but that in the event of the Court finding that this was not so, immunity is sought for the arrest and further detention by reason of the provisions of Section 46 of the Criminal Procedure Act 51 of 1977 in that the policeman effecting the arrest did so believing in good faith and on reasonable grounds that the person mentioned in the warrant was the correct person.

[5] In December 2007 early 2008 he lost his identity document issued on 30 April 1997 and though he reported the loss to the Kempton Park police station there was no case number or documentary proof thereof .According to him the police advised him to simply get a new one at Home Affairs, which he then did. This new ID was issued on 7 March 2008. He realised the

importance of losing this document but never took reporting the loss thereof any further.

Evidence for the Plaintiff

[6] In respect of merits the plaintiff testified that on the 9th October 2010 he went to the Jeppe Police Station to report that he had been hijacked and his motor vehicle stolen. Copies of some of his relevant identification documentation including certified copy of his ID document and drivers licence were provided to the police when such a report was made.

[7] On the 11th October 2010 he was contacted by Colonel Nzimande of the Jeppe Police station, who was investigating the hijacking, to come to the police station to discuss his matter. Due to work commitments he could only go to the police station on 12th October which he duly did that afternoon.

[8] According to the plaintiff he was told upon arrival by Colonel Nzimande that there was "good news" and "bad news". His car had been recovered but there was a warrant for his arrest in respect of a fraud charge dating back to 2007 and the warrant would now have to be executed.

[9] The plaintiff denied that he was the person against whom the warrant had been issued upon which he was taken to the Supervisors office. The Supervisor looked at the police system information, asked his name and identity number and informed him that in fact he was the person against whom the warrant had been issued. He had no opportunity to view the system.

[10] He requested Colonel Nzimande to accompany him to his home which was less than 5Km away from the police station to get a copy of his Drivers Licence and confirm his identity and show that he was not the person against whom the warrant of arrest had been issued. He requested the police to get the details of his driver's licence from the closest Licensing Department. His original driver's licence was issued at Randburg and his temporary licence after the hijacking in Centurion.

[11] After being shown a copy of the warrant with the name Mayoba Thomas Makgae and his date of birth on the bottom right hand side of the warrant he was arrested at approximately 14h20 on 12th October 2010 and spent the night in the cells at the Jeppe police station. He pointed out to the police at the time that his first name was Monyaba and not Mayoba. On the morning of 13th October 2010 he made a statement to the police and participated in an identity parade.

[12] At approximately 11h20 on the 13th October 2010 he was transferred to Trichardt police station by Warrant Office Sindane who came to the cells with a large docket in his hands and after looking at the documentation on the hijacking file and the drivers licence on the fraud docket was adamant that the plaintiff was the person for whom the warrant of arrest had been issued and that he was transferring the correct person to Trichardt Police Station.

[13] He was not in possession of either his original identity document or his driver's licence when he was arrested as he was under the impression he had been called to the police station in respect of his hijacking matter and they already had his documentation on file. Irrespective of requests to the police officers he was not allowed to go to his home to verify his identity nor did he get anyone to agree to check his information at any licensing department.

[14] He was fingerprinted at the Trichardt police station and appeared in Court at approximately 09h00 on 14th October 2010 at which time he obtained bail for the amount of R1, 000.00.

[15] He appeared in Court a further four times on 26 October 2010, 18 November 2010, 19 December 2010, 12 January 2011 before the results were received in respect of the fingerprints that indicated there was no match between the plaintiff's fingerprints and those taken on the 2007 fraud docket and charges were withdrawn against him on 12th January 2011.

[16] It was only after he was released on bail on 14th October 2014 that he was able to provide policemen with his ID and his payslip and temporary drivers licence (the original one having been stolen in his hijacking on 9 October 2014) in confirmation of his identity.

[17] The plaintiff was adamant that, as the warrant had been issued in respect of a fraud charge, the police should have been more vigilant in their investigation and proper identification of the person mentioned in the warrant.

He was adamant that though his middle name, surname and date of birth appeared on the warrant the other discrepancies relating to the information the police had on hand and his denial of being involved in the matter were sufficient to alert them to the fact that they were arresting the wrong person.

[18] He furthermore worked at Isando Spoornet not Braamfontein Spoornet and given that this was a fraud case this should have alerted the policeman to possible mistaken identity.

[19] In respect of the plaintiffs transfer from Jeppe to Trichardt police station by Warrant Office Sindane on the 13th of October 2010, the plaintiff testified that he was informed by Sindane that he was the person they were looking for and was not asked for his identity document. He was transported by him to Trichardt . Soon after that, his next interaction with Warrant Office Sindane was when fingerprints were taken on the morning of his first appearance at court in Trichardt on 14th October 2010.

[21] The plaintiff pointed out that there were certain inconsistencies in respect of the documentation in the 2007 fraud docket which allegedly related to him, namely:

- a. the fact that he was Pedi and not Zulu speaking
- b. the fact that his residential address was in fact 302 Mitchmore Street Berea and not 58 Sitema Street Braamfontein.

c. That he was an electrical engineer by trade and not a Grade 12 scholar.

d. That his cell phone number differed

And finally and most importantly

e. His first name was spelt incorrectly on the warrant and fraud docket reading Mayoba instead of Monyaba.

[21] The plaintiff then closed his case and the Defendant called three witnesses.

Nzimande

[22] Colonel Nzimande confirmed that he was a police officer stationed at Jeppe police station with approximately six years experience. On 9th October 2010 the plaintiff formally reported his hijacking at the Jeppe Police Station at which Colonel Nzimande was an investigating officer.

[23] He received the hijacking docket on which there was also a warrant of arrest for Mayoba Thomas Makgae and a system profile of the particulars of the person against whom a warrant of arrest was sought. These particulars detailed full names, race, gender, Id number and date of birth of the person to

be arrested. He was aware that the first name on the docket did not match that of the plaintiff but put this down to human error/misspelling..

[24] Nzimande testified that he telephoned the plaintiff requesting him to come into the police station and bring his identity document as well as car papers with him which he duly did on 12th October 2010. During this telephone conversation the officer informed the plaintiff that it was in respect of his complaint of hijacking but also queried whether the plaintiff was aware of any fraud matter dating back to 2007 / 2008.

[25] Upon the plaintiffs arrival at the police station he informed the plaintiff that his vehicle had been recovered but that there was a warrant of arrest against the plaintiff in respect of a fraud charge being investigated by Trichardt police station.

[26] According to Nzimande the plaintiff was in possession of his original ID document when he attended the Jeppe Police station on the 12th of October 2010 (which was disputed by the plaintiff).

[27] When the plaintiff was asked about the fraud and shown the warrant of arrest, the reply from the plaintiff was that he had been called sometime back about a fraud matter but his identity document has been lost in 2008 and he had not reported it. Plaintiff could give no specific circumstances relating to the place, time or circumstances of its loss . Nzimande was aware that ordinarily a

SAP 11 would need to be completed to report a lost ID and that there was no OB number on the system reflecting such a report.

[28] He took the plaintiff to the office where his supervisor Colonel Singh entered the plaintiffs ID number on the system. The plaintiff viewed this information on the system and confirmed that the ID number, initials and surname were identical to his, but he was adamant that he knew nothing about the charges.

[29] The plaintiff was given a copy of the warrant of arrest, his rights were read to him, and Colonel Nzimande executed the warrant of arrest in the honest belief that he was arresting the correct person according to the details provided on the warrant and the system.

[30] The fact that the plaintiff worked for Spoornet in Isando and not Braamfontein was not considered an issue by him as the plaintiff himself specifically mentioned that this could have been the head office of Spoornet and not the branch at which he was employed.

[31] Colonel Nzimande testified that apart from the warrant (page 74 of bundle B) he obtained the plaintiff's ID document which was verified on the police system and as a result he was convinced he was arresting the correct person and executed the warrant.

Mtungwa

[32] The second witness called for the Defendant was lieutenant colonel Mtungwa who was the policeman who opened the fraud docket in 2007 after arresting an MT Makgae for fraud. An individual attempted to purchase a motor vehicle with a suspected fraudulent drivers licence and was arrested shortly after the matter had been reported to the police.

[33] The person arrested was not in possession of an identity document but was in possession of a drivers licence, the details being MT Makgae (no full names appeared on the drivers licence) with the same ID number and date of birth as the plaintiff. The arrestee gave his own further particulars to the police when he was charged in 2007 with fraud as Mayoba Thomas Makgae.

[34] The said arrested person made a statement that he had allegedly purchased a drivers licence to avoid queuing for a new temporary licence for an amount of R400.00 and was then attempting to purchase a motor vehicle with said false drivers licence. The details of the forged licence were neither confirmed nor disputed as being those of the plaintiff. After being charged and taken to court, the said arrested person obtained bail and absconded. A warrant of arrest was then issued against a person with the initials, surname and identity number of the plaintiff.

[35] He contacted the relevant Licencing Department and received confirmation that the drivers licence was false, but no details in respect of how

it was false ,were provided or requested . The file was then handed over to an investigating officer.

Sindane

[36] The third witness for the defendant was Warrant Officer Sindane who was the investigating office in the fraud case of MT Makgae since 2010.He was handed the 2007 fraud docket in Trichardt and instructed by his commanding officer to collect an arrested person at Jeppe police station.

[37] On arrival at Jeppe, Sindane compared the original identity document that was in the possession of the plaintiff (which is denied by the plaintiff) and a copy of the plaintiffs drivers licence with the drivers licence card on the 2007 fraud docket and confirmed that the identity number, date of birth, and appearance both on the documentation and in person were one and the same and that he was transporting the correct person to Trichardt police station.

[38] At about 11h20 on 13th October 2010 he signed the plaintiff out of the Jeppe police station and handcuffed his right hand to his motor vehicle to transport him to Trichardt. He testified that on the way back to Trichardt police station the plaintiff told him that he was not the correct person to be arrested and that his identity document had got lost somewhere late in 2007 early 2008 but he could not provide any particularity as to where, when and how and he had no evidence of ever having reported such a loss. Warrant officer Sindane did not take plaintiff home to verify his identity or contact the licensing

department to verify the plaintiff's existing licence details .According to him he was not asked to do so and it was Unnecessary as the plaintiff was in possession of his original ID document and there were copies of his identification documents on the hijacking file (page 112 bundle B).

[39] They arrived at Trichard at +/- 14h30 on 13th October 2010 and he was placed in the cells until his fingerprints were taken on the morning of 14th October 2010, before he appeared in court.

[40] The fingerprints were received by CRC on 4th November 2010 and when the results came back on 20th January 2011 they were attached to the fraud docket and it was confirmed that there was no match between the plaintiffs fingerprints and those taken of the M T Makgae arrested for fraud in 2007.As a result the plaintiff was released.

[41] Warrant Officer Sindane confirmed under cross examination that he did not peruse the entire 2007 fraud docket but only what he considered was of importance therein.The reason for the fingerprints taken on the date of the plaintiffs first appearance was to make 100% sure that the correct person had been arrested as the plaintiff was adamant that the warrant of arrest was not for him.

[42] It was put to Warrant Officer Sindane by the plaintiffs attorneys that the address on the NTIS system report dated 26 October 2010 in respect of drivers licence/s issued for the plaintiff ,differed from the address in the 2007

fraud docket and the issue date and certificate number of the licence differed from that of the 2007 fraud file. This should have reasonably made him doubt that he was arresting the correct person – if it had been printed from the system before arresting the plaintiff. This printout was only obtained after instruction received by the Court on the 14th of October on the plaintiff first appearance in court.

[43] Warrant Officer Sindane put the misspelling of the plaintiff's first name on the warrant (page 74 of bundle B) and the misspelling of his surname on the system printout page (page 115 bundle B) down to human error. As the ID, date of birth, initials, middle name and surname (on documents other than the system printout) corresponded and even the appearance on the drivers licence on the fraud file appeared to tally with that of the plaintiff he was sure that he was arresting the correct person. It was pointed out to Sindane that even his own statement in respect of the plaintiff arrest referred to him as Mayoba and not Monyaba.

[44] The defendant then closed its case.

Principles and discussion

[45] In terms of section 12(1)(a) of the Constitution everyone has the right to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause.

[46] In terms of Section 46 of the Criminal Procedure Act 51 of 1977, any person who is authorised to arrest another, under a warrant of arrest, and who in the reasonable belief that he is arresting such person arrests another shall be exempt from the liability in respect of such wrongful arrest. This section exonerates an arrestor from the consequences of an unlawful arrest if there are reasonable grounds for believing that the arrestor is arresting the person to whom the warrant refers .

[47] In determining the question of whether the arresting person acted reasonably the question is asked whether a reasonable and careful person who was entrusted with the execution of a warrant of arrest would have believed that the person whom he had taken into custody was the person identified in the warrant.

[48] The arrestor has to believe in good faith and on reasonable and probable grounds that the person being arrested is in fact the correct person.

[49] It was common cause between the parties that the Plaintiff and the policemen that were involved in his arrest were unknown to each other before the hijacking incident on the 9th of October 2010 and there was no malice between the parties that may have lead to malicious or arrest in bad faith but were there reasonable grounds for the arrest?

[50] *Ingram v Minister of Justice* 1962(3) SA 225 and *Minister van Wet and Order v van der Heever* 1982(4) SA 16 (C) propounded the test as follows:

"whether an ordinarily prudent and cautious person, authorised and bound to execute the warrant, would have believed that the plaintiff was the person mentioned therein". Only exceedingly responsible and circumspect conduct will be regarded as reasonable by a policemen executing a warrant of arrest. It is for example not sufficient to take someone into custody on the grounds of a vague description which would fit many people. The refusal to allow an arrested person to produce his identification document and the failure to compare the number on the persons identity number with that of the person being taken into custody would remove all reasonableness from the conduct of the arresting person. I proceed to consider the question as to whether the defendant satisfied the court that the person/persons responsible for the arrest and detention of the plaintiff did so believing in good faith and on reasonable grounds that the plaintiff was the person mentioned in the warrant.

[51] Now it appears to me that an ordinarily prudent person confronted with

1. the fact that the plaintiff's first name was in fact Monyaba and not Mayobo as indicated on the warrant and charge sheet.
2. the fact that the warrant of arrest was in respect of a charge of fraud and theft by false pretences(it transpired to be identity fraud)

3. the fact that the plaintiff was adamant that he could verify his identity if given the opportunity to get identification documentation at home less than 5km away.
4. the fact that the licensing department could have quickly verified the authenticity of the plaintiff's drivers licence (date of issue and number) as opposed to that on the fraud file via electronic system check.
5. the fact that the plaintiff admitted to having lost his identity document in 2007/2008 even though he had no OB number on the system in respect of reporting same.
6. the fact that the option of fingerprinting the plaintiff was open to police at the time of arrest.
7. the fact that the plaintiff (who apparently absconded in the matter where he was charged with fraud) would report the hijacking of his own motor vehicle to the police.
8. the fact that the fraud docket contained personal details mentioned in paragraph [20] above that were inconsistent with those of the plaintiff and which were on admission not carefully perused by any of the officers involved in the investigation;

should have had doubts as to whether the warrant was really intended for the plaintiff.

[52] A reasonable prudent person executing a warrant in these circumstances would at least have attempted to get hold of the relevant licensing department to verify the status, date of issue, and validity of the driver's licence belonging to MT Makgae at the date of arrest and/or fingerprint the plaintiff to verify his identity and/or allow him to fetch whichever document he felt could verify his identity from home, before arresting the plaintiff, given the fact this was an identity fraud case.

[53] In my judgment the defendant has not proven to this court on a balance of probabilities that the person/persons responsible for the arrest of the plaintiff did so on reasonable grounds and I therefore find that the arrest was unlawful and the defendant is liable for damages.

Quantum

[54] The question now arises what would be the appropriate quantum to be awarded for damages?

[55] The plaintiff was incarcerated for the night in Jeppe Police Station on 12 October 2010 and in Trichardt Police Station on 13 October 2010. He was released on bail at his first appearance on 14 October 2010. The plaintiff is an electrical engineer, married with one child and was forced to be off work for the period of his arrest. He also had to appear in court on 26 October 2010;

18 November 2010, 9 December 2010 and 12 January 2010 before the matter against him was withdrawn.

[56] The plaintiff suffered humiliation and trauma as a result of the arrest and spending two nights in what he considered overcrowded and unhygienic conditions with poor ablution facilities and no bathing facilities and people “helping themselves” next to him. He described the experience as very painful to him. In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Minister of Safety and Security v Scott* (969/2013) [2014] ZASCA 84 (30 May 2014) – Any infringement of a person’s basic right to liberty will be open to censure. The censure is by way of solatium awarded to the plaintiff for injury / inconvenience and is not there to enrich the plaintiff.

[60] Having regard to all the cases cited by counsel as well as *Sithebe v Minister of Police* (31236/2012) [2014] ZAGPJHC 201, I consider that damages should be awarded to the plaintiff in the amount of R75 000.00.

[61] In the result the following order is made:

1. The defendant is ordered to pay the plaintiff the sum of R75 000.00 in respect of damages for unlawful arrest.
2. Costs of suit
3. Interest on the amount at the prescribed rate of 15.5% per annum from date of judgment to date of final payment

A handwritten signature in black ink, appearing to read 'M. Beatson', is written over a horizontal line.

M. BEATSON
Acting Judge of the High Court
Gauteng Division, Pretoria