IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

7/4/2016

CASE NO: A945/14

In the matter between:

MINISTER OF POLICE First Appellant

NATIONAL PROSECUTING AUTHORITY Second Appellant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

05/04/16
DATE

SIGNATURE

MORGAN GOMBAKOMBA First Respondent

TRANSPORT LOGISTICS SOUTHERN AFRICA

(PVT) LIMITED Second Respondent

JUDGMENT

Tuchten J:

1 The first and second respondents separately sued the appellants in the court below for damages arising from the arrest on 30 June 2010 of the first respondent, his consequent prosecution and the seizure on the same day of a truck belonging to the second respondent. The actions were consolidated and heard before Phatudi J. The court

below found for both respondents and ordered the first appellant to pay damages to both respondents. There is no appeal against the orders in relation to the second respondent and nothing further need be said about its case.

2 The first respondent is a citizen of and resident in Zimbabwe. At the relevant time, he earned his living as a truck driver which required that he haul loads across national boundaries. His case was that he was unlawfully arrested on 30 June 2010 and subsequently detained in the police cells at Zeerust. After his arrest he was charged and remained in detention in the police cells until 22 July 2010 when he was released on bail. But thereafter he was unable to leave the Republic because one of the conditions of his bail was that he had to surrender his passport. The criminal proceedings were withdrawn on about 14 June 2012, after which the first respondent's passport was returned to him and the impediment to his freedom to travel and the resumption of his employment was removed.

3 The first respondent thus brought two claims against the appellants, firstly for the loss of liberty and dignity caused by the arrest and for loss of income for the period he was in detention and secondly for the loss of income during the period after his release on bail when he was forced to remain in the Republic.

4 As to the second claim, it was conceded by counsel for the respondents during the hearing before us that the basis for the second claim was that the representative of the second appellant took too long to determine that the state could not succeed in its prosecution of the first respondent. This amounts to the contention that the second appellant through his representative, the local prosecutor, was negligent. As counsel readily conceded, in our law negligent prosecution does not give rise to a delictual claim on the part of an accused person and this second claim could not succeed.

5 The court below, no doubt *per omissio*, made no order in relation to this aspect of the case. It is clear however that the order should have been that the claim against the second appellant was dismissed and I shall reflect this in the order which I shall propose.

6 The essence of the appeal relates to the first respondent's claim for damages arising from his arrest. It is common cause that the first respondent was arrested without a warrant. The first appellant sought to justify the arrest on the ground that the arresting officer had a reasonable suspicion that the first respondent had committed "customs fraud". The evidence at the trial in the court below and the argument before us on appeal focussed on whether the suspicion of the arresting officers was based on reasonable grounds. But as I shall

show, the first appellant was also required to show that the arresting officer or officers held any suspicion at all.

7 The factual background to the arrest is largely common cause. The first respondent and his colleague, Mr Rharadza, were each in charge of a vehicle onto which sealed containers were loaded at the container depot in Bulawayo. They were told that their loads in the containers both consisted of teak decking to be delivered in Johannesburg and they were instructed to travel to their destination through Botswana, although it would have been a shorter journey if they had entered the Republic at Beit Bridge. The reason they were given by their employer for the longer journey was that clearance at the Botswana border is faster than at Musina, the border post on the South African side after Beit Bridge.

8 On 27 June 2010, at the Zimbabwe Botswana border, a clearing agent cut the seal on the container on the first respondent's truck, inspected the contents of the container and resealed the container. The first respondent and Rharadza then travelled through Botswana, arriving at the Pioneer/Skilpadhek border posts near Zeerust on 29 June 2010. They were both cleared on both sides of the border but were delayed by mechanical faults to Rharadza's vehicle. They entered the

Republic early in the morning of 30 June 2010. The first respondent travelled ahead of Rharadza.

9 The first respondent tried to call Rharadza on his cellphone but was unable to do so. The first respondent then travelled to a truck stop near Thembisa in Gauteng where he once again, unsuccessfully, tried to telephone Rharadza. He then telephoned the consignee reflected on his documentation, a Mr Noel. He was directed to a place along the national road where his consignment was unloaded from his truck to another truck. The reason for the transfer of the container given to him was that the warehouse where the offloading was supposed to take place was full. The first respondent said that this was a fairly common occurrence. The first respondent then proceeded to a truck stop in Alberton, Gauteng. He slept in his vehicle.

10 At about 23h00, the first respondent was awakened by a knock on the truck door. It was the police. At first there were two officers but they were joined by two other officers. The police officers searched the truck and found that the container loaded onto it was empty. They asked the first respondent to explain what had happened to his consignment and he told them how he had transferred it at the side of the national road. The first respondent was then arrested and taken first to the Alberton police station and then to the Zeerust police

station. There the first respondent found Rharadza, who had also been arrested.

11 In fact, Rharadza had been arrested at a police roadblock on the Zeerust road. The container on Rharadza's truck was opened and found to contain not teak decking, but contraband cigarettes, ie cigarettes on which no South African customs duties had been paid, as they should have been, for goods whose end destination was the Republic. There is a suggestion in the evidence that in fact, the documents carried by the first respondent relative to his load reflected the end destination of the load as being in Swaziland rather than in the Republic. I shall assume in favour of the first appellant that the documents did indeed reflect the end destination as being in Swaziland. The significance of this is that goods in transit through the Republic to another country do not attract customs duty in the Republic. If the true end destination of the load was in South Africa, the reliance on documents falsely stating that the end destination was in Swaziland could, all else being equal, amount to fraud on the SA customs service.

12 Captain Kgonare of the SA Police Service testified for the appellants at the trial relative to the arrest of the first respondent. He was called to travel to Zeerust because Rharadza had been arrested. He was

told that when Rharadza was stopped he tried to evade arrest by running away. Capt Kgonare saw that Rharadza's documents reflected his consignment as teak decking and was told that in fact Rharadza had been transporting cigarettes. Capt Kgonare interviewed Rharadza, who told him that he thought teak decking was loaded onto the first respondent's truck. Rharadza said that he and the first respondent usually slept at a truck stop in Alberton and Capt Kgonare proceeded there with Rharadza and four other police officers, including Warrant Officer Malfune and Constable Serobe, from Zeerust.

13 I have described how the police officers located the first respondent and that the first respondent, who told them what had happened to his load, was arrested at his truck. Capt Kgonare did not testify in terms that he, or anyone else, formed a suspicion. But in cross-examination it emerged that Capt Kgonare did not arrest the first respondent. His evidence was that the first respondent was not arrested by Capt Kgonare himself but by either WO Malfune or Const Serobe or by both of them. Neither gave evidence. Capt Kgonare did however testify that he was in charge of the operation during which the first respondent was arrested.

14 The justification for the arrest of the first respondent upon which the first appellant relies is that the arresting officer was acting in terms of s 40(1)(b) of the Criminal Procedure Act, 51 of 1977, which reads in relevant part:

> A peace officer may without warrant arrest any person ... whom he reasonably suspects of having committed an offence referred to in Schedule 1... .

15 In *Duncan v Minister of Law and Order,*[1] the Appellate Division laid down the jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the Criminal Procedure Act may be invoked: the arresting officer must be a peace officer; the arresting officer must entertain a suspicion; the suspicion must be one referred to in Schedule 1 to the Criminal Procedure Act; and the suspicion must rest on reasonable grounds.

16 It is not in dispute that police officers are peace officers for the purposes of s 40(1)(b) of the Criminal Procedure Act and that fraud in these circumstances is an offence contemplated in Schedule 1 to the Act. It thus follows that a police officer who reasonably suspects someone of having committed such a fraud is empowered to arrest him.

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1 1986 2 SA 805 A at 818F-I

17 In *Powell NO and Others v Van der Merwe NO and Others*,[2] the Supreme Court of Appeal endorsed certain *dicta* of Lord Devlin in *Shabaan Bin Hussein and Others v Chong Fook Kam and Another.*[3] Paragraphs 36 and 37 of the judgment in *Powell* read in relevant part as follows:[4]

> [36] This Court has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':
> 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.'
> [37] ... Lord Devlin went on to point out
> 'another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. ... Suspicion can take into account also matters which, although admissible, could not form part of a *prima facie* case.

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2 2005 (5) SA 62 SCA paras 36 and 37

3 [1970] AC 942 (PC) [1969] 3 All ER 1627

4 Footnotes omitted

18 Whether a reasonable suspicion existed must be considered objectively. Reasonable grounds of suspicion are those which would induce a reasonable person to have the suspicion.[5] I am prepared to accept that a police officer who was aware of what I have described as being known to Capt Kgonare *might*, if he had formed a suspicion that the first respondent was guilty of fraud in these circumstances have formed such a suspicion reasonably.

19 But the difficulty in the way of the first appellant is that Capt Kgonare's state of mind is not directly relevant to this enquiry because he did not effect the arrest of the first respondent. I shall assume, in favour of the first appellant that even though he did not explicitly testify that he held any suspicion at all regarding the first respondent, Capt Kgonare held a reasonable suspicion, arising from what he knew at the time the first respondent was arrested, that both the first respondent and Rharadza were knowingly transporting contraband, that the first respondent offloaded his cargo on the national road to evade detection and that the first respondent was guilty of fraud.

20 But there is no evidence of what WO Malfune and Const Serobe knew at the crucial time. One does not know whether either of these officers formed any suspicion at all. Perhaps they were just following an order

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5 *R v Van Heerden* 1958 3 SA 150 T 152E, referred to with approval in *Duncan, supra*, 814E.

from Capt Kgonare that the purpose of the operation was to arrest the first respondent. And, if the actual arresting office did form a suspicion, then the question arises: was the information which *the arresting officer* had enough to render the hypothetical suspicion reasonable? There is no evidence that Capt Kgonare shared any information with the other members of his team.

21 A litigant who seeks to justify an arrest on grounds such as those provided in s 40(1)(b) of the Criminal Procedure Act runs a serious risk, where the existence of the requisite suspicion or its reasonableness is in dispute, if the arresting officer does not testify to the fact of the formation *in the arresting officer's own mind* of the requisite suspicion and the factors which led the arresting officer to form the suspicion. Where the arresting officer does not testify at all, there may conceivably be cases in which the existence of the suspicion and its reasonableness can be inferred from other evidence but this is not such a case. It has been justly and authoritatively said that our law demands that those who exercise public power subscribe to a culture of justification.[6] This is particularly so where public power is invoked to deprive a person of the precious right to liberty. The onus was upon the first appellant to bring himself within the protection of s 40(1)(b). In my judgment, this onus was not discharged. On this

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6 *Prinsloo v Van Der Linde and Another* 1997 3 SA 1012 CC para 25

ground, the appeal against the orders made in favour of the first respondent must fail.

22 The quantum of damages awarded to the first respondent for the arrest and detention, R280 000, was not attacked on appeal. However, an additional amount of R377 510,76 was awarded to the first respondent for loss of income. On the basis that the first respondent earned US$150 per month at the time, it would seem that this loss of income related to the time the first respondent was in custody and that the award in this regard should stand. This aspect of the case was only briefly touched upon in argument and no submissions in regard to quantum were addressed to us in argument by either side.

23 In my view, costs should follow the result. The alteration of the order of the court below has little practical significance and I do not think that it can be said that the appellants were substantially successful on appeal. Nor can it be said that the costs order made in the court below was unfair.

24 I propose the following order:

1 The order of the court below is altered to include the following paragraph at the end of the order:

> The claims against the second defendant are dismissed.

2 Save as set out above, the appeal is dismissed. The first appellant must pay the first respondent's costs of the appeal.

NB Tuchtén
Judge of the High Court
~~March~~ 06 April 2016

I agree. It is so ordered.

MW Msimeki
Judge of the High Court
~~March~~ 06 April 2016

I agree.

HJ De Vos
Judge of the High Court
30 March 2016

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