**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

CASE NO:20924/2012

25/11/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

24/11/2016 .....
DATE SIGNATURE

In the matter between:

**APPOLO PALLOURIOS** **FIRST PLAINTIFF**
**ANTONIO INTJA** **SECOND PLAINTIFF**

**and**

**THE MINISTER OF SAFETY AND SECURITY**
**FIRST DEFENDANT**
**ADJ. OFFICER PETRUS MAKHOBELA SECOND DEFENDANT**

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**JUDGMENT**

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RANCHOD J:

[1] The plaintiffs in this matter have instituted action against the defendants for damages arising from their alleged unlawful arrest and detention without a warrant. It is, *inter alia*, alleged that:

> "5. On the 22nd December, 2010 at Hartbeespoort Police Station, the First and Second Plaintiffs were arrested without a warrant by [the second defendant] a member of the South African Police Service....
> 6. Thereafter, the First and Second Plaintiff (*sic*) were unlawfully detained at Hartbeespoort Police Station from 07h30 to 22h00 at the instance of the aforesaid policeman and various other policemen whose names and ranks are also unknown to the Plaintiffs."

[2] It is common cause that the arrest took place on the 29th of December and the particulars of claim were amended accordingly during the course of the trial.

[3] It is apparent that the plaintiff's base their claim on an arrest without a warrant. However, the defendants pleaded that the arrest of the plaintiffs was pursuant to a lawfully issued warrant of arrest.

[4] During a pre-trial conference the defendants' attorney made available a copy of the warrant to the plaintiffs' attorneys. The plaintiffs nevertheless did not amend their particulars of claim nor sought to do so during the trial.

[5] I am satisfied from the evidence led during the trial that a proper warrant of arrest had indeed been issued by a magistrate. The second defendant testified that he had been instructed by the Public Prosecutor to obtain a warrant and thereafter arrest the plaintiffs.

[6] I should mention at this stage that normally the defendant's witnesses would testify first as the onus to prove that the arrest was lawful rested on the defendant. However, the parties had agreed that the plaintiffs would testify first and the matter proceeded accordingly.

[7] The first plaintiff, Mr Pallourios testified that he had first been arrested on the 9th or 10th of September 2010 (it was a Friday) and taken to court on the following Monday when the matter was withdrawn by the Public Prosecutor and he was released. He suspected that the arrest was at the

behest of his former employer for whom he had worked as a close protection officer or, as is commonly known, as a bodyguard from September 2009 to March 2010.

[8] Mr Pallourios testified that on Tuesday 21 December 2010 he received a telephone call from a Colonel Mokwena, who was in charge of the Hartbeespoort police station, requesting him to come with the second plaintiff to see him on Friday the 24th December. He says he told the Colonel that he could meet him the next day, i.e. Wednesday. When he and the second plaintiff arrived at the police station on Wednesday they were immediately arrested. They were told by the second defendant that they are to be detained while their addresses were being verified even though their addresses had been verified in September. They were told that they were being charged for extortion and "something else" which, apparently, was intimidation.

[9] They were again detained in a cell after returning from verification of their addresses. The next day they were taken to the Brits magistrates' court where the matter was referred to the Regional Court and they were released on warning. A trial proceeded and on 28 January 2015 Mr Pallourios was found not guilty and discharged on all counts. The learned magistrate noted on the charge sheet that the proceedings against him were stopped by the Public Prosecutor on instructions from the 'DPP'. The second plaintiff Mr Intja was found guilty on the main count of an attempt to commit extortion.

[10] Mr Pallourios testified that when he was arrested he was not shown the warrant of arrest which was dated 22 December 2010. He said his arrest was on 29 December 2010 and not on 22 December 2010 as pleaded. At the end of the plaintiffs' case I granted an application by their counsel for the amendment of the particulars of claim accordingly. Mr Pallourios was adamant that he was not shown the warrant of arrest when he was arrested.

[11] Mr Intja confirmed in broad terms what Mr Pallourios testified to about the events immediately prior to the arrest and thereafter. He too said they

were not shown a warrant of arrest by the second defendant when effecting the arrest.

[12] After the plaintiffs closed their case the defendants applied for absolution from the instance. The basis for the application was that whereas the plaintiffs' case was based on an arrest without a warrant the uncontested evidence was that the arrests were with a warrant.

[13] Plaintiffs' counsel submitted that even if a warrant of arrest was issued the arresting officer had a discretion whether to arrest or not. Unless he testified it could not be determined whether he had exercised his discretion properly.

[14] Defendants' counsel argued that the issue of the proper exercise of a discretion was not raised in the pleadings.

[15] I thought it necessary to explore the issue about whether the arresting officer had exercised his discretion properly and refused the application for absolution bearing in mind the dictum of Harms JA in *Sekhoto*[1] that:

> "[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises... whether or not to arrest.... The officer, it should be emphasised, is not obliged to effect an arrest."

[16] The second defendant then testified for the defence and the defendants thereafter closed their case. Second defendant said he had arrested the plaintiffs on the strength of the warrants.

[17] It is evident that the plaintiffs having not amended their particulars of claim and faced with the fact that the warrants of arrest had been issued, changed tack and sought to persuade the court that even if second defendant

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[1] Minister of Safety and Security v Sekhoto 2011(1) SACR 315 (SCA) at 327 para [28].

arrested the plaintiffs on the strength of the warrants, he did not exercise his discretion properly.

[18] In *Minister of Safety and Security v Slabbert*[2] it was said (I quote from the Headnote):

> "The issue on appeal was whether the High Court's finding that part of the respondent's detention was unjustified addressed an issue covered by the case pleaded and established by the respondent. A determination of that issue required a consideration of the pleadings and to a lesser extent the evidence led at the trial. In the particulars of claim, the respondent alleged that the arrest and detention were wrongful because there were no reasonable grounds for his arrest and detention and that the arresting officers were aware of that fact.
>
> The question for consideration was whether the case pleaded by the respondent covered the assertion that the refusal to release him into his wife's care rendered the further detention unlawful. A perusal of the particulars of claim showed that such a case was not pleaded. The arrest and detention were challenged solely on the basis that the police had no legal justification for effecting them.
>
> The purpose of the pleadings is to define the issues for the other party and the Court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. <u>However, where the issue in question has been canvassed fully by both sides at the trial, a party may be allowed to rely on such issue even if not covered by the pleadings".</u> (My underlining).

[19] In Sethoko is was further held at para 57:

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[2] [2010]2 AII SA 474 (SCA).

> 'The case can be disposed of on a simple basis, namely, that the proper exercise of Van der Watt's discretion was never an issue between the parties. The plaintiffs, who had to raise it either in their summons or in a replication, failed to do so. The issue was also not ventilated during the hearing.' (My emphasis).

[20] In this matter before me the issue of the exercise of the arresting officer's discretion was ventilated during the trial. The second defendant testified in evidence in chief – and again under cross-examination – that he had arrested the plaintiffs because he had been told by the public prosecutor to obtain warrants for their arrest and then arrest them.

[21] The second defendant said he was not aware that Col. Mokwena had called the plaintiffs to the police station. He was surprised when he saw them there on 29 December 2010. But, he remembered that he had a warrant of arrest for them, which he had obtained a week earlier, and proceeded to arrest them.

[22] Col. Mokwena was not called to testify. I have before me the plaintiffs' uncontested version about how it was that they went to the Hartbeespoort police station. Was it just coincidence that second defendant found them at the police station and promptly arrested them? I think not. His testimony that he was not aware that Col. Mokwena had called them to the police station is not convincing. There is nothing to indicate that Col. Mokwena had called them to the police station for a purpose unrelated to their arrest.

[23] In any event, when second defendant saw the plaintiffs at the police station he had a discretion whether to arrest them or not. The plaintiffs had come to the police station as requested by Col. Mokwena. This was in spite of the fact that they had been arrested and detained earlier in September by Col. Mokwena, Capt. Tshabalala and Lady Capt. Molatse and thereafter released. There could thus have been no fear that they would evade arrest.

[24] After their arrest the plaintiffs were detained then taken to verify their address and thereafter taken to the magistrate's court the next day. The fact that they had fixed addressed indicated that they were not flight risks as is apparent from the fact that at court they were released on warning.

[25] The second defendant repeatedly stated when testifying that he carried out the instructions of the prosecutor when he arrested the plaintiffs. The issue of a discretion whether to arrest or not, according to him, did not arise.

[26] In my view, given that the plaintiffs had come voluntarily to the police station and that their addresses were verified, the second defendant could have exercised a discretion whether to take the drastic step of arresting and detaining them. In Du Toit, et al Commentary on the Criminal Procedure Act at 5-20 [Service Issue 51, 2013] the learned authors state

> 'Even where a warrant for the arrest of a suspect has been lawfully obtained in terms of s 43 this in itself does not necessarily justify an arrest to secure the attendance of the suspect in court. In *Brown and another v Director of Public Prosecutions & others* (supra) Fourie J reaffirmed that an arrest constituted such a drastic invasion of personal liberty that it still had to be justifiable according to the demands of the Bill of Rights. A change in the flight-risk of a suspect might, however, justify his arrest to secure his attendance in court (227a-c, 227 i-j). In *Theobald v Minister of Safety and Security and others* 2011(1) SACR 379 (GSJ) the court held that s44 was not peremptory in the sense that a police officer was bound to arrest a person where a warrant for his arrest had been issued. Section 44 was never intended to preclude a police officer from exercising his discretion not to effect an arrest in terms of the warrant should circumstances require that (at [310]). Where a police officer arrests a suspect pursuant to a warrant of arrest while he is unaware that he has a discretion whether or not to arrest, such an arrest is unlawful. The exercise of the arrestor's discretion to arrest or not is peremptory. It stands to reason that a police officer cannot exercise a discretion that he is unaware of ...." (My underlining).

[27] I therefore find that the arrest was unlawful in circumstances where the second defendant did not exercise his discretion at all.

[28] The arrest was at about 10:15 on Wednesday which, it is not in dispute was a normal court day. There was, in my view, sufficient time to take the plaintiffs to court the same day. Instead, they were detained until the next morning when they were brought before a court. It follows that the detention that followed upon an unlawful arrest was also unlawful until they were brought before a court.

[29] I turn then to the issue of the quantum of damages of the respective plaintiffs. It is trite law that in the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him some much needed solatium for his injured feelings. (*Minister of Safety and Security v Tyulu 2009 (5) 85 (SCA)*). There is no fixed formula for the assessment of damages for non-patrimonial loss. The satisfaction is assessed *ex aequo et bono* (according to what is just and good). (*Seria v Minister of Safety and Security and others 2005 (5) SA 130 (CPD)).*

[30] Factors that a court takes into account include the age and health of the plaintiff, the circumstances of his arrest, the nature and duration of the arrest, the plaintiffs' social and professional standing, whether he was arrested for an improper motive or as a result of malice; publication of the arrest and plaintiffs' income. A court may also have regard to awards made in previous cases, but they can merely serve as a guide as no two cases are exactly alike. It is also trite that our courts are not extravagant in compensating the loss arising from unlawful arrest and detention. (See *Minister of Safety and Security v Tyulu 2009 (5) 85 (SCA), Seria v Minister of Safety and Security and others 2005 (5) SA 130 (CPD)* and *Minister of Safety and Security v Seymor 2006 (6) SA 320 (SCA)).*

[31] In *Tyulu* at para 26 is was also said that:

> 'However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts....'

[32] At the time of his arrest the first plaintiff was manager of a shop in Pretoria-West. He testified that he felt traumatised by his arrest – more so than when he was first arrested in September. He said unlike the time of his first arrest when the police were 'arrogant' this time round they 'just kept quite'. He says an article appeared about the case in the Beeld newspaper which was factually incorrect but did not elaborate as to in what respects it was so. He says he felt embarrassed when relatives called him about it.

[33] As far as him being traumatised is concerned he again did not elaborate further. It seems to me that he did not suffer any degradation beyond that which is inherent in being arrested and detained. He was detained for just under 24 hours before being brought before court when he was released on warning.

[34] I am of the view that an amount of R50 000.00 would be adequate compensation for the contumelia, unlawful arrest and unlawful detention.

[35] I turn then to the second plaintiff. The facts and circumstances leading to his arrest and detention are almost identical to that of the first plaintiff except that he was kept in a separate cell apart from the first plaintiff. He said his family was disturbed about his arrest but did not elaborate. He said the arrest affected his reputation but again, he did not elaborate further save to

say he had been in the South African Airforce up until 2008 which was some two years before his arrest.

[36] I am of the view that in the case of the second plaintiff as well an amount of R50 000.00 would be adequate for the contumelia, unlawful arrest and unlawful detention.

[37] There remains the question of costs. When the plaintiffs launched the action the amount claimed (R100 000.00) fell well within the jurisdiction of the Magistrate's court. The amount awarded is within the Magistrate's court jurisdiction. It is appropriate that costs should be awarded on the Magistrate's court scale.

[38] I make the following order:

1. The first defendant is to pay first plaintiff an amount of R50 000.00 (Fifty Thousand Rand) as damages together with costs of suit on the Magistrate's court scale.
2. The first defendant is to pay second plaintiff an amount of R50 000.00 (Fifty Thousand Rand) as damages together with costs of suit on the Magistrate's court scale.

**RANCHOD J**
**JUDGE OF THE HIGH COURT**

Appearances:

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| Counsel on behalf of Plaintiffs | :Adv M Olivier |
| Instructed by | : F Van Wyk Inc. |
| Counsel on behalf of Respondents | :Adv Jansen van Rensburg |
| Instructed by | : The State Attorney |
| Date heard | :15 August 2016 |
| Date delivered | : 25 November 2016 |