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

CASE NO:71322/2015

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE:22/2/2021

In the matter between:

JACOBUS JOHANNES JACOBS

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

SECOND DEFENDANT

JUDGMENT

RAULINGA J

1. The plaintiff brought two claims against the Minister of Police and the National Director of Public Prosecution, namely
 - 1.1 A claim for unlawful arrest and detention; and
 - 1.2 A claim for malicious proceedings and prosecution.
2. The matter was set down for hearing on 15 August 2018, estimated to be finalised on 17 August 2018. However, on 17 August 2018 the matter was postponed *sine die* for counsel to submit heads of argument and where after to address the Court.
3. It seems to me that the defendant submitted its heads of argument on 14 September 2018, whereas the plaintiff only submitted its heads on 9 January 2020.
4. The matter was then placed on the roll for 14 September 2020 for arguments, where after Judgment was reserved.
5. At the commencement of the trial on 15 August 2018, the plaintiff formally withdrew claim 2 against the second defendant, without tendering costs, and proceeded with claim 1.
6. The plaintiff testified that he was arrested on 27 January 2015 at Kopfontein Border post en route to Botswana where he had to deliver a consignment. The arrest occurred as a result of the immigration officer who called the police stationed at the border post. No warrant of the arrest was shown to him when he was arrested.
7. According to the plaintiff, he was never informed of the reason for his arrest which took place some three hours after he had submitted his passport to the immigration officer.

8. The plaintiff testified that the police officer speculated about the reason for his arrest. He bases this on the fact that he was carrying and transporting an engine to Botswana. Surprisingly his father was allowed to cross the border with the said engine.
9. The plaintiff told the court that a female police officer in the person of Constable Mmutle, told him that she can't tell him the reason for his arrest, but will be told at Nietverdient Police Station (Ekurhuleni). He confirmed that he did not know Constable Mmutle nor the prosecutor, and investigating officers prior to his arrest. As such there could be no ill feelings or grudges existing between him and the police. He was treated well during the arrest, except that he was not informed of the reason for his arrest.
10. He only became aware of the reason for his arrest on 29 January 2015 at Benoni Police Station when his wife came to visit him. His wife has informed him that the reason for his arrest emanated from allegations of housebreaking, which took place on 5 May 2013 at 37 Morris Street .
11. The next time he formally knew of the reason for his arrest was on 30 January 2015 when he was charged by Warrant Officer Nienaber.
12. According to the plaintiff, he was also not provided with reasons for his arrest at Nietverdient Police Station. He was detained at Nietverdient Police Station from 27 to 29 January 2015 when he was collected by two detectives and taken to Benoni Police Station. He was then taken to the holding cells at the Benoni Magistrates' Court where he was subsequently released without appearing in Court.

13. Plaintiff denied ever having been at 37 Morris Street on 5 May 2013 or that he was involved in the break in.
14. The plaintiff's wife, Lizelle Jacobs, testified that she, plaintiff and plaintiff's father visited [...] Street during the early part of 2013 as a property was available for purchase and they were looking for a property to purchase.
15. Lizelle deposed to a statement on 29 January 2015 after plaintiff was arrested to confirm that, she was on the same day informed by a police officer that plaintiff was arrested for housebreaking, due to the fact that his finger print was picked up from the premises at [...] Street.
16. Constable Mmutle testified that on 27 January 2015, she was on duty posted at Kopfontein Border Post between South Africa and Botswana.
17. In conjunction with the Home Affairs Department, the members of the SAPS recovered a hit (circulation of information relating to a person or property) on the plaintiff. The plaintiff was as a result of the hit handed to her, by the immigration officer. After checking on the computer, she realised that the plaintiff was sought by the police at Benoni.
18. She contacted Benoni Police Station and spoke to Detective Constable Nemulodi who faxed her a warrant for the arrest of the plaintiff. She duly informed the plaintiff and arrested him.
19. She completed an arrest statement and handed the plaintiff over to the other members for detention and arrangement that he be sent to the Benoni Police Station.
20. She stated that at the border they do not arrest a person without a warrant, if there is no warrant, they contact the police station concerned, release the

person and tell him or her to contact the relevant police station, and make an entry in the OB. She also testified that the plaintiff was shown a copy of the warrant of his arrest. She showed the plaintiff the warrant and he declined to receive a copy thereof.

21.The evidence of Warrant Officer Mazibuko is that there were three black male suspects spotted at number [...] , Benoni. Two of the suspects were apprehended and one apparently ran away.

22.The two apprehended suspects were charged on housebreaking and theft committed on 5 May 2013 at number [...]. They were both found not guilty and acquitted.

23.Mazibuko testified that after .a year or two, he became aware of the possible other suspect as a result of a sworn statement appearing on page 12 of the index

24 According to the sworn statement the deponent states as follows :

“On 2013-05-05 at 13:25 I went to [...],Benoni for investigation for the finger, palm and footprints. I lifted identifiable prints by means of scotch tape, after developing it with black powder...

The fingerprint No1988316597 was entered into the computer system and the set of fingerprints were identified as those belonging to Jacob Johannes Jacobus”. This is the plaintiff in this case.

25.The crime was committed at around 10H00 and the fingerprints were lifted later that day at 13H35

26.Warrant Officer Mazibuko further testified that he asked in the neighbourhood of [...] if Jacob Johannes Jacobs was known to anyone. Nobody knew him in

- the neighbourhood, not even Mr William Botha the caretaker complainant
27. He proceeded to apply for a warrant of the plaintiff's arrest as a possible suspect due to the fingerprint that was found at the scene of the crime. He filled in a proforma affidavit in support of the application for a warrant.
28. He further testified that in applying and issuing of the warrant of arrest, the prosecutor also relied on the presence of a fingerprint at the scene as *prima facie evidence*.
29. During cross-examination, Mazibuko confirmed that he had regard to the statements in the dockets which he received on 6 May 2013.
30. Mazibuko also testified that he conducted interviews with the two suspects arrested on 5 May 2013. He caused warning statements to be completed on 6 May 2013. He testified that he opposed bail for the two suspects because it was a serious crime and they were found to have previous convictions. The two suspects were prosecuted and were found not guilty and discharged on or about 22 August 2013.
31. The fingerprint was lifted on the outside of a wardrobe just above the handle in the first bedroom.
32. It is important to note, that Mazibuko conceded that whereas in his statement he said he visited the plaintiff's address, it was clear that he did not know the plaintiff's address nor was the address he alleged he visited that of the plaintiff. There was no address that could be visited.
33. At the time when the J50 statement was deposed to, the two accused persons were already acquitted. The caretaker who was present at the crime scene on 5 May 2013 confirmed under oath that he was not aware of who the

plaintiff might be. Mazibuko commissioned the statement of the caretaker.

34. During re-examination by the defendant's counsel, Mazibuko testified that he had regard to an SAP69 report and based on three different ID numbers which also caused him to apply for the warrant of arrest. The SAP69 report was not part of the documents bundles before Court.

35. Mazibuko confirmed that he signed his statement on 2 October 2014.

However, he could not explain why the statement was only commissioned on 11 December 2014.

36. Mazibuko testified that the fingerprint result on its own was enough for him to form a reasonable suspicion that plaintiff was involved in the break-in on 5 May 2013

37. The test for whether the arresting officer entertained a reasonable suspicion is objectively justifiable. This is not whether a police officer believes that he or she has a reason to suspect, but whether, on an objective approach, he or she in fact has reasonable grounds for his or her suspicion- *Duncan V Minister of Law and Order*¹.

38. The plaintiff contends that Constable Mmutle arrested him without exhibiting a warrant of arrest to him. He also refutes the assertion by Mmutle that she received a faxed copy of the warrant from Nemulodi of the Benoni Police Station.

39. It is evident that Constable Mmutle; after checking on the computer she realised that the plaintiff was being sought by the Benoni Police. She

¹ 1986(2) SA 805 (A) at 814 D-E

contacted Nemulodi who faxed her the warrant of arrest. When shown the warrant, the plaintiff declined to receive a copy therefore. She then arrested the plaintiff and completed an arrest statement and handed him over to the other members for detention. She also stated that at the border, they don't arrest a person without a warrant.

40.The demeanour of Constable Mmutle is such that one is inclined to believe her testimony, she was forthright and never contradicted herself. Moreover, it took more than three hours to process the plaintiff, which points to the inference that at that stage she was contacting the Benoni Police for warrant to be faxed to her. There is no reason why she couldn't have presented the warrant to the plaintiff once she received it.

41.The contention that the plaintiff was not shown the warrant must be dismissed outright.

42.Another suspicious submission that must be dismissed is one by the defendant that Mazibuko's evidence on the SAPS69 in so far as it suggests to relate to the plaintiff, must be disregarded as it is incorrect , In that It relates to Willem Botha the complainant in the house breaking charge. I find this submission to be disingenuous in that in my view Mazibuko's evidence is tainted with a number of discrepancies.

43.The only other issue that remains to be determined is whether Mazibuko had regard to contents of the docket and if he applied his mind thereto properly in order to form a reasonable suspicion. In my view, Mazibuko misdirected himself when he applied for the issuance of the warrant of arrest of the plaintiff.

44. In *Weitz V Minister of Safety and Security and other*, Eastern Cape High Court, Grahamstown (487/11) (2014) ZAECHC 33 (22 May 2014.) the Court: “[12] Even when a warrant of arrest has been issued a peace officer has a discretion as to whether or not to execute it. In **Minister of Safety and Security V Sekhoto And Another** Harms DP held that ‘once the jurisdictional facts for an arrest, whether in terms of any paragraph of s40(1) or in terms of s43, are present, a discretion arises’ and that the peace officer is not obliged to effect an arrest: And in **Dominga V Minister of Safety and Security** Chetty J, in this Court, held that the trial court’s finding that, once armed with a warrant; the arrestor was duty bound to arrest the plaintiff without further ado, was wrong and amounts to a clear misdirection: The discretion to arrest or not obviously must be exercised properly.

[13] In *Sekhoto, Harms D. P* stated, in summary, that the discretion must be exercised in good faith, rationally and not arbitrarily. Earlier in the Judgment however, he had surveyed both South African and Foreign decisions especially English cases, and had found that the discretion could be attacked on the basis of the grounds set out - and followed consistently for over a century - in **Shidiack V Union Government** (Minister of the Interior) as well as on the further basis irrationally.”

45. In this matter, the invalid warrant of arrest flows from the irrational exercise of a discretion by Mazibuko. Unfortunately, the prosecutor was caught in this quagmire, which resulted in the magistrate ultimately Issuing the warrant. Constable Mmutle in turn executed the warrant without perusing all the relevant documents, some of which were not even contained in the docket-

(and of course she must have struggled to receive same remotely from the Benoni Police Station.)

46. It seems to me that Mazibuko, when applying for the warrant of arrest he did not consider anything else, but the fingerprint result. He also did not consider the statements contained in the docket. Had he done so, he would have come across the statements of witnesses involved in the robbery matter. In particular, the statement of Botha, the caretaker at no [...]. Mazibuko was at the scene where the erstwhile accused were arrested.

47. Further, Mazibuko conceded to an untruth in his statement where he confirmed under oath that he visited the plaintiffs address, whereas he did not have the plaintiff's address. In the event the warrant was recommended by Mazibuko on unfounded reasons.

48. The prosecutor who presented the application to the magistrate was inept in that he failed to consider all the factors surrounding the issuance of the warrant.

49. The magistrate who issued the warrant did so without evaluating all the evidence presented to him. It was his duty to ensure that no stone was left unturned before issuing the warrant.

50. Last, but not least, Constable MMutle who executed the warrant of arrest on 27 January 2015, did so without exercising a proper discretion. She was duty bound to request Detective Nemulodi to forward all the relevant documents to her, before executing the warrant by arresting the plaintiff.

51. In the circumstances the claim for unlawful arrest and detention must be granted.

52.Regarding quant um, the plaintiff was detained late in the afternoon of 27 January 2015 and released on the morning of 30 January 2015. It means that he spent between two and three days in detention.

53.The assessment of awards of general damages compared with awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly incomparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that- **Minister of Safety and Security V Seymore²**

54.In my view, the only ordeal that the plaintiff suffered is that he was arrested and detained without trial. Of course deprivation of one's liberty is by its nature damaging.

55.In the circumstances, damages in the amount of R120 000 will suffice.

56.In as far as the costs in claim 1 are concerned, the costs will follow the result. The plaintiff abandoned the second claim, and as such it must pay the costs of the defendant for the preparation of trial.

57.Consequently, I make the following order:

57.1 The plaintiff's claim for unlawful arrest and detention is granted;

57.2 The defendant is ordered to pay the plaintiff's damages in the amount of R120 000. 00

57.3 The defendant is ordered to pay costs in the first claim.

57.4 The plaintiff is ordered to pay the costs in the abandoned claim 2.

² 2007 1 All SA 558 (SCA) at page 17.

JUDGE T.J RAULINGA
JUDGE OF THE HIGH COURT

Appearance:

Plaintiff's Counsel	:Adv. C Zietsman
Plaintiff's Attorneys	:Loubser Van Der Walt INC
Defendant's Counsel	:Adv A Moja
Defendant's Attorney	:State Attorneys
Date of hearing	: 14 September 2020
Date of judgment	: 22 January 2021