THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between: **Case No.: 4390/2007**

MZIMKHULU HILTON MPEMVANA **Plaintiff**

and

THE MINISTER OF SAFETY AND SECURITY **First Defendant**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Second Defendant**

JUDGMENT DELIVERED: FRIDAY 10 DECEMBER 2010

SALDANHA, J

[1.] The plaintiff, Mr. Mzimkulu Hilton Mpemvana instituted an action for damages against the defendants arising out of his arrest and detention on a charge of armed robbery of which he was acquitted.

[2.] The court with the consent of the parties separated the issue of the merits from that of the quantum. The only issues for determination at this stage is whether the initial arrest and detention of the plaintiff at the instance of employees of the first defendant and subsequent detention allegedly at the instance of the employees of both defendants was indeed unlawful and wrongful as claimed by the plaintiff.

[3.] In the amended particulars of claim the plaintiff claimed that on the 16th April 2004 and at Plettenberg Bay members of the South African Police Services unlawfully and wrongfully arrested the plaintiff without a warrant of arrest and thereafter unlawfully and intentionally detained or caused the plaintiff to be detained at the holding cells of the South African Police Services, Plettenberg Bay and thereafter at the Knysna Prison until the 1st September 2006. In particular the plaintiff claimed that;

(i) The members of the first defendant, knew alternatively should have known that no reasonable grounds existed for the arrest and subsequent detention of the plaintiff.

(ii) That the arrest of the plaintiff was effected *animo iniuriandi* by the members of the first defendant.

[4.] The plaintiff claimed that both the investigating officer and the state prosecutor at the appearance of the plaintiff in court on the charge of armed robbery recommended that he be denied bail notwithstanding their having considered the police docket, knew or ought to have known that;

(i) Their existed no *prima facie* case against the plaintiff.

(ii) That their opposition to bail was not in accordance with law or in accordance with justice and that the plaintiff ought to have been released on bail and that the charges ought to have been withdrawn against him. Further that the state prosecutor and the members of the first defendant failed to inform the

presiding magistrate of facts relevant to the states case against the plaintiff and that relating to the bail application.

[5.] The plaintiff initially appeared on various occasions in the Plettenberg Bay magistrates court where he unsuccessfully applied to be released on bail. He subsequently appeared in the regional court at Knysna and stood trial on a charge of armed robbery.

[6.] The plaintiff claimed that at each of the remands and during the bail application the defendant owed a duty of care to him to;

(i) Assess the strength of the states case against the plaintiff and to determine whether there existed a *prima facie* case against him.

(ii) To ensure that the charges and proceedings against the plaintiff were dealt with timeously and in accordance with law and in accordance with the dictates of justice;

(iii) To ensure that the plaintiff was not detained in custody or that his detention was extended where there was no *prima facie* case against him;

(iv) To ensure that the plaintiff was granted bail in the circumstances where it was in the interests of justice and in accordance with law that he be released on bail subject to whatever reasonable conditions the court may have imposed;

(v) To place before the court during each of the remands and when determining the issue of bail all relevant information including information with

regard to the strength and weaknesses of the states case and any information favourable to the plaintiff with regard to his eligibility to be released on bail.

[7.] The plaintiff further claimed that the extension of his detention in custody on the 16th April 2004 till the 1st September 2006 was as a result as the wrongful, unlawful and or negligent conduct of members of the first and second defendants.

[8.] As a consequences of such conduct on the part of the defendants the plaintiff claimed that he had suffered damages in the amount of R982 8110. The plaintiff further claimed that the members of the first and second defendant were at all relevant times acting within the course and scope of their employment.

[9.] The plaintiff claimed that he had complied with the statutory provisions of Act 40 of 2002 alternatively that he was entitled to condonation in terms of section 3 of the Act.

[10.] Each of the defendants had filed separate pleas. The first defendant denied that the plaintiff had been unlawfully and wrongfully arrested or that he had unlawfully been detained. The first defendant claimed that the plaintiff's arrest was based on him having been found in the immediate vicinity of another person who had been positively identified by members of the public as having hired a motor vehicle which had been used earlier the day in the commission of a

robbery and that he and the other suspect had also been found to be in unlawful possession of unlicensed firearms.

[11.] The second defendant for her part pleaded that officials in her employ were in possession of sufficient and reasonable evidence and had concluded that the state had a *prima facie* case of a crime(s) committed by the plaintiff for which the plaintiff should be charged and tried in a court of law. The second defendant further denied that she had wrongfully and unlawfully or negligently caused the plaintiff's continued detention and claimed that a magistrate had considered the evidence at the conclusion of the plaintiff's bail application and exercised his/her discretion judicially in refusing the grant of bail which decision resulted in the continued detention of the plaintiff.

[12.] At the commencement of the proceedings both the first and second defendants accepted that they bore the onus of proving the lawfulness of the plaintiff's arrest and initial detention. They lead the evidence of three witnesses. The plaintiff for his part chose not to testify and neither was any other witnesses called by the plaintiff.

[13.] The arrest and detention of the plaintiff on the charge of robbery with aggravating circumstances (read together with the provisions of Act 51(2) of Act 105 of 1997) arose out of an incident on the 16th of April 2004 in which the plaintiff was charged with an alleged accomplice Mr. Sabelo Sidney Mboto (Mboto) for having robbed a farm stall known as Thyme and Again near the N2

national road, Keerbos, Plettenberg Bay and where a Ms Tanya Bezuidenhout was held up and robbed with a firearm. It was alleged that they had stolen an amount of R722.20 from Bezuidenhout.

The background

[14.] The investigating officer in the criminal case, a Inspector Marthinus Johannes Theunissen and a Warrant Officer Nomdo testified with regard to the events that lead up to the arrest and detention of the plaintiff and his co-accused, Mboto and their subsequent prosecution on the charge of armed robbery and a separate charge of the unlawful possession of a firearm by Mboto. Briefly; on the 16th April 2004 while on patrol duty Nomdo received a report over the radio about an armed robbery which had taken place at the Thyme and Again stall. The report referred to a maroon Cressida and the last three digits of the number plate of the vehicle which was alleged to have been used during the robbery. Descriptions of two of the suspects involved in the robbery were also given. One was described as having worn a long sleeved grey shirt and wearing "tekkies" with the name "Dickies" on the back. He also had a black bag strapped over his shoulder. A description of the other suspect was given as having a yellow t-shirt and a maroon jacket and that he had a distinctive hair style with a bush of hair in the middle while clean-shaven on either side. The race of both suspects was also given. Nomdo claimed that he had seen the vehicle previously in and around the Qwanoqwaba township. He subsequently found it parked in a yard and immediately called for reinforcements over the radio. At the house, he together with several other policemen found five persons whom Nomdo described as

"Nigerians." They were searched and after the police conducted a search of the premises they questioned them about the use of the vehicle earlier the day. One of the "Nigerians" named George informed them that he had loaned the vehicle to Mboto earlier that day. George together with the others accompanied Nomdo to the Plettenberg Bay police station where they were again questioned. There Nomdo met police officer Theunissen and George agreed to accompany them to the place where Mboto's girlfriend lived. There, the door was answered by Mboto and Theunissen claimed that he immediately recognized Mboto as one of the suspects from the description given to the police of the persons who had been involved in the armed robbery at the Thyme and Again stall. As Theunissen entered the premises he noticed Mboto shifted his hand to the front of his pants where Theunissen observed a firearm had been stuck into. He immediately grabbed the firearm from Mboto and alerted Nomdo about it. Nomdo moved around Theunissen and approached the plaintiff who was seated on a bed in the room. The plaintiff immediately stood up from the bed and Nomdo noticed a black bag near to where the plaintiff had sat. He also noticed that the plaintiff had worn a long sleeved grey shirt and "tekkies" with the inscription "Dickies." He searched the black bag and found a firearm in it for which the plaintiff was unable to produce a license. The plaintiff and Mboto were arrested for the possession of unlicensed firearms and their suspected involvement in the armed robbery at the Thyme and Again stall. Theunissen claimed that he had warned the plaintiff of his right to silence and his right to legal representation in terms of the Constitution and they were thereafter taken into custody at the Plettenberg Bay Police station.

[15.] The plaintiff however was according to Theunissen and Nomdo inexplicably not formally charged and prosecuted for the unlawful possession of the firearm that was found in the black bag.

[16.] An identification parade was held on the 12 May 2004 at which the plaintiff was not identified by any of the eye witnesses. On the 13th May 2004 the plaintiff unsuccessfully applied for bail and remained in custody until his acquittal on the charge of armed robbery on the 1st September 2006. The plaintiff had been in custody for a period of about 857 days.

The application for bail.

[17.] It was common course that the charge of robbery on which the plaintiff was arrested fell under Schedule 6 of the Criminal Procedure Act (CPA). Section 60(11) of the CPA provides;

> *"Notwithstanding any provision of this act, where an accused is charged with an offence referred to –*
>
> (a) *In schedule 6 the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused having been given a reasonable opportunity to do so adduces evidence satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.*

[18.] These provisions were found to be constitutional notwithstanding the shift of *onus* onto an accused in having to satisfy a court that exceptional circumstances existed for his/her release on bail. **(See S v Dlamini; S v Dladla and Others; S v Joubert; S v Schittekat 1992(2) SACR 51 (CC)).**

[19.] Theunissen testified that in preparing for the plaintiff's application for bail he investigated the personal circumstances of the plaintiff. The plaintiff had initially informed him during the arrest at Mboto's house that he had also lived at the same residence with Mboto. The plaintiff however had subsequently said to him that he lived at a different address at Sididi Street in Kwanobuhle. He also gave the Sididi address as his work address. The plaintiff informed him that he was originally from the Eastern Cape, Uitenhage and that at the time of his arrest he had only lived for about a year in Plettenberg. He claimed that he was divorced and had two children. The plaintiff had also claimed that the day prior to the incident (and his arrest) he had been in Uitenhage and that he had spent the night with an unknown woman at an unknown address. On the morning of the incident he had got a lift to Plettenberg Bay and was dropped off at the Thyme and Again stall and from there Mboto had given him a lift to the Quanoquaba township. Theunissen claimed that Mboto had given him a contrary explanation as Mboto had claimed that he together with the plaintiff and three other unknown persons had gone to the Thyme and Again stall after he (Mboto) had run an errand in the town. At the Thyme and Again road stall Mboto claimed to have looked for a particular magazine which they did not have and he returned to the vehicle. At the vehicle one of the three unknown men got into the car and told

him to drive back to the township. He had not known that the three unknown men had been involved in a robbery at the Thyme and Again stall.

[20.] Theunissen claimed that he initially sought to oppose the application for bail by the plaintiff but after the failure of the witnesses to identify the plaintiff at the identification parade he recommended to the prosecutor and in his testimony in the bail application that the plaintiff be released on an amount of bail of R1000.00 on condition that he reported regularly at a police station. He claimed that he had also informed the court that the plaintiff may have been linked to another robbery which had occurred in May 2003 as the plaintiff's nickname "Zim" was associated with that of a perpetrator in that incident.

[21.] The magistrate refused to release the plaintiff on bail. Theunissen conceded that part of the considerations the court would have taken into account was the possible involvement of the plaintiff in the May 2003 incident.

[22.] The plaintiff did not appeal the decision of the magistrate and neither did he during the course of the trial renew his application for bail. The plaintiff was also subsequently charged with the 2003 robbery and on the 23 November 2003 obtained a discharge in terms of section 174 of the CPA. The plaintiff however did not renew his application for bail thereafter on the Thyme and Again charge.

The 2003 robbery

[23.] Nomdo who was the initial investigating officer in the matter claimed that the only information that the police had about the perpetrator was that obtained from informers and that the perpetrator was allegedly known by the name 'Zim'. One of the witnesses had subsequently identified the plaintiff from a photograph shown to him as one of the suspects in the matter. No identification parade was held by either Nomdo or Theunissen who had subsequently taken over the investigation of the matter. It appeared that at the trial none of the witnesses were found which resulted in a collapse of the states case against the plaintiff and he successfully obtained a discharge in terms of section 174.

The Thyme and Again robbery prosecution.

[24.] The prosecutor who had conducted the trial in the regional court **Mr Moegamat Faried** testified about the various appearances by the plaintiff and Mboto in court. Stemmet had not been involved in the bail application which had taken place in the district court. Stemmet's evidence related specifically to the record of the plaintiff's appearances in the matter in which it appeared that the plaintiff had made approximately 20 appearances in court. The plaintiff and Mboto had applied for postponements on six occasions, the matter was crowded out of the roll on three occasions, the prosecutor was off sick on one occasion, the magistrate was unavailable on two occasions and on one occasion a bomb threat forced a postponement of the matter. Stemmet also testified that the plaintiff had not applied for a discharge in terms of 174 of the CPA after the state had closed it's case but could not recall with any certainty whether the plaintiff

himself had testified. The plaintiff he recalled had been acquitted. The record of the bail and trial proceedings could not been found. Stemmet's evidence was not challenged by any cross-examination.

[25.] Nomdo had also testified with regard to certain utterances made by the legal representative of the plaintiff during the course of the trial about his apparent surprise at the acquittal of the accused. For the purposes of the determination of this matter I will refrain from taking into account such testimony given its prejudicial nature.

Issues for determination

[26.] In the written heads of argument of **Mr Mouton** who appeared on behalf of the plaintiff he submitted that there were five broad issues for determination namely;

(i) Whether the arresting officers Theunissen and Nomdo had entertained a reasonable suspicion that the plaintiff had committed the offence of armed robbery.

(ii) If the court were to find that the plaintiff's arrest was lawful the question that arose for determination was whether the plaintiff's detention from the 19th April (the date of the plaintiff's first court appearance) to the 12th of May (the date of the identity parade) was lawful.

(iii) If such detention was lawful, whether plaintiff's further detention from the 12th of May (the date upon which the identity parade was held) to the 23rd of

November 2005 (the date on which the plaintiff was acquitted on the 2003 robbery charge) was lawful.

(iv) If the court was to find that such detention was lawful whether the plaintiff's continued detention from the date of his discharge of the 2003 robbery charge to the date of his acquittal on the Thyme and Again robbery the 1st September 2006 was lawful.

[27.] During the course of argument Mr. Mouton conceded and correctly so that there existed a reasonable basis for the arrest of the plaintiff. He euphemistically phrased it in argument as "not wishing to make heavy weather" of the contention by the plaintiff. He conceded further that insofar as the plaintiff had carried the *onus* in terms of Section 60 of the CPA in respect of the bail application on the charge of armed robbery the plaintiff was required to have proved exceptional circumstances for the court to have released him on bail. Mr Mouton however submitted that the defendants were responsible in law for the continued detention of the plaintiff after the 23rd November 2005 until his acquittal on the 1st September 2006. In this regard he argued that there was a 'duty' on the part of the defendants, in particular the investigating officer and the prosecutor to have 'advised' the plaintiff to his right to re-apply for bail after his acquittal on the 2003 charge of robbery alternatively to have brought such acquittal to the attention of the court for the reconsideration of the plaintiff release on bail. It was common cause that neither the prosecutor nor the investigating officer did so. Moreover it was common cause that the plaintiff had been legally represented at his trial in the regional court.

The arrest of the plaintiff

[28.] Section 41 (a) of the CPA provides that "a peace officer may without warrant arrest any person –

(a) Who commits or attempts to commit any offence in his presence

(b) Who he reasonably suspects of having committed an offence referred to in schedule 1 other than the offence of escaping from lawful custody.....

[29.] The first defendant correctly assumed the onus of proving the lawfulness of the plaintiff's arrest (see **Mhaga v Minister of Safety and Security 2001(2) All SA 3534 Tk**.

[30.] The defendant was required to prove that the arresting officer had entertained a reasonable suspicion that the plaintiff was involved in the commission of a schedule 1 offence.

[31.] On the basis of the evidence, which was not contradicted by any testimony of the plaintiff, both Theunissen and Nomdo found the plaintiff in the presence of Mboto who had been identified as having driven the vehicle which had been described as having been used in the robbery. It also appeared to be common cause that the clothing worn by the plaintiff on his arrest accorded with the description given by the witness and that the plaintiff was found in the immediate vicinity of a black bag (which had also been referred to by the witness) and in which an unlicensed firearm was found. In the circumstances although

the plaintiff had not been charged with and prosecuted for the possession of the unlawful firearm there appeared to be a reasonable basis for the arresting officers to have formed a reasonable suspicion of the plaintiff's involvement in the offences such as the possession of an unlawful firearm and the armed robbery at the Thyme and Again stall.

The refusal of bail to the plaintiff

[32.] The plaintiff accepted that he had carried the *onus* of proving exceptional circumstances in terms of section 60(11) for his release on bail. The investigating officer Theunissen having investigated the personal circumstances of the plaintiff and with the lack of identification of the plaintiff at the identification parade recommended the plaintiff's release on bail. However, the presiding magistrate who was charged with the responsibility of considering all of the evidence before him decided not to release the plaintiff on bail as the plaintiff had failed to prove exceptional circumstances. That decision was not taken on appeal and neither does it appear that the plaintiff thereafter ever renewed his bail application on the basis of any of his circumstances having changed.

The continued detention of the plaintiff after the 23 November 2005.

[33.] The plaintiff remained in custody after his discharge on the May 2003 charges as he remained on trial on the Thyme and Again charges. He was legally represented and nothing precluded him from renewing his bail application in the light of his discharge on the 2003 robbery. Mr. Mouton relied on the decision **Zealand v Minister of Justice and Constitutional Development**

2008(4) SA 458 (CC) in support of the contention that the defendants retained a responsibility to advise the plaintiff of his rights to reapply for bail or to bring it to the attention of the magistrate. The factual circumstances of the **Zealand** matter are different from that of the plaintiff. The principle upheld though; that section 12(1)(a) of the Constitutional of the Republic of South Africa is applicable is correct; the subsection prescribes;

> *"Everyone has the right to freedom and security of the person, which includes the right –*
>
> *(a) not to be deprived of freedom arbitrarily or without just cause."*

[34.] However inasmuch as the plaintiff is under the constitution entitled to his liberty the provisions of section 60 (11) prescribes that;

> "The court shall order" that the plaintiff be detained in custody until in accordance with the law and unless the plaintiff had adduced evidence which satisfied the court that exceptional circumstances existed which in the interest of justice permitted his release. The *onus* of initiating a bail application before the court remained with the plaintiff and I am of the view that there exists no basis to burden any of the defendants with the responsibility of having to inform or advise the plaintiff of his right to have re-applied for bail where the plaintiff had (a) already been informed of his rights upon his arrest and (b) where he was legally represented and where he had already unsuccessfully applied for bail In any bail application initiated by plaintiff, the defendants would however have carried retained the responsibility of placing all of the relevant information before the court

including the fact that plaintiff had been discharged on the 2003 robbery. However the *onus* of proving exceptional circumstances remained with the plaintiff. The plaintiff's continued detention was on the evidence not without just cause or arbitrary. I am therefore of the view that neither of the defendants had acted either unlawfully or wrongfully or that they were negligent in their failure to have advised or informed the plaintiff of his right to renew his application for bail or to have informed the court in the absence of an application for bail of the discharge of the plaintiff in the May 2003 robbery matter.

The issue of costs

[35.] During the course of the trial two specific issues arose with regard to the question of costs. The witness Stemmet had initially not been available to testify on account of ill health. The proceedings were adjourned and the defendants were required to provide proof that Stemmet's absence had been occasioned as a result of ill health. At the subsequent appearance of Stemmet he confirmed that he had been ill and was unable to attend court. His absence had been supported by a medical certificate by his doctor. I am therefore of the view that each party should carry their own wasted costs occasioned by the postponement.

[36.] The second issue relating to costs arose in respect of the wasted costs occasioned when counsel for the defendant indicated on the 8th June 2010 that the defendants wished to apply for an amendment in terms of Rule 28(10) to the

defendant's pleas by the inclusion of a special plea. The second defendant, in the proposed special plea claimed that by virtue of plaintiff's notice in terms of section 3(1) Act 40 of 2004 in which he had given notice of his intention to institute a claim against the defendants on the basis of an alleged unlawful arrest, unlawful charge and unlawful prosecution, the plaintiff was precluded from claiming damages based on any other delicts not referred to in the aforementioned notice.

[37.] The defendants also handed up to the court a proposed Amended Plea in which it claimed that plaintiff's claim arising out of allegations that he was

(a) Maliciously arrested and detained.

(b) Maliciously prosecuted.

(c) Owed a duty of care with reference to being granted bai.l

(d) Be dismissed with costs for plaintiff's failure to comply with section 3(1) of Act 40 of 2002 in that the plaintiff had failed to notify the defendant in the said notice of his intention to institute proceedings of the nature alluded to in the above paragraphs 1, 2 and 3.

[38.] Mr. Mouton objected on behalf of the plaintiff to the belated application for the amendments and informed the court that neither he nor his attorney had been appraised or informed prior to the moving of the application by the defendant's counsel of their intention to seek such amendments. Mr. Mouton further submitted that the plaintiff had not relied during the course of the trial on

the claim based on a malicious arrest, detention and the prosecution of the plaintiff by the defendants.

[39.] The plaintiff thereafter filed an affidavit by his attorney **Mr Franscois Albertus Swanepoel** in support of the plaintiff's opposition to the applications for the amendment. In the affidavit, Swanepoel raised a point *in limine* on the basis that the second defendant sought to withdraw an admission initially made by it in introducing a special plea, whereas on the 29th of December 2009 they had pleaded and admitted that the plaintiff had complied with the provision of section 3(1)(a) of Act 40 of 2002.

[40.] Swanepoel further submitted that the defendants had provided no explanation of the circumstances under which the admission was made nor the reasons for it's withdrawal. The plaintiff also claimed that the proposed amendment of the pleas by the insertion of the special plea was vague, embarrassing and susceptible to be excepted upon various grounds.

[41.] The plaintiff also submitted that the proposed amendment was without any basis as the plaintiff in his notice had in fact claimed damages for the unlawful arrest detention and further detention up until his acquittal on the 1st September 2006 and for the unlawful prosecution. The plaintiff claimed that the defendant's application was belated, without substance, vexatious and bad in law. The plaintiff prayed that the defendants applications be dismissed with costs on a scale as between attorney and client jointly and severally the one paying the

other to be absolved. As a result of the proposed application for the amendment the proceedings of the 8th June 2010 had been adjourned to the 9th June 2010.

[42.] During the course of dealing with the application for the amendments on the 9th June 2010 and having considered the response of the plaintiff's counsel the defendants withdrew the application for the amendments.

[43.] In the light of the abandonment the court requested defendants counsel to submit an affidavit from the defendants that it was in fact their instructions to move for such amendments as defendants counsel had indicated that the proposed amendments had only occurred to him during the course of formulating his heads of argument in the matter.

[44.] The defendants filed an affidavit by a Johan Truter a legal officer in the employ of the first defendant who confirmed that the amendments were moved upon their instructions and the instruction to their counsel was confirmed in an affidavit by the state attorney responsible for dealing with the matter.

[45.] The aborted amendments resulted in the matter being unnecessarily delayed by more than a full court day. Besides the wasted costs, counsel for the plaintiff and the attorney were further inconvenienced by having to spend another day in Cape Town as they were both from out of town.

[46.] In the light of the belated nature of the amendments and its abandonment I am of the view that it is appropriate that the wasted costs occasioned thereby be borne by the defendants on an attorney client scale, jointly and severally, the one paying the other to be absolved. Mr Mouton submitted that a costs award in favour of the plaintiff should include that of two counsel. I do not agree, as the nature and complexity of the matter certainly did not warrant the employ of two counsel.

In the result the following order is made:

The plaintiff's claim is dismissed with costs, save for the wasted costs occasioned by;

(i) The postponement caused by the ill health of Stemmet – where each party is ordered to carry their own costs

(ii) the aborted amendment of the 8th June 2010 which costs are to be borne by first and second defendant on an attorney and client scale jointly and severally the one paying the other to be absolved.

SALDANHA J