REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

29/10/18 .....

Date **ML TWALA**

CASE NO: A3128/2017

In the matter between:

NGWENYA: SELBY ZWELIBANZI **APPELLANT**

AND

MINISTER OF POLICE **RESPONDENT**

JUDGMENT

TWALA J

[1] The central issue in this appeal is whether the arrest and detention of the appellant by members of the South African Police Service on the 2nd of October 2015 until he was released on bail on the 29th of October 2015 was lawful and justified.

[2] At the beginning of the hearing the appellant brought an application for condonation for the late noting of the appeal. The respondent did not file any opposition to the application. The application for condonation was granted.

[3] It is common cause that the appellant was sleeping in his home on the 2nd of October 2015 when in the early hours of the morning the police came and arrested him without a warrant. It is not in dispute that he was later detained in the cells and made his first appearance in court on the 5th of October 2015. He was only released on bail on the 29th of October 2015.

[4] It is apparent from the record that the appellant was at his home when he was arrested by the police. The police asked him for a firearm and he told them he does not have a firearm. They beat him up and asked him about his involvement in a hijacking which he denied knowledge of. He was then handcuffed and bundled into the police vehicle and they drove around with him checking on other houses. He was later detained in the police cells in Springs. He then saw Ayanda Sidu (Ayanda) who was in the company of the police when he was arrested. In their conversation it transpired that it is Ayanda who directed the police to his house. Later that day the investigating officer came and told him to admit to the hijacking so that he can be released on bail, but he refused to admit something which he does not know. He attended an identity parade but no one pointed him out at the identity parade. He was detained from the 2nd of October 2015 until he was released on bail 29th of October 2015.

[5] Detective constable Koma's (Koma) testimony was that he was taken to the appellant's house by Ayanda who pointed out the appellant as an accomplice in the hijacking case and that he is in possession of the firearm that was used in committing the offence. He found the appellant hiding at the corner of the bed in his house. He confronted him with the firearm and the hijack and he decided to co-operate with the police. He directed him to Thulani, Willie and Schalkwyk. He directed him to Thulani's address whom he said has the firearm but when they got there Thulani's grandmother told him that since Thulani hijacked a taxi in Springs he does not sleep at home. The appellant then took the police to Willie's address where they phoned his father who informed them that since he hijacked a taxi in Springs Willie had not been sleeping at home. He then detained the appellant in the police cells in Springs where after he appeared in court and was remanded in custody at Modderbee prison until he was released on bail.

[6] It is trite law and in terms of the bill of the rights enshrined in the Constitution of the Republic of South Africa Act, 108 of 1996 that, everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[7] Section 40 of the Criminal Procedure Act, Act 51 of 1977 (CPA) provides as follows:

> "Arrest by peace officer without warrant:
> *(1) A peace officer may without warrant arrest any person –*
> *(a) Who commits or attempts to commit any offence in his presence;*
> *(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;*
> *(c)* .....

[8] In *Van Wyk and Another v The Minister of Police and Another (A617/15) 2016 ZAGPPHC 942 (17 November 2016)* (Unreported) the court stated the following:

> *"I consider it to be good policy that the law should be as there stated. An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."*

[9] In *Minister of Safety and Security and Another v Mhlana 2011 (1) SACR 63 (WCC)* the court stated the following:

> *"..... In order for a peace officer to be placed in a position to rely upon s40 (1) (a) it is not necessary that the crime in fact be committed or that the arrestee be later charged and convicted of the suspected offence."*

[10] In *Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG)* the court said the following:

> *"The test is an objective one and the question to be answered is in our view whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the arrestee had prima facie committed an offence in his presence. Stated differently, did the arresting officer have knowledge at the time of arrest of the arrestee, of such facts which would, in the absence of any further facts or evidence, constitute proof of the commission of the offence in question. The aim is not to determine whether the arrested person is guilty of the offence on which he was arrested. It accordingly matters not that the arrestee was not prosecuted or was acquitted at a subsequent trial on the basis of evidence other than what*

the arresting officer had in his possession at the time when he executed the arrest. An acquittal simply means that the prosecution failed to prove the guilt of the arrested person beyond a reasonable doubt on the evidence available to it at that time and placed before the trial court.

To hold otherwise is, as a matter of public policy, undesirable. It would mean that knowledge is ex facto attributed to the arresting officer, of the facts he did not have actual knowledge of at the time of effecting the arrest. It requires the search for a balance between two equally important aims of public policy, namely the liberty of the individual on the one hand, and the maintenance of law and order on the other. Arrests under s 40 (1) (a) usually take place in circumstances where prompt and decisive action is called for, and which is of necessity founded on the circumstances of the moment, such as public order offences. The arresting officer cannot be expected to determine the guilt of the arrestee in such circumstances in advance, and to hold otherwise would unnecessarily discourage peace officers from arresting offenders who are in the act of committing an offence. The arrest of a person in flagrante delicto without a warrant is a necessary power to effectively maintain order and combat crime and should not be unduly curtailed."

[11] I find myself in disagreement with the contention of the defendant's counsel that the arresting officer's suspicion was based on reasonable grounds because he received information on a co-accused who was already arrested. Firstly, the confession of one accused is inadmissible against another. Secondly, in this particular case, it is on record that the investigating officer initially was lied to by Ayanda who later pointed out the appellant. He gave the investigating officer four names of his accomplices and the follow up on them drew a blank. He admitted to the investigating officer that he was lying to him on other information regarding the commission of the offence. A reasonable peace officer would have henceforth

treated any other information from Ayanda with circumspect and same cannot be said about the investigating officer in this case.

[12] It is on record that the complainant informed the police that he was robbed by five (5) assailants. Ayanda was first to be arrested and he gave four (4) names as his accomplices but did not include the name of the appellant. In the second instance he then included the name of the appellant. It is my respectful in my view therefore that, coupled with the fact that Ayanda had lied to the investigating officer before, should have signalled to the him to be circumspect and cautious in his approach of the case regarding the information from Ayanda and exercise his discretion to arrest the appellant reasonably under the circumstances.

[13] Nothing turns on the investigating officer's testimony that the appellant took them to Thulani whose grandmother told them that he does not sleep at home anymore since the robbery and hijack in Springs and what they were similarly told by the father of Willie. It is hearsay evidence which was not corroborated at all. I therefore conclude that the arresting officer's suspicion was not based on reasonable grounds since Ayanda had already shown that he was unreliable. I therefore find that the arrest and detention of the appellant was wrongful and unlawful.

[14] It is contended by the respondent's counsel that the further detention of the appellant after the 5th of October 2015 was due to the order of the court and therefore the respondent cannot be held liable. I disagree. There is a public law duty on the part of the police officer to place before the prosecutor and the court a fair, honest and objective statement of the relevant facts to determine the issue of releasing the appellant on bail and the investigating officer failed to do so on the first appearance of the appellant in court. On the first appearance, the investigating was aware of the strength of the State's case based on the unreliability of the

information of Ayanda. Secondly, the appellant was continuously detained until he was released on bail on the 29th of October 2015 even after he was not pointed out at an identity parade. The irresistible conclusion I come to is that the continued detention of the appellant was unlawful and in breach of the right to freedom in terms of section 12(1)(a) of the Constitution. I therefore hold the respondent liable to compensate the appellant for the full period of his detention.

[15] Section 12 (1) (a) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides as follows:

"*(1) 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

(b) .....

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) .....

(b) to security in and control over their body;

(c) .....

[16] Section 35 (2) (e) of the constitution provides as follows:

"*(2) Everyone who is detained, including every sentenced prisoner, has the right-*

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment."

[17] In *Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)*, the Supreme Court of Appeal stated as follows:

> *"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 or her some much – needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. 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."*

[18] The issue of general damages never arose in the court a quo for obvious reasons. However, I find no reason why it should be referred back to the magistrate court for determination.

[19] Counsel for the appellant conceded that he is not pursuing the claim for the assault for there was no proof of the injuries nor medical evidence tendered. Further, the same applies to the claim for legal fees occasioned by the arrest and detention since the bill of costs was not subject to taxation by the taxing Master or any other body with the same authority.

[20] I agree with the plethora of authorities that action for damages against the State should not be used as a *get rich quick scheme* since taxpayers fund these kinds of damages. However, it is not in dispute that the appellant suffered the arbitrary deprivation of personal liberty and human indignation by virtue of his unlawful arrest and detention. He found himself being humiliated in front of his family in the early hours of the morning. He was deprived the enjoyment of his family and children for a period of 27 days without just cause. There was absolutely no

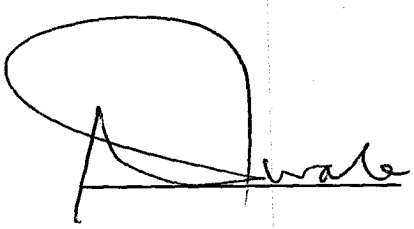
reason for the police to rush into arresting the appellant without a warrant and detain him for so long when they were fully aware that Ayanda was an unreliable person. I hold the view therefore that the appellant had quite a traumatic experience which entitles him to a fair and reasonable compensation.

[21] In the circumstances, I make the following order:

I. The appeal is upheld;

II. The order of the court a quo is set aside and replaced with the following order:

1. The arrest and detention of plaintiff from the 2nd of October 2015 up until the 29th of October 2015 was wrongful and unlawful;
2. The respondent is liable to pay the appellant the sum of R300 000 within 30 days from the date of this order together with interest at the rate of 9% per annum calculated from the date of service of summons to date of payment;
3. The respondent is liable to pay the costs of the appeal and of the action on a party and party scale.



TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree

MATSEMELA AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, GAUTENG LOCAL DIVISION

Date of hearing: 15 October 2018

Date of Judgment: 29 October 2018

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