THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 183/10

In the matter between:

MINISTER OF SAFETY AND SECURITY **Appellant**

and

ROELOF PETRUS KRUGER **Respondent**

Neutral citation: *Minister of Safety and Security v Kruger* (183/10) [2011] ZASCA 7 (8 MARCH 2011)

Coram: NUGENT, CACHALIA and SHONGWE JJA

Heard: **16 FEBRUARY 2011**

Delivered: **8 MARCH 2011**

Summary: Unlawful arrest and detention – s 55(1) of the South African Police Service Act 68 of 1995 – whether exempts state from liability – defamation and injuria – damages award.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tuchten AJ sitting as court of first instance)

The award of damages for defamation and injuria is set aside and replaced with an award of R20 000. Save for that the appeal is dismissed with costs.

JUDGMENT

NUGENT JA (CACHALIA and SHONGWE JJA concurring)

[1] Rayton is a small town of about 2 500 inhabitants. It is where Mr Kruger (the respondent) conducts business repairing motor vehicles. While at his premises Mr Kruger was arrested by the police under a warrant that had been issued by a magistrate. He was driven to a police station where he was incarcerated overnight. The following day he was brought before a magistrate and released on bail. In due course the Director of Public Prosecutions declined to prosecute.

[2] A reporter and a cameraman from e-tv – a national television broadcaster – were present at the premises when the police arrived to arrest Mr Kruger. They followed the police onto the premises and made a video and audio recording of the arrest, and of Mr Kruger being led away in handcuffs to the waiting police vehicle. That night a report of the arrest – accompanied by visual images – was broadcast on one of its news channels.

[3] Mr Kruger sued the Minister of Safety and Security (the appellant) in the North Gauteng High Court for damages, first, for unlawful arrest and detention, secondly, for infringement of his dignity, and thirdly, for defamation. All the claims succeeded before Tuchten AJ. He awarded damages of R50 000 for unlawful arrest and detention and of R300 000 for infringement of dignity and defamation combined. The Minister now appeals with the leave of that court.

[4] The chronicle commences with a complaint that was made to the police by Ms Mahlangu. She said that Mr Kruger had stolen a Mazda motor vehicle from her by false pretences. A considerable part of the evidence was taken up with that complaint. Mr Kruger said that he had been given the vehicle in exchange for a Honda vehicle by agreement with a friend of Ms Mahlangu who purported to be acting on her behalf. The dispute on that issue is not material and I need say no more about it.

[5] The complaint was investigated by Sergeant Mavuso of the organized crime unit on the instructions of Senior Superintendent Ngwenya. The full extent of the investigation does not appear from the evidence. But what does appear is that Sergeant Mavuso discovered, amongst other things, that the Honda vehicle that had been the subject of the alleged exchange was registered in Swaziland, and he suspected that it had been stolen in that country.

[6] Once his investigation was complete Sergeant Mavuso forwarded the docket to the Director of Public Prosecutions. Some time later he was informed by a member of that office that it had been decided to prosecute

Mr Kruger and Sergeant Mavuso was handed a warrant that had been issued by a magistrate authorising his arrest.

[7] Section 43 of the Criminal Procedure Act 51 of 1977 authorises a magistrate or justice of the peace to issue a warrant for the arrest of any person upon the written application of a public prosecutor (amongst others). The application must set out the offence alleged to have been committed, it must contain certain jurisdictional allegations, and it must state that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

[8] In this case the application for the warrant, and the warrant itself, were both embodied in a single-page standard-form. The application recorded that Mr Kruger was suspected to have committed fraud and forgery and uttering. The space provided in the standard-form warrant for recording the offence was, however, left blank.

[9] At about 10h00 on 3 December 2003 Sergeant Mavuso and Senior Superintendent Ngwenya arrived at the business premises of Mr Kruger to effect his arrest. They were accompanied by eight other police officers. At the premises with Mr Kruger were his parents, another relative, a number of employees and two clients. Present outside the premises were the cameraman and the reporter I referred to earlier.

[10] Sergeant Mavuso and Senior Superintendent Ngwenya entered the premises and proceeded to Mr Kruger's office. They were followed by the cameraman who recorded the interior of the premises and the arrest, which occurred in the office of Mr Kruger. Mr Kruger was told by

Sergeant Mavuso that he was under arrest and Senior Superintendent Ngwenya handcuffed his wrists behind his back. He was then led out to the police vehicle and the events that I mentioned earlier ensued.

[11] The court below found that the warrant of arrest was invalid – and thus that the arrest and subsequent detention were unlawful – because it failed to reflect the offences in respect of which it was issued. That finding was challenged only faintly before us. The terms in which a warrant of arrest must be framed are not expressly stated in the Act but I think it is implicit in ss 39(2) and 43(2) that it was intended that it should reflect the offence in respect of which it has been issued. Section 39(2) requires a person who effects an arrest without a warrant to inform the arrested person of the cause of the arrest. Where the arrest is effected in execution of a warrant the arrestor must, upon demand of the arrested person, hand him or her a copy of the warrant. Quite clearly that contemplates that the cause of the arrest will appear from the warrant. Moreover, s 43(2) provides that a warrant of arrest must direct the arrest of the person named in the warrant 'in respect of the offence set out in the warrant'. I think those two provisions make it abundantly clear that it was considered by the draftsman to be self-evident that a warrant must describe the offence and it was not considered necessary to express that in terms. I also think that it must be taken to be axiomatic that a warrant that is formally defective in a material respect – as the warrant was in this case – is invalid.[1]

[12] Two submissions that were advanced on behalf of the Minister can be disposed of briefly. It was submitted that in this case Mr Kruger would have known the suspected offences for which he was being arrested

[1] Cf *Minister of Safety and Security v Van der Merwe* (55/09) [2010] ZASCA 101; [2011] 1 All SA 260 (SCA).

because they were described in the application for the warrant that appeared immediately above the warrant on the single-page standard-form. I do not think the submission has merit. If the statute required the warrant to reflect the suspected offences and rendered it invalid if it did not do so, as the statute does, then I think it follows that it is immaterial that they are apparent from another source, even if that source is readily to hand.[2] As Cameron JA observed in *Powell NO v Van der Merwe NO*,[3] albeit in relation to a warrant authorising search and seizure, the courts examine the validity of such a warrant 'with a jealous regard for the liberty of the subject', and in my view that must apply even more to warrants that authorise the deprivation of personal freedom.

[13] It was also submitted that even if the warrant was invalid the arrest was nonetheless lawful because the police had a reasonable suspicion that offences had been committed. That was not pleaded in justification of the arrest but counsel submitted that the issue was fully canvassed in the evidence. I am not sure that the issue was indeed canvassed but in any event on the evidence that is before us the submission must fail. Section s 40(1)(b) of the Criminal Procedure Act confers a discretion upon a police officer to arrest upon reasonable suspicion that fraud or forgery and uttering (amongst other offences) have been committed. In this case the police officers did not purport to exercise that discretion. On the contrary, they purported to do no more than to execute the instruction contained in the warrant.

[14] But the principal ground upon which the Minister sought to avoid liability was in reliance upon s 55(1) of the South African Police Service

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[2] Cf *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 159 in relation to warrants authorising search and seizure.

[3] 2005 (5) SA 62 (SCA) para 59.

Act 68 of 1995, which exempts a police officer from liability for the consequences of executing a defective warrant in certain circumstances. It was submitted on behalf of the Minister that because the police officer is exempted from liability it follows that the state cannot be vicariously liable. Two decisions of the high courts stand in the way of that submission and we were asked to overrule them.

[15] Section 55(1) of that Act provides as follows:

'Any member who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent from the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were valid in law'.[4]

[16] The terms in which the submission on behalf of the Minister was framed in the heads of argument points immediately to its fallacy. It is not disputed that neither of the police officers was aware that the warrant was bad in law and that they were thus exempted from liability under that section. Reminding us that vicarious liability is a secondary liability counsel for the Minister submitted that the effect of the exemption was that the police officers 'committed no delict' and there is thus no room for vicarious liability.

[17] That construction of the section is not correct. A police officer – or anyone else for that matter – who deprives a person of his or her liberty without legal justification commits a delict, and is ordinary liable for the damage that is caused by the delictual act. The section does not purport to render the act lawful. In its terms it does no more than to relieve the

[4] Section 331 of the Criminal Procedure Act is in identical terms except that it extends beyond police officers.

police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences.

[18] The same argument was advanced and rejected in *Goldschagg v Minister van Polisie.*[5] In that case the question arose under s 31(1) of the Police Act 7 of 1958, which is in material respects the same as the provision that is before us.[6] Botha J summarily rejected an argument that the effect of the section was that a police officer who executes a defective warrant does not commit an unlawful act. The learned judge also found that while the section exempted the police officer from the consequences of the unlawful act it did not similarly exempt the state.[7] (The decision was reversed on appeal[8] but the issue that is now before us was not considered.)

[19] Thirion J reached the same conclusion in *De Welzim v Regering van KwaZulu*[9] in relation to s 34(2) of the KwaZulu Police Act 14 of

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[5] 1979 (3) SA 1284 (T).
[6] Section 31(1) reads as follows:
'If any legal proceedings be brought against any member of the Force for any act done in obedience to a warrant purporting to be issued by a magistrate or justice of the peace or other officer authorized by law to issue warrants, that member shall not be liable for any irregularity in the issuing of the warrant or for the want of jurisdiction in the person issuing the same, and upon producing the warrant containing the signature of the person reputed to be a magistrate or justice of the peace or other such officer as aforesaid, and upon proof that the acts complained of were done in obedience to the warrant, judgment shall be given in favour of such member.'
[7] The learned judge also inferred from the judgment of this court in *Minister van die Suid Afrikaanse Polisie v Kraatz* 1973 (3) SA 490 (A) at 1302A-B that the trial court had supported that conclusion (the issue was not dealt with on appeal). I have had the advantage of access to the judgment of the trial court – which was not available to the learned judge – from which it appears that the point that is now before us was not pertinently considered by that court.
[8] *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A)
[9] 1990 (2) SA 915 (N).

1980.[10] The learned judge said the following:

'By 'n beskouing van art 34(2) is dit duidelik dat dit nie die handeling van die lid van die Mag verontskuldig nie. Dit verskaf nie 'n skulduitsluitingsgrond nie en ook nie 'n regverdigingsgrond ten opsigte van die handeling nie. Dit stel slegs die lid vry van aanspreeklikheid sonder dat dit die kwaliteit of onregmatigheid van die daad self raak. Gevolglik beïnvloed dit nie die aanspreeklikheid van die KwaZulu Regering nie.'

[20] I have no doubt that the decisions in *Goldschagg* and *De Welzim* were correct. I need only add that the draftsman of s 55(1) must be assumed to have known of those decisions when the section was drafted. The repetition in s 55(1) of the material terms of the sections that were there in issue itself indicates that the draftsman intended s 55(1) to bear the construction that was adopted in those cases.[11] In those circumstances the finding by the court below that the Minister is liable for the consequences of the unlawful arrest and detention cannot be faulted.

[21] I turn to the claims for injuria and defamation before returning to the amount that was awarded in damages.

[22] The broadcast on the night of the arrest commenced with an introduction by the presenter who said the following:

'It could be the end of the road for a car theft syndicate operating between Swaziland and South Africa. After a two year investigation, Mpumulanga police today arrested the man believed to be the kingpin. Police say the cars are stolen in Swaziland and

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[10] Quoted in the judgment at 920F-H as follows:
''n Lid van die Mag wat ter goeder trou 'n handeling verrig ooreenkomstig of in die tenuitvoerlegging van 'n bepaling wat 'n verordening van 'n bevoegde wetgewende gesag heet te wees is, ondanks enige onreëlmatigheid in verband met die verordening van of gebrek in so 'n bepaling of afwesigheid van regsbevoegdheid van daardie wetgewende gesag, vry van aanspreeklikheid ten opsigte van die verrigting van daardie handeling in dieselfde mate en onderworpe aan dieselfde voorwaardes asof daardie onreëlmatigheid nie plaasgevind het of daardie gebrek of afwesigheid van regsbevoegdheid nie bestaan het nie.'
At 923H-I.

[11] *LC Steyn: Die Uitleg van Wette* (1981) by S I E Van Tonder assisted by N P Badenhorst, C N Volschenk and J N Wepener 5ed p 132.

sold in South Africa. They believe government officials in both countries and a local insurance company are also involved.'

The broadcast then switched to the reporter who opened her report as follows:

'It was not business as usual at this car repair workshop. The boss was arrested for vehicle theft, fraud and forgery'.

The interior of the workshop was shown visually, followed by a visual and audio recording of a short conversation between Senior Superintendent Ngwenya and Mr Kruger immediately after his arrest, and a visual showing of him being handcuffed. The recording went on to show Mr Kruger being led away to the police vehicle with his hands handcuffed behind his back. The reporter concluded her report as follows:

'It is alleged that cars stolen in Swaziland are brought here for re-spraying and their engine numbers are also changed. Police say they have identified three such vehicles but believe there are others'.

[23] The visual images of Mr Kruger showed only his torso at the time of his arrest, and his back as he was being led away. His name was not mentioned in the course of the report. It is clear that only those who were acquainted with Mr Kruger or his workshop would have been capable of identifying him from the report.

[24] It was alleged by Mr Kruger that one or other police officer must have informed the television team (or the television station) of the anticipated arrest and to have done so with the intention that it should be recorded and broadcast. His case was that the police officer concerned thereby wrongfully 'instigated' the defamatory and injurious broadcast and that the Minister is vicariously liable for such damage as the broadcast caused.

[25] The claim is rather unusual but we are not called upon to deal with its substance. The sole ground upon which the claim was resisted in the court below and in this court was a denial that the police were responsible for the presence of the television crew. We were told by counsel for the Minister unequivocally that if we were to find that the presence of the television team was indeed brought about by information provided by one or other police officer – which was the finding of the court below – then it was accepted that the Minister is liable for any damage that was caused by the broadcast. We have accordingly approached the matter on that basis but I must emphasise that we make no finding on other aspects of the claim.

[26] I turn to that factual question. The television reporter, Ms Mabuse, gave evidence. She said that she had no recollection of how they came to be present at the scene but that it might have been on information provided by the police. Only two other possibilities were suggested by counsel for the Minister. One was that the television team happened upon the scene fortuitously. The prospect that a television team from a national broadcaster fortuitously happened to be outside a motor vehicle workshop in Rayton at the time the police arrived is so remote as to be non-existent. The second suggestion was that one or other member of the community might have been the culprit. It is most unlikely that members of the local community would have known of the imminent arrest and least of all of the nature of the investigation that the police had undertaken. I agree with the court below that it is probable that one or other member of the police informed e-tv of the anticipated arrest so that it could be given publicity. That being so, on the approach that was adopted on behalf of the Minister before us (and in the court below) the only remaining issue is to assess the damages to be awarded for the consequences of the broadcast.

[27] It is trite that the determination of damages is within the discretion of the trial court and will be interfered with only in the event of misdirection. Misdirection might in some cases be apparent from the reasoning of the court but in other cases it might be inferred from a grossly excessive award.

[28] It has been said repeatedly that the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. They nonetheless provide a measure of guidance provided that those difficulties are borne in mind. As Potgieter JA said in *Protea Assurance Co Ltd v Lamb*, after citing earlier decisions of this court:

‘The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their *sequelae* may have been either more serious or less than those in the case under consideration.’

[29] I turn first to the award for unlawful arrest and detention. An appropriate award in a case of that kind – with reference to awards in

1971 (1) SA 530 (A) at 535H-536B.

some past cases – was considered most recently by this court in *Seymour v Minister of Safety and Security*.[12] In that case the plaintiff was unlawfully arrested and detained for five days. One night was spent in a police cell together with other inmates, and the remaining time was spent in a hospital ward, to which the family of the plaintiff had free access. An award of R500 000 was reduced on appeal to R90 000.

[30] On the face of it the arrest and detention in this case, by comparison, might seem to warrant a substantially lower award, but there is a materially aggravating factor. To be arrested, even lawfully, is inherently humiliating. So much more so when a cameraman has grossly invaded the privacy of the arrestee by entering upon his or her premises without permission and thereupon recorded the arrest. In this case the police permitted – indeed, they probably invited – all that to take place. Given that aggravating factor I see no reason to conclude that the award was excessive – and least of all that it was grossly excessive. There was no cross-appeal against the award.

[31] Before leaving this topic there is an observation that needs to be made. The police have a duty to carry out policing in the ordinary way. They have no business setting out to turn an arrest into a showpiece. Similar conduct, on that occasion by officials of the Competition Commission who were executing a warrant for search and seizure, evoked the censure of this court in *Pretoria Portland Cement Co Ltd v Competition Commission.*[13] When executing a warrant of arrest the police are obliged to do so with due regard to the dignity and the privacy of the person being arrested. The conduct of the police in permitting – indeed,

[12] 2006 (6) SA 320 (SCA).
[13] 2003 (2) SA 385 (SCA).

inviting – a cameraman to invade the premises of Mr Kruger in order to witness the arrest warrants equal censure.

[32] While the award for unlawful arrest and detention cannot be faulted, the same cannot be said for the award that was made for injuria and defamation. Two factors that come to the fore in making an assessment are the seriousness of the defamation and the extent of the publication.

[33] In this case the substance of the defamation was that Mr Kruger had been arrested on suspicion of having committed various offences. It was pointed out by this court in *Independent Newspapers Holdings Ltd v Suliman*[14] that to allege that a person has been arrested does not imply that he or she is guilty, but it does imply that there is a reasonable suspicion that he or she has committed the relevant offence, which is itself defamatory.[15] In that case the majority[16] held that before the suspect is brought before a court it is generally not in the public interest or of public benefit that the identity of the arrested suspect should be disclosed, even if the allegation is true.[17] But once the suspect has been brought before a court his or her identity may be published with impunity.[18]

[34] Although the truth of the allegation, by itself, provides no defence to a claim for defamation, it seems to me that it must nonetheless be relevant to the assessment of damages. For the action for defamation protects reputation and it is difficult to see why a person should be

[14] [2004] 3 All SA 137 (SCA).
[15] Paras 31 and 78.
[16] Marais, Scott and Mthiyane JJA, Ponnan AJA and I dissenting.
[17] Para 47.
[18] Para 47.

compensated for loss of reputation if the reputation is in truth not deserved.[19]

[35] In this case the allegations made in the report were in some respects materially untrue. It is apparent from the application for the warrant that Mr Kruger was not arrested on suspicion of 'car theft' but on suspicion of fraud and forgery and uttering. And as pointed out by the court below, Sergeant Mavuso was not of the belief that Mr Kruger was the 'kingpin' of a 'car theft syndicate', and there is no evidence that anyone else in the police held that suspicion. Nonetheless, it is not disputed that the police suspected on reasonable grounds that he had committed fraud and forgery and uttering – which are themselves serious offences of dishonesty.

[36] As for the breadth of the publication the identity of Mr Kruger is likely to have reached a decidedly limited audience notwithstanding that the broadcast was on national television. I have pointed out that his identity would have been known only to those who were acquainted with Mr Kruger or his business premises who would mainly have been the inhabitants of Rayton. Although the evidence establishes that news of the arrest quickly spread throughout the town it is by no means clear that that was in consequence of the broadcast. Indeed, it is likely that news of the event would have become the talk of a small town by word of mouth even without the broadcast. Nonetheless I have accepted that the broadcast reached at least some residents of Rayton and others who knew Mr Kruger.

[19] Cf *Johnson v Rand Daily Mails* 1928 AD 190 at 206.

[37] The plaintiff in *Suliman* was alleged to have been arrested on suspicion of having been associated with the bombing of a nightclub – a particularly heinous crime. His identity was made known and it was published repeatedly in a newspaper that had a wide circulation in an area in which the plaintiff was well known. He was awarded R50 000 for defamation and injuria. In comparison to that award alone, the award of R300 000 in the present case, in which both the nature of the defamation and the breadth of publication was decidedly more limited, was in my view grossly excessive, which points to misdirection. In the circumstances we are at large to reassess the award. It was held in *Suliman* that the injuria that is associated with defamation is a separate wrong but in that case, as in the present, a combined award was made. In the light of the considerations above, and in particular the award in *Suliman*, in my view the present wrongs are deserving of damages of no more than R20 000.

[38] Counsel for the Minister informed us that even if the award is reduced, Mr Kruger has nonetheless had substantial success, in that the appeal was brought primarily to disturb the finding that the Minister is not exempt from liability for wrongful arrest by reason of s 55(1), and that Mr Kruger is entitled to his costs.

[39] Accordingly the award of damages for defamation and injuria is set aside and replaced with an award of R20 000. Save for that the appeal is dismissed with costs.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	B R Tokota SC M S Mphahlele
	Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein
For respondent:	J J S Prinsloo SC
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