



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 991/2016

In the matter between:

MINISTER OF SAFETY AND SECURITY

APPELLANT

and

SIPHO OWEN MAGAGULA

RESPONDENT

Neutral citation: *Minister of Safety and Security v Magagula* (991/2016) [2017]
ZASCA 103 (6 September 2017)

Coram: Lewis, Petse and Swain JJA and Lamont and
Fourie AJJA

Heard: 18 August 2017

Delivered: 6 September 2017

Summary: Criminal Law and procedure — damages — Unlawful arrest and detention — appeal against judgment awarding damages for unlawful arrest and detention of the respondent — whether or not the appellant's servant had the requisite suspicion to arrest and detain the respondent — periods of detention before and after first appearance in court to be separately considered — claim for detention after first appearance neither pleaded nor established — appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Modiba AJ, Msimeki J and Olivier AJ sitting as court of appeal):

- 1 The appeal succeeds with costs, including the costs of two counsel.
 - 2 The order of the court a quo is set aside and is substituted with the following:
 - ‘1 The appeal fails; the cross-appeal succeeds.
 - 2 The plaintiff is to pay the costs of the appeal and the cross-appeal.
 - 3 The order of the trial court is set aside and is substituted with the following:
“The plaintiff’s action is dismissed with costs.”
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JUDGMENT

Lamont AJA (Lewis, Petse and Swain JJA and Fourie AJA concurring)

[1] The respondent (plaintiff) instituted action against the appellant claiming payment of damages on the basis that he had been unlawfully arrested and unlawfully detained. The trial court (Zondo J) awarded the respondent damages arising from his unlawful arrest and his unlawful detention for the period from the time of his arrest up until the time of his first appearance in court. The parties both sought and were granted leave to appeal against the order of the trial court. The Gauteng Division of the High Court, Pretoria, sitting as a full court of appeal (Modiba AJ, Msimeki J and Olivier AJ concurring), confirmed the award for damages for unlawful arrest and awarded the respondent damages for the entire period of his detention, namely from the time of his arrest up until the time of his release after the charges were withdrawn against him. The appellant appeals against the decision of the court a quo, special leave to appeal having been granted by this court.

[2] On 15 August 2004 a woman was shot dead at her home in Krugersdorp by unknown persons. Inspector Jacobus Gordon was appointed as the investigating officer to investigate the crime. In the course of his investigation and on 25 August 2004, he heard that two persons had been arrested for housebreaking. He thought that they could be of assistance in his investigation of the murder. He arranged to interview them and did so on the same day. One of the two persons, Jeffrey Ndimande (the suspect), implicated himself in the offence and identified Owen Magagula (the respondent) as the person with whom he had been at the time the offence was committed.

[3] Inspector Gordon requested Inspector Nel to interview the suspect and take the necessary steps to locate and arrest Owen. On the same day, Inspector Nel went to the offices of Inspector Gordon. The latter told him what the suspect had said. Immediately thereafter Inspector Nel interviewed the suspect. The suspect told him that Owen had made all the plans to commit a robbery and in the process shot the deceased. The suspect furnished further details of the commission of the offence which corresponded with the information which Inspector Nel had been given by Inspector Gordon.

[4] The suspect indicated that he knew where Owen worked and that he could identify and point him out. The suspect took Inspectors Gordon and Nel together with members of the 'veldspan' to a building site where he pointed Owen out. Inspector Nel approached the person in charge at the building site and asked him if he knew Owen. That person identified Owen as being the same person who had been pointed out by the suspect. Inspector Nel approached the person identified as Owen. He introduced himself, produced his appointment certificate and informed him who he was. He then asked the person to identify himself. The respondent identified himself using the name Owen. Inspector Nel then, acting without a warrant to arrest the respondent, arrested and detained the respondent. The purpose of the arrest and detention was to ensure the respondent's appearance in court.

[5] On 30 August 2004 the respondent appeared in court for the first time. The case was remanded; the magistrate directed that the respondent be kept

in custody. The case came before court on several occasions thereafter. On each occasion the magistrate directed that the respondent be kept in custody.

[6] The respondent brought a bail application approximately two months after his first appearance in court. The application was opposed by the State. The evidence is scant as to what the basis of the opposition was. One of the grounds of opposition was that the respondent had no fixed address as he resided in a temporary structure on a building site. The application was refused by the magistrate. The record of the proceedings was not admitted into evidence. The additional evidence led and the magistrate's reasoning in reaching his conclusion are unknown.

[7] The respondent remained in custody until his release on 18 October 2005 after the charges had been withdrawn against him. One of the reasons for the delay was that the prosecution was awaiting a report on the analysis of DNA samples sent to the laboratory for analysis.

Unlawful arrest

[8] In this court it was common cause that the arresting officer was Inspector Nel. The issue to be decided is whether or not Inspector Nel had a reasonable suspicion that the respondent had committed the offence of murder. If he had held such a suspicion then the arrest would have been lawful by reason of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[9] In *Shabaan Bin Hussein and Others v Chong Fook Kam & another*¹ it was held that a suspicion 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end'.²

¹ *Shabaan Bin Hussein & others v Chong Fook Kam & another* [1969] 3 All ER 1627.

² *Powell NO & others v Van der Merwe NO & others* 2005 (5) SA 62 (SCA) para 36; *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).

[10] The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion.³ Once the required suspicion exists an arresting officer will be vested with a discretion to arrest, which he must exercise rationally.⁴

[11] Inspector Nel obtained cogent evidence which on the face of it was acceptable and which was corroborated. He personally ascertained information from the investigating officer as well as the suspect. The totality of the evidence indicated that the respondent had committed the offence. The suspect was able to and did point out the person who had committed the offence as being the respondent. The building site supervisor confirmed that the person who was being pointed out was known as Owen, the same name which had been used by the suspect. It was submitted that at the time of Inspector Nel's interview with the suspect, the suspect had given conflicting evidence to Inspector Gordon. That fact is irrelevant as it was, assuming it to be true, unknown to Inspector Nel.

[12] The facts known to Inspector Nel are sufficient to establish the existence of a suspicion. That suspicion was reasonably held as the facts objectively considered establish reasonable grounds for him to have had the suspicion.

Unlawful detention

[13] The respondent alleged in his particulars of claim that he had been unlawfully and wrongfully arrested and thereafter detained. The appellant denied that the detention was unlawful and pertinently pleaded that the detention of the respondent from the time of the first appearance in the magistrate's court up until the time of the release was consequent upon the independent discretion exercised by that court. The plea was based on authority holding that once an arrest has been effected 'the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court'.⁵ The two periods of

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814.

⁴ *Minister of Safety and Security v Sekhoto and another* [2010] ZASCA 141 para 39; 2011 (5) SA 367 (SCA).

⁵ *Sekhoto* fn 4 para 42; *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130 para 38; 2015 (1) SACR 597 (SCA).

detention - the period until first appearance in court and the period from first appearance until ultimate release, must be considered separately.

[14] The respondent's case for unlawful detention for the period before his first appearance in court was dependent upon the appellant failing to establish that his arrest was lawful. The arrest was not unlawful. Hence the detention for the period ending on the day of his first appearance in court was not unlawful.

[15] The respondent's detention after his first appearance in court is dependent upon the lawfulness or otherwise of the magistrate's orders. The magistrate is not a servant of the appellant. In any event there was no evidence that the magistrate had behaved in an unlawful manner. No liability for his conduct is attributable to the appellant.

[16] The respondent sought to overcome the difficulty he faced on the basis that there had been an omission on the part of the appellant's servant, Inspector Gordon, to perform a public duty which was wrongful. This submission was premised on the assumption that the principle set out in *Woji supra* para 28 and *Zealand v Minister of Justice and Constitutional Development & another*⁶ para 53 was applicable.

[17] There is no need to decide whether the respondent's reliance on this submission was well founded as this cause of action was neither pleaded nor was evidence led on this issue. The respondent submitted that the issue had been sufficiently pleaded in that his failure to replicate constituted a deemed denial of the allegation made by the appellant that the respondent had been lawfully detained pursuant to the series of orders made in the magistrate's court. This submission does not solve the problem as the respondent was obliged to make out his case in the summons which he did not. In addition a deemed denial of facts set out in the plea does not constitute the set of allegations necessary to make out the case currently being advanced on behalf of the respondent.

⁶ *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (4) SA 458 (CC).

[18] The trial also was not conducted on the basis of the cause of action on which the respondent presently submits he relies. No evidence was led and none was admissible to establish that the respondent's detention after his first appearance in the magistrate's court was arbitrary or without just cause. No facts could be or were adduced to establish the omission upon which the respondent presently relies. The only evidence before the trial court concerned Inspector Gordon's opposition to the grant of bail. That evidence was elicited pursuant to a question by the judge hearing the matter and does not establish wrongful conduct. The admissible evidence established that the detention of the respondent was not at the instance of the appellant's servant.

[19] The appellant in my view justified the arrest and detention of the respondent up until the day of his first court appearance. His subsequent detention was pursuant to the orders of the magistrate who is not a servant of the appellant. The cause of action on which the respondent currently relies was not pleaded, may be an erroneous interpretation of the authority which it was submitted founds it and was in any event not established by the evidence led at the trial.

[20] I accordingly make the following order:

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and is substituted with the following:
 - '1 The appeal fails; the cross-appeal succeeds.
 - 2 The plaintiff is to pay the costs of the appeal and the cross-appeal.
 - 3 The order of the trial court is set aside and is substituted with the following:
"The plaintiff's action is dismissed with costs."

C G LAMONT
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant: G Marcus SC (with K M Mokotedi)

Instructed by:

State Attorney, Pretoria

State Attorney, Bloemfontein

For the Respondent: B P Geach SC (with E Seima)

Instructed by:

A P Phefadu Attorneys, Pretoria

Honey Attorneys Inc., Bloemfontein