



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MTHATHA]

CASE NO.: 2379/2019

In the matter between:

THABO STEPHEN MSIMANGO

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

NORMAN J:

[1] Plaintiff instituted an action against the defendant for unlawful arrest and detention and for *contumelia*. He alleged that he suffered damages in the amount of R5 915 000.00 for unlawful arrest and R300 000.00 for *contumelia*. The total amount of damages claimed is R6 215 000.00. The defendant defended the action. It raised certain special pleas which were abandoned at the trial. He admitted the arrest of the plaintiff but denied that it was unlawful. Defendant accepted that it bore the onus to justify both the arrest and the detention.

- [2] Defendant led the evidence of Sergeant Thulani Peter. He is stationed at Mount Frere police station. During November 2018 he held a rank of a constable and was working as a detective. He was investigating a murder case where the suspects were in the Gauteng province. He needed to go and effect arrest in relation to those suspects when he was requested by Warrant Officer Cekwana to look for the plaintiff. He was going to be accompanied by Sergeant Maliwa. Warrant Officer Cekwana indicated that the plaintiff had failed to attend court and he was in possession of a J50 warrant for his arrest. He gave him the warrant of arrest. It transpired that Sergeant Maliwa knew the plaintiff.
- [3] Upon their arrival in Gauteng they went to the address they were given by Warrant Officer Cekwana. The address was in Orange farm, Everton. Sergeant Maliwa saw the plaintiff riding a bicycle. They stopped him and introduced themselves as police from Mount Frere. They asked for his identity document. He said it was at home and they all went to his home. Upon production thereof they confirmed that it was indeed the person they were looking for. Sergeant Maliwa identified him positively.
- [4] Sergeant Peter informed the plaintiff that he had failed to attend court and a warrant had been issued for his arrest. Plaintiff told them that he did not have money to attend court. Sergeant Peter then explained to him his constitutional rights relating to his arrest. He then placed him under arrest.
- [5] He detained him at the John Vorster police station because they were still going to attend to other duties. He explained his constitutional rights relating to his detention. Plaintiff acknowledged that and signed for his rights. He

arrested the plaintiff on a Thursday and they went back to Mount Frere on a Sunday. Plaintiff then appeared in court on Monday, 19 November 2019. He took him to court. Plaintiff appeared before the magistrate and the public prosecutor and his case was postponed to a date. Thereafter he handed the matter over to Warrant Officer Cekwana who was the investigator.

[6] Thereafter he had no further interactions with the plaintiff. He read what was contained on the cover of the docket that the charge was murder and the person charged was the plaintiff. The case was opened on 31 August 2009 at the Mount Frere police station. He was referred to a notice of his constitutional rights which was admitted as Exhibit "A2". That document was issued for plaintiff at the John Vorster police station on 15 November 2018 at 14h45.

[7] He testified that he arrested the plaintiff in terms of the warrant for his arrest. A copy of the SAP14 a register where a person's name who is about to be detained is entered was also produced. There was also a copy of the occurrence book where everything that had happened was recorded. A copy of the charge sheet which reflected case number RMF225/12 and Cas No. 239/08/2009 reflected Warrant Officer Cekwana as the investigating officer was also handed in. These documents were handed in as Exhibits.

[8] He identified the J50 as the warrant of arrest which authorized the arrest of the plaintiff. It was issued by the Magistrate in Mount Frere on 31 October 2016. He confirmed that he received the document from Warrant Officer Cekwana and executed it when he arrested the plaintiff. Mr Ntayiya, for the plaintiff, objected to the admission of the document on the basis that it's

validity was being challenged by the plaintiff. The warrant of arrest was provisionally admitted as Exhibit "A4".

[9] Under cross-examination, Sgt Peter, was referred to the pleadings where it was alleged that the court had issued a J175. He explained that a J175 is a warrant that is valid for fourteen days only and thereafter it lapses. It transpired that he had in mind a J174 because it was explained to him that a J175 is a summons and not a warrant. He conceded that a summons is for calling somebody to come to court.

[10] He was questioned about what he would do if a J174 expired. His response was that he would apply for the J50 because it does not have an expiry period. He testified that if a person fails to appear in court after he had been warned to do so, the magistrate would issue a warrant for the arrest of that person. In his experience once a person has been warned, if he forgot the date, he is expected to go to the investigator to ask for the date.

[11] He was asked about the process to be followed when a case has been withdrawn due to the fact that witnesses were not in attendance. He responded that the investigator would subpoena the witnesses and summon the accused person to appear in court on a given a date. The case would then be re-enrolled. If the accused could not be found after he had been summoned the investigator would look for him and his name would be circulated throughout. If all those measures fail the investigating officer would approach the public prosecutor , apply for a warrant of arrest and if the magistrate approved it then he would execute it.

[12] It was put to him that the plaintiff will tell the court that on 7 November 2011 his case was struck from the roll pending the availability of witnesses. He was told that he would be summoned to court. He would tell the court that when he was arrested by this witness he was still awaiting the summons. The witness disputed that. He stated that if a person was released as suggested he would not be arrested and the magistrate would not issue a warrant for that person's arrest.

[13] He testified that after the arrest the magistrate accepted the accused and remanded him in custody. It was put to him that the warrant of arrest did not mention the crime committed. His response was that the crime appeared at the top of the document.

[14] The provisions of section 43(1) and (2) of the Criminal Procedure Act 51 of 1977, were read out to him and it was contended that because the crime was not reflected on the warrant, then the warrant of arrest was defective. He disputed that. It was suggested that the warrant of arrest was not applied for by a Mr Manase. Sergeant Peter stated that whoever applied for the warrant was not a member of the police force. He did not know why the name of Mr Manase was written in the pleadings. He confirmed that the case was postponed to 7 February 2019. He did not know what happened thereafter.

[15] The following version was put to him that the plaintiff would state that when he was detained at the Wellington prison he was given the date 27 February 2019. On that date he was taken to court and he never appeared before a magistrate. The witness had no comment to that. It was also put to him that the plaintiff would tell the court that he was released from Mount Frere on 4

May 2019. It was put to him that the six month's detention was not justified. It was further put to him that the arrest was unlawful. This witness was adamant that because the arrest was effected under a warrant of arrest it was justified. He disputed that the warrant was defective.

[16] In re-examination when asked about the alleged defect on the warrant his response was that both the application and the warrant of arrest appear on the same document and therefore the warrant, according to him, was valid. He stated that from the document itself the crime of murder is reflected thereon. Defendant closed his case.

Plaintiff's case

[17] Plaintiff is Thabo Stephen Msimango. He is 43 years old and he resides in the Gauteng Province. He has three children and is not married. He is unemployed. He testified that he was arrested on 15 November 2018. The police approached him carrying firearms and threatened him that if he moved they would kill him. They were pointing firearms at him. He was on the street riding a bicycle. They told him that his case was on the roll. He told them that he had a letter that stated that he was not going to stay in the police cells because there was no evidence against him. He told them that he was told that he would be called when there is evidence against him.

[18] When he asked the police for a warrant of arrest they enquired what he knew about it and refused to show it to him. They threatened to assault him if he continued to question them. They put on handcuffs on him and put him in the car. They took him to Orange Farm and he was staying in Everton. They took along a policeman that was stationed at Orange Farm. He was taken to John

Vorster Square. He confirmed that Sergeant Peter read him his constitutional rights for his arrest and detention. When it was put to him, in examination - in chief, that Sergeant Peter testified that he was shown a warrant, his response was that *"I do not know what a warrant looks like. I did not see it."*

[19] He confirmed that he was detained at the John Voster police station for one night. He was put in a vehicle where there was another person arrested. Police were looking for other suspects and they drove around with them in the vehicle and they found three of those suspects. On their way back they bound them in pairs. Even when going to the toilet they were bound like that. They allowed the other three persons to get refreshments and food. Plaintiff was denied food by the police. He did not have money to buy food. He was assisted by the other suspects who were arrested with him.

[20] They arrived in Mount Frere on a Saturday. Sergeant Maliwa informed him that there was a relative of his who was being buried at Dangwana on that day. As he was taking him to the cells he said to him that the only way he would help him was if he would spy on the other three suspects. He agreed because he did not want to argue with him. He decided not to go along with Sergeant Maliwa's suggestion instead he told the other three suspects that he was asked to spy on them. He thought the reason for his incarceration was because the police wanted him to spy on others.

[21] On 19 November 2018 he was taken to court and he appeared before a magistrate. The magistrate said the matter would be postponed for three months and it was a final remand. He understood that he was going to be kept in custody for three months. He saw the dates on his ticket. He was taken to

Wellington prison in Mthatha. He stayed there until 27 February 2019 for him to appear in the Mount Frere court. On that day they were kept in the court cells. Others were called but his name was not called. He was kept in Mount Frere police station.

[22] The police cells were dirty. He could not eat because of the bad odour. The toilets were not flushing but were still being used. Police would get into the cells at night and would molest and beat them for no reason. The blankets were dirty and there was no clean air because they were locked inside the cells for longer periods of time. The police refused to allow him to get his prescribed medication from a doctor. He had an illness that got worse because he was not being afforded treatment.

[23] One day a person from prison came to take down their complaints. The station commander and other people who were not from Mount Frere spoke to him. On another occasion he reported to those officials that he was being kept there for no reason. He confronted Sergeant Maliwa about his incarceration but Sergeant Maliwa simply told him that he was in a hurry as he was taking certain people to court.

[24] Mr Ntayiya, his legal representative, came to see him in April and thereafter he was released on Saturday, 4 May 2019. He complained that it was painful being detained. He became emotional. The police treated him as if he was not a human being. He contended that his arrest and detention were unlawful. He stated that he was kept in custody for a period of six months. Under cross-examination he stated that he left for Johannesburg in 2010. Between the years 2007 and 2009 he was residing in Mount Frere. During 2009 he was

charged with attempted murder and murder. He was accused of having murdered one Sicelo Ngqambuza from Dangwana village, he used his licence firearm to kill him. He used a Xhosa term "*ukumtshabalalisa*". When asked what he meant he stated "*I fired two shots, one shot to his head and the other to his chest, watshabalala*" which was interpreted to mean "*he perished*". At that time he was residing at Mount Frere.

[25] He attended court until he was informed that the case was struck from the roll. That was in 2011. He stated that in 2009 after the trial of six weeks he was released on bail. When asked by the court whether the case was proceeded with in a trial, witnesses leading evidence, his response was that witnesses were being called but he was not allowed to speak to them. He could not recall the date when he was granted bail.

[26] He stated that he was arrested on 2 September 2009 and then there was a six weeks of trial and then he was granted bail. He heard from his sister that he was granted bail of R2 800. He was represented during bail proceedings by a lady from the Legal Aid Board whose name he could not recall. When asked about the bail process he could not answer the questions directly. He stated that his sister fired the one lawyer and appointed another one.

[27] He stated that he was sick as he was suffering from TB. He agreed that there were certain conditions attached to his bail. When it was put to him that there is nothing said about his bail in the particulars of claim, his response was that he did not mention anything about that to Mr Ntayiya. When asked how he would be advised of court dates. He responded that Mr Ntloko, his legal representative would give him a note advising him of the next court date. He

stated that he would not hear the date from the magistrate as the magistrate was speaking softly and he would be given the date by his lawyer. He admitted that the court informed him of his next appearance date. He stated that he was hard of hearing at the time and his lawyer would tell him of the date. He stated that he was sick he did not know what was wrong with him.

[28] He testified that the case was struck from the roll on 7 November 2011. He stated that he went to Johannesburg to get proper treatment as he was sick. He did not tell the police of his change of address. He did not inform Mr Maliwa of the change of address. It was put to him that his case was reinstated in 2016 and he failed to appear. He disputed that and stated he knew nothing about that. It was put to him that when he failed to appear in court in 2016 a warrant for his arrest was applied for. He did not dispute that the warrant was issued on 31 October 2016. He confirmed that it bore a stamp. Initially he insisted that he did not miss a court date later his evidence changed when it was put to him that a warrant was issued after he failed to appear in a murder case. His response was simply "*I hear that.*" When asked whether he ever appeared in court in 2016 in respect of the murder case, his response was that in 2016 he had no pending case because he had a letter.

[29] He obtained a letter from Mr Ntloko when he was in Johannesburg and he needed to get a job for him to be able to pay Mr Ntloko's fees. He was not able to get a job as his name would be reflected as having a pending case.

[30] He later testified that Mr Ntloko got the letter from the court. The letter reads:

"Public Prosecutor
P/Bag X9004
MOUNT FRERE
5090
30th November 2011

TO WHOM IT MAY CONCERN

CASE NO A345/09

CAS 239/08/09

I/O PANDELA

RE: STATE VS THABO MSIMANGO

This is to confirm that the above mentioned matter was struck off the Roll on the 07th November 2011 pending the availability of Witnesses.

The accused person is not facing any other criminal charges.

PUBLIC PROSECUTOR
MOUNT FRERE"

[31] The letter was then produced to court by Mr Ntayiya. The plaintiff conceded after the letter was read out to him that the letter did not say he must not appear in court. He also conceded the letter was not addressed to Mr Ntloko and it did not come from the magistrate's court. He testified that he expected the police and the court to know that he was in Johannesburg by getting that information from Mr Ntloko. He did not dispute that a warrant was issued because he failed to attend court. He stated that he was shown the warrant of arrest by Mr Ntayiya in 2021.

[32] When it was put to him that this evidence was new. He conceded that after he left Mount Frere the court was not aware of his whereabouts. He stated that he could not speak to the court directly because he was not well and he had a

sibling who was representing him. His evidence changed to the effect that Sergeant Maliwa knew where to find him because he had found an ATM slip on 2 September 2009 when he arrived at his home. That ATM slip had his Johannesburg address and Sergeant Maliwa commented that he would be able to find him wherever he was in Johannesburg. He conceded that he was giving that evidence for the first time.

[33] He also conceded that it was new evidence. When questioned about Maliwa's knowledge of his address, his evidence changed that Maliwa said that in Mthatha when he had gone to hand himself over to the police. He conceded that on 2 September 2009 his address was not an issue as he was staying in Mount Frere. When questioned about Maliwa's involvement in the case he stated that Maliwa informed him that he was in charge of the investigation. He conceded that this evidence, too, was told to the court for the first time under cross-examination. It was put to him that the evidence that he was threatened with assault and firearms was never put to Sergeant Peter and there was no allegation of being pointed with a firearm in the particulars of claim. His response was that it was not possible that he did not state that because he had given that evidence to his attorney. He disputed that the allegations of being handcuffed were not put in the particulars of claim because he had told his attorney. He corroborated the evidence of Sergeant Peter that during the arrest he was very co-operative. Plaintiff closed his case.

Plaintiff's submissions

[34] Mr Ntayiya submitted that the case of the plaintiff is clear and straight forward. He was arrested on 16 November 2018 and released on 04 May 2019 having spent six months in the police cells. His arrest was wrongful and unconstitutional. He submitted that it is trite that an arrest is *prima facie* wrongful and the defendants have the onus of proving lawfulness. He submitted that arrest is regulated by Statute. It is justified in two ways, either in terms of section 40 of the Criminal Procedure Act or section 43 thereof. If it is done outside those two sections then it is unlawful.

[35] He challenged the warrant relied upon by the defendant on the basis that the warrant issued in its proper form and issued by the duly authorized person would provide an arresting officer with a complete defence. In this regard he relied on ***Amler Pleadings***¹. He submitted that we are living in a constitutional democracy. The Constitution imposes a duty on the State and all of its organs not to perform any act that infringes upon the entrenched rights to life, human dignity and freedom and security of a person. That is a public law duty. It means that a police officer is under a public law duty not to violate any person's rights including the plaintiff. If a police officer is to interfere with somebody's right then he or she should make up his mind. He referred the court to the defendant's case and its plea where it was alleged that a J175 warrant was issued. He submitted that was the case of the defendant, as pleaded changed at the trial.

[36] He criticized the practitioner who crafted the particulars of claim that he should have verified whether a J175 was issued or not and he ought to have

¹ 8th Ed page 43.

done his research to assist the court. He submitted that there was a stage when the matter was struck off the roll and the J175 was meant to reinstate it. He submitted that the case of the plaintiff that the case was struck from the roll is supported by the J175 document mentioned by the defendant. He submitted that failure to execute a J175 does not warrant one applying for a J50 warrant of arrest. In this regard he also referred the court to paragraph 2.4 of the defendant's plea where he pleaded that the defendant was expected to show the court that the application signed by Mr Manase and issued by Mr Mbolambi but it failed to produce that application. He submitted that absent that document then the arrest was unlawful.

[37] He made reference to the replication at page 28 paragraph 3.2 that what is stated therein gave the defendant an opportunity to come to court with the application. He submitted that the warrant failed to comply with the provision of sections 43(1) and (2) of the Criminal Procedure Act, 51 of 1977 and on that basis alone it is unlawful. He submitted that there was no substantial compliance with the provisions of the Act when the warrant was issued. He relied in this regard on section 12(1)(a) of the Constitution. He argued that if the court allows the impugned warrant to stand, it must comply with the law and it must not violate a person's rights. He submitted that the conclusion that the court must make is that the arrest and detention were wrongful and unlawful.

[38] When asked how the detention of the plaintiff would be unlawful if he was ordered to be in custody by the court. In this regard he referred the court to the case *Zealand v Minister of Justice*² and the reference by the court to

² 2008 (4) SA 458 (CC).

section 12(1)(a) of the Constitution. He submitted that what is relevant is what happened initially prior to the appearance at court. In this regard he relied on ***De Klerk v Minister of Police***³ this was a judgment of Leach and Rogers JA which was confirmed by the Constitutional Court. He submitted that the Magistrate orders are irrelevant but for the unlawful conduct of the defendant plaintiff would not have been brought before court. He also relied on the ***Minister of Safety & Security v Tyokwana***⁴.

[39] He submitted that there was no justification whatsoever for the long detention. He submitted that the period between 28 February until 5 May 2019 is not accounted for and the plaintiff should succeed in respect of that period. He submitted that if the court makes reference to the case of ***S v Nel***⁵ for 20 hours the court awarded R35 000. In ***Madyibi v Minister of Police***⁶ 24 hours the court awarded R40 000. In *De klerk* plaintiff was awarded R300 000 for 8 days meaning the court awarded R37 500 per day. He also referred to the matter of ***Msongelwa v Minister of Police***⁷ where Tokota J, for unlawful arrest for a period of 5 months, awarded an amount of R5 Million.

Defendant's legal submissions

[40] Mr Mbiko submitted that the issue of arrest has been admitted. He submitted that the arrest was effected based on a warrant to arrest the plaintiff that was given to Sergeant Peter by Warrant Officer Cekwana. He analyzed the warrant that it consists the address of the plaintiff and the name of the plaintiff.

³ 2018 ZASCA page 45.

⁴ 2015 (1) SACR page 597 (SCA).

⁵ 2018 ZAECGH.

⁶ 2020 (2) SACR 243 ECMTHATHA.

⁷ (112/2012) [2020] ZAECMHC 10; 2020 (2) SACR 664 (ECM) (17 March 2020).

He submitted that the warrant of arrest is valid because it contained the details of the crime. He also submitted that plaintiff had admitted that he shot at the person and the person perished. Plaintiff had also admitted that he had changed his address and moved to Johannesburg. He argued that the arrest was lawful and so was the detention.

[41] He urged the court to look at the actions of Sergeant Peter as he testified when they met the plaintiff. He argued that not only did they rely on Sergeant Maliwa having identified the plaintiff but they also ensured that they got his identity document in order to verify his names. He submitted that once there is a warrant of arrest the police do not have a discretion. The warrant authorized them to do one task, namely, to arrest the person mentioned thereon.

[42] On the issue of detention, he submitted that, he was arrested on a Thursday and was kept at John Vorster police station for one night. On Friday he was transported to Mount Frere where they arrived on Saturday. On Monday when he was taken to appear before the Magistrate it was within the 48 hours period and there was no delay at all in bringing him before the court. The matter was then postponed to 27 February 2019 as the last remand. The Magistrate confirmed the detention and Peter was there to witness that he had appeared in court and the magistrate had authorized his further detention. He submitted that the period up to February will fall within the ambit of the law.

[43] He further submitted that the period from 28 February until his release on 4 May 2019 would still also fall within the lawful period. He submitted that there is no evidence of what happened except that the plaintiff stated that “/

appeared at court once". The matter was remanded finally and he was released on 4 May 2019. The entire period falls within the ambit of the law and the court must find that his detention was lawful. He submitted that the court has two mutually destructive versions in evidence tendered by the plaintiff. On his version which changed many times, he gave completely different evidence from that which he gave in his evidence in chief. He also gave different versions under cross examination. In this regard he asked the court to have regard to ***National Employers' General Insurance v Jagers***⁸ on how to deal with mutually destructive versions.

[44] He submitted that the court must look at the reliability of the evidence, credibility of the witnesses and the probabilities. He submitted that Sergeant Peter was put under stringent cross-examination and he was not evasive. He gave truthful evidence. He argued that if the court views the evidence in its totality it must reject that of the plaintiff because he contradicted himself, he was not a reliable or credible witness. He was not a truthful witness. None of his evidence could be regarded as truthful.

[45] He relied on *De Klerk* for the submission that the plaintiff was made to appear at the reception court simply remanded the matters for seven days but for the conduct the plaintiff was arrested as a result of a warrant and was remanded in custody. Plaintiff was being lawfully remanded, he must be kept in custody, was released on a Saturday that further detentions remained lawful in all material respects.

[46] He submitted that the defendant discharged the onus on the arrest and detention of the plaintiff and plaintiff's case should be dismissed with costs.

⁸ 1984 (4) 437 AD.

[47] On the issue of *quantum* he submitted that in the Makhanda court, the court awarded damages for detention for a day in the amount of R25 000. He submitted that the period between 19 November 2018 to 27 February 2019 is accounted for and it should be taken into account as lawful detention as it was ordered by the magistrates court. If the court finds for the plaintiff he should be given R20 000 per day X 180 days.

[48] He submitted that this court must look at the fact that it does not have an innocent plaintiff. He was facing charges of murder.

Discussion

The warrant of arrest

[49] Mr Ntayiya submitted that the warrant of arrest is invalid for lack of compliance with the provisions of section 43 (1) (a) of the Criminal Procedure Act 51 of 1977. Section 43 provides :

“43 Warrant of arrest may be issued by magistrate or justice

- (1) *Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-*
- (a) *which sets out the offence alleged to have been committed;*
 - (b) *which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and*
 - (c) *which states 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.*
- (2) *A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.*

(3) *A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.*"

[50] A warrant of arrest must exist in real terms as a document that can be exhibited when necessary. In ***Baasden v Minister of Safety and Security***⁹ the court held that a warrant issued in terms of section 43 has to reflect the offence in respect of which it has been issued. If it does not, it is invalid and it is immaterial that the offence is apparent from another source readily to hand as it was found by the Supreme Court of Appeal in ***Minister of Safety and Security v Kruger***¹⁰.

[51] In this case the plaintiff had been charged long before the arrest and detention that are in issue in these proceedings. On his version he had shot a person on the head and chest, using his licenced firearm and the person 'perished', according to him. A warrant existed at the time of his arrest and it was produced at court. The issue is whether it is valid or not.

[52] For the sake of completeness I record the warrant below:

"To **The Magistrate/Justice of the Peace, District of MOUNT FERRE

APPLICATION UNDER SECTION 43 OF ACT 51 OF 1977

FOR WARRANT OF ARREST

Application is hereby made for the issue of a warrant for the arrest ofThabo Jabu Msimang..... on a charge ofMurder.....

there being from information taken upon oath a reasonable suspicion that he/she committed the alleged offence on or about the31 ...day of ...08.... year ...2009... in the District ofMt Frere.....

The saidThabo Jabu Msimang..... is at present known or suspected on reasonable grounds to be within the District of Orange Farm Gauteng.....

.....
*Director of Public Prosecutions/ Public Prosecutor/Police officer

⁹ 2014 (2) SACR 163 (GP) at para [14]; See also Du Toit et al, commentary on the Criminal Procedure Act under section 43; page 5-18.

¹⁰ Minister of Safety and Security v Kruger 2011 (1) SACR 529 (SCA) at paras [11] and [12].

WARRANT OF ARREST

(To all peace officers authorised to execute warrant of arrest)

1. Whereas from written application by ...I/O Cekwana... there is a reasonable suspicion thatThabo Jabu Msimang of Dangwana A/A Mt Frere.... On the31... day of ..08... year ...2009... committed the crime

You are hereby directed to arrest *him/her before a lower court (viz Magtes.....at Mt Frere Magisterial Court) in accordance with the provision of section 50 of the Criminal Procedure Act, 1977 (Act 50 of 1977).

2. The accused must be informed that he/she has the right to consult with a legal practitioner of his/her choice, and if he/she cannot afford a legal practitioner, he/she may apply for legal aid at the local Legal Aid Officer.

Given under my hand atMount Frere.....this 31st ..day of October.....year ...2016...

.....
*Magistrate/Justice of the Peace

Description of the accused:

.....
.....

*Delete whichever is not applicable

[53] It is apparent therefrom that the crime of ‘murder’ appears on the same document. Sergeant Peter understood and relied on that charge. The plaintiff knew what he had been charged for. Unlike in the Baasden decision above, where a copy or the original warrant was not placed before court, the defendant placed the contents of the docket, a copy of the charge sheet and a warrant as quoted above.

[54] The defendant admitted that he bore the onus of proving the lawfulness of the arrest. *Prima facie*, he has done so by proving the existence of a criminal case against the plaintiff in the form of a charge sheet, a case docket and the relevant warrant of arrest. However, that is not sufficient because the warrant in terms of which the defendant relied on for the arrest is impugned.

[55] In the Kruger matter referred to, above, the Supreme Court of Appeal summarised the facts as follows :

“[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...

[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, 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.¹¹ As Cameron JA observed in *Powell NO and Others v Van der Merwe NO and Others*¹² , 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*

[56] The facts relating to the warrant in this case are exactly the same as those that obtained in the Kruger matter. Having regard to the evidence as a whole, the evidence of Sergeant Peter was that he executed the warrant. He did not exercise a discretion. All he did was to do no more than to execute the warrant. In fact, the defendant's counsel submitted that they had no choice but to execute the warrant. He even argued that the principles in ***Minister of Safety and Security v Sekhoto***¹⁴, do not find application because there was a warrant of arrest issued by the magistrate. This argument is not only flawed but it goes against the value that court decisions place on the exercise of discretion where an arrest is to be effected. A police officer acting cautiously would have observed certain things about the warrant which are glaring. First, he would have noticed that the warrant section does not contain the crime allegedly committed by the person to be arrested. Second, that the address of the person was known to the investigating officer and would have enquired why it was necessary to arrest and detain the person there and then without warning him to appear in court. Third, it does not state that he failed to

¹¹ Cf *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC) 2009 (1) SA 1; 2008(12) BCLR 1197 para 159, in relation to warrants authorizing search and seizure.

¹² 2005 (1) SACR 317 (SCA) (2005(5) SA 62; 2005 (7) BCLR 675; [2005] 1 All SA 149) para 59

¹³ Kruger page 532 para [8] and [12]

¹⁴ 2011 (1) SACR 315 SCA.

appear at court on a particular day. This is crucial because the reason for the arrest by Sergeant Peter was that he failed to appear in court as communicated to him by Warrant Officer Cekwana.

[57] The defendant did not adduce any evidence to justify the further detention of the accused until 4 May 2019 when he was released. The fact that the investigating officer died did not mean that no officer took over his cases. The evidence of the plaintiff was that he was kept in custody for no reason for that period. There is no evidence given by the defendant to refute that. In fact, Sergeant Peter knew nothing about the case save what he was told by the late Warrant Officer Cekwana.

[58] The question of the validity of a warrant is a matter of law in that the attack is directed simply at the non-compliance with the provisions of section 43(1)(a). I am satisfied that the warrant of arrest does not comply with those provisions and is thus invalid. It follows that the arrest and detention of the plaintiff purportedly in the execution of the invalid warrant were equally wrongful and unlawful. The defendant has failed to discharge the onus resting on it. Plaintiff must accordingly succeed.

[59] In so far as quantum is concerned I have been referred to various authorities where courts have ordered substantial awards to plaintiffs. In this case the plaintiff simply claimed the amount of R6 million without supporting it with evidence of how he arrived at that amount. Both counsel simply mentioned figures to be multiplied by the number of days of detention. This manner of calculating damages loses sight of one fundamental principle that damages are to compensate for injury caused but not to enrich a claimant¹⁵.

¹⁵ Minister of Safety & Security v Tyulu 2009 (5) SA 85 (SCA) para 26.

[60] The plaintiff was not employed at the time of his arrest and detention. This does not suggest that because he was not employed he ought to have been detained unlawfully. It becomes a relevant factor because if he was employed he would have possibly lost income for those days that he was in detention. The amount of R20 000 for a day suggested by the parties is not only high but it purports to rank unlawful arrest and detention above all other damages that claimants suffer, for example, in matters where a baby sustains injuries during birth due to negligence of clinicians, road accident victims, emotional trauma that parents suffer upon losing their child due to negligence of State employees.

[61] In *De Klerk v Minister of Police*¹⁶ the Constitutional Court awarded R300 000 for damages where the appellant was detained for 8 days. In *Komape v Minister of Basic Education*¹⁷ the parents of a child fell into a pit latrine at school in Limpopo were awarded on appeal R350 000 each.

[62] Plaintiff in this case exaggerated and gave false evidence in relation to the treatment he received from the police. Mr Ntayiya could not contain his shock at some of the new evidence plaintiff tendered under cross-examination. He even requested a few minutes to speak to him, this of course, was refused. None of the evidence which plaintiff tendered, which, *inter alia*, related to being pointed with firearms, tortured in prison, handcuffed and deprived of food by the police was ever put to the defendant's witness. It is not even contained in the particulars of claim. I accordingly reject that evidence as an afterthought and an endeavour on the part of the plaintiff to augment his claim

¹⁶ De Klerk v Minister of Police [2019] ZACC 32.

¹⁷ (754/2018 & 1051/2018) [2019] ZASCA 192 (18 December 2019) at para 73.

by putting in information or evidence that he never even raised with his counsel.

[63] The facts of this case are very different from the *Msongelwa* matter relied upon by Mr Ntayiya for these reasons: the plaintiff in this case had been charged and brought before the magistrate's court on a very serious charge of murder, he was released on bail, he clearly failed to appear at court on one of the remand dates. The endorsements of the docket and the charge sheet reflect that. It is in the interests of justice that accused persons attend court in terms of the orders of remand communicated to them by the court. The plaintiff's evidence vacillated in this regard. Sometimes he would state that he did not hear the dates or that he got the dates from his lawyers. The only issue that has led to the findings made in this matter resulted from the warrant which the magistrate did not complete in terms of the law. This court, in the light of the precedent in the *Kruger* matter referred to, cannot overlook that fact. That is a separate issue from *quantum*.

[64] The evidence of the police demonstrated that they simply executed the warrant. It was never suggested to them even for a moment that they treated the plaintiff in a cruel and/or inhumane manner. It is apparent that their purpose was to simply bring the plaintiff before the court, which they did. It is for that reason that the award to be given in this matter must take into account these factors which apply to the case at hand.

[65] The facts in the *Msongelwa* matter were different. At paragraph 16 and 17 Tokota J stated:

“[16] *In my view, the conduct of the arresting officer described above is a matter to be taken account of in assessing the degree of humiliation to which the*

plaintiff was subjected. I don't think such conduct, on the basis of evidence that was led, constituted a separate act of wrongful conduct. The shooting which constituted an assault for which the plaintiff has been compensated was a chain of misconduct on the part of the police.

[17] *It is clear to me that the conduct of the police in the whole matter was reprehensible. The question of the award of damages as solatium for sentimental damages is intended to neutralise the wounded feelings of the plaintiff who has suffered the wrongful acts in the hands of the police. The high price thereof depends on the facts and circumstances of each case. I recognise in this case the lengthy period of detention of the plaintiff. Be that as it may, one must not lose sight of the fact that the injury inflicted on the plaintiff consequent to the assault contributed to the extended period in custody in that he had to be detained in hospitals. This is not like cases where the detention was continuously in the police or prison cells."*

[66] Mr Msongelwa was shot at by the police, hospitalised and detained for 158 days and thereafter was released without being brought to court. In this case it is common cause that the plaintiff was brought before court. The fact that a warrant was invalid affected the validity of any actions that followed therefrom. On this basis therefore the Msongelwa case is distinguishable from the case before me.

[67] Mt Ntayiya did not support the plaintiff's allegations of torture in argument. This is commendable because as an officer of the court his duty is to convey to the court the true facts of the matter. I am of the view that the award that this court is going to give will take into account the fact that the plaintiff was in custody for a period of six months. It will also take into account the fact that he indicated that he suffered emotional trauma as a result of the detention. The most importantly it will take into account that by arresting and detaining the plaintiff in terms of an invalid warrant, the actions of the police infringed his constitutional rights entrenched in section 12(1)(a) of the Constitution.

[68] I have taken into account that the reason for the success of the plaintiff in this matter is the invalidity of the warrant and is not based on reprehensible conduct or behaviour on the part of the police. I accordingly find that an award

in the amount of R540 000 would be appropriate compensation for arrest and detention for the period of 180 days.

[69] On the issue of costs, there is no basis for this court to depart from the normal rule that the successful party is entitled to his or her costs. Plaintiff therefore should be awarded the costs of the action including those of the trial.

ORDER

[70] I accordingly make the following Order:

1. **Defendant is ordered to pay to the plaintiff the sum of R540 000 (five hundred and forty thousand rand) as and for damages in respect of the claim for unlawful arrest and detention.**
2. **Interest on the aforesaid amount from the date of judgment to date of payment.**
3. **Defendant is directed to pay plaintiff's costs of suit.**

T.V. NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : **14 August 2023, 15 August 2023 & 16 August 2023**

Judgment Delivered on : **19 September 2023**

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