

FORM A

FILING SHEET FOR SOUTH EASTERN CAPE DIVISION JUDGMENT

PARTIES: Deon Visagie vs Minister of Safety and Security

- Case Number: 3182/05
 - High Court: Grahamstown High Court (Eastern Cape Division)
 - DATE HEARD: 27 July 2008 to 31 July 2008
- DATE DELIVERED: 22 January 2009

JUDGE(S): Revelas, J

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): Mr L Swart
- for the Respondent(s): Adv Hartle and Adv Laher

Instructing attorneys:

- Applicant(s): NN Dullabh & Co
- Respondent(s): Mlonyeni & Lesle Inc

CASE INFORMATION – FULL BENCH APPEAL

- *Nature of proceedings:* Civil Matter
- *Topic :* Money Owing
- *Key Words:*

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

Case No: 3182/05
Date Heard: 31/07/08
Date Delivered: 22/01/09

In the matter between

DEON VISAGIE

Plaintiff

and

**THE MINISTER OF SAFETY AND SECURITY
OF THE REPUBLIC OF SOUTH AFRICA**

Defendant

JUDGMENT

REVELAS J

[1] The plaintiff was arrested without a warrant, by members of the South African Police Services at a shebeen in Grahamstown at about seven o'clock on the evening of 22 January 2005, from where he was taken to the police station in Grahamstown. Here he was detained there in the police cells until his release on 24 January 2005 at about 13h20, some 42 hours later. He was held on a charge of public violence which was withdrawn. He never appeared in court. On his release form (SAPS Form 328) the reason for his release was noted by the investigating officer as:

"No evidence against him. Captain Wildskut requested me to release him."

Captain Wildskut, accompanied by Inspector Ngcele were the police officers who arrested the plaintiff and three other persons to whom I will refer to as Pater in this judgment.

[2] The plaintiff subsequently instituted an action for damages against the defendant based on his alleged unlawful arrest and detention, and for alleged malicious prosecution. He claimed R150 000.00 and R50 000.00 respectively under these two heads.

[3] The defendant pleaded that the arrest and detention were lawful in terms of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act"), because Captain Wildskut, the arresting officer, had reasonably suspected the plaintiff of having committed an offence referred to in Schedule I of the Act, (Public Violence), the arrest and detention were not unlawful. In respect of the alleged malicious prosecution claim, the defendant pleaded that in laying the charge of Public Violence, Captain Wildskut, based on information given to him, entertained an honest belief, founded on reasonable grounds, that the institution of proceedings was justified. The defendant also relied on the fact that the plaintiff never actually appeared in court.

[4] The plaintiff, who has his own panelbeating business in Grahamstown, visited the shebeen run by Mrs Pop-Eye Goliath on the day in question with the same purpose as most of her customers come to her shebeen for. Her shebeen is at 8 Blackbeard Street, Grahamstown. He was there to drink with friends and acquaintances. The plaintiff testified that he was not drunk, but slightly under the influence as a result of the beer he had consumed.

[5] The plaintiff's version was that he and his friends Rodwell Whiteboy were sitting during the late afternoon under a tree on Mrs Goliath's premises drinking with two men called Deon and Shane. Their surnames were unknown to him. After a while the four of them became onlookers of a violent fight which broke out between to groups of people in the street just outside the shebeen premises. The plaintiff said he was able to identify three persons amongst the fighters. They were: Ice (also known as Edwin Blaauw), Papu and a woman named Banana. Broken bottles were brandished during the fight. It was common cause between the parties that Mrs Goliath regarded the situation serious enough to call the police who did subsequently arrive in several cars.

[6] According to the plaintiff, Deon and Shane, who were in his presence, jumped over the fence into the adjacent yard. His younger work associate, Ronnie Bouwer (also known as Iry) had been arrested while he and Rodwell Whiteboy were still under the tree. Upon the arrival of the police, several of the participants in the fracas, ran away in the direction of the nearby township. Effectively the fight had been terminated by the arrival of the police. It is common cause that Captain Wildskut approached the plaintiff and his friends under the tree whereafter they were arrested.

[7] The events immediately before the arrest were very much in dispute and a credibility finding one way or the other on these events would determine whether or not the defendant has discharged the onus of proving that Captain Wildskut (a peace officer) was indeed justified, in terms of section 40(1)(b) of the Act to arrest the plaintiff without a warrant. (See: *Duncan v Minister of Law and Order* 1986(2) SA 805 (AD) at 818 G-11 and *Minister of Law and Order v Matshoba* 1990(1) SA 280 (AD) at 284H).

[8] The plaintiff's version was that he and Rodwell Whiteboy were immediately arrested despite protestations by Mrs Goliath who was standing nearby, to the effect that they were arresting "die verkeerde persoon", referring to the plaintiff. Captain Wildskut disputed that this was said. According to him, on his arrival, Mrs Goliath pointed out the plaintiff as one of the fighters. His version was corroborated by Inspector Ngcele. He said the reason why he arrested the plaintiff and the other persons was because they admitted their involvement in the fight which caused the police to be called and they threatened to retaliate. This was denied by the plaintiff.

[9] Because the incident in question happened more than three years ago, one should not be overly critical about the discrepancies in the evidence of the four people who testified, namely the plaintiff and Mrs Goliath (on behalf of the plaintiff) and Captain Wildskut and Inspector Ngcele. For instance, the plaintiff and Mrs Goliath contradicted each other with regard to whether Captain Wildskut indeed spoke to the plaintiff or not. It is more probable that he did. He arrested him after all.

[10] Inspector Ngcele showed himself to be an unreliable, rather than an untruthful witness. He contradicted himself quite substantially with regard to the positions of the plaintiff and other persons at the shebeen as well as his description of the surrounding area. This was evident when an inspection *in loco* was conducted during the course of the trial. However his recollection of such matter are irrelevant to the facts which are germane to the case.

[11] It was submitted on behalf of the plaintiff that Mrs Goliath and the plaintiff were truthful witnesses. It was argued that Mrs Goliath who had an interest in the matter because her personal safety and

that of her property was threatened, there would be no reason for her to exonerate the plaintiff if he was indeed one of the perpetrators. This argument is of course dependant on a finding that Mrs Goliath indeed spoke the truth, and that Captain Wildskut had lied when he said that she pointed out the plaintiff and his friends as culprit. Captain Wildskut was criticized during argument for not mentioning in his statement that the plaintiff and his friends threatened to follow the other group to retaliate. In court he gave this as the main reason why he carried out the arrest. In my view, it would be instructive and necessary to consider the reports that were made to the police on the day in question.

[12] It was common cause that Mrs Goliath made two calls to the police before they arrived at her house. On the SAP 3 document headed "First Information of the Crime" which had to be completed at the time, certain facts were mentioned by Captain Wildskut, under oath, shortly after the arrest.

[13] He stated that he was on patrol duty in the Scotch Farm area (where Mrs Goliath lives) because it was regarded as an area where there was a high incidence of crime. He received a report of "gangsterism". On arrival at the house where the reported fight was to have taken place, many people were standing around. Some of them requested the police to pull over and assist. There were four police vehicles on the scene. He said he approached Mrs Goliath who told him people that had been fighting in the street with knives and bottle, necks and chased one another. She then pointed out four males who were sitting in the yard, as the persons who were involved in the disruptive and violent activities.

[14] He further said that the four men introduced themselves. He then listed their names and addresses. They were the plaintiff,

Rodwell Whiteboy, Ronnie Bouwer (or Iry) and Edwin Blaauw ("Ice"). They reported that they had a fight with other males in the street who had however run away. He said he explained the seriousness of public violence to them and told them that they were to be arrested. This statement reflects largely what the Captain said in court.

[15] Captain Wildskut was criticized by the plaintiff for not mentioning in his statement that the plaintiff and his friends were swearing when he spoke to them. The omission of such detail is not critical to the defendant's case. Policemen no doubt often hear verbal abuse when they deal with belligerent and drunk persons. It is by no means an unusual occurrence. On his own version the plaintiff had imbibed six bottles (750ml) of beer. Alcohol is a common factor in the majority of gangster fights and so is swearing and threats to retaliate. I can draw no inference against the Captain for this omission, particularly since the plaintiff did not impress me as a truthful witness.

[16] In the circumstances which were common cause, namely that Captain Wildskut arrived in the aftermath of a gangster fight, it is hardly likely that he would ignore the complainant in the matter, who specifically told him that the plaintiff was innocent, and then arrest the plaintiff without any good reason. It is more probable that he did not ignore her, and indeed went to the people pointed out by her as the perpetrators.

[17] It was argued by the plaintiff that it was very unlikely that Mrs Goliath would, having previously implicated the plaintiff, suddenly change her mind in court and say he was innocent and even tried to prevent his arrest by the police. It was suggested by the defendant that Mrs Goliath's friendship with the plaintiff's partner, Amanda,

might explain her version in court and her siding with the perpetrators. It is common cause that the plaintiff and the other persons who were arrested live in the area. Even though the friendship with Amanda was disputed, the fact that they knew each other was not. Mrs Goliath's business interests could also be at stake. She ran a shebeen and her customers were arrested.

[18] It is also difficult to understand why Ronnie Bouwer, who was an associate of the plaintiff, would be arrested outside the gate (on the plaintiff's version), unless he was pointed out by Mrs Goliath as a perpetrator. It is also strange that Deon and Shane would jump the fence if they were innocently sitting with the plaintiff.

[19] The plaintiff argued that the testimonies of the plaintiff and Mrs Goliath, that Papu and Banana were involved in the fight, was a recent fabrication to assist their civil case against the police. It is very significant that these two persons who live close by, were not arrested, if they were indeed implicated by Mrs Goliath on the day in question. On the case docket which was opened, she is noted as the person who pointed out perpetrators and the one who pointed out the plaintiff. It was also noted on the docket that the plaintiff had a bruise (injury) on his leg which is a further indication that could have led Captain Wildskut to believe that the plaintiff was involved in the fight. Furthermore, Captain Wildskut gave the impression of being a reliable witness and I therefore accept his testimony that the plaintiff and his friends were pointed out by Mrs Goliath as perpetrators in the fight which caused her to summon the police.

[20] **Unlawful Arrest**

The next question is whether in the circumstances as accepted, the arrest was lawful. That would depend on whether the suspicion entertained by Captain Wildskut that the plaintiff was party to public violence, rested on reasonable grounds. In *Mabona and Another v Minister of Law and Order and Others* 1988(2) 654 (SE) at 34A the following was said with regard to a suspicion based on reasonable grounds:

"The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality or cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty".

[21] Captain Wildskut's testimony of the high crime rates in the area was undisputed. So was his evidence that he regarded the situation as volatile. The plaintiff was pointed out by the complainant in the matter to him and to Inspector Ncgele. Cumulatively all these facts, objectively seen, would justify a suspicion that the plaintiff was involved in public violence. The plaintiff also sported the injury noted in the docket. The plaintiff's release without being formally charged does not detract from this position either. It could not have been expected of Captain Wildskut to leave the plaintiff to his own devices, and warn him to appear in court at some later stage. He had received a report immediately before the arrest, that the two groups of people were fighting each other and that knives and bottlenecks were involved. Any reasonable person would regard such an event as a very serious threat to the safety of those in the immediate vicinity. Furthermore, the group of men were still belligerent and they threatened

retaliation. They did not appear to be upstanding citizens who would calmly abide by a warning to appear in court.

[22] The situation as found by the police on arrival (a fact which was common cause) confirmed the contents of the report. This was also confirmed by Mrs Goliath. According to Wildskut the plaintiff confirmed his involvement in the fight and he and his friends expressed a wish to retaliate against the other group who ran away. Quite plainly the peace was disturbed by two groups of people who collectively acted unlawfully and violently. Bottle pieces were lying around and Mrs Goliath found it necessary to phone the police for help on two occasions.

[23] Standing Order (G) 341 (4) (2) (c) and (e) makes provision for arrests for purposes other than to secure the presence of a suspect at court, namely to prevent the commission of an offence or to end an offence. Given the threat of retaliation made by the plaintiff and his friends, the aforesaid exceptions to the general rule are applicable to this case. There is much merit in the submission made by Ms Hartle in her heads of argument where she suggested that regard must always be had to the dangers and rigours of policing and that the reality which confronts an arresting officer should not be lost sight of. For the aforesaid considerations the plaintiff's claim for wrongful arrest and detention should be dismissed.

[24] **Malicious Prosecution**

The plaintiff's claim for malicious prosecution is premised on the fact that no charge was brought against him. This in itself is not a ground for malicious prosecution, despite the arrest. (See "Malicious Proceedings"—LAWSA, First Re-issue, Volume 15, paragraph 44).

[25] It is common cause that no warning statement was taken from the plaintiff and he was never formally charged. Consequently no charges were withdrawn and no proceedings were terminated. The plaintiff was simply released in terms of the provisions of section 50(c)(i) of the Criminal Procedure Act, 56 of 1977, because he was not brought before a lower court by virtue of the fact that no charges were brought against him. No prosecution was commenced. The fact that it was because there was not enough or no evidence against him to charge him does not assist the plaintiff. At the time of his arrest there appeared to be. There are no facts in this case to support a claim of malicious prosecution.

[26] Accordingly both the plaintiff's claims against the defendant are dismissed with costs.

E REVELAS
Judge of the High Court