

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 22/11/2007
CASE No: 29784/05

UNREPORTABLE

In the matter between

GABRIEL PETRUS MARITZ SCHOEMAN

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

RASEFATE AJ:

The parties and the claim.

[1] The plaintiff is a male person who is a data administrator by occupation with the State Information Technology Administration, commonly known as SITA. The defendant is The Minister of Safety and Security who is sued in his official capacity of being responsible for the actions of the South African Police Services.

The plaintiff's claim is for general damages in the amount of R200 000-00 which he allegedly suffered due to grave distress, inconvenience and severe humiliation and injury

to his dignity as a result of his arrest at a road block and detention at the hands of the Police on 27 April 2005.

The issues.

[2] The defendant admits the arrest of the plaintiff on the date alleged, but contends that the arrest was only carried out in the police station and not at the road block, after the police had requested him to accompany them there. Together with this point of difference is the time of the arrest: Plaintiff maintains that he was arrested at about 8h30 whereas the defendant contends that it was about 9h00. There is also a dispute regarding the time when the plaintiff was released on the day: Plaintiff maintains that he was released between 14h00 and 15h00 in the afternoon, as against the defendant's contention that it was at 9h55.

Thus, the defendant contends that the arrest of the plaintiff was justified by the fact that he was reasonably suspected of having committed a crime of possession of an unlicensed fire arm in contravention of the relevant statutory provisions pertaining thereto, which is an offence falling under Schedule 1 to the Criminal Procedure Act 51 of 1977. In this regard the parties agreed in the minute of pre-trial conference that the defendant carried the onus of proving that the arrest of plaintiff was lawful.

The event.

[3] On 27 April 2007 - ironically Freedom Day holiday - the plaintiff left his home at Rooihuiskraal in Gauteng at 8h00 and was on his way to a shooting range called Mopani near Olifantsfontein to shoot his collection of fire arms. He had his son with him, then 20

years old. He had four weapons from his collection: a ,375 Holland and Holland Winchester rifle; a 30-06 Sako rifle; a 7x57 Musgrave rifle, and a 9mm Astra Parabellum. He had licences for the fire arms, as far as he was concerned.

[4] At a road block near Tembisa he was stopped, and had to produce his licences for the fire arms he had in the boot of his car. He then realized that he had forgotten to take along one for the Astra which was in his old identity document. It also turned out that the serial number of the Winchester was reproduced wrongly on the licence card, in that it was given as G152022 whereas it was G15012 on the fire arm. He testified that the police officer who checked the licences said to him, "You have a problem. You are in possession of an unlicensed fire arm". He tried to explain to the police that it must be due to an administrative error in the issuing office that the numbers were confused, but the officer would not listen, and insisted on arresting him. However, they let him phone his wife to bring the identity document containing the licence for the Astra pistol.

[5] According to the plaintiff he was put into the back of the police van despite his pleas that he be allowed to follow them in his own vehicle to the police station where they said that he was to be taken, or that they drive him in his vehicle to the police station so that he did not have to be put in the van. The arresting police officer insisted that he had to put him in the back of the van. The police took the Astra pistol, the Winchester as well as the faulty licence along. He protested that they were leaving the rest of the fire arms in possession of his son who was not licenced to possess them, but the police would not care as they only asked if the son did not have a driver's licence which he said he had. His son

waited for his wife at the scene while he was taken to the police station by two police men.

[6] At the police station he was placed behind the counter while the police checked in the computer for the serial number of the Winchester, but it would not appear among his record of eight fire arm licences. His wife arrived about 45 minutes later with his two younger sons of 8 and 10 years, together with the oldest who had remained at the road side. He says that his wife and sons were distressed to see him behind the counter in the police charge office. His wife produced the identity document with the licence for the pistol and the police, after verifying it, handed to her the pistol together with the identity document. Both husband and wife's protests that she was not authorized to be in possession of the fire arm were not heeded by the police.

[7] The police then ordered him to remove his belt and shoe laces, saying, on his enquiry, that it would take up to a week before he appeared in court. At this point his young sons became hysterical, upon which his wife and children went outside to calm them down. The plaintiff was allowed to phone, but as it was a holiday he could not find any lawyer. He asked to see the station commander, to which the police said they would phone. About half to three-quarters of an hour later a man in plain clothes arrived, who held a meeting ('vergadering gehou') with the police, and also looked into the computer. He said that he believed that the whole thing could be an administrative error, and they did not have to detain the plaintiff ('nie toe te sluit me') while the matter was investigated. Plaintiff was given back his shoe laces and belt. When he was finally released it was

about 14h00 to 15h00. He asked for a receipt for his property which the police were keeping, and the person in plain clothes took a piece of paper on which he wrote his name and contact numbers. The plaintiff himself wrote thereon his property which was being held by the police, and a date stamp was put on it. The police would not furnish him with a case number or reference. A copy of the paper was admitted in evidence and appears on page 17 of the bundle of documents.

[8] The following day he went to the fire arms licensing office in Pretoria where it became clear from the application form he had completed in respect of the rifle that the serial number was captured wrongly on the licence. The office undertook to issue a fresh licence to him free of charge. After two weeks the detective who had released him contacted him, and was informed of progress regarding the re-issue of the licence. Plaintiff describes the experience of being arrested as traumatic to both himself and his whole family, especially that the public saw what happened to him both at the road block as well as at the police station. He says that whenever they would pass a police station, his youngest son would ask him if he has his fire arm licence.

[9] Cross examination of the plaintiff was directed at proving the following:

That when he was stopped at the road block he had his wife and only the eldest son with him in his car; That he could not produce a licence for the Winchester rifle; That he was not arrested at the road block but was only requested to accompany the police to the police station, which he did driving his own BMW car with his passengers inside; and that he was only arrested at the police station after a check on the computer revealed that

he did not have a licence for the Winchester rifle. The police further confirm that it was one Inspector Makola who told the arresting officer to release him, which was done, according to the police, at 9h55 for further investigation.

[10] The next witness was Ion Schoeman, the plaintiff's eldest son. He testified that he was the only one with his father when they were stopped at the road block. When the police discovered the discrepancy with the rifle licence they said that plaintiff should go with them to the police station. They put him in the back of the van. He remained at the scene with his father's vehicle waiting for his mother, while the other fire arms were in the boot although he was not licensed to be in their possession.

After his mother arrived in another vehicle they drove in convoy to find the police station, where they arrived after 10h00. Plaintiff was busy untying his shoe laces. His mother handed the pistol licence to the police over the counter, who then handed her the pistol. He had to go and wait in the car with his younger brothers who had become upset. According to him they left the police station with the plaintiff at 14h30 that afternoon. The fact that his father was kept behind the counter meant to him that the police had arrested him.

Under cross-examination Jon said they left the police station between 14h30 and 15h00. He remembered the time because he had to buy lunch for his younger brothers.

[11] Mrs Schoeman also testified: The plaintiff left home at 8h00 with Jon, for the shooting range. At about 9h15 plaintiff phoned to say that he was arrested and she should bring his old identity document. She had to dress herself as well as the two sons before

proceeding to the place, where she arrived at the road block at about 10h20. She found Ion waiting at the BMW. They followed each other to the police station after they were directed by the police at the road block. At the police station she handed the identity book to the plaintiff. After police saw the licence therein they handed the pistol to her despite her protests that she was not licensed to possess it. There was a lot of talking, and the police said they were going to lock plaintiff up, upon which the youngest son started to cry, causing her and Ion to go outside where she gave him money to go and buy the boys a drink in order to get them away from the scene. When she returned inside, the plaintiff was then behind the counter taking off his belt and shoe laces to be locked in. The police said they would phone someone, who arrived at about 12h00 dressed in civilian clothes. There was a big discussion among the police in a language she did not understand, before there was decided to release the plaintiff. When plaintiff was eventually released, he insisted on a receipt for his rifle, upon which the police tore a piece of paper out of a note book and wrote a note which they said would be the receipt. She was surprised, as she thought that it should have been a more official document. The plaintiff was released at 14h30.

[12] Under cross-examination, she labelled as a lie any suggestion that she had arrived at the roadblock in the same car with Ion and the plaintiff, or at the police station. She reiterated her version that the plaintiff was put behind the counter while she had been outside to calm the crying little son. S4~ denies that plaintiff was released at 9h55; or that she sat in the BMW the whole time, saying that she was too concerned about her husband not to be present.

[13] For the defendant's case, the first witness was the arresting officer, Constable Tukishi Gilbert Makofane. He testified that he stopped the vehicle of plaintiff at the road block. He maintains that there were a woman and a boy with the plaintiff in the vehicle, a BMW whose colour or registration he cannot remember. Upon the plaintiff opening the boot at his request he found guns and ammunition in boxes. He asked for licences for the fire arms. Upon examination he realized that one licence did not correspond with the serial number on the fire arm. The plaintiff's explanation was that he had left the licence at his home. One Inspector Moutlane came over, and he explained to him the problem. He continues that, "We were then bound to go to the police station to verify if he had a licence". He asked plaintiff if he knew where the police station was, to which he said he did not know. Plaintiff followed him and Inspector Moutlane in his own vehicle.

[14] At the police station Inspector Moutlane checked for the plaintiff's fire arms. The one rifle did not appear, which meant that plaintiff did not have a licence for it. He warned the plaintiff and told him that he was arresting him. He then states, "I made statement and opened a docket and handed it to Inspector Makola to investigate further". He denies that the plaintiff was arrested at the road block, but only at the police station. He was in the process of putting the plaintiff to the cells when Inspector Makola intervened. He also says he was about to take plaintiff to interrogation, which is not done in the cells. He is not sure of the time when he parted with plaintiff, but it was after 9h00 and not 14h00. he reiterated that he arrested the plaintiff because he was satisfied that he did not have a licence for the fire arm, even though he said that he forgot it at home.

[15] Under cross-examination the witness said that he did not know if the offence for which he arrested the plaintiff fell under schedule 1 of the Criminal Procedure Act or not; but he would arrest whenever a person committed an offence. He would not argue that the plaintiff was still at the police station at 13h00 as he was not there when he returned to the station from the road block during lunch. On the question why he did not realize that the discrepancy in the number on the licence and that on the fire arm could be an error, the constable said the inspector could realize it because he was more experienced than him. He did not see the two young sons of plaintiff, and does not believe that they had ever been there.

[16] The next witness for the defendant was Kwena Samuel Moutlana. He is an inspector in the police with 21 years service. He was asked by the Senior Superintendent Malerna to accompany Constable Makofane to police station, who had a fire arm with serial number G152012. He got into the police vehicle driven by the constable. At the police station he checked against the plaintiff's identity number for fire arms licensed to him, and the rifle mentioned did not appear. He showed the result of his search to Constable Makofane. According to him, plaintiff was in front of the counter, but he did not know him. When he and Constable Makofane had driven to to the police station, he had noticed that they were followed by a BMW car, but he did not notice its occupants. They were at the police station at about 9h00, and he left about 15 minutes after that, returning to the road block while Makofane was still doing some paper work. He does not know when the

plaintiff was released. He saw nobody in the back of the van when they were driving to the police station, and he did not see the plaintiff's wife at the police station.

Under cross-examination he stated that the road block to which he had returned went on until 14h00, having started at 8h00. He does not remember if any officers were released early for lunch. His normal duties are that of a systems controller, which is a computer operator.

[17] The last witness for the defendant was Tiny Kolodi Makola. He was stationed at Olifantsfontein at the time and was the detective on standby on the day, working in an office aside from the charge office. Through the window of his office he saw the plaintiff arrive, driving in his BMW into the station, but he cannot remember what colour it was. He later heard of someone arrested for possession of a fire arm. Then Constable Makofane came to him with a docket saying, "We have a problem; someone has been arrested for a fire arm". He went to the charge office where he found the plaintiff. He checked the serial number of the rifle, and Supt. Moutlana punched it into the computer while plaintiff was there waiting for a response. The rifle was not on his list of fire arms on the system. He asked plaintiff to explain his possession of the rifle. Plaintiff stated that he could have misplaced or left the licence at his home since he has a number of fire arms. Based on the explanation as well as the impression which the plaintiff made on him, which he describes as non-criminal even in his appearance, he believed that an administrative error could have been made with the issuing of the fire arm licence. He decided to release the plaintiff, and he made an entry in the SAP5 which reads:

" 2005-04-27: Case from client service centre.

09h55: Suspect arrested and he was released at SAP 328. It seemed the fire-arm is correct but there might be administrative fault. The case will be investigated first and liaise with state prosecutor for his/her decision.

The fire-arm will be taken to fire-arm register to ascertain as to whether there is administrative fault.

If nothing is found the suspect will be charged before case could be sent to senior state prosecutor.

(signed)

[18] He says that he used his discretion to release the plaintiff, taking into consideration the fact that the serial number on the rifle was original and was not tempered with. On the plaintiff's insistence he wrote the document in which he gave his name and contact particulars to the plaintiff, who then wrote thereon his property which the police were withholding. The above-quoted note in the SAP 328 register for releasing suspects was written and signed by him. In the register the time of detention of plaintiff is recorded as 9h40 and of his release as 9h55.

Under cross-examination, Inspector Makola admitted that the plaintiff never said to him that he had forgotten the rifle's licence at home. He never saw the plaintiff's wife in the charge office, but only saw her outside when, after releasing the plaintiff, he had continued to chat to him while walking him out of the police station. He saw no children who could have been of the plaintiff. He could not identify what sex the other person was whom he saw in the BMW. He did not notice the van driven by Makofane coming into

the police station in the same way he had noticed the BMW. Neither did he notice any other cars. He says he paid particular attention to the BMW because it was a nice car.

Evaluation

[19] It is common cause that the plaintiff was arrested on that date - the only difference between the parties being at what stage the arrest was carried out. When the arrest is admitted, as it is in this case, the defendant carries the onus of proving that it was justified in the circumstances of the case. The parties have recognized this fact in their minute of pre-trial conference in terms of Rule 37 of the Uniform Rules of Court. Such justification would lie in a suspicion on reasonable grounds in the mind of the arresting officer that the defendant has committed a schedule 1 offence; and also that the arrest was reasonably the only available way of dealing with the matter. The first consideration is provided by section 40(1)(b) of the Criminal Procedure Act 51 of 1977, while the second is infused into the provision by section 39(2) of the Constitution of 1996 which provides that, when interpreting any legislation, every court must promote the spirit, purpose and objectives of the Bill of Rights.

[20] Section 40(1)(b) provides that

‘A peace officer may without a warrant arrest any person

(b) whom he reasonably suspects of having committed an offence referred to in

Schedule 1,.....’

In order that his action be covered by the provision, the peace officer must not only have a reasonable ground upon which he bases his suspicion that an offence may have been committed, but he must know that the offence which he suspects the defendant of having committed is one which is listed in the first schedule. The reasonableness of the suspicion is judged on the objective test of a reasonable person faced with the same facts, while the question whether the offence is one in the first schedule is subjective.

[21] The reasonableness of the suspicion.

The plaintiff had four fire arms with him, together with their ammunition in boxes. His explanation was that he was going to discharge them at the shooting range near there. He produced licences for three, except the Astra pistol which he said was in an old identity document which he forgot to take with him. Ironically the police did not arrest him for the pistol, but for the rifle for which he produced the faulty licence. I think that a reasonable person would have approached the situation more carefully than the arresting officer did in this case. The mere fact that the licence which plaintiff produced had the correct description of the rifle, except for the second-last digit of its serial number, should have prompted the arresting officer to be inclined towards the explanation that an administrative or clerical error could have occurred, rather than that a crime was committed.

I thus find that the suspicion that the arresting officer harboured was, objectively considered, not reasonable. The fact that Inspector Makola realized that it was a mistake strengthens this finding. The explanation of the arresting officer that Inspector Makola could realize it because of his experience does not excuse the unlawfulness of the arrest

See *Neethling, Potgieter and Visser, Law of Delict, 5th Edition* p305 and the cases referred under footnote 101 and 102.

[22] Knowledge that the suspected offence is Schedule 1.

The arresting officer, Constable Makofane, testified that he was not aware whether the offence of possession of a fire arm without a licence for which he arrested the plaintiff was one falling under the schedule. In fact he said that he would arrest whenever a crime was committed. He thus acted without any consideration of the powers and limitations to arrest imposed on him by statute. That the offence actually falls under the schedule is a mere coincidence which, in my view, does not change the fact that the arresting officer did not purport to act under the protection of the provision. As such the defendant cannot discharge the burden of proof, and the arrest was not justified - See in this regard the decision in *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk). In that case Zilwa, AJ decided that the police inspector's act could not be clothed with legality where he did not know, and thus never considered whether or not the offence of child stealing was a first schedule offence.

[23] Due to the finding that the arrest of plaintiff was unlawful, it is not necessary to consider the question whether a less intrusive approach than arrest could have been employed by the arresting officer. Such a consideration would be relevant if the grounds for an arrest were established.

The time and place of arrest.

[24] For the purpose of determining the quantum of damages it is necessary to establish when the plaintiff was arrested, and when he was released.

In the defendant's plea it appears to be contended that the arrest of plaintiff happened at the road block. The relevant paragraphs of the plea read that

"4.2 The defendant admits that on 27 April 2005 at 9h00, the Plaintiff was lawful (sic) arrested in the vicinity of Olifantsfontein by Constable TG Mafokongi (sic) being a member of the South African Police Service acting in the course and scope of his employment with the Defendant"; and

"4.4 The Defendant pleads that the Plaintiff was pursuant to his arrest as aforesaid taken to the Olifantsfontein Police Station".

The two statements are in consonance with the plaintiffs version regarding the place of his arrest as well as his being taken to the police station. The fact that he was 'taken to the police station' contradicts the police members' evidence that he drove in his own vehicle there. There is thus confirmation of the plaintiff's version that he was put in the back of the police van, to the police station.

[25] Even Constable Makofane confirmed the plaintiff's version when he wrote in the investigation diary of the docket which he had opened, as follows

2005/04/27: FIC as per AI.

09h55: (1) The suspect was arrested at the Road Block.

(2) The fire arm he was possessing was fitted with telescope with serial number 265674D.

(3) The suspect was also possessing 2xBoxes containing 20 rounds each rifle cartridges.

Signed.

What is surprising, but remarkable, is also the fact that the above entry made by Makofane before he handed the docket to Inspector Makola, bears the same time to the minute as the latter's subsequent one when he released the plaintiff: All that after Makola had, according to his evidence, received the docket in his office; he was informed by Makofane about the problem of the person with unlicensed fire arm; he had proceeded to the charge office; he checked the licence against the fire arm's serial number; he checked the information on the computer (which had already been checked before); he interviewed the plaintiff before coming to the decision to release him.

Another tell-tale entry is in the document SAP 328, "Release of Suspect" which gives the following information about the plaintiff:

Date and time of detention: 2005-04-27 - 9h00

Brief reasons for detention: Found in position of a fire-arm whereby serial No's doesn't correspond

Brief reasons for release: It seemed that there is administrative mistake. Fire-arm to be taken to fire-arm register to for investigation and to ascertain the origin of the arm.

Case is temporarily (sic) for investigation.

Date and time of release: 2005-04-27 - 9h55.

The only reasonable inference that can be drawn from an assessment of these records is that they were made after the event, rather than in sequence when the events unfolded. As such they cannot be reliable in as far as they purport to give the time of arrest, detention and release of the plaintiff. The inference that the entries had not been made by the time when the plaintiff was released, ties up with his evidence that they could not provide him with a case or reference number for his case.

[26] Another serious contradiction in the version of the police is about the explanation they say the plaintiff gave regarding the rifle's licence, namely that he said it was at his home, and yet it was there with them~ and it formed the basis of their decision to release him on the ground that it had an error regarding the rifle's serial number.

The same can be said of the licence for the Astra pistol that the plaintiff says his wife brought from home, about which the police say nothing, probably because theirs is to deny that she came there separately with the licence for the pistol and the couple's two younger sons.

[27] The time of release of the plaintiff given by the police is also improbable: Too many things happened in their interaction with the plaintiff that morning to have been

completed in an hour or less. Constable Makofane's version that he returned to the station for lunch at 13h00 and found the plaintiff already gone is untenable when considered against Inspector Moutlana's that the road block went until 14h00. How would he go for lunch when they were all about to disperse!

[28] The plaintiff's version, supported where it is by that of his wife and son, remains the more probable one when compared with that of the police regarding the place and time of his arrest as well as of his release. Regarding the time of his arrest, his wife's version must also be considered together with his own, taking into consideration that they are all estimations since people do not normally watch the clock. He must have phoned her fairly early after his arrest, which I suppose became clear to him after his representations and consultations among the police happened, to which he and the arresting officer have testified. He was stopped at about 8h30, and his wife says he phoned at about 9h15. I find thus that the plaintiff was arrested at the road block at about 9b00, and was released at bout 14h00.

Damages.

[29] Arrest of an individual is a serious infringement of the right to liberty, which right, although not listed as such in the Bill of Rights has vested in terms of the common law. Arrest also has the effect of infringing upon the right to dignity which is listed in the Bill. These considerations call upon those who wield the power of arrest to do so with circumspection and to act reasonably in fitting situations. The Appeal Court per Muller AJ in the judgment in *Areff v Minister van Polisie* 1977(2) SA 900 (A) at 914G illustrated

