

22263/03-L Roux

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JUDGMENT

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IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)JOHANNESBURGCASE NO: 22263/03

200708-01

10 In the matter between

L GREENBERG

and

MINISTER OF SAFETY & SECURITY

Plaintiff

Defendant

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) YES/NO	
DATE <u>1/9/07</u>	SIGNATURE <u>[Signature]</u>

UnrevisedJUDGMENT

20 MOKGOATLHENG, J: The plaintiff Lionel Greenberg has instituted an action for damages against the first defendant Gouws Margaret and the second defendant the Minister of Safety and Security arising out of an incident which happened on 10 August 2000 at Edenvale.

The plaintiff alleges that he was wrongfully and unlawfully deprived of his freedom and liberty by the first defendant who was at all material times acting within the course and scope of her employment as such as a policewoman with the second defendant in that she arrested the plaintiff under case MAS194/8/2000 without legal justification or

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cause and that as a result of this wrongful and unlawful conduct by the first and second defendants the plaintiff suffered damages in respect of contumely, loss of self-respect, humiliation, degradation, loss of dignity, unusual and criminal punishment.

The plaintiff claims a globular sum of damages in the amount of R150 000. This globular amount is claimed under claim A. The plaintiff also instituted a claim B and claim C. I am not going to be alluding to these two claims. It is common cause that although the plaintiff states that under claim B he sustained damages in that he had to expend the sum of R15 000 in respect of legal fees and disbursements. No such
10 evidence was proffered in this court. Further in terms of claim C, although the plaintiff alleged that he had suffered a loss of earnings for the period of his incarceration in the sum of R10 000 similarly no evidence was tendered in proof of the said claim.

The action is defended. The gravamen of the defence by the first and second defendant, and this defence is encapsulated primarily in an amendment to the plea which was not objected to by the plaintiff, and that is paragraph 5, was amended in the following terms, that the defendants deny that the plaintiff was wrongfully and unlawfully arrested
20 and aver that the plaintiff was arrested by the first defendant in terms of section 40 of the Criminal Procedure Act 51 of 1977 since the first defendant reasonably believed him to have committed an offence listed in schedule I of the said Act; that therefore the first defendant was justified in arresting the plaintiff without a warrant, alternatively the amended plea reads thus that the plaintiff was arrested because he

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committed an offence in terms of schedule 1 and was thus in the presence of the first defendant and thus was committing an offence in terms of section 40 of Act 51 of 1977 since the first defendant reasonably believed him to have committed a schedule 1 offence, and alternatively that he was committing or attempting to commit an offence in the presence of the first defendant and thus that the arrest was justified under the circumstances.

The parties agreed that the plaintiff bore the onus of showing or proving that his arrest was wrongful or unlawful and then the onus
10 thereafter would shift to the defendant or defendants to show that the arrest was justifiable and lawful. *Locus standi* was admitted by both parties and thereafter the plaintiff led evidence through himself.

He testified that he is 48 years old; he is employed in the computer industry; he has two children one of whom is Kevin who is the subject of these proceedings. He alleges that he has terminal cancer. He was married but is now divorced and he states on 18 August he was arrested by Gouws the first defendant, who after having called him by telephone the plaintiff reported to the police station. He says he received such a call at about 12:00 and he came round to the police
20 station at about 15:00 and he says he was there and then immediately arrested. He was in fact told by Gouws that he is under arrest for contempt of court. The plaintiff states that he went to the police station with Kevin who was then 13 years old.

The reason proffered for the contempt of court arrest was basically that he did not return his son to Mrs Greenberg, his ex-wife.

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He alleges that Gouws stated that he would continue arresting him until he made the Guinness Book of Records. He says he felt unhappy with the situation because this was a family matter. He was traumatised, his son was traumatised because he was arrested in the presence of his son. He was requested to sign a warning statement which he did. He proffered an explanation to Gouws to the effect that he had gone to Skukuza to attend a half marathon and that he had arranged with his ex-wife that he would take his son for that weekend.

Just to summarise the evidence, according to the plaintiff he
10 denies that he was in contempt of this court order. The gravamen of his defence is basically that he returned with Kevin. On Thursday he utilised his reasonable rights to access and he says because when he took Kevin his clothes and running togs were already packed for the trip to Skukuza, so he found it superfluous to bring him back on Thursday only to return at about 05:00 AM in the morning and thus disturbed the neighbourhood or the household of Mrs Greenberg. He found it prudent to let Kevin sleep over at his place, and the following day at 05:00 AM they proceeded to Skukuza.

For completeness he says the two legal consultants Adv Bloom
20 representing Mr Greenberg the plaintiff and Mrs Greenberg's attorneys had arranged this access to endure from the Friday up to Monday. The plaintiff alleges that he returned on Monday, tried to take Kevin to his place of abode at Mrs Greenberg's house; he rang the bell; they tried to contact her through the cell phone; there was no response. Tuesday he took Kevin to school. Kevin was not fetched by Mrs Greenberg on

Tuesday, Wednesday and even Thursday. He the plaintiff as a prudent father, had to go and fetch his son. So basically he denies that he was in wilful contempt of a court order which was issued by my brother GOLDSTEIN. The court order basically gave interim custody to Mrs Greenberg subject to the reasonable rights of access of Mr Greenberg the plaintiff.

10 Mrs Gouws gave evidence on behalf of herself and the second defendant and stated that she was handed a docket which encapsulated a complaint or a charge by Mrs Greenberg that the plaintiff was in contempt of a court order in that he had not returned Kevin on Thursday before they went to Skukuza, and also on 6 August when he was supposed to have returned Kevin he did not do so, neither did he do so on 7th and 8th. On the 9th she went to lay a charge at the local police station. It was on the basis of that charge that Sergeant Gouws telephoned the plaintiff and invited him to come to the police station to come and discuss that particular charge.

20 The plaintiff proceeded to the police station. Mrs Gouws the first defendant, alleges that they had a discussion for an hour during which she explained the legal position pertaining to the court order issues by my brother GOLDSTEIN which was in the docket and advised him that if he wanted to change the *status quo* regarding custody he would have to go to the High Court for the setting aside of that order.

The first defendant alleges that because of the arrogance of the plaintiff and the fact that he was uncooperative and threatened to take the child Kevin, to Botswana she was justified in arresting him because

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he was refusing to surrender custody of the child to the mother Mrs Greenberg and was threatening to take the child away to Botswana and threatened to do whatever he wanted with this child Kevin and in her view this was a breach of the afore referred to court order which was already breached in her view by the fact that the child was not returned to the mother as per arrangement or agreement, and that the plaintiff was continuing to breach the order and was thus committing an offence in her presence, and that in terms of section 40 she was justified in effecting an arrest. She alleges that should she had not done
10 so there was a possibility that disciplinary steps would have been taken against her.

In broad outline Mrs Greenberg testified and attempted to rebut the version of Mr Greenberg that on the Monday, Tuesday, Wednesday and the Thursday in August, that is the 6th, the 7th, the 8th and the 9th she was at home; she has domestic servants; she runs a school, there is no possibility that the plaintiff could have made attempts to return the child without not having contacted her. She denies that she was aware of the arrangement which Mr Greenberg the plaintiff, made with Mr Khona, the headmaster of the primary school in which Kevin was a
20 pupil and denies also that she had packed Kevin's bags on Thursday and assumes that the school clothes which were packed or which Kevin had access to, to attend school on Monday, Tuesday, Wednesday and Thursday probably are as a result of the fact that Mr Greenberg the plaintiff, keeps some of Kevin's school clothes at his place of abode.

That in broad outline is the evidence adduced in this court. In

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my view the following are common cause:

1. That the plaintiff was arrested and incarcerated for a period of about 17 and a half hours.
2. He was released on bail. It is not clear whether he was released on his own recognisance or whether he paid bail for his release, but the fact is he was released.

The decisive dispute in this matter in my view is whether the arrest effected by the first defendant was lawful or not. It is so that the arrest is predicated upon the alleged breach of the order given by my brother
10 GOLDSTEIN. There is a dispute as to whether that order was breached or not.

In my view before I can make that finding I find it prudent just as a matter of procedure to allude to the applicable legal principles pertaining to unlawful arrest or wrongful arrest. Generally in our law wrongful arrest consists in the wrongful deprivation of a person's liberty. The plaintiff must show that the first defendant acting on the orders or within the course and scope of her employment with the second defendant deprived him of his liberty. In the strict sense liability for lawful arrest is that fault or knowledge of the arrestor's wrongful arrest is
20 not a requirement see in this regard *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139D; see also *Danono v Minister of Prisons* 1973 (4) SA 259 (C) at 262B and also *The Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154E to 157C.

It is trite that a person's liberty, personality and dignity are usually compromised by a wrongful or a malicious arrest. It is also trite

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that in the absence of a warrant an arrest is lawful if it is effected in accordance with section 40 of the Criminal Procedure Act 51 of 1977 subject of course to the effect that such person who is being arrested should be alleged to have committed a crime listed in Schedule I of the Act or of someone who is on reasonable grounds suspected of having committed such a crime see in this regard *S v Sheranda* 1986 (1) SA 573 (T).

It is also trite that police are obliged to consider in each case when a charge has been laid for which a suspect might be arrested whether there are no less invasive options to bring the suspect before court than an immediate detention of the person concerned if there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his/her arrest or a notice of summons to appear in court is obtained, then it is constitutionally untenable to exercise the power of arrest. Arrest is a drastic interference with the rights of an individual to freedom of movement and dignity and arrest should only be the last resort as a means of producing a person or suspect in court, see in this regard *The Locus Classicus of our Law* by Mr Justice Schreiner in 1951 in the case of *Tsose v Minister of Justice & Others* 1951 (3) SA 10 (A) 17GH, this is a pre-constitutional dispensation decision where the learned Judge SCHREINER said:

"An arrest is of course in generally a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of

bringing him to Court such an arrest is not unlawful even if it is made because the arrestor believes that the arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal."

Mr Justice BERTELSMANN in the case quoted by counsel for the plaintiff in the matter of *Louw v Minister of Safety and Security* 2006 (2) SACR 178, and I agree and concur with the sentiments expressed in
10 this judgment because of the new constitutional dispensation, the learned judge expressed him as follows on page 186 of the said judgment paragraph C:

"An arrest being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. Nowhere has the need for justification of government action or administrative action been better described as in the oft quoted article by the late Etienne Mureinik in 'A Bridge to Where?: introducing the interim Bill of Rights' (1994) 10 SAJHR
20 31. On page 32 the following is said: 'what the bridge is from is a culture of authority. Legally, the apartheid order rested on the doctrine of parliamentary sovereignty. Universally, that doctrine teaches that what parliament says is law without the need to offer justification to the courts. In South Africa, since parliament was elected

only by a minority, the doctrine taught also that what parliament said was law, without the need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience. The leadership of the ruling party commanded parliament, parliament commanded its bureaucracy, the bur The leadership of the ruling party commanded parliament bureaucrats commanded the people. If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, and not coercion.”

This article goes against the grain of what Mr Justice SCHREINER said in 1951.

20 In this case it has been argued by the first and second defendant's counsel that because an offence was being committed in the presence of a police officer the arrest was justifiable. In this regard I want to quote the recent judgment in the Constitutional Court of South Africa, case number CCT 74/06. It is a case between the *Minister of Safety and Security v Antos van Niekerk*. It was heard on 3 May 2007

and this judgment by Mr Justice Sachs was delivered on 8 June 2007. In this judgment the learned judge alludes to the fact that the Minister of Safety & Security being acutely aware and alive to the dilemma as to how to control the discretion of police officers under section 40 found it prudent to promulgate standing order G 341 dealing with the arrest and treatment of arrested persons. The standing order G341 issued under the Consolidated Notice 15 of 1999 entitle arrests and treatment of arrested person until such person is handed over to the community service centre commander provides as follows:

- 10 "1. Arrests constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act No. 108 of 1996), the Criminal Procedure Act 51 of 1997 and other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated, must therefore be strictly adhered to.
3. Securing the attendance of an accused at the trial by other means than arrest.
- 20 (1) There are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.
- (2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at trial

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should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather dealt with as provided for below.

(3) A member even though authorised by law, should normally refrain from arresting a person if- -

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(a) The attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or

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(b) The member believes on reasonable grounds that the magistrate's court, on convicting such a person of that offence will not impose a fine exceeding the amount determined by the Minister from time to time by notice in *Government Gazette*, (at present is R1 500), in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 51 of 1977."

The object of arrest under paragraph 4 is defined as follows:

"(1) The general rule

As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member

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may not arrest a person in order to punish, scare or harass such a person."

There are exceptions to this general rule where the law and circumstances permits a member to arrest a person although the purpose for which the arrest is not solely to take the person to court and these circumstances constitute the following exceptions:

- (a). Arrest for the purposes of further investigation.
- (b). Arrest to verify a name and/or address.
- (c). Arrest in order to prevent the commission of an offence.
- 10 (d). Arrest in order to protect a suspect.
- (e). Arrest in order to end an offence.

2. The manner of effecting arrests without a warrant.

It is only in exceptional circumstances where a member is authorised by an act of parliament, in this case section 40 and 41 of the Criminal Procedure Act, 1997 to arrest a person without a warrant, that such a person may be arrested without a warrant. Any arrest without a warrant which is not specifically authorised by law, will be unlawful."

20 So these are the general principles applicable in our law which an arresting officer must observe before effecting an arrest. These so-called jurisdictional facts which must exist before the [indistinct] by section 41 B of the Act may be invoked are that obviously the arrestor must be a peace officer and he must entertain a suspicion and it must be a suspicion that the arrestee committed an offence referred to in schedule I of the Act and that suspicion must rest on reasonable

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grounds.

It is obvious that the arresting officer has a discretion as to whether or not to exercise that power but the exercise of such a discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature, the onus to establish the proper objective of jurisdictional facts of the arrestor will rest on the arrestee see in this instance *Duncan v Minister of Law and Order* 1986 (2) SA (A) 805 at 818G to 819 B.

Those are the legal principles like I said. What are the facts in
10 this case? In my view the decisive question is whether the arrest was lawful or not. The Court is acutely aware of the fact that there is an allegation that the plaintiff was in contempt of a court order. On the balance of probabilities it is my respectful view that this has not been demonstrated for the following facts: the plaintiff Mr Greenberg denies that he intentionally withheld the custody of the child Kevin, from his mother. He gives a plausible reasonable explanation. He says on the 6th when he came back with the child and the 7th, the 8th and the 9th he made attempts to get in touch with the mother. Communication could not be effected because either the phone was off or the bell was not
20 answered.

I am aware that this evidence to an extent, there is an attempt by Mrs Greenberg to gainsay it, but critically in my view when Mr Greenberg gave evidence it was not put to him that he did not take the child from school on Monday, Tuesday, Wednesday and Thursday as a result of the mother not having taken the child, and on the

probabilities that negates the intention to commit contempt of court as argued by the defendant's counsel.

It is obvious that the two parties Mr and ex Mrs Greenberg have had an acrimonious relationship which has spilled over for the past seven years in various litigation in this Court. I concur with the plaintiff's counsel that their versions are mutually destructive but on the probabilities I cannot find that Mr Greenberg wilfully and intentionally was in contempt of the order granted by Mr Justice GOLDSTEIN.

Even if in the alternative I am wrong in that contention, even if
10 Mr Greenberg was in contempt of a court order, in my view it is obvious that he did not present any danger to Mrs Greenberg, to Kevin the child, or even the police officer. He was not a danger for the maintenance of law and order to have justified his summary incarceration on 10 August, more especially that Mrs Gouws' evidence is that she called Mr Greenberg and invited him to come over to come and discuss the charge that had been laid by Mrs Greenberg. It is common cause that Mr Greenberg came with the child to the police station. As I have said even if he was in contempt of a court order, so the address, the identity even the place of residence of Mr Greenberg was contractor to
20 Mrs Gouws the arresting officer. She has alleged that an offence was committed in her presence by Mr Greenberg the plaintiff. She was not able to explain what that offence was because the arresting statement which she attested to, to effect the arrest of Mr Greenberg alludes to a tape and intimidation of the child Kevin. That arresting statement has got nothing whatsoever to do with the facts encapsulated in this case

namely that there was a possible apprehension that Mr Greenberg would take the child to Botswana and that Mr Greenberg refused to hand over custody to mother.

It is disingenuous in my view and contrived for an experienced police investigator like Mrs Gouws to say that she did not record any of these jurisdictional facts in the docket, neither did she record it in her pocket diary or pocketbook, to the effect that the offence which Mr Greenberg was threatening to commit or was committing in her presence encapsulated the fact that he issued threats that he was going
10 to take the child to Botswana and thereby permanently or semi-permanently deprive the mother of her custodial rights as enshrined in the order given by Mr Justice GOLDSTEIN.

In any event as I have already alluded to the police station is the safest place in South Africa at the moment, it must be. In fact the evidence shows that Mrs Gouws the first defendant, picked up a telephone and called Mrs Greenberg who immediately came and took custody of the child. So there was no threat of the disruption of the maintenance of law and order. Mr Greenberg it has not been shown that there was an apprehension that he was going to disturb the peace.
20 So his arrest in my view was unjustifiable, wrongful and unlawful and for those reasons the plaintiff in my view succeeds in proving his case.

The only outstanding issue is about *quantum*. Mr Saladinho has referred me regarding quantum to the case of *Denisimo v The Minister of Safety and Security*, 2005 (2) SA 296 (W), but this case distinguishable as rightly pointed out by the defendant's counsel in that

the incarceration in this case was five days and in this case Mr Seymour was denied medical attention I believe. He is a 66 year old, he was sickly. So it is in my view correctly submitted by the defendant's counsel that it is distinguishable from the present case.

Mr Greenberg is 48 years old. He says he is an important high profile member of the Jewish community; he is a member of two choirs, Johannesburg Male Choir and the Synagogue Choir; he conducts charitable community work and he says his arrest was common knowledge and was widely published within the community from which
10 he emanates. He also says that he was incarcerated with criminals. The conditions under which he was incarcerated were unhygienic; the toilets were not clean; there were lice on the blankets; the general state of the cells were dirty.

In coming to an appropriate assessment of the *quantum* I have had recourse to some of the following cases: *Moses v Minister of Law and Order* 1995 (2) SA 51C; *Bentley & Another v McPherson* 1999 (3) SA 848E; *Thobane v Minister of Correctional Services NO* 2000 (2) SA 318 (S) and *Manase v Minister of Safety and Security & Another* 2003
20 (1) SA 567 (CK). In my view having regard to all the factors given in this case I am of the view that an appropriate equitable amount is an amount of R30 000. The plaintiff succeeds. It is ordered then that the first or second defendant jointly and severally must pay an amount of R30 000 as damages to the plaintiff and must also pay the costs of the plaintiff.

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 2002/22263

P/H NO: 1000

JOHANNESBURG, 01 August 2007

BEFORE THE HONOURABLE JUDGE MOKGOATLHENG

In the matter between:-

GREENBERG LIONEL MERVIN

Plaintiff

and

GOUWS MARGARET

1st Defendant

MINISTER OF SAFETY AND SECURITY

2nd Defendant

HAVING read the documents filed of record and having considered the matter:-

IT IS ORDERED THAT:-

1. The First and Second Defendants are to pay plaintiff R30 000,00 plus costs of the suit.

BY THE COURT


REGISTRAR
bh/

