IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/3/2014

CASE NO: 28353/2012

DATE OF HEARING: 10 AND 11 MARCH 2014

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

20-3-2014
DATE

SIGNATURE

In the matter between:

LAETITIA DYSSEL **PLAINTIFF**

and

THE MINISTER OF SAFETY AND SECURITY **DEFENDANT**

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND THE ISSUES

1. The plaintiff issued summons against the defendant for damages pursuant to the arrest of the plaintiff by members of the South African Police Services ("the SAPS") on 24 September 2010. Both the merits and the quantum of damages are in dispute. The plaintiff claimed that she was unlawfully arrested. The defendant relied on the provisions of the section 40 (h) of the Criminal Procedure Act 51 of 1977 ("the Act") as justification for the arrest. It is common cause that the arrest took place without a warrant of arrest. In terms of the docket the charge on which the plaintiff was arrested, is dealing in liquor without a license.

2. It was agreed between the parties that the defendant would bear the duty to begin and onus of proof that the arrest was lawful. It is trite that the onus rests on a defendant to justify an arrest. As Rabie CJ explained in Minister of Law and Order and Others v Hurley and Another Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589E – F: "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

THE EVIDENCE

3. The defendant called one witness only, namely Warrant Officer James Joseph Hurst ("Hurst") who testified that he has been a member of the SAPS for 24 years. He started off as a clerk in shifts and was then moved over to the section dealing with the exhibits and the protection thereof. He has been assigned to the Groot Drakenstein Police Station for 23 years.

4. Hurst testified that he knew the plaintiff prior to the date of the arrest both unofficially and officially explaining that the plaintiff had previously been in trouble with the police for the same offence. He has seen her around and spoke briefly to her on occasion. Ms Cronje who appeared for the defendant attempted to lead similar-fact evidence to illustrate that the plaintiff had previously been arrested for selling liquor without a license. Mr Snyman, who appeared for the plaintiff, objected to such evidence being led on the basis that such evidence would severely prejudice the plaintiff and that such evidence would portray the plaintiff in a negative light vis a vis the court.

5. Moreover Mr Snyman submitted that such similar-fact evidence could not, on any construction, lead to a conclusion that the plaintiff was dealing in liquor without a license on the day in question.

6. I ruled that such evidence was inadmissible and that I would furnish reasons for such ruling in the judgment. My reasoning, inter alia, is that this case involves the arrest of a person without a warrant. An arrest, wrongful as alleged, implicates a person's liberty and other personality aspects. (See Relyant Trading (Pty) Ltd v Shongwe 2007 (1) All SA 375 (SCA))

7. Such an arrest, in order to be lawful, must be shown to have been executed by the arresting officer if such officer had formed a reasonable belief that the plaintiff had committed an offence contemplated by Schedule 1 of the Criminal Procedure Act 51 of 1977 ("the Act") or, as in this case, an offence in terms of section 40 (1) (h) of the Act.

8. Ms Cronje pointed out to the court that the sub sections (b) and (h) of section 40 of the Act are identical save that sub section (b) refers to offences contained in Schedule 1. It must follow thus that, inasmuch as it is the duty of the defendant to not only show that the arresting officer suspected the plaintiff of having committed an offence but that the officer reasonably suspected the plaintiff of having committed a Schedule 1 offence, specifically, the same applies to this case, meaning specifically an offence in terms of section 40 (h). (See Manqalaza v MEC for Safety and Security, Eastern Cape 2001 (3) All SA 255 (Tk))

9. The defendant's attempt to introduce similar fact-evidence was aimed at showing that the arresting officer formed the reasonable belief that the plaintiff was selling liquor without a license, because she had previously done so. As far as similar-fact evidence is concerned the relevance thereof is dependent upon the argument that the same conditions are likely to produce the same results. The practical value of such an approach is very limited because it is more often than not impossible to satisfy a court that the condition on both occasions were sufficiently similar.

10. This is why the courts have always insisted that any kind of similar-fact evidence should have a high degree of relevance. (See Managers of the Metropolitan Asylum District v Hill (1) (1882) 47 LT 29 at 35)

11. In my view such evidence would not only be irrelevant for the purpose intended but also prejudicial to the plaintiff in that, the evidence was aimed at justifying the arrest and portraying such arrest as compliant with the provisions of section 40 (h). For this reason I disallowed such evidence.

12. Hurst's further evidence was that a member of SAPS, who apparently had wished to remain anonymous, deposed to an affidavit upon which a search warrant had been obtained from a magistrate on 23 September 2010, one day prior to the arrest. This search warrant was issued in favour of Hurst, authorizing him to search the plaintiff

residence and seize objects used in the commission of the suspected offence, being the selling of liquor without a license.

13. Although the plaintiff's case is not based on an irregular or unlawful search warrant I observed the absence of the annexure referred in the search warrant, from the trial bundle. The warrant refers to an annexure that was neither contained in the trial bundle nor presented to the plaintiff. Furthermore part of the search warrant provides the following:

"Aan: A/O JJ HURST POLISIEDIENS GROOT-DRAKENSTEIN en Alle lede soos per Aanhangsel .....

(Rang, naam en werksadres van lede wat deursoeking gaan uitvoer)

en enige ander lid van die Suid-Afrikaanse Polisiediens wat behulpsaam kan wees met die visentering en beslaglegging:

Dit blyk aan my uit inligting onder eed, dat redelike gronde bestaan om te glo dat daar binne die Landdrosdistrik van ..... **PAARL** .....

Voorwerpe is, **VERKOOP VAN DRANK** ..... en wat –

*(a) op redelike gronde vermoed word betrokke te wees by die vermelde pleging van;

*(b) tot bewys kan strek van die vermeende pleging van; of

*(c) op redelike gronde vermoed word bestem te wees on gebruik te word by die pleging van;

die misdryf(we), synde **HANDEL/VERKOOP VAN DRANK**

en dat ek redelike gronde het om te vermoed dat die voorwerpe-

*in besit, of onder beheer van **LITITIA DYSSEL EN GREGORY DYSSEL**"

(Vermeld naam van persoon(e)

.... BIEN DONNE PLAAS HUIS NR. 10, GROOT-DRAKENSTEIN

(Beskryf die perseel)

U word hierby gemagtig om gedurende die dag/nag* die geidentifiseerede –

*persoon(e) te visenteer;

*perseel te betree en te deursoek en om enige persoon(e) op of by daardie persoon te visenteer, en op die voorwerp(e) wat in Aanhangsel "A" beskryf is, beslag te le, wat gedurende die deursoeking gevind word en om daaroor te beskik ooreenkomstig artikel 30 van die Strafproseswet."

14. The warrant authorized Hurst to execute the search warrant "...gedurende die dag/nag" and the remaining parts were also marked with asterisks to select one or more of the options thereon. No option was selected and the search warrant was issued on that basis.

15. I have reservations about the validity of the search warrant and its compliance with the Act. For example section 21 (3) (a) of the Act specifically provides that the search shall be executed in the day unless it is authorized in writing to take place at night. As I have said however, this was not the case of the plaintiff. According to Hurst, on the morning of 23 September 2010 he was allocated the search warrant at the shifts of the Groot Drakenstein Police Station. He had no knowledge of the warrant prior to that morning, but said that he was allocated the search warrant to execute. No explanation was given for the delay in executing the search warrant because the search warrant was executed between 23h00 to 24h00 on 24 September 2010.

16. Hurst was accompanied by Captain Morina Abrahams (who was the station commander at the time) and Constables Jeftas and Cosa. According to Hurst he knocked on the door of the servant's quarters adjacent to the main house at the plaintiff's premises and the plaintiff's husband opened the door. Hurst asked where the plaintiff was whereupon the plaintiff's husband, Gregory Dyssel ("Gregory") called his wife from the main house and then went back into the servant's quarters. Hurst showed Gregory the search warrant. When the plaintiff came out of the main house he showed the search warrant to her as well. She did not look very happy and after searching the main house he found 4 full bottles of beer on top of the freezer, 4 full bottles inside the freezer and 8 cases of empty beer bottles.

17. Hurst explained the charge of dealing with liquor without a license to the plaintiff, loaded up the bottles and cases and took the plaintiff with them to the station where she was arrested and booked and ultimately incarcerated. It was his decision to arrest the plaintiff. He explained that the basis of his decision to arrest the plaintiff was the quantity of the empty bottles which showed how much liquor the plaintiff would have sold. He said that he knew from about 2008 and 2009 that the plaintiff was dealing in liquor without a license and he was adamant that he and his colleagues were aware of what the plaintiff was doing.

18. When asked by Ms Cronje on what authority he had executed the arrest without the necessary warrant he replied that she was in

possession of the liquor and when he asked the plaintiff why there were so many empty bottles she answered that these were left over from a previous party. He did not accept the plaintiff's explanation and he accordingly arrested her. The only other persons present aside from the plaintiff were her husband Gregory and their son who was in his early teens. There was no money found. The remaining evidence as aimed at what transpired after the arrest.

19. Under cross examination Hurst conceded that the search warrant does not contain the so stated "...voorwerpe ... **VERKOOP VAN DRANK**" and that the search warrant ought to have stipulated such "voorwerpe". Insofar as the absence of the affidavit upon which the search warrant was issued, he explained that he was not the deponent thereof and that it had been filed somewhere in the archives. He was clear that the deponent of such affidavit was not he but someone else. The absence of the annexure containing the "voorwerpe" could not be explained.

20. Hurst conceded that he formed the reasonable belief that the plaintiff was committing an offence on the basis of the complaint upon which the search warrant was issued and because he knew a long time prior to the arrest "what the plaintiff was doing". He also conceded that it would have been relatively easy to obtain a warrant of arrest at the same time as the search warrant. He stated that at the time it was not protocol to obtain warrants of arrest and at the time all they were concerned about was closing down shebeens.

21. Although the search warrant contains the name of the plaintiff and her husband, Hurst explained that it was the plaintiff that they were after. He was specific that he had formed the reasonable belief that the plaintiff had been committing an offence, and because of that, he felt that he could arrest her.

22. It was put to him that the plaintiff was not in the main house but in the servant's quarters with her husband and that he could not have found the beers in the main house and he stated that memory fades with time and that he got the impression that the beers came from the main house. His reasonable belief was formed prior to entering the premises of the plaintiff and was largely based on his prior knowledge of what the plaintiff had done previously. He also stated that the empty beer bottles were proof of his suspicions.

23. Hurst was questioned about the provisions of the then applicable Liquor Act No. 27 of 1989 but was less than sure on what provisions he might have acted when arresting the plaintiff. Although I understood his justification for the arrest to be based on section 40 (h) of the Act, as pleaded, he stated that he had looked at all the provisions of that Liquor Act and had acted in terms thereof. He tried to explain his lack of knowledge of the applicable law by saying he was a clerk at the time and he worked on what his superiors gave him and applied the law as his Captain ordered him to.

24. What is most perturbing about Hurst's evidence is that he readily conceded that the full bottles of beers did not concern him but could not explain the reason for the forensic analysis being conducted on the full beer after the arrest. Moreover the Station Commander Captain Abrahams was off duty but had accompanied him to the plaintiff's premises between 23h00 and 24h00 on that night. He went as far as admitting, incorrectly as it were, that the word "ek" contained in the search warrant referred to him whereas if fact this refers to the magistrate who issued the search warrant.

25. Hurst admitted, in re-examination, that he relied on the search warrant without thinking and because every policeman knew what the plaintiff was doing and because it was not the first time the plaintiff had been arrested, he felt he could arrest her. He admitted that the plaintiff explained the empty beer bottles as the remainder from a party and although he admitted that she had done so in front of everyone he did not believe her. The Defendant closed its case after Hurst's evidence.

26. The plaintiff testified that she and her husband were in bed at the time. The lights were off and it was dark. They were in the process of being intimate with each other when there was a knock on the door. Gregory answered the door and Captain Abrahams asked for the plaintiff. She came out and Gregory went back to bed to stay with their minor son.

27. She testified that the main house belonged to her mother and she had grown up there. She was adamant that Hurst did not speak to her at all but that Captain Abrahams dealt with her most of the time. The main house was locked at the time and she had definitely not come out from there but from the servant's quarters. The beers and the empty bottles were found in the servant's quarters and not in the main house. She was fleetingly shown the search warrant where after the search took place without any explanation. She explained that the beers were bought for Gregory and his friends upon his request.

28. She explained that the quantity of beer found was very little for her husband and his friends, who drank substantial amounts. This is also the reason why she had divorced from him together with the fact that he did not support her emotionally and financially. She denied emphatically selling liquor at the time and testified that she had stopped doing so a long time ago. She had gained employment then as a seasonal worker sorting fruit at the same company as her husband.

29. She explained the ordeal of her being in jail as disgusting, filthy and stinking of human excrement. It was unbearable. She could not eat the food she was given and had to rely upon what was brought to her by Gregory and her children. She could not sleep on the bedding provided to her because of the dirt and grime thereon and it felt like something was crawling on her the whole time.

30. In desperation she asked Constable Maart on Sunday 26 September 2010 if she could sign a statement admitting to everything if he would release her on police bail. He apparently agreed, brought her a statement purporting to be part of the section 35 warning statement and she made a short statement admitting to selling liquor without a license so that she could feed her children. She explained that she was desperate to get out and look after her children because her husband was not very interested in doing so. Despite the statement she was not released on police bail. On Monday 27 September 2010 she was taken to court and eventually released on bail of R500.00 at approximately 15h00.

31. After one postponement of the case the charges were withdrawn against her.

32. The cross examination of the plaintiff did not reveal anything of substance and was aimed mainly at inconsistencies about her previous conduct and the obvious lie she had told about being unemployed when she had clearly stated that she was at the time. This she explained by saying she was looking for sympathy.

ARGUMENT

33. In argument it was submitted on behalf of the plaintiff that it is inconceivable and improbable that the deponent of the affidavit upon

which the application for a search warrant could be anyone else but Hurst himself because the search warrant was issued in his favour. Hurst had testified that he was simply allocated the search warrant at the shifts on 23 September 2010 and he did not know anything about it until he received the search warrant. I do find this to be highly improbable.

34. Secondly the liquor legislation referred to by Hurst as having been studied beforehand was completely irrelevant because the search warrant was specific about the offence, coupled with the defendant's plea that it relied upon section 40 (h) of the Act as a defence for the arrest.

35. It was further argued that Hurst was motivated to arrest the plaintiff simply by her previous convictions and he had been committed to arresting her before he arrived at her premises. Of utmost importance is his concession that if he had not known about the plaintiff's previous conduct and he was faced with the same empty bottles he would not have formed a reasonable belief that she was selling liquor without a license. In my view this is crucial and shows that the arrest could not, on these facts, have been lawful.

36. The defendant argued that the police officers were well within their rights to arrest the plaintiff because of her history and moreover in that

the plaintiff had not proved that Hurst exercised his discretion improperly.

37. Ms Cronje referred me to the case of Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA) and submitted that the plaintiff bore the onus, once the required jurisdictional facts were established, to show that the discretion on whether or not to arrest, was exercised improperly. Whilst this is correct Ms Cronje submitted that the plaintiff should have pleaded in her particulars of claim that the arresting officer failed to exercise his discretion improperly. I do not agree. In my view the failure to exercise the discretion properly flows from the evidence led and the defendant was at all times aware of the plaintiff's case.

38. In Sekhoto supra, the Supreme Court of Appeal held that the rationality of arrestor's decision on that question is dependent upon particular facts of every case. The so called "fifth jurisdictional fact" laid down in Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) to the effect that the police are obliged to consider less invasive means of bringing suspect before court is not contained within the meaning and ambit of section 40(1) (b) of the Act.

39. I am furthermore not persuaded that the defendant's argument holds water on the probabilities. In Govan v Skidmore 1952 (1) SA 732 (N) at 734 it was stated by Selke J that: "...in finding facts or making

inferences in a civil case, it seems to me, that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even thought that conclusion is not the only reasonable one."

DECISION AND THE LAW

40. For reasons that follow I find that the arrest was unlawful. Hurst was not clear about his evidence and even admitted that he could not recall the events after almost three and a half years. I do find it improbable that the affidavit upon which the search warrant was issued in favour of Hurst specifically, given his evidence that he knew what was going on at the plaintiff's premises long prior to the day of the arrest.

41. Hurst was not trained as an official dealing with liquor cases and his attempt to justify the arrest with reference to the liquor legislation applicable at the time can only fabrication at best. His view that warrants of arrest were not protocol at the time is indicative that he considered the issuing of a warrant of arrest but because it was not protocol he decided against it. Moreover he conceded that he could easily have obtained a warrant of arrest.

42. Hurst was clearly motivated by the plaintiff's previous conduct and it seems clear to me that he had decided en route to the plaintiff's

premises that he was going to arrest her. Having said this I now to turn to the applicable legal principles.

43. The test to be applied in determining whether a suspicion is reasonable is an objective one. For the suspicion to qualify as reasonable it must be objectively sustainable. (See Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 814 E and Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ) at paragraph (9)) On the facts of this case I am hardly persuaded Hurt's suspicion was reasonable and objectively sustainable.

44. I have also considered the unreported Supreme Court of Appeal judgment in the case of Minister of Safety and Security and Jonathan Daniels v Johannes Francois Swart Case No. 194/11 wherein at paragraph 23 thereof on page 10, Bosielo JA stated: "To my mind to conclude that the respondent was under the influence of alcohol on the mere fact that he smelt lightly of alcohol, is more of a quantum leap in logic. It follows in my view that the second appellant's suspicion was not based on reasonable grounds and therefore the respondent's arrest and detention were unlawful".

45. Furthermore an arresting officer must for his own opinion (suspicion) and not rely on another person's opinion (suspicion). (See Ralekwa v Minister of Safety and Security and Another 2004 91) SACR 131 (T) at paragraph (14) page 136G). Again on the evidence of this case, Hurst

acted on the search warrant issued pursuant to someone else's affidavit and I was not persuaded that it was he that actually effected the arrest instead of his Captain.

46. The plaintiff could have been released on bail in terms of section 59 (1) of the Act. In terms of this section and with due regard to the alleged offence that the plaintiff was charged for, the police could have released the plaintiff on what is commonly referred to a police bail and warned to appear in court on the ensuing Monday. The police should have released the plaintiff either on bail or warning or arranged with a commissioned officer for this to have been done. Moreover, section 35 of the Constitution provides detailed rights to arrested, detained and accused persons, including the right to be released if the interests of justice permit and upon reasonable conditions, and to humane conditions of detention.

47. The plaintiff did, in desperation, ask Constable Maart on Sunday 26 September 2010 to release her on police bail if she would sign a statement admitting to everything. He apparently agreed and brought her a document purporting to be part of the section 35 warning statement.

48. She made a short statement admitting to selling liquor without a license so that she could feed her children. She explained that she was desperate to get out and look after her children because her

husband was not very interested in doing so. Despite the statement she was not released on police bail. On Monday 27 September 2010 she was taken to court and eventually released on bail of R500.00 at approximately 15h00.

49. It must follow that even if the arrest was lawful it does not follow automatically that such person is to be detained until he or she may be brought to court at the earliest opportunity: a proper discretion is always to be exercised as to whether detention is indeed appropriate. Perhaps this will serve (as in the Mvu judgment, supra) as encouragement for a wider awareness on detaining people when it is not necessary to do so.

50. I now turn to the issue of quantum. This matter does entail some aggravating features. The plaintiff was arrested on a Friday late at night despite the search warrant having been issued on the morning the previous day. The warrant did not provide for the search to be conducted at night. The only inference that I can draw is that the time of the arrest was designed to ensure that the plaintiff would spend the whole weekend in jail and not be able to apply for bail in a court.

51. Furthermore the arrest must have taken place in front of her husband and minor child and, as the court was told, on their way to the police station there were other members of the immediate surrounding community to whom she is well known who witnessed the arrest. The

plaintiff was clearly traumatised by the events. She and her husband were in the throes of being intimate with each other late at night when the police arrived and arrested her.

52. I am mindful of the difficulty in arriving at fair compensation which is simply based on previous court decisions. I was referred to the case of Thandani v Minister of Law and Order 1991 (1) SALR (EC) at 702 at 707 A-C wherein the factors to be considered when dealing with compensation are dealt with. These include the deprivation of liberty, the social standing in the community, the circumstances surrounding the deprivation of liberty and the publicity of the arrest. On the facts of this case the plaintiff was not a flight risk.

53. In Seria v Minister of Safety and Security 2005 (5) SA 130 C the court awarded R50000.00 for a shorter period of detention. After the appeal in the case of Seymour v Minister of Safety and Security 2006 (6) SA 320 (SCA), Bertelsmann J, in the case of Louw v Minister of Safety and Security and Others 2006 2 SACR 178 (T) awarded R75000.00. Most of the cases that I was referred to appear to have awarded amounts in this region. In this case however the plaintiff spent three nights in jail under circumstances and conditions that she described as unbearable.

54. In the circumstances I am of the view that an award of R90000.00 would be appropriate. The cases that I have had regard to and were

referred to by counsel include awards that fall within the jurisdiction of the magistrate's court. I was requested by counsel for the defendant, in the event that I find for the plaintiff, to consider awarding costs on the magistrate's court scale. I am not persuaded to do so. In all the cases referred to the underlying principle of awarding costs on the high court scale appears to be the importance which the courts attach to questions of unlawful arrest and detention. Consequently I am of the view that costs on the high court scale should be awarded.

55. In the premises I make the following order:

(a) The defendant shall pay to the plaintiff the sum of R90000.00.

(b) Interest on the aforesaid sum at the rate of 15.5% per annum from date of judgment to date of payment.

(c) Costs of suit on the high court scale as between party and party.

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Plaintiff:

Counsel	Adv: T P Snyman
Instructed by	Erwee Attorneys

Representation for Defendant:

Counsel	Adv: H T Cronje
Instructed by:	State Attorney