CASES / VONNISSE

UNLAWFUL ARREST AND UNLAWFUL DETENTION: SEPARATE GROUNDS OF ACTION AND PUNITIVE DAMAGES

Mvu v Minister of Safety and Security 2009 6 SA 82 (GSJ)

1 Facts

In *Mvu v Minister of Safety and Security* the plaintiff, an inspector in the South African Police Service was arrested without a warrant for malicious damage to property (his 15-year old daughters' cellphones). It transpired that the plaintiff, while on police business in Gauteng, visited his daughters. He became enraged when he discovered that they had received cellphones by way of a "love relationship", whereupon he took the cellphones and threw them to the ground, seriously damaging them. The daughters went to a police station and laid a charge against the plaintiff for malicious damage to property. The police officer seized with the matter telephoned the plaintiff who immediately travelled to meet him. Upon arrival he arrested the plaintiff and imprisoned him overnight with six other men and set him free the following afternoon on warning. When the matter eventually came to court, the plaintiff was discharged at the end of the state's case.

2 Decision

The case turned on the question whether the arrest and subsequent detention were unlawful. According to Willis J (88F-89F), the arrest was lawful because it complied with the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act"). In terms of this provision, the arresting officer must have had a suspicion, based on reasonable grounds, that the suspect committed the alleged offence. Willis J pointed out that such reasonable grounds must include that the suspect also had the mental element for committing the offence, relying on *Minister of Law and Order v Pavlicevic* (1989 3 SA 679 (A) 693). Against the background of events and facts that were common cause at the time, it was clear according to the court that the defendant was protected in terms of section 40(1)(b).

However, this was not the end of the matter because the claim was not only based on unlawful arrest but also on unlawful detention (89F-90D). In

this regard Willis J opined that "there is an important distinction between the [arrest and detention which is] not properly understood by many". Where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and "this includes applying his or her mind to the question of whether detention is necessary at all". If the officer fails to do this, the detention is unlawful.

The court found (90F-91A) that the detention was in fact unlawful, taking account of the principle that if the sentence likely to be imposed upon conviction in any case will be in the form of a fine or one other than imprisonment, it is highly undesirable that the accused person should be subjected to pre-trial detention. In the present case it was most undesirable, taking account the plaintiff's standing as a police officer (more particularly long service and very respectable rank), his entirely cooperative attitude, and the circumstances relating to the commission of the alleged offence, that the plaintiff should have been detained at all, never mind kept for some 17 hours in a police cell with suspected rapists and robbers. Seen in this light, viewed objectively, the arresting officer should have applied his mind to avoid detaining the plaintiff and should in fact have avoided detaining him. Consequently, the arresting officer should either have released the plaintiff on warning or arranged with a commissioned officer for this to have been done. The detention of the plaintiff was accordingly wrongful.

3 Critical discussion

In view of the judge's conclusion with regard to wrongful detention and the reasons therefor, it is inexplicable why he found that the arrest was lawful. As was emphasised in *Louw v Minister of Safety and Security* (2006 2 SACR 178 (T)) and numerous cases following in its footsteps (see Scott "Wrongful Arrest: A Brief Survey of the Impact of the Constitution in Recent Case Law" 2009 *Obiter* 724 730ff; see also *eg*, *Terblanche v Minister of Safety and Security* [2009] 2 All SA 211 (C) 215-217; *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W) 462-464; *Olivier v Minister of Safety and Security* 2009 3 SA 434 (W) 443-445; *Brown v Director of Public Prosecutions* 2009 1 SACR 218 (C) 222 227; *Slabbert v Minister of Safety and Security* 2007-11-13 case no 1128/2005 (E) par 34-35; *Olgar v Minister of Safety and Security* 2008-12-14 case no 608/2007 (E) par 14; *Nienaber v Minister of Safety and Security* 2008-11-27 case no 5347/2005 (O) par 13; *Rudolph v Minister of Safety and Security* [2007] 3 All SA 271 (T) 285-286; *cf* also *Le Roux v Minister of Safety and Security* 2009 4 SA 491 (N) 499 499-500 501 508 509; and *Steele v Minister of Safety and Security* 2009-02-27 case no 10767/2005 (C) par 40), an arrest without a warrant must not only comply with section 40(1)(b), as Willis J seemed to accept, but also with the constitutional imperative that such an arrest will only be lawful if there are no other less invasive ways to bring the arrestee to trial. This was expressed as follows by Bertelsmann J in his well-known *dictum* in *Louw* (187):

> "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 . . . [T]he 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 the 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 or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest."

In the present case all the factors pointing to the unlawfulness of the detention, with equal force indicate the unlawfulness of the arrest. It was in other words not necessary to arrest the plaintiff in order to secure his presence in court.

4 Correct approach in case law

4 1 Olivier v Minister of Safety and Security

To illustrate the correct approach, a few recent judgments are informative. In *Olivier* the plaintiff, a senior police officer, sued the defendants for wrongful arrest and detention. He alleged that he was arrested by his colleagues without a warrant and detained for approximately six-and-a-half hours before appearing in court on a charge of theft, alternatively, fraud. The charges were later withdrawn. The defendants, who bore the onus of proving the lawfulness of the arrest, admitted the arrest but pleaded that the arrest and detention were justified in terms of sections 40(1)(b) and 50 of the Act. Horn J (440-442) reiterated the requirements for an arrest without a warrant in terms of section 40(1)(b). The core of this section is that the police officer must have had reasonable suspicion that the suspect had committed the alleged offence and that the test in that regard is objective, namely that of a reasonable person. The arresting officer must have exercised his discretion as to whether the suspect must be arrested or not, and in this regard his suspicion must be realistic and well-founded, having regard to the circumstances of the case. *In casu*, the arresting officer based his suspicion on what he had heard from a third party and did not take account of what the plaintiff had told him. He had not considered the reasonableness of the plaintiff's explanation, nor had he tried to evaluate its authenticity or veracity. Given the facts, the arresting policeman had failed to show that he could have entertained reasonable grounds for his suspicion justifying the plaintiff's arrest. This was a matter which required proper investigation and consideration before the serious step of arresting the plaintiff was taken. On the facts, the policeman therefore had acted over-hastily and imprudently.

Despite the fact that the court could at this stage have concluded that the arrest was unlawful because the arresting policeman had failed to comply with the requirements of section 40(1)(b), Horn J (443-445, with reference to *inter alia Louw*) nevertheless proceeded to discuss the important factor that one of the purposes of an arrest is to ensure a person's appearance in court. According to him it was unnecessary to arrest the plaintiff for this purpose. There was no reason why the plaintiff could not have been warned or summoned to appear in court. The court therefore concluded that the arrest and detention was unlawful.

Although Willis J in *Mvu* (90B) referred to *Olivier* with approval, he ignored what Horn J in *Olivier* called an important factor, namely the constitutional imperative that an arrest will only be lawful if there are no other less invasive ways to bring the arrestee to trial. Had he done so, Willis J should have found that the arrest was unlawful despite the fact that it complied with the requirements of section 40(1)(b).

4 2 Le Roux v Minister of Safety and Security

The importance of the constitutional imperative in cases of arrest without a warrant was also emphasised in *Le Roux v Minister of Safety and Security* (2009 4 SA 491 (N)). Here a police officer in the course of an investigation regarding a case of reckless and negligent driving against the plaintiff, initially decided not to arrest him but only to warn him to appear in court on the following day instead. Upon his arrival the following morning, she changed her mind and arrested and detained him in terms of section 40(1)(b) of the Act, her main reason being to demonstrate to black members of the police service that she, a white person, did not have racial prejudice in favour of the plaintiff, also a white person. The plaintiff instituted an action for wrongful arrest and detention, which was dismissed in the magistrate's court, but succeeded on appeal.

In his judgment, Madondo J (497-499) embarked upon a detailed analysis of section 40(1)(b) of the Act. In this regard, the court pointed out (498) that section 40(1)(b) will not be complied with if the action of the arresting officer is *mala fide* or an abuse of the right given to him. But even where section 40(1)(b) has been complied with, he stated (499) that "since arrest is a drastic interference with an individual's rights to freedom of movement and to dignity, the court must look further to constitutional principles and the rights to dignity and to freedom as enshrined in the Constitution". The arrest must therefore also be justified in terms of the demands of the Bill of Rights.

Madondo J held (502) that detention of the plaintiff in the present case was not necessary to secure his attendance before the court or to protect the public, but to demonstrate to black members of the police service that she did not have racial prejudice in favour of the appellant. Her conduct when arresting the appellant was clearly not influenced by the need to maintain confidence in the administration of justice. In the premises, there was no rational connection between the detention of the appellant and the purpose the second respondent intended to achieve.

With reference to section 12(1) of the Constitution, the judge (502-503) reiterated that it is not sufficient to determine whether an arrest had been made in terms of section 40(1)(b) of the Act, and if it did, to conclude that the arrest was lawful. The arrest must also not be made arbitrarily or without just cause. The absence of just cause would indeed make the arrest arbitrary. The judge held that since the police officer in the present matter had on reasonable grounds decided not to arrest the suspect, she could not arbitrarily change such decision. She must have established reasonable and probable grounds justifying a change of the decision. The absence of the

rational connection between the arrest and the purpose of arrest had the effect of rendering the arrest of the plaintiff, albeit falling within the purview of section 40(1)*(b)*, of the Act, arbitrary and without just cause (see also Scott 2009 *Obiter* 734-735 for a discussion of this case.)

4 3 Terblanche v Minister of Safety and Security

In the same vein reference could be made to *Terblanche v Minister of Safety and Security* ([2009] 2 All SA 211 (C)). The plaintiff was arrested after an incident in which she was found in her boyfriend's room in police residential quarters. The arresting police officer instructed her to leave the premises and informed her that if she did not leave, he would arrest her. The plaintiff still refused to leave and she was arrested for trespassing. Immediately after her arrest, the plaintiff was taken to police cells and held there until her release the next morning. The prosecutor eventually declined to proceed with the prosecution. As in *Le Roux*, Brusser AJ (217-218) emphasised that the statutory provisions as well as the constitutional imperatives are necessary components of arrest without a warrant. Each has its proper place in our constitutional dispensation. If an arrest complies with the demands of both areas, it would in his opinion be "delictually unimpeachable" (219).

4 4 Conclusion

Against this background it should be stressed that in order for an arrest without a warrant to be lawful, two requirements must be met. Firstly, the arrest must comply with the applicable statutory provisions of the Act. Secondly, especially in light of the entrenchment of the right to personal freedom in the Bill of Rights, the application of the Constitution with regard to arrest without a warrant must be taken into account. This means that if the arrest is not necessary to ensure the presence of the arrestee in court because there are other less invasive means to achieve this objective, the latter approach should be followed. Unfortunately, to repeat, Willis J in *Mvu* failed to recognize the importance of the latter requirement.

5 Damages

5 1 Judgment in Mvu

Finally a few thoughts on the court's approach to damages are appropriate. As a starting point, the court (92C-93B) stated that each case must be decided on its own merits, and continued:

> "In the *Seymour* case [2006 5 SA 495 (W) par 9] I joined hands with the learned judge in the *Ramakulukusha* case [1989 2 SA 813 (V)] in regard to the surprise which he expressed at 'the comparatively low and sometimes almost insignificant awards made in Southern African Courts for infringements of personal safety, dignity, honour, self-esteem and reputation'. I also expressed the view that the courts should move, however glacially, to reflect in their awards for damages in cases of this nature, a change of values. When the *Seymour* case went on appeal [2006 6 SA 320 (SCA) par 12-22], these

> views did not meet with favour. My award of R500 000 for five days of detention was reduced to R90 000. Suitably chastened, and mindful of the well-known [House of Lords case which] stressed the importance of judicial precedent in a hierarchy of courts and gave a memorable account of why this should be so, I shall walk quietly and, I hope, in the shade, on this path created by precedent."

The court (93C-94B), following this cautious approach to avoid being too liberal in its award and taking into account the awards in previous cases and the circumstances of the case, held that R30 000 would be an appropriate award.

5 2 Punitive damages

In light of the fact that the freedom of an individual is of inestimable value, that this personality interest is entrenched in the Constitution and has always been jealously guarded by the courts (see Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 26 111), we have appreciation for the views expressed by Willis J in the trial court in *Seymour*. This view was also supported impliedly by Gamble AJ in *Steele* (par 123-129 135), where the court went so far as to award punitive damages for violation of personal freedom, especially where the damage was inflicted by the heavy-handedness of state machinery. In this regard he relied on Visser and Potgieter's (*Law of Damages* (2003) 472), where it is stated that the fact that the *actio iniuriarum* has a punitive function should be taken into account in the assessment of damages for deprivation of liberty and the following *dictum* in *Masawi v Chabata* (1991 4 SA 764 (ZH) 771), cited with approval in *Zealand v Minister for Justice and Constitutional Development* (2008 4 SA 458 (CC) 468):

> "As regards *quantum*, it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The Court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim."

Although this approach is supported at common law and some (particularly earlier) case law (see *eg*, *Salzmann v Holmes* 1914 AD 471 480 483; *Gray v Poutsma* 1914 TPD 203 211; *Bruwer v Joubert* 1966 3 SA 334 (A) 338; *Potgieter v Potgieter* 1959 1 SA 194 (W) 195; *Mhlongo v Bailey* 1958 1 SA 370 (W) 373; *Buthelezi v Poorter* 1975 4 SA 608 (W) 615-616 617 618; *Pauw v African Guarantee and Indemnity Co Ltd* 1950 2 SA 132 (SWA) 135; *SA Associated Newspapers Ltd v Yutar* 1969 2 SA 442 (A) 458; *Gelb v Hawkins* 1960 3 SA 687 (A) 693; *Brenner v Botha* 1956 3 SA 257 (T) 262; *Kahn v Kahn* 1971 2 SA 499 (RA) 500 501-502; *Chetcuti v Van der Wilt* 1993 4 SA 397 (Tk) 399-401; and *Africa v Metzler* 1997 4 SA 531 (Nm) 538 539), in more recent times it has been criticized mainly because it disregards the distinction between the law of delict and criminal law as well as the compensatory nature of delictual remedies (see *eg*, Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 1-3; Van der Walt and Midgley *Principles of Delict* (2005) 3-4; see also *eg*, *Esselen v*

Argus Printing and Publishing Co Ltd 1992 3 SA 764 (T) 771; *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 29-30; *Innes v Visser* 1936 WLD 44 45; *Lynch v Agnew* 1929 TPD 974 978; *Collins v Administrator, Cape* 1995 4 SA 73 (C) 94; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 263; *Mogale v Seima* 2008 5 SA 637 (SCA) 641-642; *Seymour v Minister of Safety and Security* 2006 5 SA 495 (W) 500; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 823-828; and *Tsedu v Lekota* 2009 4 SA 372 (SCA) 379). However, Visser and Potgieter (*Damages* 190-193 464) maintain that true satisfaction in terms of the *actio iniuriarum* can only be meaningful if punishing the wrongdoer is one of its aims. The following comments will suffice for the present. Although at common law the *actio iniuriarum* had a penal character, under the courts it developed a dual function, namely to claim satisfaction, firstly as compensation (*solatium*) for injured feelings as a result of an intentional violation of personality rights, and secondly as a punishment (punitive damages) to assuage the plaintiff's feelings of outrage for the injustice he suffered. However, because of the extreme difficulty in practice to distinguish between the compensatory and penal elements, and in light of the valid criticism leveled against awarding punitive damages in a civil action, it is submitted that aggravating compensatory damages may be made to do the work of punitive damages so that the latter is not regarded as punishment for the defendant's conduct, but rather also as compensation for outraged feelings, and in this way still do justice to the true concept of satisfaction (see for in-depth discussions Neethling "Die *Actio Iniuriarum* en Bestraffende Genoegdoening" in Boezaart and De Kock *Vita Perit, Labor non Moritur – Liber Memorialis PJ Visser* (2008) 173ff; Neethling "The law of delict and punitive damages" 2008 *Obiter* 238ff; and Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 7 fn 29). It is submitted that this approach should also be followed in assessing damages for unlawful arrest and detention and that the courts should not be too reluctant to make substantial awards where aggravating circumstances are present.

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