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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 41429/2011 JHB**

**DATE: 13/6/2016**

- |     |                                 |
|-----|---------------------------------|
| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED.                        |

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**THANDEKA DUMA**

Plaintiff

and

**MINISTER OF POLICE**

1<sup>st</sup> Defendant

**MINISTER OF HOME AFFAIRS**

2<sup>nd</sup> Defendant

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**JUDGMENT**

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**AC BASSON, J**

- [1] The plaintiff, Ms Thandeka Duma, is claiming damages from the first defendant (the Minister of Police) and second defendant (the Minister of Home affairs) in the amount of R 250,000.00 for her unlawful arrest and a further R 250,000.00 for her unlawful detention.
- [2] The plaintiff was arrested on 27 October 2010. After her arrest, the plaintiff was further detained until her release on 4 November 2010. The charges against her were withdrawn in February 2011. The plaintiff remained in detention for approximately 9 days.

**Personal information regarding the plaintiff MsThandeka Duma**

- [3] It is for purposes of this judgement important to give a brief background of the plaintiff. I will, for reasons that will become clear herein below, refer to the plaintiff as “Duma GP” and “the plaintiff” interchangeably.
- [4] Duma GP was born on [...] December 1973. According to her Declaration of Birth she was born in the Magisterial District of Johannesburg. Her identity number is indicated as: [...]208. The first four numbers of her identity number are consistent with her date of birth. Her identity number on her identity document (“ID”) is also consistent with the identity number allocated to her by the Department of Home Affairs at birth.
- [5] Duma GP was also issued with a passport by the Department of Home Affairs which passport expired on 23 August 2014. Her identity number is indicated as [...]080 and her date of birth as [...] 12-1973 which is consistent with her Declaration of Birth. She also used her first ID to apply for her two children’s birth certificates in 1992 and 2000 respectively.

- [6] In 2002 the plaintiff went to the Department of Social Development's offices in Diepkloof, Soweto to apply for child grants for her two children. She was then informed that she was already receiving child grants in Pietermaritzburg.
- [7] In 2004 the plaintiff lost her ID after a break-in. She applied for a new ID in 2004 but only received it in 2008. The information on her ID is again consistent with her Declaration of Birth.
- [8] The plaintiff had an existing revolving credit account at game stores at President Street Johannesburg.

Personal information regarding a second MsThandeka Duma

- [9] It is for purposes of this judgement also important to give a brief background of a second individual with the exact same name namely Ms Thandeka Duma. This Ms Duma resides in Pietermaritzburg, Kwa-Zulu Natal. (I will for purposes of this judgment and to avoid confusion with the plaintiff ("Duma GP") refer to the second Ms Duma as "Duma KZN".)
- [10] According to the Declaration of Birth of Duma KZN, she was born on [...] June 1973. Her ID is recorded as: [...]086. Duma KZN was also issued with an ID somewhere in the 1990'. The date is illegible on her ID.
- [11] On her ID it is recorded that she was born [...] December 1973 and her identity number is recorded as [...]080.
- [12] However, when the identity document of Duma KZN is read together with her Declaration of Birth, it is patently clear that her birth date and her ID number recorded in her ID book are incorrect in that it does not accord with her date of birth nor with the ID number allocated to her at the time of her birth.

[13] What complicates matters is the fact that the identify number and birth date recorded in the ID book of Duma KZN are identical to the ID number and birth date which clearly belong to Duma GP.

[14] It was, however, common cause that the particulars (including the ID number) that appears on Duma GP's identity document are correct and that it corresponds with the ID number allocated to her at birth whereas the ID number on the ID document of Duma KZN appears to be incorrect.

#### Facts of this matter

[15] It was therefore common cause that Duma GP is the lawful owner of the ID number although it appears that Duma KZN uses the same information on the ID issued to her.

[16] In this regard it was therefore admitted by the second defendant that the ID document that was issued to Duma GP is the correct ID and that she is the lawful owner of the document. The second defendant also confirmed that the ID issued to Duma KZN reflected an incorrect ID number and an incorrect birth date and that the ID document of Duma KZN incorrectly reflect the ID number and birth date which belong to Duma GP.

[17] Lengthy evidence was led in respect of the possible reasons for this mistake. I do not regard it necessary to repeat the evidence in detail. Suffice to note that the second respondent acknowledged that Duma KZN was mistakenly issued with an ID document reflecting the details belonging to Duma GP. Despite lengthy evidence and cross-examination, officials of the second respondent could merely speculate as to the reasons for the mistake.

[18] I have already referred to the fact that the plaintiff had an existing revolving credit with Game store. It was her evidence that she received an SMS informing her that she should come to the store because she had a credit in the amount of

R 10,000.00 on her account. When she visited the store she was arrested for fraud.

- [19] Mr Steenkamp - the general manager at the time of the specific Game Store where Duma GP was arrested - testified that he had received an instruction from RCS to arrest the plaintiff for fraud. Mr Steenkamp testified that he had been handed a letter from RCS to which a copy of the ID of Duma KZN was attached. On the document it is recorded in handwriting that this was the real owner of the identity document. It was the evidence of the arresting officer (Constable Langa) that it was he who had recorded this on the ID. Also attached is an affidavit deposed to by Duma KZN stating that she did not open an account at Game Stores.
- [20] Steenkamp testified that he formed a “suspicion” that Duma GP was a fraudster purely on the basis of the e-mail from RCS that was given to him. He conceded that he made no investigations and that he did not even peruse the plaintiff’s original application with RCS to determine which identity document was supplied to RCS at the time of her application.
- [21] Steenkamp also had regard to an affidavit deposed to by Duma KZN who recorded as her identity number as [...]080 - which is the exact same identity number reflected on the plaintiff’s ID.
- [22] Duma KZN deposed to this affidavit on 2 July 2010 wherein she bizarrely confirmed that she had two identity numbers but that she preferred to use the one which was in fact allocated to Duma GP and that she did not prefer the one that was in fact allocated to her and which accords with her actual birth date.

#### The arrest of Duma PG

- [23] Sergeant Langa (“Langa”) was called to Game Store. When he arrived he was handed copies of the two identity documents. As already indicated, both identity documents reflected identical ID numbers as well as identical dates of birth. The

only difference between the two documents was the two photographs: The one photograph belonged to Duma GP and the other photograph belonged to Duma KZN.

- [24] It was the evidence of Langa that he formed the “reasonable suspicion” that the plaintiff was a fraudster and that Duma KZN was the lawful owner of the ID document. Langa was cross-examined at length in respect of what he took into account in arriving at the decision to arrest the plaintiff. At the time Langa was given the original ID of the plaintiff. He asked Duma GP where she got the ID from. She replied that she got it from Home Affairs. This did not appear to have made any impression on Langa.
- [25] Langa then offered various explanations as to why he formed the “*suspicion*” that the plaintiff was a fraudster. In his evidence in chief he explained that he showed the copy of the ID document of the Duma KZN to the plaintiff. When the plaintiff said that it was not her face on the ID document – he concluded that there was a case of fraud. Then he testified that it was not possible for two people who look different to have the same ID number. He did, however, concede in his evidence that he suspected that there was a “*mistake somewhere*” only to conclude that “*we at the SAPS call that fraud*”.
- [26] Langa admitted that, although he did think of going to Home Affairs (the second defendant) to verify the identity of the plaintiff, he did not do so because it was not part of his job as he is not an investigating officer. He explained that his job ended once the suspect was placed in a cell.
- [27] In cross-examination Langa confirmed that he did have the plaintiff’s original ID. He was also specifically asked if he had noticed anything sinister on the ID to which he replied “no”. To a question whether the photo on the plaintiff’s ID appeared to have been superimposed he also replied “no”. He further confirmed that the ID of the plaintiff was an original ID. He also confirmed that when he

asked Duma GP where she got the ID from she told him that she got it from Home Affairs.

- [28] On the face of it, Langa therefore had no reason to suspect that the ID document of Duma GP was falsified. He in fact admitted that he was satisfied that the photo was not superimposed and that the ID document appeared to be original. The only reason for his suspicion seems to have been the fact that the two faces on the two IDs were different. From there he then merely concluded that the plaintiff was the fraudster.
- [29] To a question whether it had crossed his mind that this was merely an error and that that was the reason why the two faces on the two ID's were different, he merely replied that it had to be investigated.
- [30] Although Langa testified in his evidence in chief that he had suspected that there was a mistake, he thereafter testified in cross-examination that it had never crossed his mind that there was an error. Langa also confirmed that Duma GP begged him to go to her house to ask her mother to confirm her identity. He, however, explained that the police did not drive around with suspects and that they merely had to transport them to the police station.
- [31] It was put to Langa that he merely "assumed" that she was a fraudster to which he replied that he did interview her and that it did not just arrest and that he was *"friendly to her"*.
- [32] Importantly Langa testified that he was of the view that the plaintiff was a fraudster on account of the RCS letter and according to what Game stores told him and in light of the fact that the "real owner" had deposed to an affidavit stating that she had not opened an account at Game stores. Langa then made the startling statement that *he* did not label her a fraudster but that it was actually Game stores that had labelled her a fraudster and conceded that he

just accepted that. Langa therefore clearly did not form an independent opinion on whether an arrest was warranted.

[33] A further fact taken into account by Langa was the fact that he merely assumed that the plaintiff was a fraudster simply because Duma GP's ID was issued *after* the one that was issued to Duma KZN. In other words, Langa accepted that the Duma GP's identify document was fraudulent simply because, on the face of it, the ID of Duma KZN was issued first. As will be pointed out, this assumption made by Langa is completely wrong.

[34] I have several difficulties evidence of Langa and with the manner in which he had exercised his discretion:

- (i) Langa merely assumed that there was fraud involved because there were two similar ID documents but with different photos.
- (ii) He further assumed that there was fraud involved and assumed that Duma GP was the fraudster merely because it seemed on the face of it that the ID document of Duma KZN was issued first: The plaintiff therefore had to be the fraudster. This assumption is fundamentally wrong. In this regard the undisputed evidence of the witness on behalf of the second defendant was that the date that appears on an ID is not indicative of when an ID was first issued. In any event, it is the latest ID that is considered to be the valid one.
- (iii) It is further clear from the evidence of Langa that he had relied on the fact that Game had labelled the plaintiff a fraudster. In fact he conceded in cross-examination that he just accepted that. On this evidence it is clear that Langa did not form his own opinion as to whether reasonable grounds existed which would have warranted an arrest.



- (iv) Although Langa stated in cross-examination that it had never crossed his mind that an error had occurred, he expressly stated in his evidence in chief that he had suspected that there was a mistake somewhere. The fact that Langa (at least if regard is had to his evidence in chief) suspected that there could have been a mistake somewhere, could not have led him to believe that reasonable grounds existed which could have lead him to form a suspicion that the plaintiff was a fraudster.
- (v) Langa had the original ID document of the plaintiff in his possession whereas he merely had a copy of the ID document of Duma KZN. He conceded that the photo of the plaintiff was not superimposed on the ID and that the ID also looked original to him. The plaintiff also informed him that she got her ID from Home Affairs. Langa clearly did not consider these facts because if he had he would not have formed a reasonable suspicion that an offence as listed in Schedule 1 of the CPA was committed.
- (vi) Langa's evidence was that it was not his job to investigate. At the very least he could have contacted the Department of Home Affairs (the second defendant) to verify the information. According to the second defendant had he done so the problem would have been resolved immediately.
- (vii) Duma GP also testified, and it was not dispute by Langa, that she had told him to accompany her to her home so that her mother could verify her identity. Langa blatantly refused to do so because it was not, according to him, his job to investigate.

[35] I have little hesitation to find on the facts that Langa was grossly derelict in the execution of his duties and that he could not have formed a reasonable suspicion on the facts before him that Duma GP (who was about to be arrested) had committed an offence. In fact, he could have easily determined whether she had committed an offence purely by contacting the Department of Home Affairs

or by visiting her mother to establish her identity. Sight can never be lost of the fact that, by its very nature, an arrest constitutes a severe restriction of, and interference with, a person's freedom of movement and should therefore only be effected in circumstances allowed by the statutory prescriptions of the Criminal Procedure Act<sup>1</sup> ("CPA"). In terms of section 40 of the CPA a peace officer is authorised to arrest a person without a warrant in (*inter alia*) the following circumstances:

- "(1) A peace officer may without warrant, arrest any person –
- (a) who commits or attempts to commit any offence in his presence;
  - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

[36] In this regard the law is clear: In terms of section 40(1)(b) of the CPA a person can only be arrested if the arresting officer has a reasonable suspicion that the person who is about to be arrested has committed an offence as set out in Schedule 1 of the CPA. Section 40(1)(b) of the CPA therefore includes a reasonable suspicion test or standard that depends on a reasonable person's judgement on grounds that need not be certain or true but are at least well founded according to the objective standards of the reasonable person and with due regard to all the circumstances of the particular case. See in this regard: *Mabona and another v Minister of Law and Order and others* where the court set out the legal position as follows:<sup>2</sup>

"The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of

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<sup>1</sup> 51 of 1977

<sup>2</sup> 1988 (2) SA 654 (SE).

conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

- [37] It is clear from this decision that a reasonable man will at least critically assess the quality of the information at his disposal. More importantly, he will not accept the information lightly or “without checking it where it can be checked”. It is clear from the foregoing that Langa did none of this. Although it is accepted that what is required is a “suspicion” and not “certainty”, the information before Langa did not pass the threshold of suspicion especially because it was not based on solid grounds. Moreover, Langa could easily have verified the information but was clearly not interested to do so. See also in this regard: *Olivier v Minister of Safety and Security and Another*<sup>3</sup> where the court with reference to the *Mabona* decision confirmed that the suspicion must at least be realistic and well founded:<sup>4</sup>

“.. s 40(1) of the Act required that an arresting officer must have a reasonable suspicion that a suspect had committed a Schedule 1 offence.

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<sup>3</sup> 2009 (3) SA 434 (W)

<sup>4</sup> At 441A.

In addition, the facts on which the officer relied for his suspicion must at least be realistic and well founded, having regard to the circumstances of the particular case. The second defendant (the arresting officer) had based his suspicion on what he had heard from a third party, and not on what the plaintiff had himself told him. He had not considered the reasonableness of the plaintiff's explanation, nor had he tried to evaluate its authenticity or veracity. He also could not explain why the plaintiff's explanation was unacceptable or unreasonable. Given the facts of the matter, the second defendant had failed to show that he could have entertained reasonable grounds for his suspicion justifying the arrest of the plaintiff. This was a matter which required proper investigation and consideration before the serious step of arresting the plaintiff was taken. On the facts, the second defendant had acted over-hastily and imprudently.”<sup>5</sup>

[38] On the evidence before this court it is therefore concluded that objectively no reasonable suspicion existed at the time warranting the arrest of the plaintiff. In this regard the first defendant has failed to discharge the onus that the arrest and detention of the plaintiff was justified in terms of section 40(1)(b) of the CPA. It is therefore concluded that the arrest and detention of the plaintiff was unlawful.

[39] I am equally persuaded that no reason whatsoever existed for the continued detention of the plaintiff.

[40] The plaintiff is entitled to damages for the injustice that she has suffered. It was clear from her evidence that she had suffered great humiliation as a result of the arrest. She also testified that her in-laws were now of the view that she was lying about her true identity. Her credit rating was also affected by the incident. It is trite that the amount that should be awarded to a plaintiff as damages falls

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<sup>5</sup> Quoted from the headnote.

within the sole discretion of the court although the court may have regard to what other courts have decided to be reasonable in comparable circumstances.

[41] It is, however, acknowledged that the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are, however, a useful guide to gauge what other courts have considered to be appropriate but they have no higher value than that.

[42] The assessment of general damages is therefore a matter (which falls) within the discretion of the trial court and that it depends upon the unique circumstances of each particular case.<sup>6</sup> I have taken note of the circumstances under which the plaintiff was arrested and the subsequent trauma that she had experienced as a result of the arrest. It was clear from her demeanour in the witness box that the incident severely traumatised her. I have taken note of the fact that she had been detained for approximately 9 days. I am, however, mindful of the fact that the length of time that a person had been detained after arrest is but one of the factors to be considered when determining what should be awarded in terms of damages: All the relevant circumstances should be considered. See: *Minister of Safety and Security v Tyulu*.<sup>7</sup>

[43] I have already pointed out that the plaintiff has suffered considerable distress and humiliation as a result of the arrest. There is also no doubt that the arrest of the plaintiff constituted a serious invasion of her right to movement and dignity. In the circumstances I am of the view that it would be fair to award the plaintiff damages in the amount of R 300 000.00 (three hundred thousand rand) for her unlawful arrest and subsequent unlawful detention.

#### The liability of the second defendant

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<sup>6</sup> *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17; *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA) paras 26-27.

<sup>7</sup> 2009 (5) SA 85 (SCA).

- [44] There is one outstanding issue to consider and that is whether the second defendant could also be held liable. The plaintiff claimed that the second defendant's employees were reckless, negligent and careless in dealing with the plaintiff's and with Duma KZN's applications for identity documents. I have already pointed out that it was common cause that the second defendant had issued the same ID (apart from the photos appearing in the documents) to both Duma GP and Duma KZN. It is, however, not clear from the evidence how this mistake had occurred. What is clear from the evidence is the fact that the second defendant was already aware of the duplication of ID's at the time of the arrest and had Langa made enquiries with the second defendant, the second defendant would have clarified the situation for him.
- [45] I am in agreement with the submission that the plaintiff bears the onus to prove the existence of a nexus between the second defendant's conduct and the detrimental consequences she had sustained as a result of the second defendant's conduct in issuing two identical IDs.
- [46] Although it was not in dispute that the second defendant did in fact issue two identical ID documents, it was submitted that the issuing of the two IDs (factual causation) is simply too remote from the actual arrest (legal causation). In respect of causation the Supreme Court of Appeals (as it then was) in *International Shipping Co (Pty) Ltd v Bentley*<sup>8</sup> stated as follows:

"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a

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<sup>8</sup> 1990 (1) SA 680 (A).

hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'.... Fleming *The Law of Torts* 7th ed at 173 sums up this second enquiry as follows:

'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.'<sup>9</sup>

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<sup>9</sup> At 700E – 701C.

[47] The important enquiry in this instance is whether the wrongful act (of issuing two IDs to two different individuals) is linked sufficiently closely to the unlawful arrest of the plaintiff in order for legal liability in respect of the second defendant to ensue.<sup>10</sup> In general it is accepted that a wrongdoer is not liable for harm which is too remote from the conduct concerned or where the harm was not foreseeable.

[48] I am of the view that the damages suffered by the plaintiff are simply too remote. It is in my view inconceivable that the second defendant even though it was negligent could have foreseen the reasonable possibility that the first defendant would some 18 years later arrest the plaintiff for ID fraud even though there was no such fraud. Furthermore, had Langa - who had a duty upon him to properly consider the facts available to him and not to accept lightly or without checking the facts where it can be checked – the plaintiff would not have been arrested. I am therefore on the evidence before me not persuaded that the arrest is sufficiently closely connected to the issuing of two IDs in order for legal liability to arise in respect of the second defendant to arise.

### Order

In the result the following order is made:

1. The first defendant is ordered to pay the plaintiff an amount of R 300 000.00 (three hundred thousand rand) for her unlawful arrest and subsequent unlawful detention and to pay interest on this amount at the rate of 15,5% per annum from 14 days after the date of judgment to date of payment.
2. The first defendant is ordered to pay the costs of suit.

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<sup>10</sup> *mCubed International (Pty) Ltd & another v Singer NNO & others* 2009 (4) SA 471; [2009] 2 All SA 536 (SCA) para 22.



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**AC BASSON**

**JUDGE OF THE HIGH COURT**