

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE - MTHATHA**

**CASE NO: 210/08
DATE HEARD: 07 & 08 /12/2010
DATE DELIVERED: 03/02/2011**

In the matter between

ZOLEKA ERASMUS

PLAINTIFF

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR TRANSPORT – EASTERN CAPE PROVINCE**

DEFENDANT

JUDGMENT

ROBERSON J:-

[1] This is an action for damages for wrongful arrest and detention. It is common cause that on 29 August 2007, at about 07h30, the plaintiff was arrested, without a warrant, at a roadblock at Ngqeleni, by Traffic Officer Fillis, acting in the course and scope of his employment with the defendant. The offence for which the plaintiff was arrested was driving a motor vehicle without a driving licence, alternatively failing to carry her driving licence in the vehicle which she was driving. After the arrest, the plaintiff was taken in a South African Police Services (SAPS) vehicle to Ngqeleni police station, from where she was released at about 13h00 the same day, after an admission of guilt fine for the

alternative offence had been paid. The defendant denied that the arrest was unlawful and denied in particular that the plaintiff had been detained at the police station, alleging that she had not been put in a cell, but in a “waiting room”.

[2] The plaintiff is a 42 year old school teacher. She testified that on 29 August 2007 she was on her way to work when she was stopped at the roadblock by Fillis, who checked her vehicle licence disc and demanded her driving licence. She did have a valid driving licence at the time but that morning she had left her wallet containing the licence at home. She had her identity document and her Walter Sisulu University student card with her, which she showed to Fillis, but Fillis wanted only her driving licence. She also had a university disc on her windscreen containing her name and student number. Fillis pulled her out of her vehicle and instructed her to join other persons who had been arrested. She was handcuffed to an unknown man, but pleaded to be allowed an opportunity to make a telephone call. She was then placed in an official vehicle and telephoned her school principal, Mr. Majeke, who came to the scene of the roadblock. She alighted from the vehicle and she and Majeke arranged that he would collect her driving licence from her domestic employee at a meeting point in Mthatha, and bring it to her at the roadblock.

[3] A colleague, Mr. Mpuku, also arrived at the scene and she alighted from the vehicle to speak to him because she was concerned about her vehicle and, having left her keys in the vehicle, she wanted him to take care of it. She also

alighted from the vehicle in order to find out from Fillis if he was going to take control of her vehicle, but he told her that he would not do so. She and other colleagues, who had found her at the scene, tried to explain to members of SAPS that her driving licence was on the way but Fillis told her she was disobeying his orders and she was again handcuffed to a man, a taxi driver whom she did not know. A crowd had gathered at the roadblock, and amongst the crowd were high school children whom she had previously taught. Some of them appeared sympathetic to her, but others laughed and clapped. Mpuku approached Fillis to try to find a solution but Fillis told Mpuku that she had been arrested and had to remain there. Fillis also told Mpuku that he could drive the plaintiff's vehicle but he would first have to see his driving licence and test him for consumption of alcohol.

[4] The plaintiff saw Majeke arrive and speak to Fillis, but by this time the SAPS minibus had arrived and she and other arrested persons had to board the minibus. Still handcuffed, they were taken to Ngqeleni police station and put in a room, the burglar door of which was locked. There was one other woman amongst the arrested persons. Some of the men in the room were her former pupils who had dropped out of school and they taunted her by saying that even though she was educated, she was now locked up together with them. After about two hours, she and the other woman called for help as they needed to relieve themselves, and a female police officer responded. This officer expressed concern that the two women had been put in the same room as the

men. She unlocked their handcuffs and transferred them to another smaller room, which had a cement floor and was cold, and in which was a small toilet and a thin mattress covered with a blanket. The windows of the room were set high up and had burglar guards on them. The door of this room was also locked. The plaintiff was in telephonic communication with a number of people, including Majeke, who informed her that he had given her driving licence to Fillis.

[5] Some time after 12h00 she was taken to yet another room where Fillis was seated. He did not explain her rights to her but merely asked her to confirm her identity and told her that her driving licence had arrived, that she was to be released, and that she was to pay R300.00. She did not have any money but when she was released she met Mpuku who told her that he had paid the R300.00, having been informed at the police station that this was the amount required. She had not instructed Mpuku to pay this amount, and she was not aware that payment was an admission of guilt. She thought the money had to be paid in order for her to be released.

[6] The incident affected her to the extent that she was unable to go to work for a few days. The publicity was an additional hurt. Schoolchildren, who knew her as a strict teacher, were aware that she had been arrested. People who had witnessed her arrest and others who had heard about it, questioned her, and she had to explain what had happened. She felt she had been regarded as a criminal.

[7] Majeke testified and corroborated the plaintiff's evidence that after she had contacted him, he found her at the roadblock, in the official vehicle, and thereafter collected her driving licence at Mthatha and returned to the roadblock. There he found the plaintiff handcuffed to a man. He gave the plaintiff's driving licence to Fillis, and told Fillis to whom the licence belonged. He knew it was Fillis because Mpuku had pointed Fillis out as the person in control at the roadblock, and Fillis had a name tag on, which bore his name. Majeke did not notice what Fillis did with the licence. He then left for his school.

[8] Mpuku testified that he was a passenger in a taxi which was also stopped at the roadblock. He saw the plaintiff in the official vehicle and on enquiring from one of the traffic officers at the scene, was told she had been arrested because she did not have her driving licence. Fillis was admonishing the plaintiff for trying to escape and the plaintiff was telling Fillis that she wanted to make a telephone call. Fillis then handcuffed her to a young man, who was a taxi driver. Mpuku enquired from the traffic officers if it was proper to handcuff a woman to a man and was told by one of them that the plaintiff was arrogant, and that he was disturbing him from performing his duties. Majeke then arrived and the arrangement was made for him to fetch the plaintiff's driving licence. When Majeke returned, he handed the plaintiff's driving licence to Fillis, and left for school. Mpuku then enquired from one of the traffic officers what the next step was because the plaintiff's driving licence had arrived. He was informed that all those who had been arrested were to be taken to the police station where

paperwork was to be completed, and those who produced driving licences would have to pay R750.00. Mpuku then took the plaintiff's vehicle keys, but Fillis told him if he was going to drive the plaintiff's vehicle, he would first have to perform a breathalyser test on him. Fillis did not however perform this test. The SAPS minibus then arrived and the arrested persons, including the plaintiff, boarded two by two. Mpuku was not in a position to see if they were handcuffed. Once the roadblock was concluded, Mpuku drew R750.00 from a bank ATM and proceeded to Ngqeleni police station. There he was informed by a traffic officer that all those arrested were going to be charged. He and others were called into the charge office and told that anyone who had money could pay for the arrested persons. Names were called, and when the plaintiff's name was called he was prepared to pay R750.00 but was told that the amount was R300.00. He paid R300.00 and a receipt was issued to him, which he gave to the plaintiff when she was released. The incident was the "talk of the town" in relation to all those who had been arrested, but the plaintiff had been singled out because she was a teacher who was well known.

[9] Fillis, a fellow traffic officer, William Tessling, and Constable Lubuzo of the SAPS, testified on behalf of the defendant.

[10] Fillis indeed stopped the plaintiff and demanded her driving licence. When she was unable to produce it or any form of identity, he informed her that it was an offence to drive without a driving licence and that she would be detained until

the licence was produced. He also informed her of the fines for the main and alternative charges. He requested her to telephone someone to bring her licence to the scene of the roadblock. At this stage about ten persons had been arrested, some for not being in possession of a driving licence. These persons were handcuffed because there was no police vehicle immediately available and he was afraid that they would vanish into the crowd which had gathered. There was a shortage of handcuffs so they were handcuffed in pairs. Fillis initially placed the plaintiff in the official vehicle but because she had on three occasions alighted from the vehicle, he decided that the only way to secure her presence at the scene was to handcuff her. He thought that she too might vanish into the crowd. In its plea the defendant alleged that the plaintiff was handcuffed because she was trying to escape, but Fillis denied that she had tried to escape. When the SAPS vehicle arrived, the plaintiff and the other arrested persons had their handcuffs removed and then boarded the vehicle and left for the police station. Up to this point, he was not aware that the plaintiff's driving licence or other documentation had been brought to the scene. He continued to perform duties at the roadblock, and then proceeded to the police station. There he found the arrested persons in a room which he presumed was a consultation room, and which was not a cell. It had a burglar gate which was not locked. He was concerned to see the plaintiff and another woman in the same room as men and requested a police official to move them to another room. They were moved to a smaller room, which also had a burglar gate which was not locked. He then registered a case against the plaintiff. On the first information of crime document

he gave instructions that she could pay a fine of R1 500.00 if no driving licence was produced, and a fine of R300.00 if her driving licence was produced. If the plaintiff had not been able to pay the fine, she would have appeared in court the next morning. He called the plaintiff to a room and explained her constitutional rights to her, and she signed the relevant document. At this stage he had still not seen her driving licence. The next day he learned that she had paid a fine of R300.00 and he was satisfied that the case was finalised.

[11] When asked during cross-examination what his purpose was in arresting the plaintiff, Fillis answered that it was to “educate” her. He had learned three steps at college, in the following order: the first was to educate a person in the rules of the road; the second was to fine or summons a person; and the third was to arrest. When reminded that the purpose of an arrest is to ensure a person’s attendance at court, he said he wanted to correct his earlier evidence, and agreed that this was so. However he did not agree that it was unlawful to arrest a person for the purpose of education, and said that education was part of his purpose in arresting the plaintiff. He is aware of other methods of bringing a person before court, namely summons and written notice, but if a person who cannot produce a driving licence has no form of identity, it is his practice to arrest that person. Driving without a licence is a serious offence and prevalent in the Nqeleni district. When specifically asked on what legal basis he was entitled to arrest the plaintiff, he said he would have to look through the Criminal Procedure Act¹ (CPA), and when asked again by the court, referred to the offence of driving

¹ 51 of 1977

a motor vehicle without a licence. With specific reference to arrest without a warrant, he referred to the CPA and the National Road Traffic Act², but did not specify any sections of those Acts, or describe them in his own words.

[12] Tessling was also on duty at the roadblock. He testified that he heard Fillis reprimanding the plaintiff and telling her to get back into the official vehicle, and that Fillis had handcuffed her because she was not willing to remain in the vehicle. Fillis said to him that it looked as though the plaintiff wanted to run away. The handcuffs of the arrested persons were removed before they boarded the SAPS vehicle. He said that the two rooms in which the plaintiff had been placed at the police station were not cells, were not locked, and were “more like offices”. According to him, in this type of situation (presumably when a person cannot produce his or her driving licence at a roadblock), arrest is a last resort. Arrested persons are taken to a police station and it is hoped that they will be released the same day. In response to a question by the court, he conceded that if such persons tried to leave the police station before the necessary documentation arrived, he would prevent them from doing so.

[13] Constable Lubuzo was on duty at Ngqeleni police station when the arrested persons arrived. She also said they were not handcuffed. Because they had all arrived together, they were all initially placed in what she described as a waiting room, but when Fillis arrived he instructed her to move the plaintiff and another woman to another waiting room. She conceded that persons kept in these

² 93 of 1996

waiting rooms are in custody. The arrested persons were charged by the traffic officers and some of them paid admission of guilt fines. Through Lubuzo, the receipt for the plaintiff's payment of R300.00 was handed in. This receipt reflected that the money was paid in terms of s 57 of the CPA.

[14] It will be seen from this summary of the evidence that the main events and their sequence were common cause. The main disputes of fact concerned the production or otherwise of the plaintiff's identity document and student card to Fillis, the delivery of the plaintiff's driving licence at the roadblock, and the length of time for which she was handcuffed.

[15] The plaintiff, Majeke and Mpuku were all impressive witnesses. They testified in a calm and dignified manner. None of them exaggerated any detail of the events nor did they display any bias towards Fillis. The plaintiff in fact said that she knew that he was doing his duty. There was no sign of collusion between them in order to strengthen the plaintiff's case. For example: when the plaintiff saw Majeke talking to Fillis, she did not say that she saw her licence being handed to Fillis; Majeke did not say that he saw the plaintiff boarding the SAPS vehicle in handcuffs; Mpuku could not say if the plaintiff was handcuffed when she boarded the police vehicle because he was not in a position to see. Their evidence dovetailed in a logical sequence. It is correct that some details of their evidence were not put to Fillis: for example that the plaintiff had shown him her identity document and her student card, and that her driving licence had been

handed to Fillis personally at the roadblock. The plaintiff explained that in her instructions to her attorneys she was mainly concerned with the affront to her dignity and the fact that Fillis would not listen or consider a better way of dealing with the situation than exposing her in public. It was also put to Fillis that Mpuku would testify that the plaintiff's driving licence had been handed to the police.³ These omissions were in my view adequately explained, especially in the light of the totality of the evidence.

[16] Fillis was not an impressive witness. He appeared to be trying to play down the whole incident. The professed need to handcuff the arrested drivers because they might vanish into the crowd, was improbable and illogical, in view of the fact that their vehicles were still on the scene. His evidence that the plaintiff had not tried to escape, contradicted the defendant's plea, which must have been drawn on his instructions. His description of the room in which the plaintiff was initially held, as a consultation room, was a transparent attempt to show she was not in detention. Clearly all the arrested persons in this room were in custody. He also changed his evidence when it was put to him that the purpose of an arrest is to ensure a person's attendance at court: only then did he say that he wanted to correct his previous evidence and add that this was part of his purpose.

[17] Tessling similarly tried to play down the arrest by describing the rooms in which the plaintiff was held as offices, and saying that they were not locked.

³ Plaintiff's counsel later informed the court that he had meant to put to Fillis that Majeke had handed over the licence.

Lubozo seemed to do the same by referring to the rooms as waiting rooms. Both of them had to be specifically asked before they conceded that the arrested persons were in custody.

[18] Overall therefore, where there was a dispute of fact, the evidence on behalf of the plaintiff was to be preferred to that on behalf of the defendant.

[19] In any event, I am of the view that the resolution of these disputes of fact was not material to a decision on the wrongfulness or otherwise of the arrest. What was material, was Fillis' purpose in arresting the plaintiff, and the subsequent events at the police station.

[20] In *Minister of Safety and Security v Sekhoto*⁴, Harms DP, in analysing s 40 (1) (b) of the CPA, said at paragraph [19]:

“The methods of securing the attendance of an accused in court for the purposes of trial are arrest, summons, written notice and indictment in accordance with the relevant provisions of the Act (s 38). The word ‘arrest’, which translates into Afrikaans as ‘in hegtenis neem’, has in this and related contexts always required an intention to bring the arrested person to justice.”

Further, at paragraph [31], in dealing with arrests for a purpose not contemplated by the legislator, he said:

“The law in this regard has always been clear. Such an arrest is not bona fide but *in fraudem legis* because the arrestor has used a power for an ulterior purpose.”

4 [2010] ZASCA 141

[21] Fillis' purpose, on his own evidence, was not to bring the plaintiff to justice, but to "educate" her. Put more colloquially, he arrested her (and probably all the other persons who were arrested) to "teach her a lesson". Bringing the plaintiff to justice was the last thing on his mind. S 40 (1) (a) of the CPA authorises a peace officer to arrest a person without a warrant if such person commits or attempts to commit an offence in his presence. The plaintiff did commit an offence in Fillis' presence, in that she did not carry her driving licence in her vehicle. Fillis did open a police case with a reference number, and said that the plaintiff would have had to appear in court if she had not paid an admission of guilt fine. However Fillis' professed purpose in arresting the plaintiff, namely to educate her, and the subsequent events at the police station, showed in my view that the overall exercise, from the arrest of the plaintiff to her release, was an abuse and a distortion of, and utter non-compliance with, correct criminal procedure. Fillis' evidence that part of his purpose was to ensure the plaintiff's attendance at court was clearly an afterthought. This conclusion is strengthened by his ignorance of the provisions of the CPA, and his insistence that arrest for the purpose of education was not wrongful. It is also strengthened by Tessling's evidence that in these situations it was hoped that arrested persons would be released the same day.

[22] Events at the police station reinforced the illegal purpose of the arrest of the plaintiff. I have mentioned that the admission of guilt fine of R300.00 was receipted as a payment in terms of s 57 of the CPA. S 57 provides for payment

of an admission of guilt when a person has been issued with a summons (s 54 of the CPA) or given a written notice to appear in court (s 56 of the CPA). Presumably a written notice to appear in court was issued in respect of the plaintiff. S 56 (2) of the CPA provides that the effect of a written notice handed to a person in custody is that the person must forthwith be released from custody. A person who is issued with a written notice to appear in court has a choice of appearing in court or paying an admission of guilt fine. The plaintiff was neither released nor allowed to exercise such choice.⁵ She had to remain in custody until the fine was paid. She did not choose to pay the fine. Mpuku was told that it would have to be paid in order for her to be released. Such procedure was a complete abuse of s 56 of the CPA. The plaintiff's release effectively had to be bought for a non-negotiable sum. The plaintiff's belief that the money was paid in order to secure her release was correct.

[23] Mpuku's evidence showed that even if a person's driving licence was eventually brought to the roadblock, as was the case with the plaintiff, the traffic officers were none the less determined to arrest alleged perpetrators and take them to the police station. There was therefore no exercise whatsoever of a discretion to arrest. Such absence of discretion further underscores the illegal purpose of the plaintiff's arrest.

[24] The treatment of the plaintiff, from arrest to release, was therefore

⁵ She could have chosen to appear in court and ask for a lesser fine, or she could have made representations to the prosecuting authority for a reduction of the fine.

completely illegal and the defendant failed to establish, as it bore the onus to do, that the arrest and detention of the plaintiff was justified. The plaintiff must therefore succeed in her action.

Damages.

[25] The wrongful deprivation of liberty is in itself a very serious injury. The experience of being handcuffed in public must have been extremely degrading and humiliating, particularly when amongst the crowd of onlookers were former pupils of the plaintiff, some of whom were apparently enjoying her ordeal. At the police station she was in a cell with males, some of whom mocked her because her status as a teacher had been diminished. The gender issue is of relevance in that she could not relieve herself in that cell and had to call for help. The second cell in which she was placed with the other woman was cold and sparsely equipped. The plaintiff's hurt endured for some time after the incident and it was apparent from the manner in which she testified that the experience has been a major event in her life. The defendant denied liability to the bitter end, and Fillis would not concede that her experience was degrading. It was submitted that Fillis acted with malice, but I do not think that the evidence justifies such a finding. He acted in a high handed manner, but with ignorance.

[26] I have had regard to recent awards in actions for wrongful arrest and detention, none of which is on all fours with the present case, but which give context in which to consider an appropriate award.⁶ In all the circumstances, I

⁶ *Olgar v Minister of Safety and Security* [2008] JDR 1582 (E), *Peterson v Minister of Safety and Security* [2009] ZAECGHC 65, *Fubesi v Minister of Safety and Security* [2010] ZAECGHC 91

consider an award of R75 000.00 to be appropriate.

[27] The plaintiff claimed damages of R200 000.00. The award of R75 000.00 falls within the monetary jurisdiction of the Magistrate's Court, namely R100 000.00. I raised with both counsel the question of the scale of costs to be allowed should an award be made which fell within the jurisdiction of the Magistrate's Court. The plaintiff's counsel submitted costs should be awarded on the High Court scale, whereas the defendant's counsel submitted they should be awarded on the Magistrate's Court scale. Neither counsel mentioned any factors which supported their submissions. I am of the view that costs should only be allowed on the appropriate Magistrate's Court scale. Although there is always some degree of uncertainty about what sum will eventually be awarded in claims such as these, there are enough recent decisions involving similar claims which demonstrate that it was unlikely an award of over R100 000.00 would be made. The action did not involve complex issues of fact or law, and actions such as these are often heard in the magistrate's courts. The plaintiff said that she brought the action because her dignity was impaired, and that an award of damages would comfort her and attend to her "inward cry". An action in the magistrate's court would have met her needs.

[28] I would hope that the defendant takes heed of this judgment and ensures that its officials have the necessary knowledge of correct criminal procedure before embarking on similar exercises in the future. Roadblocks serve an important purpose and driving without a licence is a serious offence, but a peace

officer's extensive powers cannot be used merely for the purpose of teaching a person a lesson, in other words subjecting a person to an illegal and shocking experience so that they will not transgress again.

Order

[29] The following order is made:

29.1 There will be judgment for the plaintiff in the sum of R75 000.00, with interest thereon at the prescribed rate from 14 days from the date of judgment to the date of payment.

29.2 That the defendant pay the plaintiff's taxed party and party costs of suit on the appropriate Magistrate's Court tariff and scale, together with interest thereon at the prescribed rate from 14 days of the date of taxation to date of payment.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv Kubuleki, instructed by Mantyi Attorneys, Mthatha

For the Defendant: Adv Gaju, instructed by The State Attorney, C/O T.Mnqandi & Associates, Mthatha

