

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 9198/2010

In the matter between:

GEORGES BAHITI NGONA

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT: 08 October 2012

DAVIS J

Introduction

[1] On 23 May 2007, plaintiff was arrested by members of the South African Police Services ('SAPS') in terms of s 41 of the Immigration Act 13 of 2002 ('the Act'). He was arrested at the Wynberg railway station and taken in the back of a police van to the Retreat railway police station. From there he was taken to the Cape Town police station and finally to the Sea Point police station before he was released into the custody of immigration officials on 24 May 2007, whereupon the latter released him.

[2] The plaintiff's case is that members the SAPS acting within the course and scope of their employment wrongfully arrested plaintiff and detained him at the various police stations to which I have made reference before he was finally released on the next day, 24 May 2007. By agreement, the merits and *quantum* of this dispute have been separated. Thus, I am only required to deal with the merits of the dispute.

The factual background

[3] Plaintiff testified on 23 May 2007 that he travelled on the train to Diep River, where he resided at that time with his sister and brother in law. He testified that ununiformed police entered his coach at the Wynberg Station and asked immigrants to provide police with their papers. He clarified his testimony later by suggesting that he had thought that the police had approached people 'who looked like immigrants'. When a policeman approached him he asked to confirm that the latter was a police officer, whereupon the police officer showed him his badged. He searched for a certified copy of the document generated by the Department of Home Affairs entitled 'Formal Recognition of Refugee Status in the RSA Particulars of Recognised Refugee in RSA' but could not find the copy in his bag. He told the court that the original document was at home because he was concerned that, were he to lose the original, had it proved difficult to acquire another original from the Department.

[4] In his case, he was from the Democratic Republic of the Congo and had resided in South Africa since 2003. I should add that it is common cause that he was legally entitled to reside in South Africa having been recognised as a refugee in terms of the Refugees Act 113 of 1998.

[5] Owing to his inability to find the copy of the registration papers he was taken off the train, searched and then arrested. When he tried to use his cell phone to contact his sister he testified that a lady police officer warned him not to phone saying '*what do you think you are doing*'. From there he was taken to the Retreat Police Station where he asked to contact his sister, which request was refused by the police officers on duty. They however informed him that he should not worry because an immigration official would deal with the problem. He was then transported in a police van to the Cape Town police station but as the cells were full, he was then taken to the Sea Point police station.

[6] At Sea Point he was told to take off his belt and shoe laces and placed in a cell. According to his testimony, his cell phone had already been taken from him. When he was in the cell, he again searched in his bag, which he insisted had not been taken from him, for a copy of the papers. He eventually found his papers and handed it to a police guard. The police guard examined the paper and informed him that an immigration official would decide the issue. He slept in the cell that night and was only allowed to leave the police station the next morning after an immigration official had arrived and examined his papers. He insisted

that he was given no opportunity to call his sister at any point whether it be at Retreat, Cape Town or Sea Point police station.

[7] Under cross-examination, he insisted that he had not been allowed to use his cell phone at Retreat nor was he able to make a call. In answer to a series of questions as to why it had taken him hours to find his papers in his bag and why he did not continue to search therein in Retreat whereas he was held for more than two hours he told the court that 'I had lost hope that I would ever find it' and accordingly had not continued to search until in one final desperate move he found his papers while detained at the Sea Point police station. Under cross examination, he also confirmed that on 24 May 2007 at approximately 11h00 am he had been placed in a police van, taken to immigration offices at Barrack Street in Cape Town, whereupon after an examination of the copy of his refugee papers, he was finally released.

[8] The only other witness called on behalf of plaintiff was his sister Jeannine Dhesi. She had resided in South Africa since 2001 and confirmed that during this period plaintiff had lived with her and her husband. On the night in question when she returned home from work her brother was not at home. She tried to phone him but his phone was off. She then confirmed that she tried to phone him again at approximately 22h00 pm. She insisted that, had he called her, she would have been in a position to take the original papers to her brother after his detention. She was asked whether it was possible that her brother's cell phone

had run out of 'time'. She confirmed that, even with a 'pay as you go phone', her brother would have been able to receive calls. It was only on the next morning, when her brother's friend phoned her, that she was able to ascertain the whereabouts of her brother.

[9] Defendant called two witnesses, Constable Vuysannani Geca who had been employed in the police force for eight years. He confirmed that he was stationed at the Retreat Railway police station. He testified that on the night in question there was an operation which the police had conducted with a particular view to searching for illegal substances. He confirmed that the plaintiff had been arrested at the Wynberg Railway station. Geca had driven the police vehicle, first to the Diep River police station where more people were arrested and then finally to the Retreat railway police station. The detainees were taken to the parade room where they were asked if they had their documents. Constable Geca insisted that they all were allowed to make a phone call, pursuant to which one of the detainees was released when a relative arrived at the police station with the necessary papers.

[10] He testified further that Warrant Officer Thompson had been in charge of the phone call process and had dialled the numbers for the various detainees. He testified further that the valuables of the various detainees had been removed at the Sea Point police station and had been recorded by the police in the so called SAP 22. According to this document, three leather belts, two pairs of

shoelaces, one leather bag, belt black in colour, one black leather watch had been placed in police custody. Furthermore, a series of cell phones were taken from various detainees including a black Nokia which, it was common cause, was the cell phone of the plaintiff.

[11] Constable Geca insisted that he had seen the plaintiff with a cell phone on the platform at Wynberg station and that he had retained his cell phone until such time as they arrived at the Sea Point police station. Under cross-examination, he was asked whether the detainees had claimed that they possessed the necessary papers. He answered that they all had replied in the affirmative but that only one had managed to contact a relative and produce the required documentation.

[12] Under cross-examination he also insisted that plaintiff had approached Thompson who had told him he could call, although he was not able to confirm whether in fact the plaintiff had made such a call.

[13] The second and final witness who testified on behalf of the defendant was Inspector Malcolm Thompson. He was a warrant officer at the time of the events in question. He confirmed that there had been an operation on that night, that police were searching for drugs or dangerous weapons and that, because it was a 'full on operation', all police officers were required to be in uniform. Although

he was present at the railway station together with Constable Rosen, it was Constable Geca who had been the arresting officer. He testified that he had spoken to the immigration department informing them of the arrests that had been made. Each detainee was then given an opportunity to make a call. They came into the charge office one at a time. The captain, who was presumably the officer in command, punched in the necessary pin and Thompson then made the telephone call. He confirmed that all detainees had been allowed to make calls but, whether the calls had been resulted in a successful communication with relatives, was not a matter on which he could testify. He testified further that the immigration department official had instructed the police to take the prisoners to Cape Town station.

[14] Under cross-examination, he confirmed that he personally would have taken a detainee arrested in these circumstances to the latter's home to find an original set of papers, if the arrest had taken place within a reasonable distance from his or her home. While he could not remember plaintiff's specifically making a call, he said 'they all did, some spoke French'.

Plaintiff's case

[15] Ms Joubert, who appeared on behalf of the plaintiff, relied heavily on the relevant legislation in order to set out the obligations of a police official in the circumstances of this case.

[16] Section 41(1) of the Act was the key section. It reads thus:

“(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.”

This section must therefore be read with the ‘reasonable steps’ which had been prescribed in order to guide the arresting officer as to how he or she was required to assist the detainee. The relevant Immigration Regulations were promulgated in the Government Gazette 27725 of 27 June 2005. Regulation 32 provides thus:

“32. An immigration officer or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41 (1) of the Act:

- (a) Access relevant documents that may be readily available in this regard, or*
- (b) contact relatives or other persons who could prove such identity and status; and*
- (c) access departmental records in this regard.”*

[17] The process which is therefore envisaged was described by Cachalia JA in **Jeebhai v Minister of Home Affairs** [2009] 3 All SA 103 (SCA) at para 24 thus:

"Section 41 (1) is concerned with the very implication of the identity and status that persons suspected of being illegal foreigners. To this end an immigration officer or police officers who reasonably suspects a person to be an illegal foreigner may interview that person about his identity and status and hold him in custody briefly for this purpose. If necessary a person may be detained in terms of s 34 (2) for a period not exceeding 48 hours during the verification exercise."

[18] The question therefore arises as to:

1. Whether there was a reasonable suspicion that plaintiff was an illegal foreigner; and
2. Whether the police took 'reasonable steps as prescribed in Regulation 32 to assist the person in the verification process.

[19] Manifestly, the members of the SAPS were entitled to form a reasonable suspicion of plaintiff being an illegal foreigner when they apprehended him on the train and he was unable to produce the necessary documentation. I should add that a considerable debate took place as to whether the police required an original document to be produced or whether a certified copy may suffice. For the purposes of this dispute, the evidence of Inspector Thompson is sufficient, namely that where a detainee produces a certified copy, that is a copy of the

necessary papers which has been certified in the proper manner, he would give the detainee the benefit of the doubt and therefore release him, in the event that it proved impossible to contact a relative who might possess the original. For the purposes of this dispute, this issue does not have to be taken further.

[20] The key question therefore is whether the plaintiff was afforded the necessary opportunity to access the relevant documents by contacting a relative to prove his identity upon arrival at the Retreat railway police station. Plaintiff insists that he was given no such opportunity. The evidence of his sister is that she received no call from her brother even though she was at home from 19h30 on 23 May 2007 and that her phone clearly was in working order because she had attempted to phone her brother without success.

[21] Ms Ipsier, on behalf of defendant, submitted that the evidence of both Geca and Thompson indicated that the plaintiff had been given an opportunity to phone his relatives when he was apprehended at the Retreat railway police station. Furthermore, she cast doubt on the plaintiff's version as to the whereabouts of his cell phone. Whereas plaintiff had insisted that his cell phone had been taken from him presumably by Constable Rosen, when he was arrested at the Wynberg railway station, Ms Ipsier submitted that, as his phone was handed in at the Sea Point police station, the probabilities indicated that he had his phone on his person until such time that it was taken from him at Sea Point and booked in pursuant to the requisite SAP 22. She further cast doubt on plaintiff's version,

namely that he had done nothing to retrieve his papers after an initial search at the Railway Station and later at the police station in Retreat. In her view, this was hardly a credible version of someone who was in serious trouble because he could not find his papers, yet somehow must have known that they were in his bag. Furthermore, it was highly unlikely that he had his bag on his person at Sea Point because the SAP 22 reflects that a black bag had been taken into police possession.

[22] By contrast, Ms Joubert sought to question the veracity of the two police witnesses. She observed that they both appeared to have a perfect recall of events which had taken place more than five years previously; in particular as to the precise location of plaintiff's cell phone as well as the call that plaintiff made from the Retreat railway police station.

[23] She also placed considerable emphasis on defendant's plea. In the plea, the following was set out regarding plaintiff's opportunity to phone:

"While at the Retreat police station which was only a processing office, plaintiff was informed by Inspector Thompson that he would be granted access to a telephone call at the Cape Town Central police station. During the interview and while being in custody, plaintiff did not otherwise co-operate with police officials and was riotous."

Plaintiff was eventually taken to the Sea Point police station as there was no space for him to be kept in the cells at the Cape Town police station.

At the Cape Town police station and the Sea Point police station, plaintiff was interviewed by an immigration officer whose identity was not recorded by the police officials at either police station and whose identity is to defendant unknown, where after the said immigration officer arrested plaintiff in terms of section 34 of the Immigration Act 2002.

Plaintiff was thereafter detained at the Sea Point police station until his release on 24 May 2007 by an immigration officer, whose identity is similarly unknown to defendant."

[24] Thus, Ms Joubert pointed to a clear discrepancy between the plea and evidence of Inspector Thompson. Whereas Inspector Thompson claimed with considerable precision that the captain had punched in the pin and Thompson had assisted each of the detainees to make a call at Retreat, the plea indicated that Thompson had informed the plaintiff that he would be granted access to a telephone call at the Cape Town central police station. Furthermore whatever doubts may be cast on the whereabouts of plaintiff's bag by Ms Ipser, defendant's plea indicated that "*defendant believes that plaintiff's release by the immigration officer was a result of plaintiff finding a permit showing his status as a permanent resident of the Republic on his person and producing it to the immigration officer.*"

In her view, this paragraph corroborated the version of the plaintiff that he had finally located the necessary papers by Sea Point police station.

[25] There can be no doubt that sometime after 23h30 on the night of 23 May 2007 plaintiff produced the necessary papers. It may well have been after midnight in that he only arrived at the Sea Point police station at 23h30. On defendant's version a number of possibilities then arise:

1. The plaintiff was given an opportunity of calling his relatives but somehow either a wrong number was dialled or no contact was made.
2. He refused to make use of the opportunity given to him to so call.
3. He was never given an opportunity to call his relatives.

[26] On the probabilities, it seems inconceivable that a person who was arrested and was subsequently found to be a legal refugee with a certified copy of the relevant permit in his possession, would not have insisted on attempting to contact his relatives, after being informed of his right to so do. To come to the opposite conclusion would mean that, somehow plaintiff was prepared to spend a night or perhaps longer in police custody for some ulterior motive, which was never made clear during the trial. Similarly, it is unlikely, on the probabilities, that, had he been afforded an opportunity to call his sister at the Retreat police station he would not have refused to do so. I should add that no attempt was made to


release the plaintiff immediately after he had actually produced a certified copy of his papers at the Sea Point police station.

[27] While accepting that the evidence with regard to the possession of the cell phone is not clear, whatever the truth thereof, it does not detract from the key question: why would the plaintiff have not attempted to employ his cell phone or the opportunity given to him to call from Retreat when he knew that the original papers were in the house of his sister? His sister's uncontested evidence was that she attempted to call him at approximately 22h00. At that time, it would, on the evidence, appear that he was enroute to the Cape Town police station. No explanation was given as to why someone who was in possession of his cell phone, which could receive incoming calls, would not then have kept his phone in operation so that he might receive a call from his sister.

[28] In my view, the probabilities in this case, based upon plaintiff's evidence and the material contradictions between the evidence of the two police officers who was so insistent that they had perfect recall of details of one detainee more than five years ago, and defendant's plea, is that members of the SAPS did not, pursuant to Regulation 32, take any steps to ensure that the relatives of the plaintiff were contacted. In this way his identity could have been proved which, in turn, would have triggered off an obligation to access the relevant departmental records of the Department of Immigration, at worst, or a decision to release him at best.

[29] In the result, when Regulation 32 is read together with the obligations of the arresting officer under s 41 (1) of the Act, the police did not comply with their statutory obligations. Accordingly from the time that the police detained the plaintiff at the Retreat Railway Police Station, he was held wrongfully and in breach of the legal duty of SAPS.

[30] For these reasons, I find that plaintiff, was detained illegally by defendant as from his arrival at the Retreat Railway Police Station on 23 May 2007 at approximately 19h30 until his release into the custody of immigration officials at approximately 12h00 on 24 May 2007. Accordingly the defendant is ordered to pay plaintiffs costs.



DAVIS J