IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

Case No. 14572/04

In the matter between:

DAVID BENJAMIN VAN RENSBURG Plaintiff

and

THE CITY OF JOHANNESBURG Defendant

JUDGMENT

Horwitz AJ :

Traffic law enforcement, no less than other forms of law enforcement, is extremely important for society to function in a well-ordered manner. Allied to this is the need to ensure that people who drive on our roads not only obey the rules thereof but if they disobey those rules, they have respect for, and heed, those procedural laws which are essential to bring the wrongdoers to book. The particular law that I have in mind is that which obliges an offender to attend Court on a specific day to face prosecution for an offence that he or she is alleged to have committed or, if the offender prefers, to admit guilt, pay the prescribed fine and thus avoid the need to suffer the inconvenience of having to spend a few hours in Court.

To secure compliance with what I have referred to as the procedural laws, the City of Johannesburg, through the medium of its Metro Police Division, has resorted to the procedure colloquially referred to as a roadblock. Its prime purpose, so it would seem, is to enable police officers to check the details of drivers against official records maintained by the Traffic Department and the local Magistrates' Court and thereby ascertain whether drivers, who pass through the particular road block, have any unpaid fines recorded against their names, for which they have been summoned to appear in Court, and have failed to heed the summons or summonses. If the investigation yields a positive result, that is, that there are recordals against the name of a driver, the latter is then arrested, imprisoned at one or other Police Station and from there taken to Court to answer the original alleged traffic violation and a further charge of contempt of Court.

A roadblock is a notoriously unpopular procedure, because of the inconvenience that it causes, particularly at peak times. It is the bane of every busy motorist's hectic life as he or she confronts endless lines of slow-moving traffic as they

wend their way along congested arterials. Nevertheless, according to the authorities it does achieve its purpose and unless and until someone comes up with a more viable and less frustrating alternative, it seems that it is something that the motorised folk of (at least) this city are going to have to live with. (It is not my function to consider whether the operation is lawful or not.)

There are obviously cases in which people are going to be properly caught for not having paid fines and not having obeyed the alternative directive contained in the summons to appear in Court on the appointed day. They may have blithely chosen to ignore the summons or they may in the meantime genuinely have forgotten about it. Then again, because no system is foolproof, there may be instances where a warrant of arrest has wrongly been issued against a person for not having appeared in Court in circumstances in which the particular individual might have paid the fine or in which the summons was in fact not served on him or her. To obviate instances of persons being wrongly accused of, and consequently being arrested and detained at a roadblock for, having ignored a summons, the defendant, in the guise of its Metro Police Department, put in place quite an elaborate system aimed at providing police officers who man roadblocks with accurate on-the-spot information which can almost immediately be passed on to the alleged offender. The latter would then be in a position to contest the allegation, if the circumstances indicate that he or she is not guilty of the alleged wrongdoing. This procedure was fully described to me during the trial by one Sergeant Botolo of the Metro Police. He testified that since 15th June 2003 (the date of the incident to which this trial relates, when the plaintiff was arrested for having allegedly ignored five summonses for traffic violations) the City has even improved on the system of safeguards aimed at reducing inconvenience to motorists and avoiding instances of unwarranted arrests.

The system of safeguards appears to me to have been a most efficient one. The problem that gave rise to the plaintiff's claim (an action for damages against the defendant for unlawful arrest and imprisonment), however, lay not with the system itself, but rather with the individual Metro police officers, employees of the defendant, at the scene of the roadblock who simply did not do their job properly and, indeed, were guilty of a gross abuse of their powers and dereliction of duty. It is, ironically, the very quality of the safeguards aimed at avoiding instances of wrongful arrest and detention that supported the plaintiff's version regarding his arrest and detention by the Metro Police on that day because if the procedure had been meticulously followed, it is inconceivable that the plaintiff would have been detained after his initial arrest. (I use the notion of support for the plaintiff's version in the limited sense that one might have looked for support for it, if it was necessary. As matters transpired at the trial, the defendant did not tender any meaningful evidence to gainsay the plaintiff's version, which was beyond any reproach. The plaintiff was clearly a truthful witness and although counsel for the defendant did not go so far as to concede the merits, he preferred to direct most of his attention to the issue of *quantum*. In adopting that approach he was both right and fair.)

And now for the merits of the case. I commence with an outline of the procedure

which the defendant originally (that is, prior to the plaintiff's arrest) implemented. Although Sergeant Botolo's evidence was very detailed and elaborate it is unnecessary for me to recount it fully. The following summary of his evidence will suffice.

If a person were confronted at a roadblock with an allegation that he or she had failed to obey a traffic summons, the police on the scene were able to make immediate contact with one of their colleagues at the relevant Magistrate's Court, stationed in the office in which warrants of arrest were kept. This last-mentioned official also had immediate access to the original summons – the one to which the warrant of arrest related – with the result that this official was able to immediately verify whether the summons had been served on the person sought to be detained and if the summons had not been personally served on him or her, the official at the Magistrate's Court was able to see from the summons upon whom it had been served. This official would then have been able to pass all the relevant information on to the police officials at the scene of the roadblock.

The plaintiff is a seventy-four year old gentleman, a retired accountant; a very decent person, dignified, courteous, softly-spoken and urbane. It was about 11h00 on Sunday, 15 June 2003 and he was on his way to the Vereeniging airfield. When he was in the vicinity of Eikenhof, he was confronted with a roadblock. A male Metro Police official indicated to him to pull his motor vehicle off the road and to stop. He heeded this instruction. A female Metro Police official (whom the plaintiff described as blonde and thick-set) then approached him and asked him for his driver's licence and he handed it to her. She went way with it, returned a while later and instructed him to accompany her to a "kombi" motor vehicle. Again he obeyed. When they reached the kombi, she turned to him and in Afrikaans said: "Meneer, u is onder arres." He enquired of her the reason for his arrest but she just smiled and walked off. There was a male police officer nearby and he asked the latter as well why he was being arrested but the latter just ignored him.

About fifteen to thirty minutes later, after about ten people had been arrested, they were all loaded into the kombi and taken to a police station in Johannesburg. It was referred to in the trial by its earlier appellation, namely, John Vorster Square. The plaintiff was taken to the fourth floor – despite his age he was hustled up the four flights of stairs – where he was locked up in a cell.

The plaintiff testified further that he noticed people being released so he enquired from someone, whom I presume was a cell guard, how these people had managed to secure their release. The official informed him that they had paid their fines. He asked the official what he (the plaintiff) had to pay to be released. The official looked up on a list in his possession and told the plaintiff that he had to pay fines totalling R1 780,00. The plaintiff then attempted, using his cellular telephone, to telephone a friend of his to ask him to bring money to pay the fines. As it was father's day and the friend was presumably out celebrating, the plaintiff only managed to make contact at about 16h00. The

friend eventually arrived, assisted the plaintiff to make payment of what he allegedly owed and he was released between 17h00 and 17h30.

Aside from having learnt from the official at the cell door that he owed fines totalling R1 780,00, nobody informed the plaintiff why he had been arrested; no-one offered him anything to eat or to drink.

Two days later, the plaintiff paid the Magistrate's Court a visit to ascertain why he had been arrested and what he learnt was this. Five summonses for traffic violations had been issued against the National Cancer Association. The plaintiff had previously worked for that organisation but had left its employ some nine years previously. Regulation 336 of the National Road Traffic Regulations, which are contained in Government Notice R225, published in Government Gazette 20963 of 17 March 2000 and promulgated in terms of the Road Traffic Act, No. 93 of 1996 provides that in the case of a motor vehicle registered in the name of an association such as the National Cancer Association is, the latter must identify a proxy or a representative. I presume that the defendant contends that the person thus identified is someone upon whom summonses intended for the relevant association may be served and for present purposes that contention may be accepted as correct. The plaintiff's name had been recorded in the appropriate vehicle registry as the responsible person. Despite his having left the employ of the Association, his name remained on record. Now for that error on the part of the Association, the defendant surely cannot be blamed. In the light of the facts, however, that is irrelevant because *ex facie* each of the summonses, none of them purport to have been served on the plaintiff. One had been served on a certain LH Le Roux and four on a certain B Sithole. In each summons, there is a description of the physical characteristics of the person served and the plaintiff fits none of them.

I did not mention earlier that according to Sergeant Botolo, *en route* to the police station, a stop is made at the Magistrate's Court to fetch all the original warrants of arrest, which are then fully explained to the arrested individuals and that at the police station, the police make sure that everyone who has been arrested is satisfied with the explanation that is provided. Well, it is obvious that - certainly in the case of the plaintiff - that just did not happen. It is also abundantly clear that when he was arrested, his request for information fell on deaf ears. The defendant could not seriously have suggested that procedure was followed, even to a very limited extent, in the plaintiff's case. At the risk of being frivolous, one might ask: had the police been as courteous and helpful as Sergeant Botolo believed that they always are, what would have occurred in the plaintiff's instance? The plaintiff would have learnt that he was being arrested because traffic summonses issued against the National Cancer Association had been ignored. It is unthinkable that the plaintiff would not have protested that he had never been served. Had the police then behaved as they should have done, they would have learnt that according to the information recorded on the summonses, not one of them had been served on the plaintiff but that they had been served on two other individuals whose physical characteristics, as I have said, did not fit those of the plaintiff. Their dereliction of duty is palpable.

The defendant called as a witness a female Metro police officer, Modishe Deborah Mashabela, who alleged that she had been on duty at that particular roadblock. She had no recollection of events on that day but relying on a document on which were recorded details of persons who had been arrested, she claimed to have arrested the plaintiff. The reason that she made that claim was because alongside the plaintiff's name was recorded her "call sign" whatever that term may mean. I have difficulty with this witness's evidence. Firstly, the plaintiff testified that the only woman with whom he had had any contact at the roadblock was a white, blond woman and that evidence was not challenged in cross-examination at all. The witness was a black woman. Secondly, the witness asserted that she was inflexible in her application of the prescribed procedure about which Sergeant Botolo had testified. If she was the arresting officer then for the reasons which I have given above, she lied on this score because none of those procedures were followed in the case of the plaintiff. The best that I can say in her favour is that if she indeed carries out her duties with such devotion, such that she would have carried them out in the case of the plaintiff, then somehow, a mistake has crept in, in the recordal of her call sign alongside the name of the plaintiff in the document containing the names of arrested persons. I therefore reject the defendant's version that officer Mashabela effected the arrest of the plaintiff.

It was common cause between the parties that the defendant bore the onus of proving that the arrest was lawful[1]. Now the issue of a warrant of arrest by a magistrate is a complete defence to a claim for wrongful arrest[2] and that, in the ordinary course of events, would render the ensuing imprisonment lawful. That presupposes that the arresting officer has access to a valid warrant to back up the arrest. In respect of four of the summonses, there were warrants of arrest, albeit that they were not physically available at the scene of the roadblock and, therefore, at the time of the arrest. Mr *Theron*, counsel for the plaintiff, submitted that that, in itself, rendered the arrest unlawful. I was not referred to any law or authority to the effect that an arrest effected in those circumstances would nevertheless be valid. On the contrary, section 45 of the Criminal Procedure Act, No. 51 of 1977, provides as follows:

"45 **Arrest on telegraphic authority**

(1) A telegraphic or similar written or printed communication from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any person, shall be sufficient authority to any peace

1 As the cases in the next footnote indicate, if an arrest is effected in accordance with a warrant of arrest, the *onus* of proof shifts. In the present case, warrants for the arrest of the plaintiff had been issued but they were not available at the scene of the arrest, a problem I address in the main paragraph. Because I have assumed, for the purpose of this judgment, that the plaintiff was lawfully arrested, the question of *onus* does not arise.

2 *Divisional Commissioner of SA Police, Witwatersrand Area and others v SA Associated Newspapers and others* 1966 (2) SA 503 (A) 511G- 512B; *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 500A and 507G-H; *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A) at 56B – D

officer for the arrest and detention of that person.

(2) The provisions of section 50 shall apply with reference to an arrest effected in accordance with subsection (1)."

Not only was there no suggestion that a "communication" of the nature described in section 45 existed, there was no suggestion that the knowledge of the warrants that the Metro Police officers at the scene of the roadblock had at their disposal, was forthcoming from either a magistrate, justice of the peace or peace officer. Were I to speculate that the officers stationed in the Magistrate's Court, who were passing on information to the officers at the scene of the roadblock, were peace officers, I am still left with no evidence that what the former passed on to the latter constituted a telegraphic or similar written or printed communication.

I nevertheless do not intend to proceed on that basis. The reason is that even though the arrest might in those circumstances have been unlawful, it introduces an unnecessary complication into the matter so for present purposes I will assume that the Metro Police were entitled to act on the strength of the communication to them that there were in existence warrants of arrest for the plaintiff. Mr *Theron*, made a point that in the case of one of the summonses, the defendant was unable to produce the warrant at all (copies of the others were handed in during the trial) and that in the case of that summons at least, the defendant was unable to prove that the arrest was lawful. For reasons that follow, I need also not deal with this point.

When a magistrate issues a warrant for the arrest of a person, it is not the function of the arresting officer to sit on appeal, as it were, to decide whether the magistrate was correct or not in issuing the warrant. As I have already pointed out, if a police officer executes a warrant, he or she cannot be faulted for having done so and if it later transpires that the warrant should in the first place not have been issued, that is not something that can be laid at the door of the police officer. If, therefore, it later transpires that there was insufficient reason to justify the issue of the warrant, that, *per se* would not ground an action for unlawful arrest and imprisonment against the police officer or his or her employer.

What takes this case out of the scope of the general rule, in my view, is the *proviso* to section 55 of the Criminal Procedure Act, No. 51 of 1977. In short, section 55 provides for a court to issue a warrant for the arrest of a person who fails to appear in court in answer to a summons, if the court is satisfied from the return of service that the summons was served on that person. What is important is the *proviso* to that section.[3] The relevant portion of the *proviso* reads as follows:

"Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant-

3 The cases to which I refer in the previous footnote were all decided in respect of arrests effected under Act 56 of 1955, the predecessor to Act 51 of 1977. Act 56 of 1955 did not contain a *proviso* similar to that contained in section 55 of Act 51 of 1977.

(a) may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or

(b) shall, where it appears to him that the accused did not receive the summons in question ..... or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he may require the accused to furnish an affidavit or affirmation,

release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall *mutatis mutandis* apply with reference to the said offence."

Now it appears abundantly clear to me that the court that issued the warrants of arrest for the plaintiff should not have done so.[4] It is difficult to comprehend how someone exercising a judicial discretion to cause the arrest of a person with the name "Van Rensburg" would not have noticed that the summons was served on a person with a completely different name, unless of course the judicial officer who did so merely performed a mechanical exercise by rote in signing one warrant after another, without personally ensuring that it was correct to do so. I suppose that a mistake could creep in somewhere but the same mistake five times in respect of the same individual?[5] The mind boggles at the notion that one can be deprived of ones liberty with so little thought going into the act which precipitates it; that a person who appends his or her signature to a document which will be used to deprive a person of his or her liberty might have given scant thought to the seriousness of the act. On the face of it, the judicial officer or officers who signed the warrants appear to have been indifferent to the consequences of that act. As I have already indicated, that was not the arresting officer's concern, insofar as the initial arrest was concerned. The same does not hold true for the further detention of the plaintiff thereafter.[6] That is where the *proviso* to section 55 comes in.

4 I say this because the accused named in the summonses was the not the plaintiff: it was the Cancer Association, so service on Le Roux and on Sithole did not amount to service on the plaintiff. At best, it might have constituted service on the Cancer Association.

5 I suspect that that may be the result of a misconception concerning the import of regulation 336 to which I refer above. At best, it entails that service on the proxy amounts to service on the entity which he or she represents. It most certainly does not mean that if service is effected on some other employee, then service on the latter amounts to service on the proxy, who in any event is not the accused. Whilst the law caters in a number of instances for substituted service (i.e., service other than personal service) on the party required to be served, I am unaware of the concept of substituted service on the so-called proxy. Thus, if service on X (a natural person) is in law deemed to be service on an association, service on Y (also a natural person) may constitute service on the association. It cannot constitute service on X, if X is not the accused.

6 Because of what I state in footnote 3 above, the cases to which I refer in footnote 2 are distinguishable.

I will accept that paragraph (b) of the *proviso* vests an arresting officer with the power to make a judgment call and that a court will not readily interfere with it. The officer must apply an element of subjectivity in reaching a decision and a court is not entitled, in such circumstances, to adopt an entirely objective approach to determine whether the officer's decision was a proper one or not.[7]

The difficulty that I have in the present case is that it is abundantly clear that the arresting officer or officers did not remotely bother to do anything at all towards fulfilling the duty imposed under paragraph (b) of the *proviso* to decide whether to detain the plaintiff or release him with a warning to appear in court. On the facts placed before me, both officers whom the plaintiff questioned about the reasons for his arrest simply ignored his question. Whilst there might (unjustifiably) be something impersonal about issuing a warrant of arrest, there certainly is nothing impersonal about executing it and detaining the subject of the arrest. It is difficult to imagine a person meekly submitting him- or herself to arrest without questioning the reason therefor and, if it is invalid, protesting the invalidity. What happened in the present case was that the plaintiff was deprived of the opportunity to place any facts before the arresting officer. Had he been permitted to do so, not only would it have appeared to the arresting officer that the plaintiff had not received the summons (the yardstick set by paragraph (b) of the *proviso* to section 55) the arresting officer would have been impelled ineluctably to the conclusion that the plaintiff had not been served.[8] That would have obliged the officer to release the plaintiff. The officer would not have had any discretion not to do so. It was the officer's failure, nay, reckless dereliction of duty, which resulted in the plaintiff's imprisonment and further detention following his arrest. Whilst I accept that before an arresting officer may release an arrested person, the officer must be satisfied of the existence of circumstances postulated in the *proviso* to section 55 which would justify the officer releasing the arrested person, the fact that the arresting officer did not give consideration to the facts surrounding the plaintiff's arrest was due entirely to the officer's default and he or she cannot be excused from liability for not doing what it is abundantly clear that he or she would have done (namely, to release the plaintiff on warning) had proper procedure been followed.

I am satisfied that the Metro policemen who arrested the plaintiff acted unlawfully in detaining him (albeit that the initial arrest was lawful) and that they did so in reckless disregard of whether they were acting lawfully or not. The defendant admitted in its plea that in arresting and detaining the plaintiff, the Metro police acted in the course and scope of their employment with the defendant. That entails liability on the part of the defendant for the plaintiff's

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7 *SA Associated Newspaper* case (footnote 3) at 511H – 512A; *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883 – 884

8 At the risk of stating the obvious, my judgment is not that the arresting officer *should* have been satisfied (the objective yardstick). My finding is that he or she *would* subjectively have been satisfied along the lines specified in the *proviso* to section 55 of Act 51 of 1977 that the plaintiff had not received the summons, had he or she made the necessary enquiries.

damages that he has consequently suffered and the question that I now have to address is the *quantum* of the plaintiff's damages. In performing that exercise, I am guided by the judgment of NUGENT, JA in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA).

In paragraph 17 of his judgment, NUGENT, JA stated:

"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 a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

Notwithstanding that *dictum*, I must take due note of the *quantum* of the award in that case and then highlight both similarities and differences between that case and the present one.

There is not a critical difference, timewise, between the occurrence in the *Seymour* case and the present one. The former took place in 2001, the latter in 2003. Further, whilst the plaintiff in the former was detained for five days, only one was really spent in prison; the remainder of the time he was hospitalised. So there is really not much difference in the time actually spent in prison. As regards their respective ages, the plaintiff in the *Seymour* case was 63 years old; the plaintiff in the present case ten years older. The plaintiff's other personal circumstances I have already adumbrated above.

It is obvious that a mathematical extrapolation from the award in the *Seymour* case to the present one is not possible, indeed, would be undesirable. I do not intend to attempt to place a monetary value on the differences between the two cases. The *quantum* of the award in *Seymour*, however, makes it clear that the amount that the plaintiff claims (R300 000,00 in the summons or R150 000,00 in his counsel's heads of argument) is excessive. Viewing the facts of the case as a whole, I believe that justice would be done were I to award the plaintiff an amount of R75 000,00. Although the *quantum* falls within the jurisdiction of the Magistrate's Court, the plaintiff was, in my view, justified in seeking redress in the High Court. Added to that is my distaste for the behaviour of the defendant's Metro Police and their indifference to the lot of a respectable citizen. I intend therefore to award costs on the High Court scale. Further, counsel asked that I award costs on the scale as between attorney and client. There is merit in that request. Public officials must be made aware that the Courts will not tolerate high-handed (not just neglectful) behaviour which results in the people that they serve suffering injury at their hand.

Judgment is granted against the defendant in favour of the plaintiff for:

1. Payment of the sum of R75 000,00;

2. Interest on the said sum at the rate of 15,5% *per annum* from 8 September 2003 (the date of delivery of demand) to date of payment;

3. Costs of suit on the scale as between attorney and client.

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A.J. Horwitz

Acting Judge of the High Court

Date of hearing	:	17, 18 May 2007
Date of judgment	:	21 November 2007
Plaintiff's counsel	:	E Theron
Plaintiff's attorneys	:	De Villiers Scholtz Johannesburg
Defendant's counsel	:	S Bunn
Defendant's attorneys	:	Molefe Knight Randburg