IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL COURT)

CASE NO: EL 375/15

ECD 775/15

[Not reportable]

In the matter between

CURTIS DAMIEN NEL Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

MBENENGE J:

Introduction

[1] On the evening of 22 January 2015 the plaintiff and his companions (the late Madoda Chelsean (Madoda) Hallom and a certain Kwanele) had been at Ndosie's Tavern, Southernwood, East London where they partook of alcoholic beverages. At about 21h00, on the same night, as they left the tavern proceeding to a shop to buy bread for themselves, it started raining heavily. They took refuge in a distribution room

(electrical room) in Bishop Court (the Flats), in the hope that the rain would subside. It however continued raining, resulting in the plaintiff and his companions spending the remaining hours of the night in the electrical room.

[2] In the earlier hours of the following morning the plaintiff and his companions were arrested and subsequently detained by members of the South African Police Service (the Service) having been suspected of breaking into a motor vehicle and stealing therefrom several items. Because the plaintiff and Madoda had sustained injuries at about the same time the arrest was effected, they were treated at the Frere Hospital (the Hospital) and discharged, but remained in police custody until released on bail upon appearing in court. The criminal proceedings that the plaintiff and his companions subsequently faced were eventually withdrawn.

[3] In the wake of such withdrawal the plaintiff and Madoda launched separate action proceedings before this court seeking to recover damages from the defendant sued on a vicarious liability basis, consequent upon their alleged wrongful arrest and detention, and alleged assault by members of the Service. The proceedings were consolidated as they emanated from the same set of facts. At the commencement of the trial of the consolidated action I was informed, from the Bar, that Madoda had met his demise on the previous morning. In light of this, the actions were separated, with the case of Madoda standing over to allow for a possible substitution, in due course. In these circumstances, the plaintiff's case proceeded on its own, and ran to a finish, hence this judgment.

The pleadings

[4] As already pointed out, the action is three-pronged. Claim A is for arrest and detention of the plaintiff from 23 January 2015 to 26 January 2016, which is said to have been unlawful principally on the ground that prior thereto the members of the Service concerned bore no reasonable grounds for believing "*that the plaintiff had been involved in the commission of an offence.*"

Claim B relates to the assault on the plaintiff allegedly perpetrated by members of the Service during the arrest and resulting in the plaintiff sustaining lacerations to his head and left hand, and "*injury to his dignity.*"

[5] In resisting the action the defendant, whilst admitting that the arrest had been without a warrant, pleaded that the arrest was "*executed after a case of theft and malicious injury to property was brought against the [plaintiff].*" The assault, so it was pleaded, was perpetrated by "*community members who assisted the complainant in the case against the plaintiffs whilst they were fleeing from the scene of crime.*"

Issues for determination

[6] The trial proceeded with the following issues falling to be determined, namely:

(a) whether the arrest and resulting detention of the plaintiff was justified;

(b) whether the plaintiff was assaulted by members of the Service; and

(c) in the event of any one of the issues referred to in paragraphs (a) and (b) above being decided in favour of the plaintiff, the quantum of damages to which the plaintiff is entitled.

[7] Regard being had to the provisions of rule 39(13) of the Rules of Superior Court Practice, the plaintiff adduced evidence first, bearing the onus to prove the alleged assault on him, whilst the defendant remained bearing the onus to justify the arrest and detention. The case of the plaintiff was closed after he (the plaintiff) had testified. In pursuit of the defence to the action Constable Mntwelizwe, Constable Mani and Ms Nolubabalo Mpanza testified, one after the other.

The assault

[8] According to the plaintiff he drank himself to a stupor and slept through the night, whilst his companions continued drinking, in the electrical room. Towards daybreak on Friday, 23 January 2015, at about 4h00, the plaintiff was woken up by the scream of Madoda, the first victim of the assault. Two policemen clad in uniform, in the company of a civilian, started hitting them. He said he was hit three times on his head with a steel object, approximately 30cm in length, that looked like a gun; he warded off the fourth blow with his left hand, in the course of which he sustained an injury to his middle finger. As a result of the injury to his head he bled a lot and at some point became unconscious. Kwanele was handcuffed whilst he and Madoda were tied with a cable around their wrists.

[9] The assault and the fact that blood flowed on the floor into a nearby flat made one of the flat occupants agitated and demand that they clean the floor of the blood, which Kwanele did. Pepper spray was thereafter shot in their eyes. Even though water contained in a 20 litre drum was splashed on them to wipe out the blood on the plaintiff's and Madoda's heads, the bleeding did not stop. The only person the plaintiff said he saw being assaulted by a civilian was Kwanele. The plaintiff testified that the injuries he sustained were caused by the police.

[10] The plaintiff denied ever breaking into a motor vehicle parked outside the Flats and having stolen items therefrom. Because he and Madoda grew weak from the injuries they bore, prior to being detained, they were taken to the Hospital where they were treated and discharged. The plaintiff testified that when they were being treated he asked the nurse in charge to furnish him with a J88 medical form, at which point the policemen in their company interposed saying the nurse should not do so as the plaintiff was a criminal who did not deserve of being furnished with the J88 form.

[11] Under cross examination the plaintiff denied having informed the attending nurse that he had been assaulted by members of the community, stating that all he told the

nurse was that they had been assaulted by the police and that the police had told them to keep their mouths shut and say nothing about the assault.

[12] Constable Mntwelizwe who was the first to testify in defence to the action is a member of the Service who resides at the Flats. Upon knocking off duty on the morning in question, he got to the Flats and saw three men escape from the side of the driveway in the vicinity of the car park. He smelt a rat, and gave chase. He apprehended one of the suspected culprits, described as having been taller than the two others – Kwanele. Mr Botye, one of the flat occupants, apprehended the plaintiff and Madoda. When the two were brought to the scene they were already bleeding from their heads. Constable Mntwelizwe did not know how the plaintiff and Madoda got to be injured, and only received a report from Mr Botye that they might have been assaulted by some young men in the street before being apprehended. Constable Mntwelizwe said he enquired about the identity of the assailants from Mr Botye, but Mr Botye did not seem to know the names of the assailants. He at some stage went down the street to investigate who the alleged assailants were, to no avail.

[13] Constable Mani, who effected the arrest on the plaintiff and his companions, testified that he got to the scene at a time when the plaintiff (and his companions) had already been apprehended. According to Constable Mani at that point the plaintiff was already bleeding from his injury on his head.

[14] Ms Mpanza was a nurse in the Casualty Section at the Hospital during January 2015. She testified that whilst treating the plaintiff she made entries to the relevant hospital card. One of the entries appearing on the card is -

> "Community assault with a knobkerrie complaining of body pains and two lacerations to the head."

[15] Whilst she bore no independent recollection of the facts of this matter, Ms Mpanza was adamant that she made the entry based on the information supplied by the plaintiff, adding that it was standard practice to do so, unless the patient in the company of the

police was not able to speak, in which event she would have recorded what the police informed her.

[16] It is clear from the above that I am faced with two mutually destructive versions and the court's approach in such an instance was stated by Eksteen AJP (as he then was) in *National Employers General Insurance Co. Ltd v Jagers* as follows:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.
>
> This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-öperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[17] The plaintiff claims to have been assaulted by members of the Service when the impugned arrested was being effected. On his own showing he was heavily intoxicated and at some point half conscious. His perceptions must have been greatly impaired, rendering his account of how he received the injuries less credible. There is no reason to

disbelieve the version of the police witnesses that Mr Botye is better placed to shed light regarding how the plaintiff got to be injured. The version of the police witnesses regarding the assault finds support from Ms Mpanza's testimony concerning what the plaintiff told her. Ms Mpanza was not shaken under cross examination.

[18] It is thus more probable that the plaintiff was assaulted by members of the community prior to being arrested, and not by the police, with the result that the plaintiff must be non-suited on the assault claim.

The arrest and detention

[19] According to the plaintiff none of the police who arrested them and accosted them to the police van informed them of the reason for the arrest. Nor were they warned of their constitutional rights prior to the arrest. He further testified that Kwanele said he overheard the police discussing among themselves that they were just going to drive them around the block and thereafter release them, but that never happened. There had been mention of them having broken into a car and having stolen therefrom a spare wheel, car radio and some money from Kwanele, but according to the plaintiff the police informed them of the alleged offence upon arrival at the police station. The only time, according to the version of the plaintiff, they were warned of their constitutional rights was on Saturday, 24 January 2015 when they were being charged.

[20] The version of Constable Mani which is a far-cry from that of the plaintiff was that at the scene the plaintiff and his companions were warned of their constitutional rights.

[21] An aspect which, in my view, is dispositive of this case is whether the plaintiff's arrest, without a warrant, was justified in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). Section 40(1)(b) gives a police officer, such as Constable Mani, the power to arrest, without a warrant, a person reasonably suspected of having committed an offence referred to in Schedule 1 to the CPA.

[22] It is trite law that jurisdictional facts for an arrest made in terms of section 40(1)(b) are that-

(a) the arrester must be a peace officer;

(b) the arrester must entertain a suspicion;

(c) the suspicion must be that the arrestee committed an offence referred to in Schedule 1; and

(d) the suspicion must rest on reasonable grounds.

[23] Constable Mani who arrested the plaintiff is definitionally a peace officer. It remains only to consider whether the defendant discharged the onus of establishing the three other requisites.

[24] Constable Mntwelizwe bore no hand in arresting the plaintiff. He however interacted with Mr Botye and verified that Mr Botye's vehicle had been broken into and certain items removed therefrom.

[25] Constable Mani arrested the plaintiff (and his companions) on the strength of information gleaned from Mr Botye. The relevant portion of the transcript captures the essence of Constable Mani's testimony as follows:

> "… I then interviewed Pumi Botye aside.
>
> And what did he tell you in this interview? --- He told me that there had been a breakage from his motor vehicle. I asked him as to what was he thinking off.
>
> And what was his response? --- He said he was thinking of opening a case M'Lord.
>
> Did he say who he suspected to have broken into his motor vehicle? --- Yes I asked him that question, he pointed at the three people who were standing with the constable. After he told me that M'Lord he had an intention of opening a case I said to him that he had to go to East London Police Station to open a case.
>
> Yes? --- The other thing that I noticed to the three people, the other two were bleeding.
>
> Yes? --- When I tried to find out as to what happened, it appeared M'Lord that the people who tried to apprehend them, according to the information I gathered from Mr Botye when he tried to apprehend them they ran to the street. He went to fetch them across the

> street, he was assisted by people and it became clear M'Lord that when he went to fetch them across the street he came with them bleeding. Before I could go M'Lord Constable Ntwelizo went to look if he could see those people from the street, but when he came back he came back not seeing those people.
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> Sir were the three people arrested at any stage? --- Yes.
>
> COURT At which stage? --- After Constable Ntwelizwe came back and I also M'Lord, after I interviewed Mr Botye I told them that as they were pointed after the breakage from the motor vehicle that they are the ones that broke into the motor vehicle and they are now arrested.
>
> So you were the person who arrested them? --- That is correct.
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> COURT Sorry before you proceed, you arrested tem on the strength of what Botye told you? --- Yes that is correct M'Lord Botye pointed at them as the people who broke into his motor vehicle.
>
> For no other reason? --- No M'Lord."

[26] From a reading of the above, there certainly is nothing linking the plaintiff to the commission of the alleged offence. There was no investigation, on the part of Constable Mani, into the essentials relevant to each particular offence. Even assuming that Constable Mani harboured a suspicion, the circumstances giving rise to the suspicion were not such as would ordinarily move a reasonable man to form the suspicion that the plaintiff had committed a First Schedule offence. Constable Mani appears to have accepted the mere *ipse dixit* of Mr Botye without ado. He conducted no verification of what he was told by Mr Botye. There is no evidence of the information gleaned by Constable Mntwelizwe having been conveyed to Constable Mani. The steps taken by Constable Mani were not sufficient.

[27] The detention of the plaintiff following upon an unjustified arrest was similarly unjustified. This renders it unnecessary for me to enquire into whether Constable Mani applied his mind as to whether the detention was necessary at all.

Quantum

[28] There remains the question of damages to be awarded the plaintiff for the unlawful arrest and detention.

[29] One should be wary of the fact that the award to be made should reflect on the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is regarded in our law. In *Thandani vs Minister of Law and Order* Van Rensburg J made the following observation with regards to unjustified deprivation of liberty:

> "In considering *quantum* sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual."

[30] Another useful and comprehensive list of the factors to be taken into account when an award of damages for wrongful arrest and detention is being considered is highlighted in *Law of Damages* in the following terms:

> "The circumstances under which the deprivation of liberty took place, the presence or absence of an improper motive or "malice on the part of the defendant; the harsh conduct of the defendant; the duration and nature (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age and health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interest such as honour and good name and constitutionally entrenched fundamental rights have infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed in some way to his or her misfortune; the effect the award may have on the public purse; and according to some, the view that the *actio iniuriarum* also has a punitive function."

[31] The plaintiff was arrested in the early hours of Friday, 23 January 2016. He was thereupon detained in police cells for the period up to and including Monday 26 January 2016 at 16h00 when he was released on bail. The arrest took place within view of members of the public (occupants of the Flats). He was being associated with the

commission of an offence. There is no evidence of how many members of the public eye-witnessed the arrest. He was not supplied timeously with the medication he needed given to him at the Hospital. He estimated the cell inmates at around 28, yet the cell area was 150m². They were all supplied with not so thick mattresses and two blankets per awaiting trial inmate. The circumstances were not described as having been squalid, but that does not detract from the fact that an unlawful detention constitutes a serious inroad into the freedom and rights of an individual.

[32] There is not much to say about the plaintiff's personal circumstances. He is 24 years old, having been born on 24 February 1992, and is unemployed.

[33] Regard being had to the factors dealt with above and awards made in other cases,involving unlawful arrest and detention, I am of the view that an award of R140 000.00 should reasonably compensate the plaintiff.

Costs

[34] The parties were *ad idem* that costs should follow the result, but differed with regards to the scale of such costs. The plaintiff has attained substantial victory. This is not the case of a defendant who has been successful on a distinct issue wholly unconnected with the issue upon which the plaintiff has succeeded. The whole of the plaintiff's evidence was relevant in pursuit of both claims, albeit that the assault claim, which is in any event on the facts of this matter a smaller claim, has failed.

[35] Unlike in *Fubesi vs Minister of Safety and Security*, I did not find the facts of this matter and the application of the legal principles thereto to be complicated. In my view, costs should be awarded on the Magistrate's Court scale as that court could and should have been approached for redress, in the first place.

Order

[36] The following order is made:

(a) The plaintiff's claim for damages arising from his arrest and detention (Claim A) succeeds, whilst the claim for damages arising from his assault (claim B) is dismissed.

(b) The defendant is directed to pay the plaintiff R140 000.00 as and for damages in respect of his unlawful arrest and detention, as also interest on this amount at the legal rate from a date 14 days from today to date of final payment.

(c) The defendant shall pay the plaintiff's costs of suit on the Magistrate's Court scale, together with interest thereon at the legal rate from a date 14 days after *allocator* to the date of final payment.

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S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the plaintiff : Mr D Pitt

Instructed by	:	M T Klaas Attorneys East London
Counsel for the defendant	:	Mr N P Mnqandi
Instructed by	:	Bhisho State Attorney East London
Date heard	:	21 – 23 June 2016
Date delivered	:	26 July 2016