REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/05013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

KHAMBULE, PEPI Plaintiff

and

MINISTER OF POLICE defendant

J U D G M E N T

A J BESTER, AJ:

[1] In this action, launched in January 2011, the plaintiff, a script writer and an actor in minor television dramas and the odd film production, and a self-proclaimed celebrity, instituted action against the defendant, the Minister of Police, for damages in the total sum of R3 715 000,00 for unlawful arrest, detention and assault by members of the South African

Police Service ("SAPS"). That sum was subsequently amended down to a total of R270,250.00.

[2] In summary, the plaintiff's claim against the defendant is based, among others, on the following allegations:-

a) At about 16:00PM on 19 May 2010, he was unlawfully arrested on a charge of "*(a)ssault on police officers and obstruction*" by members of SAPS, Johannesburg Central, acting within the course and scope of their employment, and assaulted;

b) After the arrest, he was "*unlawfully and unreasonably detained*" in the Johannesburg Central Police Station holding cells until about 23:45 PM on 20 May 2012, when he was released on warning;

c) The arresting officer "*incorrectly exercised*" or failed to exercise his or her discretion in favour of releasing the plaintiff in terms of sections 56 or 59 of the of the Criminal Procedure Act;

d) On 21 May 2010, the Control Prosecutor issued a certificate of *nolle prosequi* in respect of the charges;

e) As a result of the conduct of the members of SAPS, he has suffered injury to his person, privacy, dignity and right to freedom.

[3] The defendant admits, among others, the arrest; the application of a minimum of force to subdue the plaintiff and to effect the arrest; certain minor injuries sustained by the plaintiff during the course of the arrest; the detention and the release of the plaintiff on warning; and the *nolle prosequi*. The defendant denies the alleged assault.

[4] The defendant furthermore pleads that the arrest and detention was justified in terms of section 40(1)(a) of the Act and are thus lawful. In terms of section 40(1) of the Act a "*peace officer may without warrant arrest any person – (a) who commits or attempts to commit any offence in his presence*". Where an offence is committed in the presence of a

peace officer, a warrantless arrest under section 40(1)(a) is therefore not peremptory, but discretionary.

[5] For the sake of completion I mention that, in its request for trial particulars, the plaintiff made the following enquiries relevant to the exercise of this discretion by his arresting officer :-

a) Why the arresting officer had arrested the plaintiff instead of merely giving him a written notice to appear in court in terms of section 56 of the Act;

b) Whether the arresting officer had considered the section 56 procedure and if so, "*on what reasonable grounds … (he had decided) not to issue a written notice for the plaintiff to appear in court*".

[6] In its response to the request the defendant stated that the particulars sought, is "*a matter of evidence*".

[7] Two witnesses were called in the plaintiff's case, namely the plaintiff and a medical practitioner, Dr Sack. The defendant in turn called three witnesses: the principal arresting officer, Detective Warrant Officer Kutoane ("Kutoane"), the assisting arresting officer Detective Constable Segone ("Segone") and Warrant Officer Malebe.

[8] It is necessary to say at the outset that there were sharp conflicts between the testimony given by the plaintiff and that given by the police officers on topics pertinently relevant to the disputes in the action. Moreover, during cross-examination various inconsistencies were demonstrated in the evidence of all of the witnesses. However, when a general allowance is made for the rapid, phase by phase unfolding of the events that lead to the scuffle during the arrest and the circumstances under which observations were made by the players in the action, coloured as these must inevitably be by peculiar traits of character, differing vantage points and the lapse of time since the

arrest, then these blemishes in their evidence do not warrant, either in isolation or cumulatively, adverse credibility findings favourable to, or against any party. As underscored in **Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd** 1987 (3) SA 453 (A) at 469F – G,

> "Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction."

In this regard it is also apposite to refer to the remarks of Diemont JA in **S v Nyembe** 1982 (1) SA 835 (A) at 842F – H in respect of contradictions relating to events that had occurred some eight months before the hearing in that case:-

> "I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial Judge knows that human memory is only too fallible …"

[9] So it was in this case. The plaintiff narrated his version of the events with dramatic flair, graphic detail, colourful embellishment and, at occasion, gross exaggeration. He even broke down, as if on cue, and wept, for a moment in time, apparently overcome by emotion at the mere recall of what he considered to be the sheer, mindless brutality visited upon him by his arrestors. But graphic detail, embellishment and exaggeration in his case do not necessarily point to deliberate

dishonesty; it could equally be an oddity of an artistic propensity to accentuate a perceived wrong by inadvertent dramatization.

[10] The testimony of each of the police officers was also not quite picture perfect; it did not dove-tail in all respects with factual summaries in old sworn statements or even with the testimony of the other officers. Understandably, where long after the event memory is strained to reconstruct and to recall minutiae under the pressures of cross-examination, new and broader detail and insight would emerge, inevitably criticisable as *ex post facto* modification, addition or distortion. But that too, does not necessarily point to dishonesty. On the contrary, had these officers, so long after the event and with so many other subsequent, successive factual sets to cloud memory, sung as it were in chorus and with a perfect recall, that could certainly have been indicative of, euphemistically pitched, an overzealous defence witness preparation.

[11] For reasons that will become apparent below it is, however, not necessary to embark on an exacting, scientific analysis of the evidence such as that propounded in **Stellenbosch Farmers' Winery Group Ltd v Martell et Cie** 2003 (1) SA 11 (SCA) in order to resolve the irreconcilable versions in this case in order to determine, on the probabilities, the more acceptable of the versions.

[12] Considering first the plaintiff's case based on the alleged assault, this claim can be eliminated without much ado. The plaintiff's evidence on the alleged assault amounted to this:-

a) He was repeatedly and brutally assaulted by the arresting officers by whom he was slapped, punched, kicked ("with booted feet"), stomped and trampled.

b) These alleged assaults commenced, he said, during the arrest when he was after a chase tripped and wrestled to the ground on the cobbled kerbing of the Rea Vaya Bus Rapid Transport lane,

and then punched, kicked and trampled underfoot. When attempting to rise after being cuffed, he was hit on the right knee with a pistol but. He contended that had had attempted to protect his face with his arms and hands, the latter which were cuffed in front of his body, in order to avoid injury to his face (because he had an up-coming audition for a film).

c) That assault, he alleged, continued after he was seated by his arrestors in a sedan in which he was transported to the police station. Fist-blows were in the sedan rained on him.

d) The assault was resumed again in the basement of the police station after their arrival. There, he was kicked and beaten to the point where he had given up all hope of life.

e) Apparently not yet satiated, his arrestors then resumed the assault in the lift on their way to their office. He was then punched and slapped.

f) Next, in the charge office, he had to ward of blows when forced to sign certain formal documents, such as his warning statement. (Ironically the latter has, among others, a declaration by the plaintiff to the effect that he had not been assaulted in any way.)

[13] The arresting officers admitted a moderate measure of force to effect the arrest of the plaintiff and certain minor injuries sustained by the plaintiff in the course of the arrest. They had wrestled the plaintiff down in the buss lane because he had resisted arrest by Kutoane. However, they emphatically denied the alleged subsequent assaults.

[14] The plaintiff's evidence of this unbounded train of incessant and vicious assaults involuntarily called to mind the generalisation in **R v David** 1962 (3) SA 69 (SR) that "*complainants in assault cases … are notoriously prone to exaggerate*". And "*exaggeration*" becomes apposite and improbability inevitable when the plaintiff's evidence of

these alleged assaults is considered together with the testimony of his witness, Dr Sack:-

a) Dr Sack testified that during an examination of the plaintiff in the morning of 21 May 2010, he had found that the plaintiff had swelling and tenderness of the right knee and lower back, and tenderness of the chest wall, abdomen, lower back, neck and skull.

b) However, he found no bruises, abrasions and contusions.

c) Dr Sack further testified that the plaintiff did not present "*like a man beaten up*".

d) He said that the injuries were "*not that serious*", but were entirely consistent with, for example, a situation where minimum force was exerted in order to execute an arrest.

e) It was telling that Dr Sack's examination of the plaintiff did not reveal any injuries to the arms and hands. Such injuries would be expected if the plaintiff had indeed covered his head with his arms to protect his face during the alleged assaults.

[15] Dr Sack's observations, his conclusions and evidence, therefore, not only corroborate the denial of the assaults by the arresting officers; they also highlight the improbability of the plaintiff's allegations regarding the alleged sustained and mindlessly brutal assaults.

[16] Quite fairly, the plaintiff's counsel did not press the plaintiff's case founded on the alleged assaults and did not, in the final analysis, seek any relief in that regard.

[17] What then remains of the plaintiff's action is the alleged unlawful arrest and detention. The relevant facts alleged by the plaintiff in regard to his arrest are the following:-

a) At about 16:00 PM on 19 May 2010, the plaintiff was nearly run over by Kutoane at the intersection between Commissioner and Eloff Streets where Kutoane had skipped a red light;

b) Kutoane was talking on a cell phone when the incident occurred;

c) After Kutoane had made a U-turn and had parked the vehicle, the plaintiff deviated from, and interrupted his walk home to approach Kutoane to remonstrate with him, absolutely coolly, calmly and politely, the plaintiff maintained, about his recklessness, and to extract an apology;

d) Kutoane, the plaintiff also said, recognised him as a celebrity, and then became argumentative and insulting;

e) Segone then exited an adjacent shop and appeared to be supportive of Kutoane in his fracas with the plaintiff;

f) The plaintiff therefore turn his back on them and proceeded to walk away;

g) When the plaintiff was approximately 10 to 20 metres away, he heard the sound of pursuit and he tried to sprint away, but failed;

h) He was tripped, tackled and brought down in the bus lane, assaulted, handcuffed;

i) He only became aware of the fact that his pursuers were police officers during the course of that assault;

[18] In regard to the detention, the plaintiff testified, among others, that he was, after the repeated assaults referred to herein above, paraded in the general office of the police station where he was introduced to all and sundry as a celebrity, and mocked and humiliated. Thereafter he was incarcerated a holding cell of about $40m^2$ meters, over-crowded

with over 30 inmates. The latter, the plaintiff said, had immediately recognised him as a celebrity and had mobbed him for his autograph.

[19] The appalling conditions in the holding cell, described graphically by the plaintiff, ranged from faeces-smeared walls through malfunctioning toilets to a grime-stiffened and stained blanket that was "*unfit for human consumption*". Counsel for the defendant did not attempt to put a different spin on these sub-human conditions.

[20] In his evidence in chief and in cross-examination Kutoane testified, among others, as follows:-

a) He was called as back-up in a search of a shop in downtown Johannesburg after he had already departed for home;

b) He was on his cell phone whilst driving to the shop (despite that it was wrong to do so);

c) He got directions to the shop on his cell phone as he was lost;

d) He did in fact stop at a red robot at the intersection of Commissioner and Eloff Streets, but the vehicle had lurched forward and had nearly collided with the plaintiff;

e) He had signalled his apology to the plaintiff before he again proceeded on his journey.

[21] Kutoane further testified that, after he had parked and exited the vehicle, he was approached by a visibly agitated plaintiff. The latter had hurled an array of verbal abuse at him (comprising invective like "*big, fat pig*" preceded by the ubiquitous "f"-word). Then, apparently not getting the attention he demanded and the apology expected, the plaintiff had meted out a top-down, overhead slap to Kutoane's forehead and turned around and walked away.

[22] On Kutoane's testimony the slap was, however, not vicious - as he described and demonstrated it to the court, it was rather more of an indignant kind of a swat. In any event, it was common cause between counsel for the parties that the slap could ordinarily by no stretch of the imagination be considered as anything but a minor assault. However, counsel for the defendant argued, when a police officer doing no more than to attend to the discharge of his duties is at the receiving end of such an indiscretion, it should justify judicial scrutiny.

[23] Kutoane himself was apparently less annoyed with the verbal abuse than with the slap for, subsequently, he said, after some introspection, he had embarked on an exercise regime to improve his fitness and to reduce his weight. Nevertheless, despite the fact that Kutoane had no quarrel with the generally triviality of the slap, the slapping of a police officer whilst in the execution of duties apparently went a step too far for his sensitivities. He therefore called after the plaintiff to stop and, getting no reaction, set off in pursuit. The plaintiff attempted to sprint away. Kutoane tackled the plaintiff in the bus lane, wrestled him down, cuffed him and arrested him for assault on a police officer (with another count to be added later).

[24] Segone corroborated, among others, Kutoane's evidence of the verbal abuse, which he had overheard, and the slap which he had observed from the shop. Segone also testified that he had assisted in the pursuit of the plaintiff and with his arrest.

[25] The plaintiff denies both the verbal abuse and the slap, but I can find no reason why I should not in this regard accept, on the probabilities, the evidence of Kutoane as supported by Segone. Why would Kutoane, without any provocation and for no apparent reason invoke the power of a warrantless arrest and then perpetrate the alleged, but roundly disproved, succession of vicious assaults?

[26] Importantly, however, for the purposes of section 40(1)(a), both Kutoane and Segone testified that they did not at any time consider the release of the plaintiff on warning or on police bail as opposed to an arrest and detention as that was not their function. They said that even after they had opened a docket and had completed the necessary admin, the plaintiff was simply handed over to the lock-up. The further fate of the plaintiff, including a possible early release was, according to them, the responsibility of another official specifically tasked with such matter in accordance with standing order or policy. On their own version, therefore, they did not exercise any discretion whether to arrest or not; the warrantless arrest was a purely mechanical function pursuant to a perceived offence.

[27] A peace officer, such as Kutoane, in whose presence an offence is committed, such as an assault on a police officer, of course has a discretion whether or not to arrest the offender, for the requisite jurisdictional requirements for the making of an arrest under section 40(1) of the Act would be satisfied. But the presence of those jurisdictional facts alone does not suffice to make the arrest lawful, for when they are present, a discretion whether to arrest or not arises, and that discretion must not only be exercised, it must *properly* be exercised: **Duncan v Minister of Law and Order** 1986 (2) SA 805 (A) at 818H – J; **Gellman v Minister of Safety and Security** 2008 (1) SACR 446 (W) paragraphs 94, 100, 101; **Minister of Safety and Security v Sekhoto and Another** 2011 (5) SA 367 (SCA) paragraphs 29, 30.

[28] It is clearly established that the power to arrest is only available for the purpose of bringing an alleged offender before a court, and that the available methods of securing that attendance in court are arrest, summons, written notice and indictment in accordance with the relevant provisions of the Criminal Procedure Act. Read with section 40(1)(a) this implies that where a warrantless arrest is permissible, the *arresting*

peace officer must consider all factors relevant to the appropriate method of bringing the alleged offender before a court and balance them, the one against the other, for what might be justifiable in one case could constitute a gross abuse of power in another.

[29] It is clear that the Kutoane, the arresting officer, had never performed that balancing act. In fact, he had never applied his mind, as he was required to do, to the question of whether he should exercise his discretion in favour of, or against an arrest. He simply proceeded with an arrest on the basis of an erroneous assumption (or pursuant to an errant official directive) that it was not his job, but that of some other official tasked with the making a decision on an early release at some stage after the arrest.

[30] Even if Kutoane was unsure as to whether, for example, a written notice to appear would be an appropriate alternative to an arrest because of considerations such as the identity of the plaintiff, a fixed residential address, etc., he had available to him another option. That option was an arrest for the purpose of the verification of such matter and as a precursor to a written notice to appear in court. But even that option was not considered; he simply abdicated his responsibility of exercising the discretion to another. The arrest of the plaintiff was therefore unlawful.

[31] But even if I am wrong in this regard, and if it is persuasively arguable that the delegation to another of the discretion afforded a peace officer under section 40(1)(a) is competent, then the defendant in any event finds itself at the horns of a dilemma. It is common cause that the assault on Kutoane was barely of a sufficiently serious or reprehensible character to merit criminal sanction in the interests of society. There is ample authority for the proposition that offences of a trivial nature do not warrant the attention of a court and even if prosecuted, a court should acquit an accused: see **Coetzee v National Commissioner of**

Police and Others 2011 (2) SA 227 (GNP) paragraph 26 and the cases there cited; **S v Bugwandeen** 1987 (1) SA 787 (N).

[32] Moreover, as pointed out in **Sekhoto**, *supra*, at paragraph 44, by Harms, DP, "… *it is clear that in cases of serious crime — and those listed in Schedule 1 are serious, not only because the legislature thought so — a peace officer could seldom be criticised for arresting a suspect for that purpose … On the other hand, there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest*."

[33] If the exercise of a discretion to arrest an offender for a trivial offence is irrational, then the arrest of the plaintiff for that trivial offence and his continued, subsequent incarceration for it is in any event unlawful.

[34] It is common cause that the plaintiff was incarcerated in the above mentioned sub-human conditions from the late afternoon of his arrest to close on midnight of the following day. It needs to be said that, even if his arrest was warranted purely for the verification of his identity and address as a precursor to a notice to appear in court, his incarceration beyond the evening of his arrest was hardly required. It was common cause at the hearing that he by then had furnished the police with information readily capable of such verification.

[35] The court in **Coetzee**, *supra*, at paragraph 40, underscored the very important principle that, "*in the light of the provisions of the Constitution, read with the provisions of s 59, it is clear that an accused person who has been arrested for minor offences, for which bail may be granted in terms of s 59 of the Criminal Procedure Act, has a right to be treated in such a way that he is considered, for purposes of obtaining bail in terms of s 59 of the Criminal Procedure Act, as soon as possible*". (my underlining)

[36] The plaintiff's continued incarceration beyond the evening of his arrest and the failure to release him as soon as possible, which the defendant

did not explain or justify, was therefore not only unlawful, it assumes, on reflection, a fair air of spitefulness. As also pointed out in **Sekhoto**, *supra*, at paragraph 13, "*(t)here is judicial, academic and — according to media reports — public disquiet about the apparent abuse by some peace officers of the provisions of s 40(1): because they arrest persons merely because they have the 'right' to do so, but where, under the circumstances, an arrest is neither objectively nor subjectively justifiable. Paragraph (a), for instance, permits a peace officer to arrest a person who commits any crime in his or her presence. This may be used to arrest persons for petty crimes such as parking offences, drinking in public, and the like.*"

[37] I am accordingly of the view that the plaintiff is entitled to a satisfaction in damages for his unlawful arrest and detention.

[38] I have, for the purposes of the determination of an appropriate award, considered matter such as the circumstances of the arrest; the duration of the deprivation of the plaintiff's liberty; the high value of the right to liberty; the infringement of the plaintiff's honour and good name; the failure by the defendant to explain the plaintiff's continued incarceration beyond the evening of his arrest; the plaintiff's occupation, age, health and general income.

[39] However, I have also taken into account the fact that, on the probabilities, the plaintiff had indeed verbally abused and slapped Kutoane. Such conduct is generally indefensible but when perpetrated on a police officer about his duties, it is decidedly reprehensible. But for such conduct, the award ultimately made in the favour of the Plaintiff would have been more substantial.

[40] In the exercise of my discretion, I have therefore concluded that a sum of R35,000.00 is sufficient in the peculiar circumstances of this case to compensate the plaintiff for his unlawful arrest and detention.

[41] In respect of costs, because the sum of the damages ultimately claimed fell well within the jurisdiction of the Magistrates' Court, the matter did not deserve the attention of the High Court. In this case, as is the case with far too many damages actions, the sum initially claimed, was grossly overestimated and simply not justifiable on any basis. Realistically, the true value of the claim, if successful, was never a matter for the High Court. The plaintiff should therefore not be awarded High Court costs. Furthermore, although the plaintiff has attained a measure of success, he achieved substantially less than what he claimed. He should therefore not be awarded a full measure of costs.

I accordingly make the following order:-

(a) The defendant is ordered to pay the plaintiff the sum of R35,000.00;

(b) The defendant is ordered to pay to the plaintiff 50% of his taxed party and party costs, such costs to be taxed on the scale of costs as applicable in the Magistrates' Court.

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A J BESTER
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF	:	ADV A BESSINGER
INSTRUCTED BY	:	BESSINGER ATTORNEYS
COUNSEL FOR THE DEFENDANT	:	ADV M MAKOPO
INSTRUCTED BY	:	THE STATE ATTORNEYS
DATES OF HEARING	:	4, 5, 8, 9 OCTOBER 2012
DATE OF JUDGMENT	:	12 OCTOBER 2012