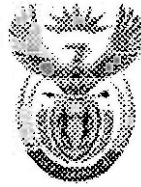


REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT OF SOUTH AFRICA
JOHANNESBURG LOCAL DIVISION

CASE NO: 2011/05017

(1)	REPORTABLE: <input checked="" type="checkbox"/> NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> NO
(3)	REVISED.
<u>11/1/13</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

BONGANI JOZELA

Plaintiff

and

MINISTER OF POLICE

Defendant

J U D G M E N T

MUDAU, AJ:

[1] This is an action for unlawful arrest and detention brought by the plaintiff against the Minister of Police, the defendant, arising out of the alleged

arrest and detention of the plaintiff by members of the South African Police Services.

[2] The plaintiff was allegedly arrested and detained on 17 August 2010 at about 13h00 in Booysens, Johannesburg.

[3] The defendant disputes the merits as well as the quantum.

THE APPLICABLE LAW

[4] Section 40 (1) (a) of the Criminal Procedure Act No. 51 of 1977 (the Act) states that:

“(1) *A peace officer may without warrant arrest any person –*
 (a) Who commits or attempts to commit any offence in his presence.”

[5] Chapter 2 of the Constitution of the Republic of South Africa Act No. 108 of 1996 headed Bill of Rights provides *inter alia* as follows:

“Freedom and Security of the person
 12. *(1) Everyone has the right to freedom and security of the person, which includes the right –*
 (a) Not to be deprived of freedom arbitrarily or without just cause;
 (b) Not to be detained without trial;
 (c) To be free from all forms of violence from either, public or private sources;
 (d) Not to be tortured in any way; and

(e) *Not to be treated or punished in a cruel, inhuman or degrading way.*"

[6] It is trite law that an arrest is *prima facie* wrongful and unlawful. It is for the defendant to prove that the arrest, if any, was lawful¹. Where a police officer relies upon Section 40 (1) (a), the onus is upon him to prove that a crime was committed in his presence². It follows if no crime was committed in the presence of the police officer that any arrest and subsequent detention would be unlawful.

EVIDENCE OF THE PLAINTIFF

[7] The plaintiff testified that he was arrested in John Street, Booyens in Johannesburg and detained from 17 August 2010 at about 13h00 until 12h00 on 18 March 2010 when he was released from the cells at Johannesburg Central Police Station. The plaintiff further testified that he did not know what he was arrested for, or that his rights were ever explained to him. He received a piece of paper that had his name on it but had lost it. The police told him that he was arrested for loitering, but he did not know what it meant.

[8] After his arrest, he was never taken to court. The plaintiff was detained in a 6X8 meters cell with sixty people. He was allocated a dirty and smelly blanket. The toilet in the cell was not working properly, had no toilet paper and

¹ See *Ralekwa v The Minister of Safety and Security* 2004 (1) SACR (T) at 134; *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) at 17; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 830.

² *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A).

no privacy. The plaintiff testified that he did not eat food the evening of 17 August 2010, but had bread and tea on the morning of 18 August 2010.

[9] During cross-examination, the plaintiff indicated that he was never arrested and detained in Johannesburg Central Police Station before 17 August 2010. Counsel for the defendant indicated that he had found a file in which plaintiff had instituted a similar action against the defendant which action was settled in favour of plaintiff. The plaintiff conceded this aspect.

[10] The plaintiff was recalled to the witness stand to explain the contradiction. He (the plaintiff), explained that there were two cases involved. In the first case he was arrested in April 2010 and in the second one in August 2010. He was confused about the dates and besides, he is yet to receive the money in settlement of his claim.

[11] Mr Masivuye Jozela testified on behalf of the plaintiff that he is the brother of the plaintiff and confirmed that he was arrested together with the plaintiff on the same day and place. They were both detained at Johannesburg Central Police Station. Mr Jozela testified that there were 40 to 60 people in the cell where he was detained. They were counted numerically and their names were also called out. He further testified that he received a notice of his rights but had lost it.

EVIDENCE BY THE DEFENDANT

[12] Warrant Officer Van Dyk testified that he is a police officer at the Johannesburg Central Police station with about 30 years service. He is currently an administration officer. He gave evidence regarding the SAP14 (cell register), SAP10 (occurrence book), SAP14A (the notice of rights) and SAP22 (register for property of prisoners).

[13] Warrant officer Van Dyk testified that it would be irregular for sixty people to be in a cell and that this could not happen. Each cell has a number indicating the total number of inmates that can be detained in that specific cell. Inmates are detained accordingly. There are regular cell visits to ensure that this is adhered to by authorities. He further testified that he was not aware of any broken toilets in the cells and that people's names would be called when checks were done.

[14] Warrant Officer Nukeri testified on behalf of the defendant, that he is a police officer stationed at the Johannesburg Central Police Station. He is in charge of the cells. He confirmed Van Wyk's testimony. His evidence is that he was on duty on the day of the plaintiff's alleged arrest and detention. As the name of the plaintiff does not appear in the SAP14, it could only mean that the plaintiff was not arrested and detained, or he gave a false name.

[15] Warrant Officer Nukeri emphasised that it would be irregular for 60 people to be kept in a cell and that he not aware of any broken toilet. If there

[15] Warrant Officer Nukeri emphasised that it would be irregular for 60 people to be kept in a cell and that he not aware of any broken toilet. If there was, inmates would immediately be moved to a different cell for maintenance work to be done. Their Police Station has more than 30 cells which accommodates from 7 to 30 inmates depending on the category of the offence at each of the three floors.

EVALUATION

[16] The credibility of the witnesses is decisive to a determination of the dispute. It is trite that, in order to succeed, the plaintiff must discharge the burden of proof that his version is true and that of the defendant is false.

[17] In evaluating the evidence on behalf of the plaintiff, it is common cause that there is no entry in the relevant police registers that the plaintiff was detained at the Johannesburg Central Police Station. Furthermore, it is common cause that, the plaintiff has no SAP 14 (notice of rights in terms of s 35 of the Constitution) that he claims he was issued with.

[18] I have no difficulty in finding that the plaintiff contradicted himself in a material way in this matter in that in his evidence-in-chief he testified that it was his first experience to be arrested and detained in this matter. He retracted this version when he was recalled to the witness stand after it was conceded that he had been arrested before as a result of which the defendant

in this case, settled the matter in the applicant's favour. I find this to be a material contradiction.

[19] The plaintiff's explanation that this was due to a misunderstanding holds no water. It inherently contradicts his version that as a result of his arrest in August 2010, not only did he inform his family but also the members of his church. His experience in this matter would certainly not be surprising as he based a claim regarding his arrest in April 2010 on facts that are similar. In both claims, he used the same instructing attorney. That there was a misunderstanding can only be a fabricated version.

[20] The plaintiff also testified in cross-examination that the reason why he gave conflicting versions in this regard was because he never received the money with regard to his first claim. Later in his evidence, he conceded that he received the money in respect of the first damages claim.

[21] There is no logical reason why the plaintiff's names would not appear on the SAP 14 register like two of his brothers and the rest of the people who were arrested on the date in question regarding this specific incident. Common sense dictates that the plaintiff was either, not arrested and detained as he alleges or he gave the police false names.

[22] The plaintiff's witness, Masivuye Jozela, was equally not an impressive witness. He could not tell this court whether plaintiff mentioned his names to the officers in charge of the cells at the police station. Neither could he tell this

court whether the plaintiff answered to his real names at the time of the roll call. This is in the least very surprising. One would expect the plaintiff's witness to have noted all these.

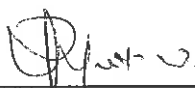
[23] Besides, the plaintiff's version that he was released the next day whilst at the police station is contradicted by an entry that was made on the 18th August 2010 on the SAP 10 register which indicates that those people who were arrested for loitering including his two brothers were escorted to the Johannesburg Magistrate Court by Warrant Officer Mahlangu at 10h05. This contradicts the version by the plaintiff that they were not taken to court. The plaintiff and his witness contradicted each other with regard to the number of inmates in the cell they were detained in. I find it highly improbable that sixty prisoners could fit inside a 6x 8 meter cell as suggested by the plaintiff. There would have no room for any of them to sit or sleep at night.

[24] In the contrary, I find that the version by the defendant's witnesses with regard to the prevailing practice at the time as well as the events surrounding the detention of those who were in custody during the relevant period, as highly probable. To my mind there are no reasons why the police would detain sixty people in one cell. Besides, this is not supported by the plaintiff's own witness or by the relevant registers that were discovered. The version by the plaintiff is overall dismissed as having been fabricated.

CONCLUSION

[25] In my view the plaintiff failed on a balance of probabilities in proving his claim against the defendant.

[26] In the result the plaintiff's claim is dismissed with costs.



T P MUDAU
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Dates of hearing: 23-24 October 2013.

Date of judgment: 01 November 2013.

Plaintiff's Counsel: Adv. A Bessinger.

Instructed by Bessinger Attorneys.

Defendant's Counsel: Adv. A.M Pheto.

Defendant's Attorneys: State Attorney.