



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 201/34042

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. YES 13/3/2013
7/03/2013 DATE	
..... SIGNATURE	

DUARTE, NICOLAU JOSE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

SPILG, J:

THE CLAIM

1. The Plaintiff sues for damages in respect of wrongful arrest, detention and also assault. The claim was initially instituted against the Minister of Police and the two policemen who were alleged to have committed the delicts. The summonses were not served on the individual policemen because of an alleged misdescription and mistaken spelling. The plaintiff confirmed that he would not pursue the case further against them. They are Lieutenant Masola

(at the time a warrant officer) and a reservist Constable Raphelo. Accordingly it is only necessary to refer to the Minister as the defendant.

2. The summons is made up of two parts; one for unlawful arrest and detention claiming an amount of R250 000 (general damages of R100 000 and damages for post-traumatic stress of R150 000) and the other for assault in which an amount of R254 000 is claimed (past medical expenses of R4 000, general damages of R100 000 and damages for post-traumatic stress of R150 000).

UNLAWFUL ARRESTS GENERALLY

3. It is clear that both under the common law, in respect of a claim for unlawful arrest and detention, and for delictual damages under Section 12(1) (a) of the Constitution, the defendant bears the onus to establish the lawfulness of both the arrest and the detention on the balance of probabilities. Under common law, see *Minister of law and Order & Others v Hurley & Another*, 1986 (3) SA 568 (A) 589E-F and *Minister van Wet en Orde v Mtshoba*, 1990 (1) SA 280 (A)284E-H and 286B-C. Both cases confirm that the action is based on an interference with the liberty of the individual. In relation to the constitutional infraction of Section 12(1)(a), see *Zeeland v Minister of Justice and Constitutional Development & Another*, 2008 (4) SA 458 (CC), at paragraphs 24 and 25 and 35, which identifies the claim as based on the unreasonable and unjustifiable infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause. In *Zeeland* the court also stated that the defendant bears the burden to justify the deprivation of liberty, whatever form it might have taken.

4. In order to escape liability for wrongful arrest and detention a peace officer effecting an arrest without a warrant must fall squarely within the provisions of section 40(1) of the Criminal Procedure Act 51 of 1977. The relevant provisions of the section for the purposes of this case are:

“(1) A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;*
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody*

5. The only relevant provision under Schedule 1 that can assist the defendant relates to the commission of an offence (other than resisting arrest), the punishment for which “... *may be a period of imprisonment exceeding six months without the option of a fine*”.

OVERVIEW

6. The defendant accepted the duty to begin. It became evident that generally the chronology of events is not in dispute: During the evening of the 9th July 2010 while returning from work the plaintiff was driving along Eric Street and his motor vehicle struck an 18 year old youngster who was either walking or running across the road. The accident occurred almost in front of the Sophiatown police station. The Plaintiff ran from the scene. He was apprehended by Lt. Masola and reservist Cnst. Raphelo at a street corner some 200 to 250 meters away. The policemen were in a police truck. They arrested the plaintiff at about 19:30.

7. After the plaintiff was arrested and placed inside the truck, he was driven back to the police station where his fiancé spoke to him while he was still in the back of the truck. He was then taken to the Drager Centre in order to have a breathalyser test conducted. From there the plaintiff was taken to the District Surgeon.
8. It is at this stage that the plaintiff claims to have been assaulted. He also claims that just prior to the assault the policemen had tried to force him to imbibe alcohol. After a blood sample was taken the plaintiff was driven back to the police station. The chairperson of the local Community Policing Forum, a Mr Oxley, arrived at the police station with Ms Bishop who was the plaintiff's fiancé at the time: they are now husband and wife. While at the police station Oxley was also arrested and detained by Masola for allegedly interfering with the police. An attorney arrived who secured police bail of R1000 and the plaintiff was subsequently released. According to the occurrence book he was released at 01:15 on Saturday morning 10 July 2010. The prosecutor subsequently declined to prosecute and the docket has disappeared as has the Plaintiff's blood sample. Masola claims that he had submitted the sample for forensic testing. Accordingly no test results are forthcoming.
9. The defendant contends that the arrest and detention were lawful. It claims that the plaintiff was arrested on the evening for reckless and negligent driving, driving under the influence of alcohol and for fleeing an accident scene. Tragically some four months later the young pedestrian passed away despite, by all accounts, having made good recovery. A charge of culpable homicide was added.
10. I proceed to deal in greater detail with the evidence led regarding how the accident occurred. It appears that the parties wished to prove who caused the accident. However such a determination is unnecessary. The cause of the accident is only relevant to the question of whether the police had a

reasonable suspicion that the plaintiff had committed an offence of reckless and negligent driving or committed it while under the influence of alcohol.

11. The defendant first called Mr Davids, a witness to the accident who was also the deceased's uncle. The deceased's mother, Ms Williams, was then called as was Ms Gordon who was driving her vehicle very slowly in order to enter the security gated parking area to her flat and who was travelling ahead of the plaintiff immediately prior to the collision. The defendant also called Masola but not Raphelo who had accompanied him and who the plaintiff alleged in the pleadings had also assaulted him. The defendant also elected not to call the station commander on duty who held the rank of Lieutenant Colonel. She would have witnessed the incident between Masola and Oxley which occurred immediately after he told the Lieutenant Colonel that the plaintiff had been assaulted.

THE INITIAL ARREST AND DETENTION

12. It is not my intention to set out the Defendants' evidence in detail. Suffice it that the evidence of those at the scene of the accident together with the plaintiff's admissions are to the effect that his vehicle collided with the young man when he was crossing the road at night, that the plaintiff did not go across to see the youngster's condition but left the car he was driving and departed from the scene of the accident without giving his details and despite the accident occurring right across the road from the police station. Ms Gordon considered that the plaintiff had been driving very fast. The issue of whether the plaintiff was driving fast or not is irrelevant. Of relevance is that Ms Gordon would have conveyed her impressions of how the accident occurred.
13. There is no reason to doubt that this would have been conveyed to the arresting officers who apprehended the plaintiff while he was some distance

from the scene. When they apprehended the plaintiff they claim that he smelt of liquor and believed that he had been driving under the influence of alcohol. The plaintiff denied that he had been drinking.

14. I accept that the charge initially laid was driving under the influence of alcohol and failing to stop after the accident. The police were alive to the pedestrian's condition and its severity as there was blood on the windscreen and it had been shattered due to the impact. A suspicion of the plaintiff driving at excessive speed would have been reinforced by Ms Gordon's account and her view that the plaintiff had been travelling fast. All this would have been consistent with a particularly egregious set of circumstances led Lt Masola to believe that the charge "*may*" merit an exclusive custodial sentence of not less than six months.
15. Police officers are not expected to be skilled lawyers worrying about the particularity they give. They are law enforcers and adopt a shorthand description or label for the offence. Masola used a number of labels to describe the basis of the offences and they are not inconsistent with the circumstances that would have been gathered by the police and conveyed to the arresting officers together with their own observations when they arrived at the scene before apprehending the plaintiff. The events may have unfolded differently had the plaintiff taken those few steps from the scene of the accident across the road from the police station to the charge office.
16. Taking all these considerations into account I am satisfied on the evidence presented by the defendant, and in material parts admitted by the plaintiff, that the arresting officers had a reasonable suspicion that the plaintiff had been driving recklessly or negligently while under the influence of alcohol. I am also satisfied that these suspicions would have been heightened by the plaintiff's failure to remain on the scene or take the most obvious course and simply leave his car and walk across to the police station to make a report.

Masola confirmed that the plaintiff just before being arrested admitted that he had collided with a pedestrian and stated that he was in a state of shock and scared that the community might attack him. Nonetheless, the suspicion that the plaintiff might have been under the influence of alcohol, is corroborated by the fact that the arresting officers promptly took the plaintiff for a breathalyser test. I should add that the plaintiff's version of being afraid of the crowd of people that had gathered need not be tested, since the police could not have been expected to guess that this was the reason; a reason I would have treated with a certain degree of reservation had it been material.

17. Accordingly having regard to the cumulative import of the offences listed by the police and what they had been told I am satisfied that the arresting officers had a reasonable suspicion that, in the circumstances present at the time, the plaintiff may be found guilty and sentenced to imprisonment for a period of 6 months without the option of a fine. It becomes unnecessary to then consider whether an arrest may be effected when a person flees a scene where the consumption of alcohol may be material in order that he may be tested as soon as possible because the evidence, being his blood/alcohol levels are so material in the conviction and sentencing of a person against whom there is a reasonable suspicion of reckless and negligent driving. There have been cases where the police were criticised for not ensuring that a breathalyser or a blood sample was properly taken. Where the suspect has already left the scene of a motor accident involving injury there may be scope for the application of section 40(2) since the other provisions contemplated in sub-section (a), while in certain circumstances may be relied upon and may be said to approximate the events in issue, do not appear to exactly cover them.
18. I am also satisfied that there was adequate compliance with informing the plaintiff of his rights.

19. The occurrence book records that the initial arrest and detention occurred at 21:50 although it is clear that the arrest and detention was as early as 19:30

CONTINUED DETENTION POST-BREATHALYSER

20. I now turn to the events from the time the plaintiff was taken to the Alcohol Test Centre known as the Drager Centre until his release.
21. The full test results were never produced due to the disappearance of the docket by the time the plaintiff insisted on compliance with discover. Only certain documents previously supplied or which somehow survived were produced. One of these is a single page marked "*Drager Test*" It is a form that was completed by hand at the Centre. Masola is identified as the arresting officer and that the arrest was effected at 19:40. Of importance is that under a space for comments the following was noted: "*No injuries only chest pains*". The only other injury noted at any stage was described as a scratch on the face. Hardly a description of the bruising clearly evident to anyone who was in the plaintiff's proximity at the police station on his return,
22. There is evidence to suggest that a breathalyser test was taken; if so it would not have demonstrated that the plaintiff exceeded the permissible limit. Oxley's evidence however suggest that the Drager officials declined to test the plaintiff when it was apparent that he had sustained some injuries. In either event The arresting officers then took the plaintiff to the District Surgeon.
23. The plaintiff alleges that Masola, with Raphelo's assistance, tried to pin him down and force him to drink a liquid. He took a sip and spat it out. It smelt and tasted of alcohol. According to the plaintiff Masola then punched him several

times on the face and body and Raphelo punched him in side of the ribs and forced to submit to a blood test. After that he was brought back to Sophiatown Police station but was not released despite the clear inference to be drawn from the facts that the plaintiff was under the legal limit. All this was denied. According to Masola the only force used on the plaintiff was limited to pulling his hands free , which the plaintiff had locked behind his back in an attempt to prevent a blood sample being taken.

24. During this period the plaintiff's cellphone had rung when his fiancé tried to contact him again. He had first contacted her when he had left the scene to report that he had an accident. The cellphone was activated at this time and Ms Bishop could hear the plaintiff pleading with the policemen to stop hitting him.
25. On their return the plaintiff was placed in a cell. His fiancé and Mr Oxley then arrived. She had requested Oxley to accompany her as they were neighbours. As stated earlier he headed the local Community Policing Forum. He went to the charge office (customer reception centre), explained why he had come and said that he was concerned as there had been an allegation of assault on the plaintiff. Masola who was seated nearby at the time reading a paper then stood up. He came across to Oxley and within sight of the duty station commander arrested him on grounds of interfering with the police.

UNLAWFUL DETENTION

26. It is evident that after leaving the Drager Centre there would have been no basis to continue detaining the plaintiff if the breathalyser test was taken and proved negative. If it was not taken then by the time the blood sample was taken there was no evidence that his blood alcohol level was above the limit. In forcing the plaintiff to take the alcoholic concoction Masola evidenced his

reappraisal of the plaintiff's state of sobriety. While the initial arrest was justified, in my view there could be no reason to deprive the plaintiff of obtaining "police bail" by this stage.

27. While the suspicion of excessive alcohol consumption may have justified a reasonable suspicion that the accident which led to the youngster being severely injured was due to recklessness on the plaintiff's part, if only because drinking under the influence may be regarded as *per se* reckless, once that element had been removed from the equation, the only possible reason for continued detention might have been a reasonable suspicion that the plaintiff may attempt to escape lawful custody (section 40(1)(c)), because he had fled the scene, that could no longer be a legitimate basis because he had furnished his details and his fiancé had already arrived at the police station.
28. Accordingly as soon as they ought reasonably to have returned to the Sophiatown police station there was no longer a legitimate basis for continuing to detain him. Police bail could have been readily obtained before the duty station commander. She was of sufficient rank to grant bail. Once more the Lt. Colonel failed in her responsibilities. I already referred to the first occasion when she simply stood by while a police officer who she significantly outranked acted in a manner unbecoming a police officer, if not in a manner that brings the police force into disrepute.
29. The conduct of the police from at least the time Lt Masola and Cnst Raphelo were at the District Surgeon does the police force little credit. Firstly I find that Lt Masola deliberately concealed the truth regarding the events that occurred from the time they attempted to take a blood sample until the plaintiff was released.

30. The taxpaying public through the fiscus must now pay for the conduct of two policemen who are required to uphold the law, and the public must also pay for the abysmal failure of a senior ranking duty commanding officer to perform her duties and assert her rank to secure discipline and inculcate a culture of service to the public over much junior officers, particularly where the citizen involved has voluntarily given of his time and ability to assist in community based policing.
31. Little wonder that the Lt Col did not testify about what occurred in her presence and which, with a simple intervention, she could have avoided. Little wonder too that Cnst Raphelo was not called upon to support Lt Masola despite it being plain during his cross examination that Masola could not be believed on his say so without support and despite Raphelo also being cited as a defendant. None was forthcoming and the only evidence produced by the defendant of the events from the time the plaintiff was at the District Surgeon until he was released, including the events relating to Ms Bishop at the police station, was that of Lt Masola and his evidence was patently false in material respects.
32. The incident regarding Mr Oxley bears repeating. It is relevant to demonstrate the extent to which a police officer is prepared to be untruthful despite taking the oath in open court. Whether this is because he believes his badge provides a degree of immunity or simply out of disdain because he still will wield the power once back on the beat, is not now the concern of the court. Of importance is the wielding of that power, where he has absolute control and appears to be immune from rebuke or disciplining by his superior officers. It also demonstrates a particularly disconcerting attitude which appears to find its justification in the power which can be wielded. This is amply reinforced by Masola's conduct towards a member of the public who himself gives up his time and voluntarily took up the call to assist the police force in making the streets safer.

33. Mr Oxley was concerned about the claim that the plaintiff had been assaulted. Instead of responding or otherwise dealing constructively with the issue, Masola arrested him for interfering with police duties. The Lt. Colonel made a sworn statement supporting Masola's arrest of the Oxley (unfortunately it is difficult to discern her name. As one would expect, the charge against Oxley was withdrawn by the prosecuting authority. Masola's only response was that Oxley was shouting that he had assaulted the plaintiff and claimed that Oxley had apologised to him when placed under arrest. This version is rejected as false having regard to the objective events that are not in dispute, the failure to call the duty commander and the evidence of Ms Bishop which corroborates Oxley
34. The plaintiff was stripped of his dignity and unlawfully deprived of his freedom from at least the time they ought to have returned to the police station which was about 21:00 but no later than 21:30 after the blood test, until he was released at about 01:15. This is a period of some 3 ½ to 4 hours. Instead of simply carrying out their duties in a professional manner they, with the acquiescence of the duty commander, abused the power with which the people of our country and the legislature entrusted them to use in order to uphold the law. The plaintiff therefore is entitled to damages for this period on the grounds of unlawful detention.
35. In this regard, I respectfully endorse the sentiment expressed by Borchers AJ (at the time) in *Van Rensburg v City of Johannesburg*, 2009 (1) SACR (W) 34 who referred to the irony that exists where the very persons who are engaged to protect citizens actually invade their rights.

THE ASSAULT

36. The plaintiff claims that when they arrived at the hospital to have a blood sample drawn by the District Surgeon an opaque white plastic vinegar bottle was produced. This was while they were inside the back of the parked police van and it was quite dark in that area. There was a liquid inside the bottle. He started to take it and it had a strong alcoholic taste. He then spat the liquid out. Masola started to punch him in the face, one of the blows striking his right eye. He responded by pleading with them not to hit him. At this time his cellphone vibrated to indicate that there was an incoming call. The evidence confirms that it was Ms Bishop trying to establish his whereabouts. I have already dealt with what she overheard. Raphelo confiscated the cell phone and demanded that the plaintiff drink the liquid "or we will f...ing kill you" He then did.
37. When the District Surgeon told him that she was going to take a blood sample the plaintiff said that she cannot do so as he had been forced to take alcohol and that it was against his rights. In the presence of the District Surgeon Raphelo then repeatedly punched the plaintiff's ribs while Masola forced the plaintiff's hands apart so that a blood sample could be taken. The plaintiff did not know the District Surgeon's name but believed that she had been in court earlier the day he testified. In any event a blood sample was taken.
38. The dispute centres on whether the plaintiff sustained any injuries during the period of his detention. The defendant says no. However while in the cells a photograph was taken of the plaintiff's right eye. There was clear bruising consistent with being punched Subsequent photographs taken immediately after his release show bruising around the plaintiff's ribs, also consistent with being punched.

39. Lt. Masola's evidence was false because it does not reconcile with the occurrence book and the photographs of the plaintiff taken in the cell. He show visible bruising below the right eye consistent with being punched. There can be no other explanation for the bruising; it did not occur during the accident as the plaintiff wore a seat belt and the only person who struck the vehicle's windscreen on impact was the young man. Most significantly the occurrence book recorded that the plaintiff had no injuries when he was first detained. The fact that the occurrence book also claims that the plaintiff had no injuries on his return is consistent with the failure of the duty commanding officer to ensure that police perform their duties and correctly record events. Either they simply did not bother to look or it was part and parcel of the cover-up. It is however clear that the plaintiff had visible bruising when he was in the cells. Again it requires a member of the public to film or photograph incidents for the truth to come out. In the present case the truth did not come out the mouths of those who are there to uphold the law.
40. I am satisfied that Ms Bishop was a credible and reliable witness. She mentioned that she told Masola about seeing the plaintiff in the van just before they left the scene for the Drager Centre and at that time the plaintiff had no injury below the right eye. Masola's response was that they would detain him until the injury vanished. This again is symptomatic of an attitude that power can be manipulated with impunity and be used to instil unnecessary anguish.
41. I am satisfied that the plaintiff was assaulted because the denial is palpably untrue when regard is had to the plaintiff's good physical state on arrest, barring only a complaint of chest pains and some scratches, recorded in some of the police records, and having regard further to the failure to call Raphelo who I consider was a material witness.

42. The plaintiff did not seek to prove any medical expenses and accordingly that part of the claim falls away.

QUANTUM

43. I consider the cases of *Seria v The Minister of Safety and Security* [2005] 2 All SA 614 (C) and *Stapelberg v Afdelingsraad van die Kaap* 1988(4) SA 875 (C) to be relatively appropriate comparators regarding the indignity or humiliation endured with the qualification that in the former the circumstances underpinning the arrest were less egregious. I had regard to *Olivier v Minister of Safety and Security* 2008 (2) SACR 387 and a number of SAFLII cases such as *Rowan's case* and considered *Khutsoane v Minister of Safety and Security* (SGHC case no 19987/08, judgment of 23 November 2009, unreported) where I awarded R90 000 at the end of 2009 in respect of wrongful arrest and detention in a more serious case and where the period of detention was longer. In my view an appropriate award in respect of wrongful arrest and detention would be an amount of R75 000.
44. I have so far referred to cases dealing with damages for wrongful arrest and detention. In regard to assault and continued detention the plaintiff relied on the evidence of Mr Mostert, a counselling psychologist.
45. The report deals with the consequences of the helplessness and vulnerability at the hands of authority which the plaintiff experienced. The plaintiff was subjected to a series of tests and Mr Mostert considers that the plaintiff has developed a chronic post-traumatic stress disorder ("PTSD") and is at risk of developing a mood disorder. In his opinion chronic symptoms of PTSD are known to develop into a major depressive disorder if left untreated. Mr

Mostert was of the view that the plaintiff needs to be referred to psychiatric treatment and that he continues with psychotherapy.

46. Mr Mostert referred to the plaintiff avoiding the area of the incident, that he felt guilty about the whole incident and had also stopped attending gym and became socially withdrawn. While some of these symptoms may be related to the accident itself and the death of the young man, at another level he had “hit rock bottom” and was extremely jealous if someone looked at his wife. The plaintiff also experiences feelings of helplessness and disempowered and is extremely traumatised and nervous when seeing police. He also experiences disturbing flashbacks of police vehicles and police officers. Accordingly while some symptoms may be attributable to knocking down the Mr Williams, a young man who subsequently passed away other symptoms mentioned are directly traceable to his vulnerability and effective degradation and powerlessness while under the control of the police. An aggravating feature is that the plaintiff was assaulted *because* he had stood up for his rights and despite this the aggressors in uniform considered themselves sufficiently inviolable that they continued assaulting the plaintiff in the presence of the District Surgeon with impunity and without fear of being reprimanded or the incident being reported on by the District Surgeon. It is a slippery slope if we must return to the days where District Surgeons forget the Hippocratic oath.
47. I have been referred to a number of cases. Each case must depend on its own facts and circumstances. In this case the traumatic effect of the assault and its sequelae cannot be minimised, nor the impotence of someone who effectively was only able to assert his or her rights because there was a lawyer available who had the presence of mind to record the injuries while in the police station and who could indirectly give the plaintiff a voice. Since the threat of keeping the plaintiff in the cells until the bruising disappeared did not materialise because another

attorney had to be called in, should be reflected in the damages to be awarded for the assault. To the extent that any element of the forced imbibing of the alcohol is to be treated as an assault, that in my view does not add to the overall award having regard to the features which overlap and which I believe are already adequately taken into account. In *Khutsoane* I awarded the plaintiff R40 000 for a far more severe physical assault and resultant physical *sequelae* while some of the other features in this case were not present.

48. Before concluding I note that in the judgment of the full bench in *Rampalt* at paragraph 21, the court drew attention to:

"An alarming degree of ignorance on the part of (the police officers) of their powers and more importantly the limits of their powers. This is all the more disturbing because this case is concerned with the power to deprive people of their freedom."

49. Unfortunately this case again raises, as did *Khutsoane* a concern about the standards within the police force and the ability of those who are entrusted with law enforcement, to carry out their functions properly as well as the abuse of the badge where suspects are vulnerable and impotent with little chance of redress against the violation of their rights precisely because only those who can tell remain silent.

50. I do not consider that this case is reportable and consider mentioning it to my colleagues because it evidences, through irrefutable photographic testimony not only assaults within police custody but those witnessed by others who, despite their professional calling and respect to which they are justifiably entitled, remain silent witnesses for whatever reason. It is also for this reason that I request that the State Attorney brings this

judgment to the attention of the offices of both the Police Commissioner and the Surgeon-General.

AWARD

51. I make the following award:

1. General damages for wrongful detention including psychological trauma and *contumelia* – R75 000.
2. General damages for assault, and pain and suffering including psychological trauma and *contumelia* – R60 000.00.
2. Interest at the prescribed rate as from date of judgment.
3. Costs of suit and the qualifying fee of Mr Mostert

DATES OF TRIAL	17 October to 25 October 2012
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JUDGMENT:	7 March 2013
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LEGAL REPRESENTATIVES

FOR PLAINTIFF	ADV VAN DER SANDT BISHOP DUARTE ATTORNEYS
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FOR DEFENDANT	ADV NHUMURAVATE THE STAE ATTORNEY
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