

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2012/45728

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

24 OCTOBER 2014

FHD VAN OOSTEN

In the matter between

NOMCEBO SYLVIA CWAILE

PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

CONTABLE MOTLEPA

SECOND DEFENDANT

CONSTABLE MKHONTO

THIRD DEFENDANT

Criminal Procedure – delict - unlawful arrest and detention - without warrant - arrest and detention admitted in defendants’ plea - onus on defendants to prove lawfulness – evidence - mutually destructive versions before court - evidence adduced on behalf of defendants held to be credible - plaintiff’s version improbable - material contradictions between plaintiff’s evidence and allegations pleaded as well as contents of statutory demand - ineptness of defendants’ legal representatives - admission held procedural blunder - court’s duty to ensure that justice is done - false evidence fatal to claim – claim dismissed.

Delict – assault – denied by defendants - onus on plaintiff - discharge of - plaintiff’s evidence improbable - failure to discharge onus - claim dismissed.

Costs - dilatoriness of defendants’ legal representatives in conduct of case - court’s disapproval thereof to be reflected in costs order - no costs order made and defendant’s counsel disentitled to recover fees.

J U D G M E N T

VAN OOSTEN J:

[1] This is an action for damages for unlawful arrest and detention (claim A) and assault (claim B). The incident from which the claims arise occurred on 26 March 2011, in Turfontein, Johannesburg. It is the plaintiff's case that she was unlawfully arrested by members of the South African Police Service, that she was assaulted by them and then taken to the Booyens police station where, in the charge office area, she was again assaulted and detained until she was released a few hours later, without having been charged. The defendants' plea contains a denial of the assault but an admission that the plaintiff was arrested and thereafter detained at the Booyens police station. It is further pleaded that the plaintiff's arrest was lawful in that the arresting officers 'suspected the plaintiff of having committed the offence of interfering with the police'.

[2] The plaintiff testified and called Ms Zanele Zulu to give evidence. The defendants adduced the evidence of the second and third defendants, who are both constables in the South African Police Service (I shall henceforth refer to them by their names).

[3] The plaintiff's version, and that of Ms Zulu, is the following: during the evening of the incident the plaintiff, Ms Zulu and another person were passengers in an Almera motor vehicle, which was driven by Ms Zulu's brother, in Turfontein. The vehicle was zigzagging across the road and the driver, notwithstanding a police vehicle siren alarm for it to stop, failed to do so. They reprimanded him to stop and he came to a standstill. Members of the SAPS arrived at their vehicle and pulled and dragged them all out of the vehicle. They were ordered to lie face down on the ground with their hands behind their heads. The plaintiff was kicked by one of the police officers on the neck, at the back of her head and also all over her body. All other police officers left the scene and the plaintiff and Ms Zulu were taken to and put into the back of the police van. While inside the van they were pepper sprayed by the police, being Constables Motlape and Mkhonto. The driver of the Almera smelled of liquor and was suspected of drunken driving. On their way to the police station he was off-loaded at the Metro offices for blood tests. They eventually, after some two hours driving, arrived at the Booyens police station and were taken to the charge office area. Ms Zulu requested that her handcuffs be released as they were too tight and

hurting her. One of the police officers, who both witnesses identified as Cnst Motlape, jumped over the counter and, according to the plaintiff, slapped Ms Zulu in the face. He tightened her handcuffs which prompted the plaintiff to ask why he was doing this to her. He then also slapped the plaintiff in the face. She needed to go to the toilet and one of the female police officers escorted her there. She made no mention to her of the assault nor did she at any time lay a charge of assault against the police officers. The plaintiff started crying, referred to her children at home and pleaded for her release. She was then released and allowed to go home in the Almera, although she had told them that she was not in possession of a driver's licence.

[4] The version of the two police constables stand in stark contrast to that of the plaintiff. They corroborated each other on all material aspects. Their version is the following: they were on night shift patrol duty in Main street, Turfontein, when they observed the Almera zigzagging across the road. They decided to stop the Almera and the siren and blue lights were activated. The driver failed to stop and accelerated. In pursuing the Almera, Cnst Mkhonto called for back-up over the radio. He was however, informed that the Almera had already been intercepted some distance ahead, at the corner of Tromway street, by members of the SAPS, and they proceeded there. On their arrival at the scene other members of the SAPS were present and the driver and passengers of the Almera were lying face down on the ground. The driver was asked to stand up and he smelled of liquor. He was unable to produce a driver's licence and admitted not having one. He was arrested and escorted to the police vehicle. Ms Zulu approached them at the police vehicle and shouted that they could not arrest her younger brother and that he was driving the vehicle for her. She started swearing at them saying that that they were stupid and uneducated. She attempted to prevent them from opening the door of the police van and also tried to pull her brother out of the back of the van. Despite warnings to desist from interfering with their duties she persisted and was arrested, handcuffed and also put into the back of police van. The driver and Ms Zulu who were now in the back of the police vehicle, were taken to the Booyens police station. There they sought and obtained permission from the Commanding Officer to take the driver for blood tests and Cnst Motlape later took him to the Metro offices. They saw the plaintiff for the first time in the client services section of the police station. The

Almera was brought to the police station by the other police officers, who had been at the scene. The plaintiff started abusing them in saying that they were stupid and that they did not know their job. They warned her twice to refrain from interfering with their duties. The plaintiff smelled of liquor and was aggressive. Ms Zulu's handcuffs were removed by Cnst Motlepa. Ms Zulu handed the keys of the Almera to the plaintiff who signed for them in Cnst Mkhonto's pocket diary, whereafter she left. They denied and remained adamant that the plaintiff was not arrested, detained, or charged or assaulted in their presence.

[5] On the pleadings the plaintiff bears the onus of proving the assault while the defendants bear the onus of proving that the arrest was lawful (*Minister of Law and Order and another v Dempsey* 1988 (3) SA 19 (A) 38 B-C; *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) para 24 and 25). Starting with the assault, as for credibility, the plaintiff's version in my view reveals certain improbabilities. It is, for one, improbable that the police officers would have assaulted the plaintiff in the manner they are alleged to have done, for no reason at all. I have carefully observed the two witnesses for the defendant while giving evidence: they both impressed me as honest and reliable witnesses. On their version insulting remarks were made by Ms Zulu and she attempted to protect her brother. Rightly or wrongly so, they considered her conduct to constitute interference with their official duties. She was arrested and a police docket opened against her. The outcome of the investigation has not been revealed to this court. Their version accords with the probabilities. Counsel for the defendant referred to the too many cases of unjustified, unprovoked police brutality before our courts and submitted that the plaintiff, likewise, could have suffered the same fate. I am unable to agree. Police brutality, although occurring, can never be elevated to a norm and each case must be considered on its own facts. On the other hand, it should also be remembered that the Minister of Police remains a soft target for bogus claims. The improbability I have referred to exists on the evidence as a whole, in particular having regard to the credibility findings I have made.

[6] The plaintiff testified that she sustained no injuries as a result of the assault except for painful eyes resulting from the pepper spray and slight uneasiness in swallowing the next day. In the plaintiff's particulars of claim it is alleged that the

plaintiff as a result of the assault, *inter alia* 'had abrasions all over her body'. These allegations stand in stark contradiction to her evidence and, at best for the plaintiff, is indicative of extreme exaggeration. I am alive to the fact that the plaintiff was not challenged on this aspect in cross-examination but, the contradiction remains unexplained. It is moreover true that no evidence was called to gainsay the plaintiff's version concerning the assault at the scene before the arrival of defendants' witnesses, but the absence of such evidence, in my view, does not cure the difficulties I have referred to. I am accordingly not satisfied that the plaintiff has discharged the onus on the assault claim.

[7] In regard to the plaintiff's claim for unlawful arrest and detention the defendants bear the onus of proving that the arrest and detention were lawful. I have already assessed the credibility of the defendants' witnesses. Counsel for the plaintiff was driven to concede as much. Their evidence however, contradicts the defendants' plea in which, as I have already pointed out, the arrest and detention are admitted. This brings to the fore the manner in which the defendants' case was conducted by the defendants' legal representatives. An absence of diligence and proper preparation of the case is quite apparent: counsel for the defendant omitted to challenge important aspects of the plaintiff's case and several material allegations in the evidence of the plaintiff's witnesses were left unchallenged in cross-examination. In fact, propositions put to the plaintiff's witnesses in cross-examination either contradicted the defendants' plea or, are plainly irreconcilable with the evidence adduced on behalf of the defendants. This, of course, provided ample fertile ground to counsel for the plaintiff, in argument, to attack the credibility of the defendant's witnesses. But, nothing was advanced to justify any negative finding concerning the inherent quality and credibility of those witnesses. I am satisfied that the admission is nothing but a procedural blunder resulting from ineptness to be attributed to the defendants' legal representatives.

[8] A further disturbing feature has come to the fore during my preparation for the judgment. In the statutory letter of demand addressed to the first defendant by the plaintiff's attorneys of record, dated 20 September 2011, the following is recorded (in paragraph 3 thereof):

‘Subsequent to her arrest she [the plaintiff] was taken to Booyens police station and then she was detained at the Johannesburg Central SAPS Cells’.

The demand letter forms part of the documents bundle before me in regard to which it was agreed, at the pre-trial conference, that the documents are what they purport to be. Neither party, at any stage, dealt with or referred to the obvious contradiction I have referred to. The omission by both parties is inexcusable. This court however, is not only entitled but also duty-bound to take cognisance thereof. Litigants should never be allowed to mislead the court even if, as a result of the negligence or dilatoriness of legal representatives, obvious inconsistencies are not disclosed. It is the duty of the court to ensure that justice is done. The allegation that the plaintiff was detained at Johannesburg Central SAPS cells can in no way be reconciled with the evidence of either the plaintiff or Ms Zulu. I am accordingly of the view that the plaintiff’s version, in the face of the reliable and honest version of the police officers, appears to be fabricated, if not concocted, and that a grave injustice will result if any reliance by this court is placed on that evidence. I am accordingly constrained to find that the plaintiff’s claim in respect of the alleged arrest and detention is based on false evidence and that it accordingly, for that reason alone, is doomed to failure.

[9] As to costs, I propose, as a mark of this court’s disapproval of the manner in which the defendants’ case was conducted, firstly, to make no order as to costs and secondly, to order that counsel for the defendant is not entitled to recover any fees in regard to this matter.

[10] In the result the following order is made:

1. The plaintiff’s claims are dismissed.
2. No order as to costs is made.
3. Counsel for the defendant may not recover any fees from the defendants’ attorneys of record relating to this matter.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

ADV DJ COMBRINK

BESSINGER ATTORNEYS

COUNSEL FOR DEFENDANTS

DEFENDANTS' ATTORNEYS

WITHELD

THE STATE ATTORNEY

DATE OF HEARING

DATE OF JUDGMENT

22 & 23 OCTOBER 2014

24 OCTOBER 2014