REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO:08/00091

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

11 APRIL 2014 **T L MOSIKATSANA**

In the matter between

HENDRIK DANIEL WOITE **PLAINTIFF**

and

THE MINISTER OF SAFETY AND SECURITY **DEFENDANT**

Delict – assault – unlawful arrest and detention – s 40(1)(a) Criminal Procedure Act 51 of 1977 – incidence of the burden of proof – whether the defendant adduced sufficient evidence to justify plaintiff's arrest and detention – crucial shortcomings in evidence of police witnesses – plaintiff's evidence accepted.

Quantum of damages – general damages – assault causing minor injuries – wrongful arrest and detention for thirteen hours – comprehensive amount of R 50 000 awarded.

J U D G M E N T

MOSIKATSANA AJ:

Introduction

[1] Plaintiff was a control prosecutor at the time of his arrest. He is a frail man in his sixties. He has suffered from a movement disorder termed 'essential tremors' since he was thirty-years-old. He claims damages in the amount of R500, 000.00 for an alleged assault, wrongful arrest and detention by members of the South African Police Service (SAPS) in the employ of the defendant on 21 July, 2007.

[2] It is common cause that on or about 20 July, 2007 at approximately 24h00, the Plaintiff's son, Vernon was arrested at a roadblock in Roodepoort, by the Johannesburg Metropolitan Police. Following his arrest, he was taken to Honeydew police station for processing. The Plaintiff attended with his other son Jacques, at the Honeydew police station, to secure his release. When plaintiff arrived at the police station, there was an altercation which led to his arrest by Inspector (Insp) Banda, with the assistance of Sergeant (Sgt) Chauke. It is also common cause, that plaintiff was arrested and detained at approximately 03h00 on 21 July, 2007. He was released after about thirteen hours at 16h00 the same day. It is further common cause that the Director of Public Prosecutions declined to prosecute the charges against the plaintiff.

[3] The defendant pleads that plaintiff was lawfully arrested in accordance with ss 40(1)(a)[1] of the *Criminal Procedure Act*[2] based on plaintiff's disorderly and violent conduct.

Factual Background

[4] The parties presented conflicting versions of what transpired on the day in question. The plaintiff's narrative is that when he arrived at the honeydew police station, he saw his son Vernon handcuffed uncomfortably with his hands to his back. He noticed that Vernon was experiencing excruciating pain, from the tight cuffs. He asked Insp Banda to relax the cuffs. Insp Banda said that he did not have the keys. After approximately 10 minutes, Insp Banda took out a set of keys and removed the cuffs.

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[1] Subsection 40(1)(a) stipulates:
'(1) A peace officer may without a warrant arrest any person
(a) who commits or attempts to commit an offence in his presence;...'
[2] 51 of 1977

[5] Vernon told plaintiff that he was assaulted by a lady in civilian clothes. He pointed out the lady to the plaintiff, who then asked the lady to identify herself, because he wanted to report her. The lady refused to identify herself. Plaintiff took out his cell-phone, to take her picture so that he could identify her, when he made his report. Insp Banda intervened. He informed plaintiff that he was not allowed to take pictures inside the Honeydew community service centre (CSC).

[6] Insp Banda grabbed plaintiff's hand with the cell-phone in it. He wrestled plaintiff for the phone, to prevent him from taking pictures. Insp Banda used his one hand to hold plaintiff's hand with the cell-phone and used his other hand to push plaintiff towards the door of the CSC. Insp Banda then pushed plaintiff forcefully against the window. Plaintiff bumped into the window and wall of the CSC from the force of being pushed by Insp Banda. The window broke in the process. Plaintiff sustained injuries to the right hand side of his body, in the area of his ribcage. Plaintiff's spectacles were damaged during the alleged assault by Insp Banda. Plaintiff testified that when his son Jacques picked up the broken spectacles from the floor one lens was missing.

[7] Insp Banda handcuffed plaintiff and charged him with resisting arrest, assaulting a police officer and malicious damage to property. Plaintiff was read his rights. He was also given a 'Notice of rights in terms of the Constitution' to sign. He was taken to the Randburg Police cells for detention at approximately 03h00 on 21 July, 2007. He was released thirteen hours later at approximately 16h00.

[8] Plaintiff testified that during his detention he could not sleep because he was scared of his cell-mate. The blankets in the cell were dirty and it was cold. He testified that he could not drink the water in the cell because the place was dirty, he only drank water in the morning during breakfast.

[9] The plaintiff testified that he is the primary caregiver to his sickly wife, and that during his detention, he was concerned for her welfare, as she had no one else to care for her. Plaintiff stated that he suffered humiliation due to the fact that he had to appear in the Randburg Magistrate's Court to face his colleagues and explain his appearance on criminal charges of resisting arrest, malicious damage to property and assault on a police officer. Plaintiff testified that he also suffered anxiety at the

prospect of enduring the hardship of a possible criminal trial and conviction leading to a custodial sentence without the option of a fine on spurious charges.

[10] Plaintiff was medically examined by Dr Geldenhuys two days later, on 23 July, 2007. The doctor testified in chief, that he was informed by the plaintiff that he was assaulted by police. During the medical examination of plaintiff, the doctor suspected rib fracture and recommended x-rays for the plaintiff. During cross examination, Dr Geldenhuys testified that similar injuries could be sustained in a struggle. It was revealed in cross examination that Dr Geldenhuys' report did not bear the date of the plaintiff's medical examination.

[11] Vernon corroborated plaintiff's testimony in material respects with regard to the fact that he was assaulted by a female in private clothes in full view of other police officers, and that Insp Banda cuffed him incongruously, such that plaintiff intervened on his behalf, by asking Insp Banda to uncuff him. Vernon testified that Insp Banda initially stated that he did not have the keys for the cuffs, but ten minutes later he took out the keys for the handcuffs and released the pressure of the cuffs. Contrary to what plaintiff had said, Vernon testified that Insp Banda did not remove the handcuffs but that he only released the tightness of the handcuffs.

[12] Vernon also testified that plaintiff asked the female in civilian clothes, who had assaulted him, to identify herself, but she refused. Plaintiff then attempted to take a picture of the female but he was prevented from doing so by Insp Banda.

[13] Vernon further testified that he was not present in the CSC, when his father was allegedly assaulted, arrested and detained. He was being transferred to the Roodepoort police cells, when his father was involved in a struggle with Insp Banda. He only heard a window break when he was being loaded into the police van outside the CSC.

[14] The only inconsistency between the plaintiff's and Vernon's version is that the plaintiff testified that Insp Banda had removed the handcuffs from Vernon. And yet Vernon testified that Insp Banda had relaxed the cuffs. The inconsistency is not material.

[15] Jacques also corroborated plaintiff and his brother vernon's testimonies in most material respects. He testified that when he arrived at the Honeydew Police Station with his father, he saw his brother handcuffed in 'a funny way'. Vernon told

him and plaintiff while he was still inside the room where Vernon was held, that he was assaulted by a lady in private clothes. Jacques testified that he was then ordered out of the room where Vernon was held. Resultantly, he didn't observe Insp Banda remove the cuffs from Vernon. However, he testified that he witnessed plaintiff and Insp Banda wrestle for plaintiff's cell-phone. He also witnessed the assault by Insp Banda on plaintiff as well as plaintiff's subsequent arrest and detention.

[16] During cross examination, when asked what happened to the plaintiff's spectacles during the alleged assault by Insp Banda on plaintiff, Jacques testified that, he did not remember anything about the plaintiff's spectacles. This latter aspect of Jacques' testimony differed slightly from plaintiff's testimony that Jacques picked up his broken spectacles from the floor, and that one lens was missing. Despite this slight inconsistency, I find Jacques' testimony satisfactory in every material respect and reliable.

[17] Two witnesses, Insp Banda and Sgt Chauke testified for the defendant. They were both on duty at the CSC when the incident involving the plaintiff occurred. Insp Banda testified that he has been a police officer for eleven years. He contradicted plaintiff and Vernon's testimonies that he handcuffed Vernon and later released the handcuffs. Insp Banda testified that he had no dealings with Vernon and that he did not see him being assaulted by the woman in civilian clothes.

[18] Insp Banda testified that he only noticed the plaintiff, whom he said attracted his attention because he was making noise and causing havoc in the CSC, informing everyone that he is a prosecutor and that he wants Vernon released from police custody. Insp Banda testified that he attempted to calm plaintiff down but he would not calm down. Instead plaintiff was allegedly swearing at police in the CSC,calling them "monkeys".

[19] Insp Banda testified that he ordered plaintiff to leave the CSC, but he refused. He also testified that he and Sgt Mpikashe held the plaintiff under the armpit on each side and ushered him out of the CSC. They left plaintiff outside the CSC, but he immediately returned and followed them into the CSC. Insp Banda stated that when plaintiff got back into the CSC, he tried to restrain him by holding him, but plaintiff assaulted him by kicking and punching him. He allegedly warned the plaintiff to stop

assaulting him, but plaintiff allegedly continued to punch and kick him delivering more than twenty kicks which allegedly landed from Insp Banda's torso to his lower legs.

[20] Insp Banda testified that he attempted to arrest plaintiff but he resisted arrest, breaking the window of the CSC in the process. He also testified that he struggled to handcuff the plaintiff and that he was eventually assisted by Sgt Chauke, to restrain and arrest the Plaintiff. Insp Banda further testified that he charged the plaintiff with the assault on him, malicious damage to property and resisting arrest. He explained the plaintiff's rights to him and gave him a 'Notice of rights in terms of the Constituton' for him to sign. Plaintiff was then taken to the Randburg police cells for detention.

[21] During cross examination, Insp Banda was asked if he sustained injuries from the alleged assault by plaintiff. He responded that he sustained bruises and experienced pains. When asked if he sought medical attention for the bruising, he stated that he didn't consult a doctor because he could tolerate the pain and bruising.

[22] Insp Banda was then asked if he is aware that an assault complainant has to seek medical attention for purposes of evidence. He responded by saying that he was aware but he nonetheless, chose not to seek medical attention for his alleged injuries. When asked if it is possible that a frail older person like the plaintiff could attack a younger and much stronger person such as himself in the company of his colleagues who are police officers, Insp Banda could not give a satisfactory answer.

[23] Insp Banda was asked what other swear words the plaintiff used. He added that the plaintiff used the word 'Kaffir' which he did not state during his examination in chief. Insp Banda had only stated that the plaintiff used the word 'monkey'.

[24] Insp Banda was asked why he didn't add a charge of crimen iniuria to the plaintiff's charges for swearing at him. He responded that it was nothing, because it happens all the time, that he is insulted by arrestees whilst on duty, and that his training as police officer has steeled him to endure such insults.

[25] Sgt Chauke testified that he has been a police officer for 15yrs. He was a constable at the time of the incident. He was on duty on the night of the plaintiff's arrest and detention. He stated that he heard the plaintiff swear at police officers in

the CSC, calling them 'monkeys'. At the time he was taking a statement from a suspect. The next thing he heard Insp Banda ordering plaintiff to leave the CSC, but plaintiff allegedly refused to leave the CSC. He then observed Insp Banda and officer Pikashe haul the plaintiff out of the CSC. He saw them both hold the plaintiff by his arms from under his armpits.

[26] He stated that he did not see Insp Banda assault plaintiff. All he saw was Insp Banda informing plaintiff that he was arresting him. Plaintiff allegedly refused to cooperate. He stated that plaintiff was swaying his arms to avoid being handcuffed. He stepped in to assist Insp Banda arrest plaintiff.

[27] During cross examination, Sgt Chauke stated that he could not tell whether the plaintiff had a clenched fist or an open hand during the struggle with Insp Banda. Sgt Chauke also testified that he did not see how the plaintiff sustained his injuries. He stated that when he assisted Insp Banda to arrest the plaintiff they did not subdue him. He also stated that plaintiff broke the window as he was swaying his arms to avoid being handcuffed. Sgt Chauke denied seeing Vernon being arrested.

Onus of proof

[28] In argument, both plaintiff's and defence counsel stated the general proposition that the plaintiff as the party who asserts, bears the onus of proving the assault and the unlawfulness of the arrest and detention. Defence counsel referred to *African Eagle Life Assurance Co Ltd v Cainer*[3] and *National Employers' General v Jagers*[4] in support of the general proposition that the plaintiff bears the onus. The two cases referred to by defence counsel deal specifically with the general rule regarding onus of proof in ordinary civil cases but not in cases of unlawful arrest and detention, where the defendant raises a special defence. In such cases, the Courts take a nuanced[5] approach regarding the allocation of the burden of proof.

[29] The plaintiff only has to establish a *prima facie* case by proving on a preponderance of probabilities that he was unlawfully and intentionally arrested and

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[3] 1980 (2) SA 234 (W) at 237 D-H

[4] 1984 (4) SA 437 (E) at 440 D.

[5] See *Pillay v Krishna* 1946 AD 946 AT 951-2 per Davis AJA: 'If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is the second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it...'

detained. The onus regarding the justification for the arrest and detention then falls on the defendant who bears the onus of proving that the arrest and detention were lawful.[6] This does not amount to a shifting of the onus of proof. In most civil cases where there are several and distinct issues, there will invariably be several and distinct burdens of proof. Each of the parties may bear the onus of proof with regard to a particular issue.[7]

Newman articulates the policy considerations for allocating the burden in unlawful arrest and detention cases as follows:

> 'Once the plaintiff makes a prima facie case of a warrantless arrest, the burden should shift to the defendant to produce evidence of probable cause. This approach yields the best balance between the competing interests of law enforcement and protection of citizens' constitutional rights. When the burden of production is placed on the defendant officer, he will be required to testify and give his version of the circumstances leading up to the arrest. This burden shift is appropriate because the defendant police officer has the best access to the information on probable cause, and because requiring the officer to present this information will deter misconduct.'[8]

Probabilities

[30] Turning to the probabilities, it is incontrovertible that in order to make a finding on the probabilities I will have to assess the credibility of the witnesses.

[31] The plaintiff's testimony that he was assaulted because he wanted to take a picture of the woman in civilian clothes in the CSC was corroborated by his sons, Vernon and Jacques. Plaintiff's testimony with regard to the injuries he sustained was corroborated by Dr Geldehuys. Except for minor inconsistencies mentioned above, regarding the evidence of the plaintiff and his sons, Vernon and Jacques, they were reliable witnesses.

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[6] *See Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (4) SA 458 (CC) paras [24] and[25]. See also Minister of Law and Order v Hurley 1986(3) SA 568 (A) at 589 E-F; Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) per Grosskopf JA and Jothanan Burchell "Judicial control of arrests and detention: Theory and Reality" **www.disa.UKZN.ac.za/DC/renov 87.5** [Accessed on 06 April, 2014].

[7] See *Pillay v Krishna* supra note 5 at 953; See also: PJ Schwikkard *et al Principles of Evidence* 2009 (3rd ed) at 573;

[8] Sarah Hughes Newman 'Proving probable cause: Allocating the burden of proof in false arrest claims under § 1983' *The University of Chicago Law Review* (2006) 347 at 349.

[32] Insp Banda was an unreliable witness. He was evasive and argumentative. Instead of answering questions directly, he interrogated the motivation of plaintiff's counsel, for the questions being put to him. He went to the extent of reversing the process of cross examination by himself putting questions to plaintiff's counsel. His testimony that the plaintiff kicked and punched him more than twenty times, from the torso to his lower legs, is highly improbable given the plaintiff's diminutive and frail stature as compared to his relatively youthful and imposing physique.

[33] It is also improbable that the plaintiff, considering that he was outnumbered by the police officials in the CSC, could hurl insults such as 'monkey', as well as highly emotive and racially charged epithets such as 'kaffir', at police officers in the CSC risking possible arrest and detention.

[34] The most perplexing aspect of this incredible narrative, is that Insp Banda rightly took great offence to being called a 'monkey', but was unfazed by the odious appellation of 'kaffir', which only occurred to him as an afterthought during cross examination. The dubious explanation for his nonchalance to being called a 'kaffir' is unconvincing. It is highly improbable that a police service in a race-sensitive country such as South Africa, can train its officers to tolerate such egregious racial slurs, that attract criminal liability, and not to press charges of *crimen iniuria*.

[35] Insp Banda's testimony as to how the plaintiff sustained his injuries and how the plaintiff broke the window is also unconvincing. In my view, the charges of resisting arrest, assaulting a police officer and malicious damage to property, were only brought against the plaintiff by Insp Banda, to cover up the assault on the plaintiff. This is a fairly common ruse, which Newman attests to in the following terms:

> '...[F]alse arrest cases frequently involve excessive force. Excessive force may lead to arrest, as an officer arrests his victim to cover up the illegality of his own conduct.'[9]

It is hardly surprising that the Director of Public Prosecution declined to prosecute plaintiff on the spurious charges laid against him.

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[9] Supra note 8 at 347.

[36] Sgt Chauke is also as an unreliable witness. He has a selective memory. He didn't corroborate the evidence of Insp Banda in material aspects. For instance he stated that he didn't remember plaintiff calling them 'kaffir' but he only remembers the word 'monkey' being used by plaintiff. He couldn't remember if plaintiff had clenched fists or open hands during the struggle with Insp Banda. He didn't corroborate Insp Banda's testimony that the plaintiff broke the window intentionally. He said that the window broke as plaintiff was swaying his hands to avoid being handcuffed. He didn't see how Insp Banda was allegedly assaulted by plaintiff, because he thought there was no need to look. He also did not see how plaintiff was assaulted. Sgt Banda's testimony is unsatisfactory. He is frugal with the truth. The probabilities favour the plaintiff's case. In the result, the damages claim for assault, unlawful arrest and detention succeeds.

Quantum

[36] Plaintiff's counsel conceded that the damages claim of R500, 000 initially prayed for was excessive. He proposed an amount, in the province of R100 000 - R170 000. Defence counsel argued that in the event that the Court finds against her, a damages award ranging from R80 000 – R100 000 would be appropriate.

[37] Inexorably both counsel observed that almost all the Courts that have pronounced on quantum for unlawful arrest and detention, uniformly sound an unambiguously parsimonious note. This may be gleaned from the following instructive *dicta* in:

Olgar v Minister of Safety and Security[10] per Jones J:

> 'In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, *to avoid the notion of an extravagant distribution of wealth*

[10] [ECD 18 December, 2008 (case 608/07) at para 161

> from what Holmes J called the "horn of plenty", at the expense of the defendant.' [My emphasis]

And in Minister of Safety and Security v Tyulu[11] per Bosielo AJA (as he then was):

> 'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is *not to enrich the aggrieved party* but to offer him or her some much-needed *solatium* for his or her injured feelings.'[12] [My emphasis].

[38] Visser and Potgieter catalogue the following useful guide to the relevant factors for the assessment of damages in cases of unlawful arrest and detention which include:

> 'The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and the nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the plaintiff; the extent of publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and according to some, the view that the actio iniuriarum also has a punitive function.'[13]

[39] In fixing an amount for damages, I am guided by awards in previous cases without abdicating the need to exercise my discretion. I also take into account all the relevant factors including the fact that the plaintiff was a frail man in his sixties and that he was a prosecutor at the time of his arrest. He was arrested in full view of his son Jacques. He was assaulted during the arrest. As a prosecutor, the plaintiff commanded respect and he had considerable standing in the community. It most certainly was embarrassing for him, to have to appear in court before his colleagues, on trumped-up charges. There is no doubt that the arrest caused him great anguish.

[40] Having regard to all the relevant facts, including the age and infirmity of the plaintiff, the circumstances of his arrest, its nature and short duration, his social and professional standing at the time of his arrest, the fact that he was arrested for an

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[11] 2009 (5) SA 85 (SCA)
[12] At par 93d
[13] Visser & Potgieter *Law of Damages* (2012) 545-548.

improper motive and awards made in comparable cases,[14] an appropriate award of damages for the assault and the wrongful arrest and detention is a comprehensive sum of R50,000. This in my view constitutes a *solatium* which is commensurate with the injury inflicted.

Order

[41] In the result judgment is granted in favour of the plaintiff against the defendant for:

1. Payment of the sum of R50,000 (Fifty thousand rands);
2. interest on the amount in paragraph 1 above at the rate of 15,5% per annum from 14 days after the date of judgment to date of payment;
3. costs of suit on the appropriate Magistrates' Courts scale.

T L MOSIKATSANA
ACTING JUDGE OF THE HIGH COURT

Appearances:

COUNSEL FOR PLAINTIFF INSTRUCTED BY	ADV JJ HAYES STRYDOM ATTORNEYS
COUNSEL FOR DEFENDANT INSTRUCTED BY	ADV Z BUTHELEZI THE STATE ATTORNEY
DATE OF HEARING DATE OF JUDGMENT	14 MARCH 2014 11 APRIL 2014

[14] See *Tyulu* (supra note 11) where a damages award of R250,000 in respect of the unlawful arrest and detention of a magistrate for about 15 minutes was reduced on appeal to R15, 000; *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) an award of R500 000 for unlawful arrest and detention - for a period of five days, one night being spent in a police cell with other inmates, the other four days being spent in a hospital ward with family visits permitted - was reduced on appeal to R90 000; in *Mvu v Minister of Safety and Security and Another* 2009 (6) SA 82 (GSJ) mindful of the conservative approach of our courts, and the well-founded censure by the Supreme Court of Appeal in (*Seymour*), Willis J, awarded damages of R30 000 for one day's detention; in *Ngema v Minister of Police* (05081/2011 [2012] ZAGPJHC 104 (24 May 2012) plaintiff claimed damages of R250 000 for assault, wrongful arrest and detention lasting approximately three hours. Van Oosten J, awarded damages in the amount of R40 000 plus costs on the Magistrates' Courts scale.