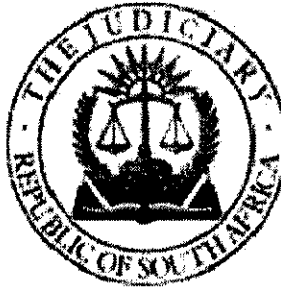


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 37807/2014

9/3/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO. *Not*

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO. *Not*

(3) REVISED. *Yes*

DATE: 09/03/16 SIGNATURE: *[Signature]*

In the matter between:-

MOSES JULLY SIMELANE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

SKOSANA AJ

[1] In this matter the plaintiff sues the defendant for damages arising out of unlawful arrest and detention as well as the attendant degradation. The plaintiff also sues on the basis of assault allegedly perpetrated on the plaintiff by the members of the South African Police Service (SAPS).

[2] In the opening address by plaintiff's counsel, Mr Mkhize, I was informed that the plaintiff was arrested on 08 June 2011 at 00h50 from his home situated at Groenvlei farm next to Belfast in Mpumalanga. Three officers arrived in a Nissan double cap bakkie.

[3] He was arrested on the day without any information as to the reason for the arrest. He was handcuffed and put at the back seat of the bakkie. On their way to Belfast police station, the driver of the bakkie stopped the vehicle and asked the arresting officer, Constable Madikane as to why he was arresting the plaintiff. Constable Madikane did not answer but asked him to drive on.

[4] On 09 June 2011, the plaintiff was taken to the Belfast Magistrates' court which did not sit on 08 June 2011. He did not appear before the Magistrate on 09 June 2011 but was taken to court the following day on 10 June 2011 where his matter was left until the end of the roll. It was later found that his matter is not placed on the roll at the Belfast Magistrates' court and thereafter he was released.

[5] The defendant's opening address, made by counsel for the defendant, Ms Kgatla disclosed the following:

5.1 That on 24 April 2011 a complainant, being Ms Roelofs Johannes Mare, complained to the police and laid a charge of theft of 2 cattle from his farm Groenvlei farm. He is the owner of such farm.

5.2 Constable Madikane investigated the matter. During the investigation he was informed by Mr Jacob Fana Ndlovu, who is an employee of the complainant and the plaintiff's cousin that the plaintiff, Mr Boy Tlou and Mr William Tlou were involved in the theft of the two cattle.

5.3 Constable Madikane took a statement from Mr Jacob Ndlovu and proceeded to try and locate the plaintiff. He could not find the plaintiff at his place of residence.

5.4 On 08 June 2011, he was informed that the plaintiff was at his house and hence he went to arrest him in the early hours of the morning.

5.5 The arrest took place within the jurisdiction of the Belfast police station and the Belfast Magistrates' court.

5.6 In the morning of 08 June 2011, Constable Madikane informed the plaintiff that he was being charged of theft of two cattle from Groenvlei farm and proceeded to charge him accordingly. The plaintiff could not be taken to Belfast magistrates' court on 08 June 2011, since the court was not sitting on the day.

5.7 On Thursday, 09 June 2011, Constable Madikane was informed by the prosecutor that from the case docket there is nothing linking the plaintiff to the crime and consequently the plaintiff was released.

5.8 The arrest took place without a warrant but was effected in terms of section 40(1)(b) of the Criminal Procedure Act no. 51 of 1977 (CPA).

[6] As the arrest was admitted, the defendant had to begin in order to establish the lawfulness of the arrest since the onus rested on the defendant in that regard.

[7] The defendant called Constable Madikane who testified as follows in brief:

7.1 That he is an investigating officer in the SAPS stationed at the stock theft unit in Middleburg and his rank is a Constable. He has been at that unit for 8 years and was working in that unit in 2011. His duties involve the investigation of theft of livestock.

7.2 He serves 43 stations in Mpumalanga including Belfast and Dullstroom police stations.

7.3 Normally what prompts an investigation is a report of theft of livestock by a complainant.

7.4 In this case, he received a docket on 25 April 2011 pertaining to theft of two cattle in the Belfast area at Groenvlei farm which is owned by Mr Roelofs Mare.

7.5 When perusing the docket he found that there are suspects being Mr Moses Simelane, Mr Boy Tlou and Mr William Ndlovu.

7.6 He went out to look for Mr Simelane who was unknown to him as well as Mr Boy Tlou at the farm.

7.7 He visited the farm where he interviewed the complainant, Mr Mare who indicated what had transpired.

7.8 In essence, Mr Mare told him that he had been informed by Mr Jacob Ndlovu that he had seen the three suspects at his cattle kraal in Groenvlei farm.

7.9 He tried to find Mr Moses Simelane and looked for him from time to time but could not find him until on 07 June 2011 when he set off to arrest him. He

had been phoned by Mr Mare on 07 June 2011 that he had seen the plaintiff's car at his house.

7.10 He then left from Middelburg to Belfast with Warrant Officer Botha using a Nissan Toyota double cap. The bakkie has no canopy or canvas at the back.

7.11 They arrived in Belfast about midnight and sought a marked vehicle from the Belfast police station to no avail. They then drove out to Groenvlei farm with the double cap bakkie and stopped in front of the plaintiff's house around midnight.

7.12 After knocking at the door, the plaintiff opened and when they informed him that they were looking for Mr Moses Simelane, he identified himself as such person.

7.13 Constable Madikane then informed him that they were there to find out more about the two stolen cattle from Groenvlei farm during April 2011. His response to that was that if the law allows it, they may arrest him.

7.14 Thereafter Constable Madikane informed him of his constitutional rights and handcuffed him, checked if the handcuffs were firmly set and not hurting him and put him in the back seat of the bakkie. They then drove to the Belfast police station.

7.15 On arrival at the police station, he was informed that he was arrested for theft of two cattle from Mr Mare and his constitutional rights were repeated and he was shown a written version of such rights for which he signed as acknowledgement.

7.16 He was then left there and Constable Madikane returned the following day in the morning to charge him and entries were made of his arrest so that he attend court on 09 June 2011. On 08 June 2011, there was no court sitting at Belfast Magistrates' court.

7.17 On Thursday 09 June 2011, the Constable took the docket to the Public Prosecutor who, after scrutinizing it told him that there is no link between the offence and the suspect. The plaintiff was to be brought to court by the uniform police that day.

7.18 After speaking to the prosecutor he then looked for the plaintiff but could not find him, he was later informed that he had not been brought to court because it is only the regional court that sits on 09 June 2011.

7.19 He later found him at the Belfast police cells and instructed the administrative personnel to release him as he was not linked to any offence. He also showed them the entry on the occurrence book. They promised to release

the plaintiff although he does not know if they eventually released him on that day.

7.20 In cross-examination, he could not confirm that the plaintiff was released on 09 June 2011.

7.21 He confirmed that he still works with W/O Botha but he does not know why he was not in court. He however in re-examination stated that W/O Botha had attended an auction operation in Belfast and therefore could not come to court.

7.22 He indicated that he had gone there to investigate on 07 June 2011 and not necessarily to arrest the plaintiff but arrested him when the plaintiff stated that if he is being suspected, he must be arrested. He could not explain what value such statement had added to his investigation.

7.23 It was also put to him that there were 3 police officials that day, 2 black males and 1 white male. He denied as stated that it was only the 2 of them, being W/O Botha and himself.

7.24 He also denied that the alleged incident whereby the bakkie was stopped on the way and W/O Botha had asked why the plaintiff he was being arrested. He stated that W/O Botha was his superior and if he was at fault he would have informed him so.

7.25 He also denied that the plaintiff was manhandled by other police officials and stated that that did not happen in his presence nor did he perpetrated such an offence.

7.26 He also indicated that he did not take the plaintiff to Dullstroom Magistrates' court because the case fell within the jurisdiction of the Belfast Magistrates' court.

[8] Before closing the case for the defendant, counsel for the defendant also informed the court that the docket has not been discovered so the date of the release of the plaintiff could not be confirmed by the defendant.

[9] The plaintiff was then called, who testify as follows:

[9.1] He was arrested on 08 June 2011 from his place of residence at Groenvlei farm in Belfast and that is the place where he was born and bred. He is married with 4 kids.

[9.2] He works at Woestaleen Colliery Mine at Middelburg and was working at such place during June 2011. He stayed at a rented place in Middleburg and only travelled to home to Groenvlei, Belfast, when necessary. On the day of the arrest he was on a 3 day-leave.

[9.3] It was on Tuesday around midnight when a white police double cap Nissan bakkie came and the policemen knocked at the door when his daughter responded. The police stated that they were policeman looking for Mr Simelane.

[9.4] The plaintiff opened the door for the police who asked if William Tlou was leaving there and he indicated that he does not but identified himself as Moses Simelane.

[9.5] The policeman, being Constable Madikane then produced his appointment card and asked him to walk with him to the bakkie. At the bakkie, he told him that the owner of the farm, Mr Mare, had complained that the plaintiff stole his 2 cattle and that he must arrest him. He then asked whether the law allowed the police to arrest him in those circumstances. The policeman then responded that he is there to arrest him. The plaintiff then said if that is the case let him do so.

[9.6] He was handcuffed and the grip was tightened to the point of being painful. One of the persons who was at the back seat of the bakkie was removed and put on the open end of the bakkie where he was tied to the side of the bakkie. The plaintiff was placed at the back seat.

[9.7] He indicated that there were 3 policemen that day but could only define 2 being the white person driving and another black male police officer sitting on the rear seat with him.

[9.8] They continued to question him along the way to the police station about the cattle, which he denied. At some point the white police officer stopped the bakkie and asked Constable Madikane why he was arresting him to which he said that he wanted the plaintiff to show him where William Tlou's place is. The white officer asked the plaintiff if he knew William Tlou's place to which the plaintiff answered in the negative.

[9.9] At Belfast police station, Constable Madikane did some writing and thereafter took the plaintiff to the police cells where there were no blankets available though it was a very cold winter day. The other arrestees however provided him with blankets.

[9.10] He was released on Friday around 14h00, having been arrested on Tuesday.

[9.11] He had been taken to court on Thursday but never appeared before a presiding officer. He was put into a cell in the Magistrates' court at Belfast as the court was sitting at Dullstroom that day.

[9.12] There were 3 other arrested persons who were taken to Dullstroom and a police officer at Belfast police station had asked why he was also not taken to Dullstroom Magistrates' court. The other policeman replied that they had been ordered to take him to Belfast.

[9.13] On Friday, he and others were taken to Belfast court cells and thereafter to court. Before getting into the dock, he was asked to identify himself and upon doing so he was told that somebody is playing a fool of him and that he should go home. A policeman then escorted him out of the premises and that is the last time that he saw Constable Madikane.

[9.14] He was led in detail as to the appalling conditions at the police cells by his counsel.

[9.15] He indicated that he had been taken by the police for questioning before on another occasion regarding theft of livestock.

[9.16] In cross-examination he was asked as to whether other people including his children could see him being arrested as he had stated that it was dark at the time and the only lights that were there were those of the police bakkie which were facing the house. He indicated that his children had seen him being arrested and that the policeman had a torch with him. He insisted that he had slept for 3 nights at the police cells.

[9.17] He also stated that he knows Mr William Tlou who is a son of his cousin and who stays in a distant neighbourhood.

[9.18] He indicated that on the day of his arrest, he meant that if the police had a reason to do so he was not going to resist arrest.

[9.19] He indicated that he never consulted a doctor regarding the injury from the handcuffs as the pain had subsided later. He also confirmed that he never opened any criminal case against the police.

[9.20] On questioning by the court, it became clear that he had been arrested in the early hours of Wednesday 08 June 2011. He also indicated that he had worked for the current owner of the farm for a year. It was next to the bakkie when he was told that they had come to arrest him.

[10] The plaintiff relies on an unlawful arrest. The defendant has an onus to show that the arrest was lawful.

[11] I gave the defendant latitude to show through the evidence of Constable Madikane that there were grounds for a reasonable suspicion of the plaintiff which would justify his arrest. I even overruled an objection by the plaintiff's counsel against the evidence of Constable Madikane when he was relating what

was reported to him. My ruling in this regard was based on the understanding that such evidence was not adduced to prove the truthfulness and the correctness of what was reported to him during the investigation but to show what was placed before him in order for him to be able to exercise his discretion whether or not to arrest.

[12] Constable Madikane stated that he interviewed the complainant, Mr Mare who informed him that he had been told by Mr Jacob Ndlovu that he had seen the 3 suspects near the cattle kraal. There is no evidence that Constable Madikane also interviewed Mr Jacob Ndlovu to establish and explore what he had been told by Mr Mare. None of the statements of either Mr Mare or Mr Ndlovu were produced. As stated earlier, the whole docket was not discovered and no explanation or reason was proffered for that.

[13] Furthermore, Constable Madikane first went to the house of the plaintiff with a view to investigate and not necessarily to arrest him. However when he enquired from the plaintiff about the theft in issue, the plaintiff did not want to give any details to him but merely stated that if the law allows him he may arrest him. I took this up with the counsel for the defendant that this statement merely meant that if there was a reasonable suspicion then Constable Madikane would be entitled to proceed to arrest him. The question then remains whether grounds for a reasonable suspicion existed for Constable Madikane to arrest him at a time.

[14] At that time, Constable Madikane only had a vague statement from Mr Mare which was also based on hearsay. The Constable had not probed further by interviewing Mr Jacob Ndlovu, according to the evidence he gave. Neither Mr Mare nor Mr Ndlovu testified.

[15] In my view, there were no grounds for a reasonable suspicion against the plaintiff when Constable Madikane arrested him and therefore the arrest was unlawful and is not justified by the provisions of section 40(1)(b) of the CPA. This is so notwithstanding the fact that theft falls under schedule 1 and therefore if there were reasonable suspicion, the offence would have been covered by that section. It is now trite law that the test for the reasonableness of the suspicion is an objective one. The facts stated by the defendant's witness do not satisfy such test.

[16] The next question is the length of the plaintiff's detention. The plaintiff was understandably confused with regard to the day in which he was arrested. He was arrested immediately after midnight and did not look at the watch when he was arrested.

[17] While I understand the plaintiff to be an unsophisticated person, he made a few glaring errors in his testimony. For instance, he could not give a clear account of who was in the vehicle when he was taken to the Belfast police station after his arrest. Hence I find it difficult to accept that W/O Botha had stopped the

vehicle and asked the investigating officer why he was arresting him. In my view, it is unlikely that the warrant officer would have asked that question openly in front of the plaintiff thereby exposing his colleague even if he thought he was wrong. In any event, the Constable testified that the warrant officer was senior to him and could have merely instructed him to release the plaintiff if he thought the arrest was wrong.

[18] In any event, in the light of my finding above that the arrest was unlawful, it is unnecessary to make a finding with regard to this statement as the arrest continued to be unlawful up to the time of the plaintiff's release¹.

[19] According to the plaintiff, he was taken to court for the first time on Thursday 09 June 2011 but did not appear before any presiding officer and was returned back to the Belfast police cells and taken back to the Belfast Magistrates' court the following day on 10 June 2011. He was then released in the afternoon of Friday 10 June 2011 when it was found that his case was not on the roll and after the prosecutor had stated that the docket does not disclose any link between the crime and the plaintiff.

[20] On the other hand the defendant's version is that the plaintiff was released on Thursday in the afternoon about 15h00 after the prosecutor had found that there is no link between the crime and the plaintiff. In other words, both the plaintiff and the defendant's witnesses agree that the plaintiff was released at

¹ Minister of Safety and Security v Tyokwana 2015(1) SACR 597 (SCA) para 31

about 15h00. after the prosecutor had found that the docket does not establish any link. The question is whether it was Thursday or Friday.

[21] There is no clear reason why the plaintiff would not have been brought to court on Thursday 09 June 2011. The contention by Mr Mkhize that both on Thursday and Friday the plaintiff had been brought to court and it was found that his case was not on the roll seems to be far-fetched. There is no reason to disbelieve the investigating officer when he said that on Thursday 09 June 2011 the prosecutor stated that there is no link established by the docket, which statement of the prosecutor is confirmed by the plaintiff himself. It must be remembered that the period of the detention itself must be established by the plaintiff though the lawfulness thereof must be shown by the defendant. The plaintiff did not produce any evidence to show that he was actually kept in detention until Friday 10 June 2011.

[22] In the circumstances, I find that the plaintiff was, after his arrest, detained until Thursday afternoon and therefore for about 36 hours.

[23] As regards the quantum, I was referred to various authorities by both counsel including the detailed reference to the case of **Minister of Safety and Security v Seymour**². I accept the argument by counsel for the plaintiff that the reduction of the amount of R500-000-00 to R90 000-00 was based on the fact that the actual incarceration in prison cells had been for about 24 hours for the

² 2006 (6) SA 320(A)

plaintiff in that matter³. At the end of the day, the various awards provide a mere guide.

[24] In coming to the appropriate award to be granted in this case, I take into account that the plaintiff was a middle aged man who was taken from his family in the middle of the night. Although it could not be established whether his children observed the actual arrest and handcuffs being put on him, it is clear that they were aware of the arrest of their father on that night as his daughter was the one who responded to the knock (this allegation was not disputed).

[25] I was not proved that the plaintiff was ill treated at the time of his arrest and/or during his detention. It must be mentioned that during the cross examination of Constable Madikane, it was strongly put to him that the plaintiff would say that he was manhandled and assaulted by a group of police on 09 June 2011, to which he stated that he did not see that happening and was not involved. The plaintiff in his testimony did not touch on that at all, despite having been asked more than once by his counsel whether any else had happened to him during his incarceration.

[26] I could find nothing exceptional with the conditions of imprisonment of the plaintiff though I acknowledge that it may have been extremely cold that night especially in the area of Belfast during June. The plaintiff's constitutional right to liberty and integrity was therefore violated and such violation cannot be taken lightly.

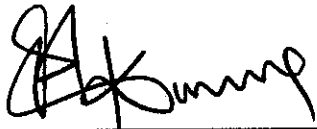
³ See Seymour (*supra*) para 21

[27] In the circumstances of the case, I am of the view that an appropriate award would be R80 000-00 as damages and *solatium* for the infringement of his rights including the *contumelia* or insult on his well-being and person.

[28] In the result, I make the following order:

[28.1] The defendant is to pay to the plaintiff an amount of R80 000-00.

[28.2] The defendant is ordered to pay the costs of suit.

A handwritten signature in black ink, appearing to read 'DT Skosana', written over a horizontal line.

DT SKOSANA
Acting Judge of the High Court