REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 41578/2013

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

[redacted]
SIGNATURE

14 March 2022
DATE

In the matter between:

LUDWIG: ANDREW **PLAINTIFF**

AND

MINISTER OF POLICE **DEFENDANT**

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] This is an action for damages from the plaintiff for damages allegedly suffered consequent upon the unlawful arrest and detention by members of the South African

Police Service('SAPS'), employed by the defendant. The plaintiff in his amended particulars of claim seeks payment in the sum of R100 000.00 in respect of unlawful arrest and detention and claims a sum of R100 000.00 for assault.

[2]. Initially, the action was framed in three (3) separate claims, namely: Claim 1: unlawful arrest and detention; claim 2: assault, claim 3: malicious prosecution. I hasten to mention that at the commencement of the trial, the plaintiff abandoned claim 3 and the trial proceeded only in respect of the first two claims.

[3.] The plaintiff's claim is premised on vicarious liability, it being his pleaded case that the police officers who arrested and detained him, were at the time employed by the defendant and were thus acting within the scope of their employment and in the execution of their duties.

[4.] The plaintiff was arrested without a warrant in the early hours of 20 December 2012 in Knysna and was kept in police detention in Plettenberg Bay until he was released the same day without appearing in court.

[5.] The action is opposed. The defendant in its amended plea, pleaded that the plaintiff was in respect of the assault claim, arrested because he resisted the arrest, and the police officials used force to restrain him and control him. Whereas, in respect of the first claim, the plaintiff failed to stop at the stop sign, driving under the influence of alcohol, and therefore the arrest was justified in terms of s40(1)(a) of the Criminal Procedure Act 51 of 1977('CPA').

BACKGROUND

[6] The claims of arrest, detention, and assault by the plaintiff all arose from a single event of failing to stop at a stop sign in Knysna in the early hours of 20 December 2012

and almost causing an accident with a marked police vehicle. The event unfolded whilst the plaintiff was on holiday in Knysna.

[7] The plaintiff alleges that during the arrest, he was assaulted by unknown police officers who were part of the group of policemen conducting the arrest. The plaintiff claims that because of assault which took place on numerous occasions and locations on the night in question, he sustained soft tissues injuries all over his body, and because of the conduct of the police officers in effecting the arrest, he was insulted, degraded, humiliated, defamed, and suffered a loss of privacy and liberty.

[8.] Subsequent to his arrest, the plaintiff was held in police custody at Plettenberg Police Station for a period of 4-6 hours when he was released from custody without appearing in court.

[9.] The plaintiff claims that the conditions under which he was detained were 'very bad and sickening' and that he fell ill and had to seek medical intervention after his release. The plaintiff further contends that the members of SAPS who arrested him had no reasonable grounds for instituting charges against him on the night in question.

MATERIAL EVIDENCE

[10.] The plaintiff testified himself and as such was a single witness. The defendant called 3 witnesses in support of its case, namely, Sergeant ('Sgt ") Tukani, the arresting officer, Sgt Damon, and Sgt Maselane.

[11.] I do not intend to summarise all their evidence, but only to highlight those portions of the evidence necessary for the outlining of essential narrative of events and those material to the determination of liability. It is common cause that Sgt Tukani is the peace officer who is qualified to effect an arrest and detain a person as envisaged in s 40(1)(a) of the CPA. The defendant attracted the onus and duty to begin. The parties agreed that

the Plaintiff in respect of claim 2 bears onus and duty to begin, therefore, the plaintiff commenced with calling of his first and only witness, Mr. Ludwig.

[12.] I now recount the evidence of Mr. Ludwig - On the 20 December 2012, around midnight, the plaintiff and his friend Mr Chris Pickering ('Chris') were at a nightclub in Knysna. At around 2 o'clock midnight, he decided to leave for home as the pub was full. Whilst still inside his rented car with his friend, Chris at the parking lot, even before he could drive off, the police officers approached them shining a torch, and he was asked to drive to the nearest police station. Because he was familiar with the area, he complied. The police who were inside their marked motor vehicle followed him. He drove and parked right Infront of the police station.

[13.] Upon his arrival at the police station, he was aggressively met and was arrested and during his detention, he was pepper-sprayed several times by members of the South African Police Service('SAPS').

[14.] He was later put into a police motor vehicle, handcuffed, and was not informed where he was being taken. Whilst en-route to the unknown destination, police stopped the motor vehicle and he was pepper-sprayed on the side road and was put back in the back of the police van, and they drove off with him. Still whilst en-route, the van drove in a bumpy road before it stopped for the second time, and he was threatened to be shot if he did not keep quiet. He was ultimately taken to a hospital where he was pinned down and injected with a tranquiliser in his right shoulder area. The injection so inserted sedated him immediately. The injection was not consistent with where a needle for drawing blood is inserted, so his testimony goes.

[15.] This resulted in him concluding that the blood was not drawn from him and that no mark or sign of a needle mark could be found on either of his arms. Also, no plaster or cotton wool was attached to his arm, which he testified was the usual practice when

he donated blood in the past. He was then taken to the Knysna Police Station. Upon his arrival, he was jeered by other police officers and even spat on and was further detained. The conditions in the cell were deplorable. Without appearing in Court, he was released from custody on 21 December 2012 at approximately 10h30.

[16.] Mr. Ludwig has since 21 December 2012 not heard anything of the charge for which he was arrested. He described the incident of his arrest, detention, and assault at the hands of the SAPS as very traumatic. He had to receive counselling on numerous occasions to deal with his ordeal. He suffered nerve damage to his wrists, which persists to this day. He denied the versions as put to him on Defendant's behalf.

[17.] The Plaintiff closed its case and the Defendant called its first witness, whose evidence can be summarised as follows:

SGT. TUKANI ("ARRESTING OFFICER"):

[18.] Sergeant Tukani has eighteen years' service in the SAPS. Between 02h15 and 02h30 on 21 December 2012, he and two crew members were on patrol. They observed a Polo motor vehicle, traveling at high-speed crossing a stop street, in the process almost bumping into them. They then pursued the Polo with blue lights and siren on.

[19.] The Polo then came to a standstill in front of the Plettenberg Bay Police Station. Sgt. Tukani testified that the Polo which the plaintiff was driving at the time and was alone in it stalled right in front of the station, which is where they caught up with him.

[20.] Sgt. Tukani approached the Plaintiff and realised he was drunk. He then arrested the Plaintiff for drunken driving. Plaintiff's car was in the middle of the street, but

Sgt Tukani could not say how it was moved or by whom. They walked into the police station which was a few metres away. No mention in his testimony was made that he had to assist or support the Plaintiff into the station.

[21.] They completed paperwork with the Plaintiff, then took Plaintiff to Knysna to have blood drawn. When approaching the police vehicle, Plaintiff refused to enter the vehicle. Plaintiff then assaulted him with his elbow and bent his spectacles in the process. It was when the Plaintiff fell, and he was pepper-sprayed and handcuffed.

[22.] On arrival at Knysna Hospital, where a doctor drew blood. Some blood sample was placed in an alcohol kit. Plaintiff was then taken to Knysna Police Station and further detained. He was detained in Knysna Police Station because of the construction underway at the Plettenberg Police station and therefore the station had no holding cells.

[23.] Sgt. Tukani testified that during a conversation, Plaintiff informed him that he was a student from Cape Town. Plaintiff also stated that he was born in 1983, which rang a bell as his own brother was also born in 1983. A proper look at the plaintiff's year of birth, suggests that the plaintiff was born in 1975 and not in 1983.

[22.] Sgt. Tukani did not observe any injuries on Plaintiff's body, despite having been physically constrained and sprayed with pepper spray. He could not dispute the injuries of the Plaintiff as depicted in the J88 medical report which forms part of the discovered documents before me.

[23.] Sgt. Tukani confirmed that Plaintiff was arrested for drunken driving. When asked why Plaintiff was not arrested for the numerous other offences he allegedly committed, he testified that he felt sympathetic towards Plaintiff and did not want to get him into more trouble. This despite already having arrested the Plaintiff on the very serious charge of drunken driving and making sure he is prosecuted by having blood drawn.

[24.] During cross-examination Sgt. Tukani was asked to explain why no mention was made in his arrest statement of all the other alleged offences committed by Plaintiff, i.e. that he drove recklessly and negligently, that he obstructed the police in conducting their work, that he assaulted him when resisting arrest, and that he had to be restrained forcefully and pepper-sprayed. His response was that he did not want to get the Plaintiff into more trouble.

[25.] Sgt. Tukani testified that whoever used the pepper spray, had to be recorded in the Occurrence Book. No such noting was made. He conceded that the times stated on the documentation in the docket was not accurate.

SGT. DAMONS (CREW):

[26.] Sgt Damons was on duty and a crew member early hours of 21 December 2012. His evidence corroborated that of his colleague Sgt Tukani in all material respects.

[27.] Sgt. Damons confirmed that he is the one who pepper-sprayed the Plaintiff, however, he did not record it in the Occurrence Book. He conceded that he was instructed by Sgt. Tukani only mention the offense of drunken driving in his statement.

SGT. MASELANA (CREW):

[28.] Sergeant Maselana was on duty and a crew member early hours of 21 December 2012. Her evidence too corroborated the evidence of her two colleagues she was with on duty on the night in question.

[29.] When confronted with her statement, she testified that it was done and commissioned on 21 December 2012. The document itself is clearly commissioned on the 6th January 2013. A date stamp was even affixed. The Commissioner was none other than Sgt. Damons. All three police officers testified that they were not involved with the docket or the investigation after 21 December 2012.

[30.] Sgt. Maselana was involved with completing the SAPS 22 at Knysna Police Station, at which time Plaintiff still had his vehicle keys on his person.

THE APPLICABLE LAW

[31.] I refer herein the provisions of sections 40 and 50 of the Criminal Procedure Act 51 0f 1977('CPA") that are implicated in this matter. In terms of section 40(1)(a) a peace officer may without warrant arrest any person who commits or attempts to commit any offence in her/his presence. The jurisdictional factors that must be established for a successful invocation of section 40(1)(a) are –

(a) the arrestor must be a peace officer;

(b) an offence must have been committed by the suspect or there must have been an attempt by the suspect to commit an offence; and

(c) the offence or attempt must occur in the presence of the arrestor.

[32.] "*[I]n the presence of*" contained in the section is an expression whose meaning has not been interpreted consistently. Ordinarily, the expression means "*within the eye shot of that police official or on her/his immediate vicinity or proximity*"[1]

[33.] Most importantly, the assessment of the legality of an arrest in terms of section 40(1)(a) requires a determination of whether the facts observed by the arresting officer as a matter of law *prima facie* establish the commission of the offence in question. The question to be posed and answered is – did the arresting officer have knowledge at the time of the arrest of such facts which would in the absence of any further facts or evidence, constitute proof of the commission by the arrestee of the offence in question? The arresting officer's honest and reasonable subjective conclusion from the facts observed by her/him is not of any significance to the determination of the lawfulness of her/his conduct[2]

[34.] On the other hand, section 50 reads as follows:

> *"(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.*
>
> *(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.*

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[1] In *Levuna v R* **1943 NPD 323** at 325 where Hathorn JP (Selke concurring) was of the view that a peace officer's power to arrest without warrant should not be confined to cases where she/he can actually see the offender committing the offence, whilst in *Fancult v Kalil* 1933 TPP 248 at 251 it was held (in relation to section 26 of Act 31 of 1917- predecessor of section 40) that the power to arrest was limited to offences which could be seen in their entirety (compare also *Minister of Justice and Others v Tsose* **1950 (3) SA 88** (t) at 92 – 3.`

[2] *Scheepers v Minister of Safety & Security* 2015(1) SACR 284 (ECG) at [20] – [21]

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after arrest..."

EVALUATION

[35.] I begin with claim 1 for unlawful arrest. It is common cause that Sgt Tukani arrested the plaintiff without a warrant in terms of s 40(1)(*a*) of the Act. The only issue was whether Sgt Tukani by his observation of the plaintiff's conduct on the day in question, the plaintiff's conduct indeed *prima facie* constituted the commission of the offence as charged?

[36.] From the testimony of Sgt Tukani as summarised above, it's indicative of the fact that the only information the arresting officer had at the time of the arrest was that, the plaintiffs' car was recklessly driven and almost bumped into theirs and almost caused an accident, further, the plaintiff did not stop at one of the stop sign he was travelling in, Upon pursuing the plaintiff, he found that he was under the influence of alcohol. This piece of evidence is corroborated by his two colleagues in all material aspects. In contrast to the plaintiff's evidence that, he was 'hand-picked' in a parking lot near a pub amongst other vehicles parked with other patrons in the middle of the night and police, unknown to him and with no reason shone blue lights and siren on him and his friend and arrested him after he was mishandled.

[37.] I am of the view that, just the first observation by Sgt Tukani, the arresting officer who also happened to be the driver of such police van ,of the Plaintiff 's conduct of not stopping at the street light and almost colliding with the marked motor vehicle, from the peace officer's own perception, the offence had just been committed, he in terms of the section therefore possessed the power to arrest without warrant and he was so charged. This involved Sgt Tukani being on the scene of the offence at the time of its commission, so he personally had seen (or otherwise perceives) that an offence has just been committed.

SINGLE WITNESS

[38.] In the SCA decision of **Stevens v S** [3]the court expressed itself at para 17 as follows:

> "*As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, S v Webber 1971 (3) SA 754 (A) at 758G–H). The correct approach to the application of this so-called "cautionary rule" was set out by Diemont JA* ***in S v Sauls*** *and others 1981 (3) SA 172 (A) at 180E–G as follows:*
>
> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness… The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.)*

[3] [2005] 1 All SA 1 (SCA)

It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense".

[39.] As outlined in paragraph 36 above of my judgement, it is not probable that the arrest could have happened in the manner the plaintiff narrated.

[40.] I find that on totality of the evidence including the cautionary rule that I must adopt, I am convinced that the truth has not been told by the Plaintiff and am of the view that the arresting officer was within the purview of the section in effecting the arrest. Accordingly, I found that the arrest was lawful.

UNLAWFUL DETENTION

[41.] The basis for the plaintiff's claim was that even after being admitted at hospital for drawing of his blood, he was still kept under police guard at Plettenberg Police station. His movements were restricted due to hand cuffs, and the appalling conditions he was detained under.

[42.] It is common cause that the investigation officer ,also a member of the defendant and not Sgt Tukani owed a duty to the Plaintiff to properly investigate the crime and bring to the attention of the prosecutor and the magistrate at the bail hearing, information which was relevant to the exercise by the magistrate of his discretion. This include the duty to ensure that any further charges are brought against the plaintiff which he was not originally charged with after the arrest. This is the common practice in the performance of police duties in matters of this nature. It is common cause that no court

appearance was made by the plaintiff as he was released from police custody without appearing in court. All of this took place within the 48hrs envisage in s50 of the CPA.

[43.] The central issue this court had to deal with is whether as a consequence of the unlawful arrest, whether the continued detention of the respondent, fell within the purview the provisions of s 50(1) of the Act?

[44.] The purpose of the section is twofold; to ensure that an arrested person appeared before court as soon as possible after the arrest and to allow the court to order the further detention of the arrested person for the purposes of trial.

[45.] Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of s 12(1)(*a*) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages.

[46.] This court in considering the manner how the arrest and detention took place from the plaintiff and defendants' point of view, is seated with two mutually destructive version. I will hereunder discuss the caution that this court ought to deal with in assessing such evidence.

ASSAULT

[47.] As regard to the assault claim, the plaintiff in his particulars of claim and testimony in court contends that on the day in question, he was assaulted by Sgt Tukani and Sgt Daniels by being pushed to the ground and being forcefully pulled from his car,

repeatedly pepper sprayed, placing a gun against his head and thrown out of the police vehicle unto the ground and injuring his knees.

[48.] In contrast, the defendant in its amended plea dated 13 January 2022, denied that plaintiff was wrongfully and unlawfully assaulted. Pleading that plaintiff is the one who assaulted a police official ,Sgt Tukani and resisted being arrested, which resulted in the police officials using minimum force. As far as the arrest is concerned, the defendant pleaded that the plaintiff's arrest without a warrant was justified in terms of Section 40 *(1) (a) of the* Criminal Procedure Act, as plaintiff had committed the offences as alleged by defendant in the presence of the police. A proper consideration of the J88 and the injuries depicted thereon seems to bolster the defendant's version and not that of the Plaintiff. These injuries are swollen eyes, which the defendants witnesses admitted to have pepper sprayed him when he was being restrained for arrest. The lacerations by the knees is suggestive of the defendant's version. Accordingly, the force used by the defendants witnesses in this regard, is found to have been reasonably necessary for the purpose of the arrest of the plaintiff.

MUTUALLY DESTRUCTIVE VERSIONS:

[49.] The approach, when facing mutually destructive versions was set out in the case of ***National Employers General Insurance Co Ltd v Jagers*** by Eksteen AJP when he stated:

> "... w*here the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities.*

The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[50.] The approach on mutually destructive versions as delineated above obtained a stamp of approval from the Supreme Court of Appeal in 2003 in the case of ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others***[4], where the court restated the law as set out in the ***National Employer General Insurance Co. Ltd* case *supra*.**

[51.] The test propounded by Wessels JA **in *National Employer's Mutual General Insurance Association v Gany*[5]** is to the effect that "*where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rest is true and the other false".*

[52.] The principles extracted from these two cases are that when there are mutually destructive versions before court, the plaintiff's *onus* of proof can only be discharged, if he proves his case on a preponderance of probabilities and that the prerequisite, that a court must be satisfied that the plaintiff's version is true and that of the defendant

[4] 2002ZASCA98(6September 2002)
[5] 1931 AD187 at 199

is false, in order for the plaintiff to succeed in discharging his *onus* of proof, is only applicable in cases where there are no probabilities one way or the other.

[53.] The plaintiff was not a very impressive witness, who's evidence had material inconsistencies which remained unexplained, further contradictions as he tried to explain them whilst testifying. He entangled himself in incomprehensible explanations, making it difficult for anyone to understand as to which version he was exactly standing by. The version as summarized above that he finally chose is improbable, to be able to conceive it as the truth. In certain instances, during cross examination, he was so obviously untruthful making the testimony of the plaintiff wholly unreliable and not credible.

[54.] Considering the approach formulated in considering mutually destructive versions in the cases above, I find that the plaintiff failed to convince this Court on a preponderance of probabilities and in considering the plaintiff's version against the general probabilities, that his version of events is the truth. On the other hand the defendant's witnesses were all credible and truthful witnesses, although some of their statements to the police differed to the respective testimonies in Court, marginally and there was not a substantive difference but merely on certain insignificant details taking into consideration that the incident took place almost 10 years ago, their testimony is accepted as credible and a more probable reflection of the events surrounding the arrest, detention, and assault on that day.

[55.] Accordingly, I find the detention of the plaintiff *in casu*, as it has been demonstrated above was within the purview of s 50 and accordingly lawful.

ORDER:

[56.] In the result the following order is made:

(a) The plaintiff's claims are dismissed with costs.

NDLOKOVANE N
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgement is handed down electronically by circulation to the parties' legal representatives by email the date and time for hand-down is deemed to be 10h00 on 14 March 2022

Appearance

Applicants' Counsel:	Adv C Zietsman
Instructed by:	Louber Van Wyk Inc.
Respondent's Counsel:	Adv S O'Brien
Instructed by:	State Attorney

Date of Hearing:	17 – 19 January 2022
Date of Judgment:	14 March 2022