



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED - NO

DATE: 25 JULY 2022.....

SIGNATURE:

Case No. 7016/2018

In the matter between:

DENISE MARY FOWLER

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Coram: Millar J

Heard on: 19 & 20 July 2022

Delivered: 25 July 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 25 July 2022.

Summary: Action for damages for unlawful detention and invasive bodily search – two versions, corroborative in certain respects and mutually destructive in crucial respects – plaintiff's version not probable and is rejected – detention not unlawful - plaintiff's claim is dismissed with costs.

ORDER

It is Ordered:

1. The plaintiff's claim is dismissed with costs.

JUDGMENT

MILLAR J

1. This is an action for damages brought by the plaintiff against the defendant arising out of what is contended to have been the unlawful conduct of two police constables on 28 June 2018 during the afternoon on Ontdekkers Road, Florida Gauteng.
2. When the trial commenced, the defendant, applied for a postponement of the trial. The postponement was predicated on the possible non availability of witnesses for the defence as well as an amendment to the plea. During the course of the argument of the postponement, it became apparent that the defendant's witness, Constable Sithole would in fact be available to testify and so the postponement was refused.
3. The argument of the postponement did not take particularly long and I am of the view that there should be no order for costs in respect thereof. The defendant moved for an amendment of its plea – the initial plea was a bare denial while the amended plea now contained a specific version. The amendment of the plea was granted by agreement between the parties.
4. There were 2 witnesses called at the trial. The plaintiff testified in her case and Constable Sithole testified on behalf of the defendant. There was no separation of issues sought and the entirety of the matter – in respect of both liability and quantum of damages (if apposite) is to be decided on the evidence presented.

5. The plaintiff testified that on 28 June 2018, she was employed by BMV Foods. She was working as a saleslady, attending at various supermarkets supplied by her employer to check that their shelves were properly stocked and to take orders. On the day in question, she had just finished with a client in Florida and was on her way to another client in the area. She was driving along Hattingh Road towards its intersection with Ontdekkers Road. It was approximately 13h00. She noticed a marked police vehicle behind her. She slowed down before turning onto Ontdekkers Road and once she did so, the police vehicle that was travelling behind her, a van, drove up behind her with its blue lights now flashing.
6. She pulled her car over to the side of the road and climbed out of the car and walked towards the police van with her driver's licence in hand. She believed that it was a routine traffic stop. While walking towards the police van, the police officers climbed out of the van and were holding rifles (which she described as R4 or R5 automatic rifles) and pointing them at her.
7. She took fright and ran back to her car shouting to the police that they could follow her to the nearest police station. She got in her car and used her GPS to find the closest police station which was the Florida Police Station approximately 1 kilometer away. She started driving there.

8. The police officers got back into their van and gave chase and cut her off and forced her to stop. Her evidence was that they had then climbed out of the van and, still carrying their rifles, had come to her car and forced her out of the car. Not knowing what was happening and being scared by the presence of the rifles, she testified that she had run into Ontdekkers Road to flag down passersby to help her. Initially two passersby had stopped and had enquired from the police officers what was going on and her evidence was that the police officers had verbally rebuked the passersby, one of whom was a Mr. Govender, and told them not to interfere.
9. The police officers had then taken hold of her and tried to force her into the police van. She described the way in which this was done by stating that they had grabbed her by her arms and pulled her towards the van and had also tried to push her into the van – the van was a double cab and they had tried to push her onto the back seat.
10. Her evidence was that she had resisted and had pulled away and had '*fought the police*' to avoid being put onto the back seat of the bakkie. Her evidence was that while they had tried to put her into the bakkie and had grabbed her by her arms and pushed her, they had not assaulted her save by shouting at her and using inappropriate language.

11. Two further police officers arrived on the scene and after some discussion, it was decided that she would drive in her own vehicle to the Florida Police Station and would be accompanied by Constable Sithole. Her evidence was that still frightened by the rifles, she had refused to allow Constable Sithole into her vehicle with the rifle and Constable Sithole had acquiesced and placed her rifle in the police vehicle and accompanied her in her vehicle without it.
12. It was the plaintiff's evidence that she then drove with Constable Sithole to the Florida Police Station and was followed by the other two police vehicles. When they arrived at the police station, the 4 police officers had then attempted to take her into a 'holding room' which she had refused to go into and she had run back to the charge office calling for help and asking to speak to someone in charge.
13. When she got to the charge office, she had encountered an officer who she described as Colonel Nyaba who had looked at her and had then said to Constable Sithole that in his opinion because she was so frantic, she must have had something to hide and must be searched.
14. She then went with Constable Sithole to the restroom. According to her, Constable Sithole had asked her to remove all her clothes so that she was standing naked in the restroom. The restroom was a female restroom and

other women besides herself and Constable Sithole came into the restroom and observed. According to the plaintiff, Constable Sithole, without wearing any gloves and having instructed her to remove all her clothes, then proceeded to conduct a humiliating and invasive search of her body.

15. After the search was concluded, she had come out of the restroom and collapsed in the charge office. Her evidence was that she had been offered 'sugar water' but had been too afraid to drink it because she did not know if the police wanted to poison her and had been asked if she wanted to sit at the window to get some fresh air but had also refused this as she was scared that they may have done something to her – presumably pushing her out of the window.
16. The plaintiff testified that after Constable Sithole had reported that the search had found nothing, she had then been told that she could go. She was never arrested or told why she had been stopped or searched. The plaintiff was adamant that she was first stopped at around 13h00 and that they had arrived at the police station at 16h00 and that it was at 16h30 that she was told that she could go.
17. In consequence of what had transpired, the plaintiff said that she was unable to drive and had called a work colleague to come and assist her. The work colleague arrived, and she said it took about 2 hours for her to drive home with him following because she was unable to drive for an extended period of time without stopping because of what had happened.

18. She informed her employer of what had happened to her and her employer had sent her to a psychologist for counselling. She had also gone of her own accord the day after to see a medical doctor because she was concerned for her health in consequence of having been searched by someone who was not wearing gloves.
19. No report from either the psychologist or the medical doctor was placed before the court.
20. The plaintiff testified that the consequences of the incident have been devastating to her life. She was booked off for 2 weeks after the incident but could no longer drive. Her life partner assisted by driving her around for work for a short period of time, but her employer refused to allow him to do so on the basis that since he wasn't an employee it presented an insurance risk to them. As a result of this, she left her job at the end of July 2018. Thereafter, she relocated with her partner to the Eastern Cape, the trauma of living in Gauteng in consequence of its association with what had happened being too much for her to bear. She testified that she is still unable to drive on her own and that any award that she would receive would be utilized for therapy to try and 'give her her life back'.
21. Constable Sithole testified on behalf of the defendant. She was one of the police officers on duty on the day in question. She had been on general crime prevention duties in the area of Florida together with Constable White. Constable White was driving the van and she was his crew member. She confirmed that on the day in question, she had been in possession of a rifle and

that in terms of police procedure, the person to who such rifle had been issued had to carry it with them at all times.

22. She also testified that at approximately 13h00 they had been on patrol when they had observed a vehicle in front of them. The area that they were patrolling was a known drug area. The vehicle in front of them had been driving relatively slowly and had then suddenly sped up. Their suspicions had been aroused by the speeding up of the vehicle and they thought that perhaps the driver may have been wanting to evade them.
23. They pulled the vehicle over and the plaintiff was inside. They told the plaintiff that they wished to search her and her vehicle. The plaintiff refused to get out of the vehicle and told them that she did not know whether they were in fact genuine police officers or not. She told them that she had been hijacked previously and did not know whether they were going to try and hijack her again. The plaintiff told them that she was not a criminal and would not consent to being searched in public on the road.
24. Constable Sithole testified that the plaintiff had said she wanted to go to the police station so that the search could be conducted there, and they agreed. Constable Sithole testified that she told the plaintiff that she would accompany the plaintiff in her car to the police station. The plaintiff agreed to this provided that Constable Sithole did not bring her rifle in the plaintiff's car as it made the plaintiff uncomfortable. She agreed and put her rifle into the police van and then drove to the police station with the plaintiff in her car with the van following behind.

25. It was Constable Sithole's evidence that there were no passersby who stopped at the scene and that there was no second police vehicle.
26. When they arrived at the police station, she had taken the plaintiff inside to the restroom and asked her if she could search her. The plaintiff agreed and so she had asked her to lift her top to see if there was anything concealed in or about her breasts. Before starting the search, she had washed her hands but had not worn any gloves. She ran her hands over the plaintiff's body on the outside of her clothes. All she asked her to remove were her socks to see if anything was concealed there.
27. Once the search had been completed, she had then gone outside with the plaintiff to the plaintiff's vehicle and had then searched the vehicle in the presence of the plaintiff and Constable White.
28. Once the search of both the plaintiff and the vehicle had been completed, she had told the plaintiff that she was free to go.
29. She recalled that at the time that she had told the plaintiff that she was free to go, the administrative staff at the police station had started to go home and so that is how she knew that it was at approximately 15h00 to 15h30 as that was when they normally went home.
30. She denied that the plaintiff had ever exited her car before getting to the police station or that either she or Constable White had in any way physically or verbally abused the plaintiff. She denied that the plaintiff had run onto

Ontdekkers Road, that there was a holding room at the Florida Police Station and specifically that the search which she had conducted on the plaintiff had been on the basis that she had told the plaintiff to remove all her clothing or had in any way been invasive.

31. It is these two versions, corroborative in some respects and mutually destructive in others that must be weighed up in deciding this case.
32. The version of the plaintiff differs from that of Constable Sithole in a number of respects.
33. Firstly, the plaintiff testified that there was more than one stop;
34. Secondly, the plaintiff testified about her non cooperative and combative engagements with Constable Sithole and Constable White while on Ontdekkers Road and
35. Thirdly, that there were passersby and an additional two police officers who witnessed events on Ontdekkers Road and
36. Fourthly, the plaintiff testified that the search conducted at the Florida Police Station was humiliating and degrading.
37. Both the plaintiff and Constable Sithole gave their evidence in a satisfactory manner. Both answered questions put to them forthrightly and were consistent in their respective versions. In the circumstances this is not a case which falls to be decided on credibility. It is rather one to be decided on the probabilities.

38. If the version of the plaintiff is to be accepted, particularly in regard to what she says occurred on Ontdekkers Road when she resisted being put into the police van, it is quite clear that the plaintiff is not someone who is easily intimidated or easily brow beaten. On her own evidence at the time of the first stop, she did not wait for the police to come to her but exited her vehicle and went to confront them directly, only taking fright when she saw the rifles and thereafter running after the second stop onto Ontdekkers Road to flag down passersby for help. This is also corroborated by the evidence of Constable Sithole when she testified that the plaintiff refused to allow her into her vehicle unless she left her rifle in the police van.
39. Having regard to this conduct, and on the plaintiff's version that she refused to cooperate or acquiesce to the police for some 3 hours before arriving at the police station, it is inexplicable and in fact highly improbable that a person who had behaved in this manner would without further ado submit to a request to remove all her clothing and to then fail to object to or resist a humiliating, degrading and invasive search of her body.
40. Had the incident occurred in the manner testified to by the plaintiff, one would have expected her to have tendered into evidence the medical reports of the psychologist and the medical doctor and to have led the evidence of one or more of the alleged witnesses. When the plaintiff was asked why the reports

were not available, she testified that she had left her employer and had not obtained a copy of the psychologist's report from them. She conceded in evidence that the report of the medical practitioner would have not been of any assistance.

41. The absence of independent corroborative evidence which was available at the time of the incident and in respect of which no proper explanation has been furnished for the failure to lead it, is a matter of concern. The incident occurred on 28 June 2018. By 23 July 2018, less than 4 weeks thereafter, the applicant had already consulted her attorney and a letter of demand had been dispatched to the defendant.
42. It offers no succour to the plaintiff to say that relevant evidence which was available is no longer available because of the passage of time when on the evidence before the court, she consulted and instructed an attorney very shortly after the incident. The ineluctable inference to be drawn is that if there was any other relevant and corroborative evidence available to the plaintiff, it would have been procured and secured by her attorney at the time or shortly after he was instructed.
43. I am not persuaded on the probabilities¹ that the version of the plaintiff is to be preferred over that of the defendant. There are inherent improbabilities in

¹ See *Krishna v Pillay* 1946 AD 946 at 952-953

certain crucial aspects of the plaintiff's version as indicated above and in particular in regard to the events surrounding the bodily search. The request by the police to search the plaintiff was in my view entirely reasonable and did not amount to either an arrest or any detention of the plaintiff. The entire series of events, on both versions are as a result of the plaintiff's unreasonable and combative behavior. It is for this reason that I find that the plaintiff was neither arrested nor detained and her claim must fail.

44. Having regard to the view that I take of the matter it is accordingly not necessary for me to deal with the quantum of damages.

45. In the circumstances, I make the following order:

45.1 The plaintiff's case is dismissed with costs.



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

19 & 20 JULY 2022

JUDGMENT DELIVERED ON:

25 JULY 2022

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