

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE****CASE NO: 575/2020**

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

DATE.....

SIGNATURE:.....

In the matter between:

TSHEPHO MAMATLEPA**PLAINTIFF****And****MINISTER OF POLICE****DEFENDANT**

JUDGEMENT

KGANYAGO J

- [1] The plaintiff has instituted an action for damages against the defendant for alleged unlawful arrest and detention. The plaintiff in his particulars of claim alleges that he was arrested without a warrant on 7th November 2019 by members of the South African Police Services (SAPS) who were acting within the course and scope of their employment. Thereafter the plaintiff was detained and released on 13th November 2019. The plaintiff is claiming R500 000.00 against the defendant as damages for alleged unlawful arrest and detention.
- [2] The defendant has defended the plaintiff's action. In its plea, the defendant admit that the plaintiff was arrested on 7th November 2019 by the members of the SAPS who were acting within the course and scope of their employment. The defendant in its plea further alleges that the members of the SAPS went to the plaintiff's homestead to attend to a complaint of loud noise coming from the plaintiff's homestead. The defendant has further stated that in the process of attending the complaint, the plaintiff assaulted a police officer which led him to be arrested and detained. The defendant has pleaded that the plaintiff was lawfully arrested by members of the SAPS in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (Act).
- [3] The parties in their pre-trial minutes have agreed not to separate the issue of liability and damages. This court is called upon to determine whether the arrest and detention of the plaintiff was lawful or not. If this court finds in favour of the plaintiff, to award the appropriate damages allegedly suffered by the plaintiff. Since the defendant had pleaded that the members of the SAPS have arrested the plaintiff in terms of section 40(1)(b) of the Act, the onus is on the defendant to justify the arrest.

- [4] The defendant's first witness to testify was Tinyiko Thomas Maluleke. He testified that he is police officer stationed at Bolobedu SAPS, and constable by rank. On 7th November 2019 at about 19h30 they received a report that there was a person who was playing loud music whilst it was during examination time for other children. They were requested to go and tell that person to lower down his music. Maluleke in the company of constable Matjeke went to the plaintiff's homestead.
- [5] On arrival at the plaintiff's homestead they parked their vehicle next to the gate. In the yard they saw a shack and a house. The sound of the music was coming from the shack. They went to the house where they found a certain lady who introduced herself as Mmatjatji Mamatlepa. Maluleka told Mmatjatji to reduce the volume of the music so that they can be able to talk to her. Mmatjatji told Maluleka that it was his brother (plaintiff) who was playing the music, and that she was afraid to reduce the volume. At that time the plaintiff was not at home. Mmatjatji told Maluleke that she will go and call the plaintiff wherever he was. Mmatjatji left to go and call the plaintiff whilst the two officers stood next to the gate waiting for the plaintiff.
- [6] As they were standing next to the gate, the plaintiff arrived and he was running. On arrival the plaintiff asked the two officers what they were doing in his yard. Before they could respond to the plaintiff and tell him the purpose of their visit, the plaintiff pushed Maluleke who lost balance and fell to the ground on his back. In the process of falling, Maluleke hit the shack and speaker of the sound system with his back. When Maluleke stood up, the plaintiff slapped Maluleke twice with open hands. Whilst Maluleke was still surprised as to what was

happening to him, the plaintiff grabbed Maluleke with his uniform shirt. In the process of been grabbed, Maluleke lost two buttons of his uniform shirt.

- [7] That is when Matjeke decided to grab the plaintiff, even though it was not easy as the plaintiff was fighting. Matjeke managed to handcuff the plaintiff on his one hand, whilst Maluleke also handcuffed the plaintiff on his other hand. The struggle lasted for about 15 minutes. They were unable to handcuff the plaintiff on both of his hands in order to join them together. After some time, a certain female person who told them that she was the plaintiff's neighbour arrived. On arrival she calmed down the plaintiff, and told him that if he did nothing wrong he must co-operate with the police and board the police vehicle. The two officers ended up forcefully pushing the plaintiff to enter the police vehicle as he was resisting arrest. The plaintiff was arrested for assaulting Maluleke. He does not know whether the plaintiff was released on bail or not.
- [8] After the plaintiff was arrested, he was taken to Bolobedu police station where a docket of assault was opened against him. Thereafter the plaintiff was taken to Tzaneen police station where he was detained as there are no holding cells at Bolobedu police station. On arrival in Tzaneen, the plaintiff lodged a complaint that he wanted to consult a doctor as his body was painful. The plaintiff was taken to Van Velden hospital where he was examined by a doctor, given treatment and discharged. From there the plaintiff was taken to the holding cells at Tzaneen police station. Sometime later Maluleke was given a subpoena to appear in court in order to testify about the case he had opened against the plaintiff. He went to court and testified.
- [9] The witness was cross examined and he conceded that when he went to the plaintiff's homestead, there was no crime that had been committed by the

plaintiff, but that he went there to attend to a complaint of a loud music that was been played. The witness denied that on arrival of the plaintiff at his homestead, he (witness) accused the plaintiff of being disrespectful and started assaulting him and dragging him. The witness denied that the plaintiff co-operated with them after the neighbour had talked to the plaintiff, but that the plaintiff continued resisting arrest even after his neighbour had talked to him. The witness stated that he was not aware that the plaintiff was acquitted of all the criminal charges that he was facing. The witness also stated that he was not aware that the plaintiff was detained from the 7th to 13th November 2019.

[10] The second and last witness to testify for the defendant was Hlaolane Prudence Matjeke. He corroborated the evidence of the first witness of the defendant. He testified that when plaintiff arrived and found them waiting for him, the plaintiff started by insulting them, attacked Maluleke by assaulting him with open hands. Maluleke fell to the ground and that he (witness) is the one who had assisted Maluleke to stand up. Thereafter the plaintiff grabbed Maluleke by his clothes and the buttons of Maluleke's shirt were ribbed off. That is when the witness grabbed the plaintiff's hand whilst Maluleke also grabbed the plaintiff's other hand. Despite that the plaintiff continued fighting.

[11] The plaintiff's neighbour arrived and calmed the plaintiff. They struggled with the plaintiff for 10 to 15 minutes in trying to arrest him. They wanted to arrest the plaintiff for assaulting Maluleke and also for tearing Maluleke's shirt. The plaintiff's neighbour told the plaintiff that if he had not committed any offence he must co-operate with the police. From there they arrested the plaintiff and took him to Bolobedu police station where a docket of assault was opened against the plaintiff. From Bolobedu police station the plaintiff was taken to the holding

cells at Tzaneen police station. On arrival at Tzaneen the plaintiff complained that he was having some pains and he was taken to Van Velden hospital. From Van Velden hospital the plaintiff was taken to the holding cells at Tzaneen police station. The plaintiff was charged for assault of Maluleke on 8th November 2019 and released from custody on 13th November 2019. Later he received a subpoena to appear in court and to testify about the assault case in which the plaintiff had assaulted Maluleke. He went to court and testified. He stated that the plaintiff was lawfully arrested, and denied that they have assaulted the plaintiff.

[12] The witness was cross examined and he stated that when the plaintiff returned to his homestead he and Maluleke were standing at the gate, and that the radio was still playing loud music. The witness stated that the plaintiff's sister also came back and that she was one of the people who were telling the plaintiff to co-operate with the police. The witness stated that the plaintiff on arrival did not ask any question but started by insulting them, and thereafter pushed Maluleke. The witness stated that in the end he and Maluleke assisted each other in arresting the plaintiff. The witness denied that the pains that were experienced by the plaintiff were as result of the assault by him and Maluleke. The witness stated that they have handcuffed the plaintiff because he had damaged State property (Maluleke uniform shirt). That concluded the evidence of the defendant and they closed their case.

[13] The plaintiff took the witness stand and testified under oath. He testified that he was arrested on 7th November 2019. He appeared in court for the first time on 11th November 2019, and released on warning on 13th November 2019. Due to covid-19 the proceedings were suspended around March 2020. Later he was

served with the summons to appear in court on 19th April 2022. He was found not guilty and discharged on the charges he was facing on 15th March 2023.

[14] On 7th November 2019 when the police arrived at his homestead he was not present. When he came back home he found the police vehicle been parked at the gate. When he entered his shack, he found two police officers who looked as if they there looking for something. He stood there being surprised, and he was at the same time giving the said policemen time to search for whatever they were looking for, and also to ask him any questions.

[15] Seeing that they were not asking him any questions, the plaintiff decided to take one of the television set he was repairing to test it if it was working. He was selling cooldrinks, simba chips and also repairing television sets. When he tried to plug the television set, the two police officers wanted to grab him by his hands. He asked them the reasons for wanting to grab him as he did nothing wrong. The two police officers responded by assaulting him and dragging him to the police vehicle. They held him by both his hands and wanted to handcuff him. As he did not know what wrong he did, he resisted being handcuffed and wanted to know what he had done. The reason why he resisted was that he could see that his sister Mmatjatji was not there, and he was afraid that should he be arrested in her absence, his goods will be left unattended.

[16] The plaintiff denied having assaulted Maluleke or fighting back when he was arrested. He also denied having insulted Maluleke. The plaintiff stated that his neighbour later arrived and asked what was happening, and the policemen told his neighbour that he was been disrespectful. The neighbour told the plaintiff to go with the police and that she will be his witness for what she had seen. The plaintiff then allowed the two policemen to handcuff him. The plaintiff further

stated that on the day in question there was no radio that was playing, and also that he was never told to lower the volume of his radio as the children were writing examination. The plaintiff denied that on the day in question he was in possession of any radio.

[17] The plaintiff stated that thereafter he was handcuffed and taken to the police station without his constitutional rights been read to him. He tried to open a case of assault against the two police officers but he was not assisted. He was seriously injured as a result of the assault. Before he was detained in the holding cells at Tzaneen police station, he was taken to Van Velden hospital for medical attention. He had a broken rib as a result of the assault. He was born on the 2nd June 1988.

[18] The plaintiff was cross examined and he stated that when he found the policemen in his spaza shop, they looked like they were looking for something but that they did not tell him what they were looking for. He conceded that he did not ask the two policemen what they were looking for but thought that they will ask him should they need assistance. The plaintiff stated that the two policemen assaulted him after they have held him by his two hands and after he had asked them what wrong did he do. He stated that instead of telling him what wrong he did, they responded by assaulting him. He stated that he was assaulted at his homestead and also at the satellite police station. It was put to the plaintiff that he was arrested because he had assaulted Maluleke and he denied that and stated that he could not have done that as the two police officers were armed. The plaintiff stated that the only thing that was torn, was Maluleke's boot which was as result of Maluleke kicking him (plaintiff). That concluded the evidence of the plaintiff and he closed his case. Both parties

have submitted their closing address in this matter through their written heads of argument.

- [19] The plaintiff even though has testified that he was assaulted by the police, his claim for damages is not based on assault. Counsel for the plaintiff has also conceded in his closing address that even though the plaintiff has testified about been assaulted by the police, his claim is not based on assault. The plaintiff's claim is based on alleged unlawful arrest and detention.
- [20] It is trite that a person's liberty, personality and dignity are usually compromised by the wrongful or malicious arrest. An arrest or detention is *prima facie* wrongful and unlawful, and it is for the defendant to allege and prove the lawfulness of the arrest or detention once admitted. (See *Lombo v African National Congress*¹).
- [21] It is also trite that in the absence of a warrant an arrest is lawful if it is effected in terms of section 40(1)(b) of the CPA. However, there are four jurisdictional facts which must exist before the power conferred by 40(1)(b) may be invoked. Those jurisdictional facts are that the arrestor must be a peace officer, he must entertain a suspicion, it must be a suspicion that the arrestee committed an offence referred to in schedule 1 of the Act, and that suspicion must rest on reasonable grounds. (See *Duncan v Minister of Law and Order*²).
- [22] The arresting officers were Maluleke and Matjeke whom it is not in dispute that they are police officers, and are therefore peace officers. Both Maluleke and Matjeke have corroborated each other that the plaintiff had assaulted Maluleke, and also tore two buttons of Maluleke's official shirt. The plaintiff has disputed

¹ 2002 (5) SA 688 (SCA) at 680G-H

² 1986 (2) SA 805 (A) at 818G-I

assaulting Maluleke, but did not call any witness to corroborate his version, despite having testified that his neighbour had told him to co-operate with the police, and that she was willing to testify for him on whatever she had witnessed. It was not explained by counsel for the plaintiff why this vital witness was not called to come and testify.

[23] The two police officers when they went to the plaintiff's homestead was to investigate a complainant about a loud music that was been played. According to the two officers, when they arrived at the plaintiff's homestead, the loud music was been played in a shack, and that they even told the plaintiff's sister to lower the music so that they can be able to talk to her. However, when the plaintiff took the witness stand, he testified that there was no radio that was been played that day. He even went to the extent of stating that there was no radio that was in his possession that day. This version of the radio not been played or been in possession of it was never put to the defendant's witnesses, despite it been the source that the two officers visited his homestead.

[24] Even though the plaintiff's claim is not based on assault, he had testified that he was assaulted by the two officers at his homestead and at the satellite police station. However, it was never put to the two officers that the plaintiff was also assaulted at the satellite police station. The plaintiff denied grabbing Maluleke by the shirt and causing two buttons of Maluleke's shirt to tear, but stated that the only thing that he saw been torn was Maluleke's boot which was torn when he was kicking him (plaintiff). This version was never put to Maluleke when he was been cross examined. The plaintiff has testified that he was seriously injured as a result of the assault to the extend that he had a broken rib, but surprisingly he is not suing for assault as well.

- [25] The plaintiff testified that the two officers had held him by both his hands as he did not want them to handcuff him. This corroborate the version of the two witnesses for the defendant as they testified that they had held the plaintiff by both his hands as he was fighting and refusing to be handcuffed. By fighting the two officers, the plaintiff had committed an offence in the presence of the two officers. Therefore, there were reasonable grounds, and not merely suspicion to arrest the plaintiff as he had committed an offence in their presence, and it did not need them to obtain a warrant of arrest before arresting the plaintiff. Therefore, in my view, the four jurisdictional facts were met before the plaintiff was arrested, and his arrest was lawful and justifiable.
- [26] It is not in dispute that after the plaintiff was arrested, he was detained from the 7th to 13th November 2019 when he was released on warning. The plaintiff was arrested on the 7th which was on a Thursday, and made his first appearance in court on Monday the 11th November 2019. On 11th November 2019 the matter was postponed to 13th November 2019 when the plaintiff was ultimately released on warning. The defendant did not lead any evidence why the plaintiff was not released on the 11th on his first appearance, but only released two days later.
- [27] On Monday the 11th November 2019 when the plaintiff made his first appearance in court it was still within the 48 hours period. Since I have found that the arrest was lawful, justified and that the plaintiff had made his first appearance in court within 48 hours, it follows that the detention of the plaintiff from the 7th to 11th November 2019 was lawful. The detention from 11th to 13th was sanctioned by the court.

[28] The next question to be determined is if the court finds the plaintiff's detention beyond the 11th to be unlawful, will the defendant be liable for the detention which was sanctioned by the court also. In *De Klerk v Minister of Police*³ Theron J said:

[62] The principles emerging from our jurisprudence can be summarised as follows. The deprivation of liberty through arrest and detention, is per se prima facie unlawful. Every deprivation must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by the magistrate does not necessarily render subsequent detention unlawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable test and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after the unlawful arrest, especially if the police acted unlawfully after the arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.”

[29] The onus is still on the defendant to show that the post-court appearance detention was lawful, and further that the defendant did not play any role in the further detention of the plaintiff. No evidence was led regarding the manner in which the remand was made, and why the plaintiff was not released on 11th November 2019, but only on 13th November 2019. No evidence was led as what

³ ZACC 32; 2019 BCLR 1425 (CC); 2020 (1) SACR (CC); 2021 (4) SA 585 (CC) (25 August 2019) at paras 62 and 63

role did the police play in this matter been remanded for such short period of time with the plaintiff in custody. We should not loose sight of the fact that the charges which the plaintiff was facing was that of an assault of a police officer, and it is therefore vital to know the conduct of the police officers after the arrest of the plaintiff since the offence which the plaintiff was facing involves one of their colleague, and also whether they have played any role in the plaintiff been remanded in custody. Without any evidence been tendered to that effect the detention of the plaintiff will remain *prima facie* unlawful. Therefore, the detention of the plaintiff from the 11th to 13th November 2019 is unlawful, and the defendant is liable for that.

[30] What this court must determine is the appropriate damages to awarded to be plaintiff for the unlawful detention for the period 11th to 13th November 2019. Except that the plaintiff was repairing television sets, selling sweets and chips, and born on 2nd June 1988, no further details regarding the plaintiff were given. In my view, the appropriate damages to be awarded to the plaintiff is R80 000.00.

[31] In the result I make the following order

31.1 The plaintiff's claim on alleged unlawful and wrongful arrest is dismissed.

31.2 The plaintiff partially succeeds in his claim for unlawful detention, and is awarded damages in the amount of R80 000.00.

31.3 The defendant to pay the plaintiff's costs on party and party scale and on a magistrate court scale.

KGANYAGO ADJP

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the appellant	: Adv MS Sikhwari
Instructed by	: Kovani Attorneys
Counsel for the respondent	: Adv M Khosa
Instructed by	: State Attorney Polokwane
Date heard	: 25th April 2023
Electronically circulated on	: 24th May 2023