

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/5959

DATE:26/08/2011

REPORTABLE

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

.....
DATE

.....
SIGNATURE

In the matter between:

GOBUAMANG, AKANYANG RODNEY

Plaintiff

and

MINISTER OF POLICE

Defendant

J U D G M E N T

SALDULKER, J:

INTRODUCTION

[1] The plaintiff has instituted an action against the defendant for damages for his unlawful arrest and detention which occurred on 4 July 2008.

[2] According to the plaintiff the arrest, without a warrant was made by two uniformed white policemen at or near a roadblock in Belendina Street in the district of Roodepoort. The plaintiff alleges that the arrest was '*on the accusation that he was intoxicated*'. Thereafter he was detained at the Roodepoort police station. The defendant filed a plea denying these allegations.

[3] The trial proceeded on both the merits and quantum. The plaintiff sued for an amount of R180 000,00 for deprivation of liberty, discomfort, inconvenience, defamation, *contumelia* and general damages.

EVIDENCE

THE PLAINTIFF

[4] The plaintiff, a teacher by profession, testified that on July 2008, he spent the afternoon at his girlfriend's place and later left her place to board a taxi, on his way to his home, with his girlfriend. His home was six kilometres away. Whilst they were walking in Belendina Street, the plaintiff noticed that there was a roadblock, in the same street, set up by members of the South African Police Services (SAPS). They had to pass the roadblock to board a taxi.

[5] As they got to the roadblock, he was approached by two white police officers. One of them asked him if he had been '*drinking*' which he denied. The other accused him of '*drinking*' and told him that they were arresting him and taking him to the police van. He tried to reason with them, insisting that he was not drunk. One of the police officers pulled out an electrical device, with which he prodded the plaintiff's buttocks as he boarded the police van. The police van was crowded with people that had also been arrested.

[6] At the police station he and the other people who had been arrested with him, were instructed to line up against a wall in the parade room, where policemen took down their particulars. The plaintiff refused to do so, as he believed that his arrest was unlawful.

[7] When it came to take the plaintiff's particulars, he at first attempted to explain to Constable Sebola that he had been mistakenly brought there. A scuffle ensued between Constable Sebola and the plaintiff, during which he was pushed aggressively against the wall by the Constable, who then started to assault him, striking the plaintiff several blows. Initially, he assaulted him with open hands, followed by blows to the stomach and face. In the process Constable Sebola, whilst aiming a further blow, missed and hit the window pane behind the plaintiff. The window broke and Constable Sebola sustained a cut on his hand, which bled. With the bleeding hand he struck the plaintiff further blows and then pulled him outside, where he began to kick the plaintiff. After the plaintiff fell down, the Constable continued to kick the

plaintiff in his chest. Constable Sebola was ultimately stopped from further assaulting the plaintiff by another policeman.

[8] At around 23h00 Const Sebola took him to the cells and entered the plaintiff's name in the register. He refused to inform the plaintiff what the charges against him were. The plaintiff was then detained alone in a cell and separated from the other arrested people. The plaintiff was released on bail at around 15h45 on the following day, 5 July 2008. After his release he laid a charge of common assault against Constable Sebola. He also made a statement to Constable Gumede in regard to the assault perpetrated on him.

[9] The plaintiff was charged with malicious damage to state property, common assault and *crimen injuria*. He appeared in court in respect of the foregoing charges and a '*nolle prosequi*' decision was made by the prosecutor in respect of the charges.

[10] After his court appearance he went to Dr Moloi who examined him and recorded in the form J88 that the plaintiff sustained soft tissue injuries to the left ear, to the left side of the face and the anterior chest.

[11] The plaintiff was not tested for alcohol at the time of his arrest or at the police station. He felt aggrieved and insulted by the incident. He was a teacher and had a good standing in the community. The pupils in his school became aware of the incident and he felt defamed and depressed about the arrest.

[12] Under cross-examination the plaintiff denied that there was a tavern in Belendina Street where the roadblock had been set up, stating that he informed the two white policeman who arrested him that he was not drunk, and that he was on his way to take a taxi. He also denied that he and his girlfriend were arrested by Constable Sebola together with a group of 17 other people as they were coming, drunk, from the tavern.

[13] The plaintiff stated that the policemen had smelt his breath, and then '*shocked him with an electric device*', which he described as being two-pronged, which pierced his buttock and caused him to suffer excruciating pain. He continued to feel this pain for some four to five days thereafter.

[14] He denied that the reason for his arrest was to prevent crime and loitering in the area or that he had been arrested for being drunk in public. The plaintiff stated that he was never told the reason for his arrest. He denied that he had pushed Constable Sebola or could have done so, taking into account Constable Sebola's physique and his official capacity.

The plaintiff then closed his case.

EVIDENCE

THE DEFENDANT

[15] Constable Sebola testified that he was part of a joint operation on 4 July 2008, a Friday night around 19h30, to patrol the Roodepoort CBD, '*doing*

stop and search' duties. He was with Constable Netshiunda at the time of the incident.

[16] He testified that the reason why drunk people were arrested, was that these people were vulnerable to being robbed and killed and sometimes they also committed crimes. He was able to tell from a person's mannerisms that such a person was drunk, namely speaking loudly and smelling of liquor. On the night of the incident 17 people were arrested for being drunk.

[17] Generally, when drunk people were arrested they would be taken to the police station, and booked in. They would then be kept there until the next morning, until they were sober, when they would be given an opportunity to pay an admission of guilt fine and no case would be opened against them. He stated that drunkenness is not a criminal offence.

[18] Constable Sebola testified that whilst patrolling with his crew he noticed the plaintiff and his girlfriend walking in a manner which showed that they were drunk. When they approached him, he realised the extent to which the plaintiff was drunk. He asked to search the plaintiff, but he would not co-operate. He realised that the plaintiff and his female companion would get robbed and not reach their destination. They were noisy and had difficulty understanding the questions being put to them.

[19] The plaintiff insisted that he was not drunk. However he proceeded to arrest him because all drunk suspects when stopped and searched,

maintained that they were not drunk, although they were. He denied that a white police officer had been involved in the plaintiff's arrest. There were no white policemen on their shift. He also denied that they had used a two-pronged electrical device that night, but stated however, that they did carry a pepper spray but did not use it on that occasion.

[20] At the police station the plaintiff refused to give him his details and swore at Constable Sebola using vulgar words. As the plaintiff spoke loudly, he realised that he was influencing the others, who had been arrested, '*to get out of control*'. He then decided to handcuff the plaintiff, but the plaintiff pushed him and he fell against the wall behind him, striking the window pane with his outstretched arms, and in the process injured his thumb, for which he later received medical treatment. Constable Netshiunda tried to separate them during their altercation. He denied assaulting the plaintiff in any manner.

[21] Under cross-examination he agreed that there were three charges against the plaintiff, malicious injury to property, assault and *crimen injuria*. He conceded that the plaintiff did not have the intention to break the window pane as he had merely pushed him, nor did he have the intention to assault him. At the time the plaintiff was arrested, he did not intend to charge him but to keep him safe from being attacked or robbed by criminals. He did not charge the plaintiff with drunkenness as it is not a criminal offence. A case of drunkenness was not registered in the docket. The following day those people who had paid admission of guilt fines were released. It was pointed out to him

that in the case of the plaintiff, no admission of guilt fine was paid, instead he was released on bail.

[22] At the time of the incident, the plaintiff and his girlfriend were not walking straight but colliding with each other. However, he could not say that they had come from the tavern. He testified that the plaintiff was not stopped because he was suspected of committing any criminal offence. It was put to him that when the plaintiff was detained the only charge mentioned in the '*notice of rights*' was malicious injury to state property and not *crimen injuria* or assault.

[23] He stated that the plaintiff had committed an offence in terms of s 23 of the Liquor Act of 2003, but he did not arrest the plaintiff in terms of the Liquor Act. He had been arrested for being drunk on a public road. He denied that the plaintiff had been assaulted even though this was recorded by Constable Gumede in his '*statement regarding interview with suspect*'.

[24] The defendant's second witness was Constable Leonard Netshiunda. He was on duty with Constable Sebola. He testified that he saw the plaintiff and his girlfriend lingering in Belendina Street. Constable Sebola approached the plaintiff and his girlfriend and asked to search them. Constable Sebola realised the plaintiff was drunk as he was staggering and smelling of liquor and arrested him.

[25] The plaintiff was arrested for contravening s 127 of the Liquor Act which allowed a police officer to arrest drunk people for their own safety. He was sure that the plaintiff and his girlfriend were coming from the tavern.

[26] At the police station, the plaintiff was swearing at all the policemen. As a result Constable Sebola decided to handcuff the plaintiff. This led to an altercation between the plaintiff and Constable Sebola in the parade room. The plaintiff forcefully pushed Constable Sebola causing him to fall against a window pane and injure his hand. They were armed with firearms, handcuffs and pepper spray. They did not have any electric devices.

THE LAW

[27] An arrest or detention is prima facie unlawful and the onus is on the defendant to prove the lawfulness thereof. The defendants rely on the provisions of Section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act) in terms of which a peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

(b)

[28] Section 127 of the Gauteng Liquor Act 2 of 2003 (Liquor Act) provides that:

“It is an offence for any person to –

(a) ...

(b) ...

- (c) *be intoxicated in or on or near any public place, including but not limited to any road, street, lane, thoroughfare, square, park, market, shop, warehouse or public garage, etc;*
- (d) *consume liquor in or on or near any public place, including a motor vehicle driven on a public road or parked in a public place;*
- (e) *introduce, possess or consume any liquor on a sports ground, or any part thereof, to which the public has or is granted access, except on any licensed premises situated on the sports ground concerned."*

[29] In terms of the Liquor Act '*intoxicated and intoxicated condition*' each mean the condition a person is in when his or her capabilities are so impaired by liquor that he or she is likely to cause injury to himself or herself or be a danger or nuisance or disturbance to others.

ASSESSMENT

[30] The burden of proof rests on the defendant to prove that the arrest and detention of the plaintiff on 4 July 2008 was not unlawful. Constable Sebola, who alleges that he arrested the plaintiff for being drunk testified that when he arrested the plaintiff, he was not suspected of committing any criminal offence. There is no evidence that the plaintiff's condition was such that his capabilities were so impaired by liquor that he was likely to cause injury to himself or be a danger or nuisance to others. Constable Sebola conceded that the plaintiff did not have any intention to assault him nor any intention to damage the window pane in the parade room. However, despite this concession the plaintiff was nevertheless charged with malicious injury to property, *crimen iniuria* and assault.

[31] The plaintiff was not charged with being drunk in public because that is not a criminal offence. The terms of section 40(1)(a) of the Act are that a peace officer may without a warrant arrest any person who commits or attempts to commit any offence in his presence. The plaintiff committed no offences.

[32] In my view, the plaintiff's version that he was not drunk when he was arrested by the two white policemen is credible and reliable. He was not charged in terms of the Liquor Act for being intoxicated in a public place. He was not incarcerated with the other drunk detainees. He did not pay an admission of guilt fine. He was not released in the morning. He was released on bail.

[33] That the plaintiff was assaulted by Constable Sebola is borne out by the complaint of an assault by the plaintiff recorded by Constable Gumede when he interviewed him and the J88 completed by Dr Moloi. Although there is reference to the altercation in the parade room in Constable Sebola's statement, there is however, no reference to the arrest of the plaintiff.

[34] There was no reasonable suspicion to arrest the plaintiff. He was not arrested for committing any crime. In these circumstances, there were no grounds that could justify the arrest of the plaintiff and it was not lawful in terms of s40(1)(a) of the Act.

[35] The defendant's witnesses were not impressive. The defendant in its plea denied that the plaintiff had been arrested on the accusation that he was drunk. This is in contradiction to the testimony of both the policemen who advanced the version that the plaintiff had contravened the provisions of the Liquor Act to justify the plaintiff's arrest. Yet the plaintiff was not arrested in terms of the Liquor Act. Clearly, the defendant's employees were not acting in terms of section 40 of the Act. Nor can the defendant rely on the provisions of the Liquor Act to justify the arrest. It is not clear on which provisions of the Act or the Liquor Act the defendant seek to rely on, as no provision is pleaded by the defendant.

[36] What is clear, is that there was no intention to charge the plaintiff with any particular offence at the time he was arrested. The only intention was to arrest and detain him at the police station, and then release him after he had paid an admission of guilt fine. This did not materialise as he was ultimately charged with various alleged crimes which occurred after his arrest. I am therefore of the view that the defendant failed to justify the arrest and detention of the plaintiff.

CONCLUSION

[37] In view of all the foregoing I find that the detention of the plaintiff was unlawful. Constable Sebola conceded that the plaintiff committed no offence prior to his arrest and did not have the intention to assault him nor damage state property. The plaintiff's version that he was assaulted is reliable and

credible. He reported the assault to Constable Gumede. There is no reason to reject his version of the events that led to his unlawful arrest and detention.

[38] It is improbable that the plaintiff would act violently in the presence of other policemen, in a crowded parade room. He laid a charge of assault against Constable Sebola on the following day after his release. He also visited Dr Moloi who confirmed the injuries in the J88.

[39] I find that both the arrest and detention of the plaintiff were unlawful. The defendant has failed to discharge the *onus* which rests upon him to prove that the arrest and detention were lawful.

[40] The plaintiff has claimed R180,000 for his unlawful arrest and detention. The plaintiff testified that he was detained from Friday evening until Saturday afternoon. The plaintiff was assaulted at the hands of the police whose duties are to protect and to serve the community. The police who arrested the defendant on their own version did not intend to charge him. He clearly posed no danger to himself or to the public at large at the time of the arrest. The arrest in full view of the members of the public was a drastic invasion of the plaintiff's liberty. He must have been humiliated by the accusation of being drunk. He was placed in a cell on the false accusation that he was drunk. He was never examined nor was a sample of blood taken from him to determine his level of intoxication. He was detained in isolation from about 23h00 until his release the following afternoon at 15h45, a period of approximately 16hours. The plaintiff is a teacher by profession, a man of good

standing. Clearly his incarceration must have caused him embarrassment and humiliation and tarnished his reputation amongst the school children. It is clear that the experience has been traumatising and distressing for him. Having regard to all the facts there can be no doubt that the plaintiff suffered damages.

[41] The awarding of damages for unlawful arrest and detention is discretionary and is the domain of the trial court. Previous awards can only serve as guidelines. In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) paragraph [17], Nugent JA stated as follows:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.”

In the above case the plaintiff was deprived of his liberty for five days. During his detention he had access to his family and medical adviser. The court also found that he suffered no degradation beyond that inherent in being arrested and detained. However, the Supreme Court of Appeal reversed the award made by the High court of R500 000,00 to that of R90 000,00.

[42] In *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W), the plaintiff was a senior police officer who was arrested by the police in full view of his colleagues and then detained at same police station where he worked. He had claimed R150 000,00, for such arrest where he spent about six hours in custody and the court awarded him the amount of R50 000,00 which it regarded as fair and reasonable to both parties.

[43] In *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (W), the court awarded R75 000,00 in damages for a 74 year old retired accountant who was arrested by the Metro Police and spent about five hours in custody.

This amount is equivalent to R 99,000 according to Robert Koch, *The Quantum Yearbook*, 2011.

[44] In *Areff v Minister van Polisie* 1977(2) SA 900 (A), a 41 year old business man who was arrested and detained for about two hours was awarded the amount of R1000. This amount is equivalent to R31 000 in 2011.

[45] In *Minister of Safety and Security v M Tyulu* 2009 (5) SA 85 (SCA), The Supreme Court of Appeal awarded R15 000,00, to a magistrate who was arrested and detained for 15 minutes. The Honourable Court in the above matter further held that although the plaintiff in the matter was arrested for a relatively short period, the length of time for which a person is detained after arrest is not the only factor to be considered when determining damages. All the surrounding circumstances deserve to be taken into consideration.

[46] The *Tyulu* case (*supra*) is very similar to the facts in this case. The police maintained that their arrests in that case, without a warrant were lawful and justifiable in terms of s 40(1) (a) of the Act as the plaintiff had committed an offence in terms of the Liquor Act. The plaintiff was accused of being drunk in public. The Supreme Court of Appeal held that the evidence did not show that the plaintiff was not in control of his physical or mental faculties or both as a

result of him having consumed alcohol at the time when he was arrested. He may have been under the influence of alcohol which did not necessarily mean that he was drunk. It further held that the plaintiff's arrest without a warrant for being drunk in public was not justified by s 40(1) (a) of the Act.

And at para [26] of the judgment the following is stated by Bosiello JA:

"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. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts".

[47] Viewing the facts of this case as a whole, the past awards and the relevant case law, a fair and reasonable amount of damages to be awarded to the plaintiff is the amount of R70 000,00.

[48] In the result I make the following order:

Judgment is granted against the defendant in favour of the plaintiff for:

1. Payment of the sum of R70,000,00;
2. Interest on the said sum at the rate of 15.5% per annum a tempore;
morae from date of judgment to date of payment;
3. Costs of suit.

H SALDULKER

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

ATTORNEY FOR THE PLAINTIFF- MOSALAKAE SEPAMLA ATTORNEYS

ATTORNEY FOR THE DEFENDANT – THE STATE ATTORNEY

COUNSEL FOR THE PLAINTIFF – ADV MOKALE

COUNSEL FOR THE DEFENDANT – ADV DLAMINI

DATE OF HEARING: 4TH MARCH 2011

DATE OF JUDGMENT: 26TH AUGUST 2011