

16/4/2010



DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES
(3) REVISED
DATE 2010 04 14
SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

CASE NUMBER: 17088/05

THEUNIS CHRISTOFFEL BOTHA

PLAINTIFF

v

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

MABUSE AJ

- (1) This is an action for payment of money. The plaintiff, an adult male of Komatiepoot, Mpumalanga Province, has sued out summons against the defendant for payment of a total sum of R500 000, 00. His action arises from the events of 12 August 2004 when he was arrested at his house in Komatiepoot by Inspector Pilusa ("Pilusa") and Sergeant L Jacobs ("Jacobs"), both members of the South African Police Service and who were at all material times hereto acting within their course and scope of their employment with the defendant and subsequently detained. He contends that his aforementioned arrest and detention was unlawful and that, as a consequence thereof, he sustained damages.
- (2) After his arrest he was taken to Komatiepoot Police Station where he was detained at the instance of the said police officers for one hour and fifteen minutes. During his aforementioned detention he was informed that he was in detention and that he should wait for the members of the uniform branch

of the South African Police Services who would convey him to Low's Creek Periodical Court where he would appear on the charge of assault.

- (3) Around 12h00, after waiting from 09h00, he and his then co-suspect, Fernando Yingwane("Fernando") were taken in the police van to Low's Creek Periodical Court by two members of the South African Police Services where on their arrival they found that the court was already in session. After their arrival both of them were left in the police van by one policeman who got inside the court building while the other policeman remained behind with them.
- (4) After fifteen minutes the policeman who had gone into the building returned. Fernando asked two policemen that he wanted to use the bathroom and they allowed him to go to it. He too asked in isiSwazi to be taken to the bathroom but this particular policeman did not respond. They immediately drove back without him having appeared in court or taken to the bathroom or even being informed of the reasons for not appearing in court. They drove to another place, which to him looked like a court building, where the motor vehicle was again stopped. The driver and a woman got out of the motor vehicle and walked around the corner of the building. A few minutes thereafter the driver came back. Again he asked to be taken to the bathroom. This time the driver refused on the basis that the plaintiff wanted to escape.
- (5) From this place the police van drove to Nelspruit and from Nelspruit to Komatipoort where they arrived at 17h15. Up to this stage he had neither used any toilet facilities nor had he been furnished with any refreshments or water with the result that he had become dehydrated by the time he arrived at Komatipoort Police Station. During the day he was not allowed to contact his legal representative.
- (6) At Komatipoort he was detained with twenty seven inmates of whom only two were white. During his detention, he was severely assaulted by some of his co-detainees. He was forced by his co-detainees to take off his clothes. His arms and legs were held tight by some whilst simultaneously others hit

him 250 times in turns with his shoe on his buttocks for more or less thirty minutes. As a consequence of the said assault he was half unconscious and suffered certain wounds, bruises and injuries.

- (7) His legal representative arrived later at the Police Station and not only took photographs of his injuries but also arranged that he should be held in a separate cell. He only made his first court appearance the following day where and when he was released on bail of R750, 00.
- (8) All the policemen involved in, or connected with, this matter were at all material times acting within their course and scope of employment with the defendant. According to him his arrest and detention or deprivation of liberty detention was malicious and unlawful by reason of the fact that there was no reasonable prospect of success in his prosecution. The conduct of the police in unlawfully arresting and detaining him, amounted to a breach of his *fama, dignitas* and self esteem.
- (9) Whilst he was being assaulted in the police detention cells, no policeman came to his rescue or visited the cells. He contends that there lay a duty on the members of the South African Police Services to guarantee humanity, equality, freedom and safety of all the detainees on this particular evening. The members of the Police neglected their duty or did not perform their duties properly and as a result he was detained unlawfully. If he had appeared in court at Low's Creek on 12 August 2004, he could have been granted bail. As a consequence of the aforementioned unlawful arrest and detention and assault he has suffered damages in respect of *contumelia*, deprivation of liberty, violation of his *dignitas* and assault. It is for all these reasons that he claims the sum of R500 000, 00.
- (11) The defendant admits that the plaintiff was indeed arrested and detained by his employees, who were acting as aforementioned, but denies that such arrest and detention was unlawful. The defendant contends that the police officer who arrested the plaintiff had reasonable grounds to arrest and open charges against him. He pleaded further that his members did all that they

could in the circumstances to ensure the safety of the plaintiff and that failure to secure bail on 12 August 2005 was due to the plaintiff's own fault. The defendant denies that he is liable to pay the plaintiff the amount so claimed or any part of it.

- (12) I now wish to deal with the evidence of the witnesses who arrested the plaintiff and analyse the manner in which he was arrested. It needs to be recalled that the defendant has admitted that the plaintiff was indeed arrested. The defendant's defence however is that the plaintiff's arrest was not, as claimed by the plaintiff, unlawful.
- (13) According to the evidence of the defendant's witnesses two people were involved in the arrest of the plaintiff at his home at Komatiepoort on 12 August 2004 and these were Captain Pilusa, who at the time of the plaintiff's arrest was an inspector, and sergeant Jacobs. It needs to be mentioned though that although they were involved in his initial arrest, Pilusa and Jacobs were not involved in the plaintiff's subsequent detention, that task, in their absence, having fallen to the police who had conveyed him to court and the charge office staff at the time.
- (14) This episode commenced with the plaintiff having laid a charge of theft of his tools against some people. It continued with the plaintiff becoming disconsolate with the pace and the hopeless manner in which he perceived that the police were investigating his case. The police went to search for the plaintiff's tools at certain places with the plaintiff and ended up getting into some people's houses. Pilusa asked the plaintiff to let him speak to his informer but the plaintiff told him that his informer was indisposed and lying in the hospital. Upon this report Pilusa became despondent and aborted any further search for the plaintiff's tools, whereupon they went back to the Police Station where they parted ways.
- (15) On the morning of 12 August 2004, Pilusa received a report that the person who was lying at the hospital according to the Plaintiff, was under arrest and had been severely beaten. He and his colleagues went to interview that

person while he was lying in the hospital. On their arrival, they noticed that that person had been severely beaten and had sustained serious bodily injuries which included fractures of both hands. As a consequence of the report that they were given by this person and the seriousness of the injuries that this person had sustained, they laid charges of attempted murder or assault with intent to do grievous bodily harm against the plaintiff.

(15) Having opened the case, they decided that they were going to arrest the plaintiff because of the seriousness of the injuries sustained by that person. There was another reason why he decided that he would arrest the plaintiff and that was to prevent him from interfering with the injured person while he was lying in the hospital. That morning Pilusa went to the plaintiff's place of work or business where he found him. He told the plaintiff that there was a case of assault against him for which he would arrest him and then warned him to summons and to retain the services of his legal representative.

(17) He had to arrest the plaintiff in order to make sure that he would not interfere with the state witness who was lying in the hospital. He proceeded to arrest the plaintiff and to take him to Komatiepoort Police Station where he took down his warning statement and thereafter detained him. On the same day of his arrest he arranged that the plaintiff should be taken to court at Low's Creek as no court was sitting at Barberton. The court at Barberton was only going to sit on 13 August 2004. He was hoping that if he appeared at court at Low's Creek on 12 August 2004, the court would release him on bail.

(19) Just after 20h00 that evening Pilusa received a call from a colleague of his who gave him a report about the plaintiff. He was shocked to learn from the call he received from his colleague that the plaintiff was in detention at the Police Station as he had thought that he had been released at court during the day. He went to the Police Station and visited the plaintiff in the police cells. He found the plaintiff in cell 4 and not in cell 7 where he should have been placed. He noticed that the plaintiff had sustained some injuries. According to him, the plaintiff was assaulted in cell no. 7. According to his

knowledge, cell 7 was for people who had committed serious offences, while cell 4 was an exercise room. He gave an order that the Plaintiff should not be kept in the cell where he had been assaulted. Raymond Nkuna is the person who had been assaulted by the plaintiff. The plaintiff was later convicted of assault and fined R10 000, 00 or three months imprisonment, despite his claim, even when he testified, that there was no prospect, when he was arrested, that he could be successfully prosecuted.

- (19) The question that this court is called upon to decide is firstly whether the arrest and detention of the plaintiff was unlawful, and if that is the finding of this court, the quantum of damages that should be awarded to the plaintiff; secondly, whether or not the plaintiff was deprived of his freedom when he was taken in a police van from one place to another; and, if so, the amount of damages he is entitled to for such deprivation; thirdly, whether the plaintiff's assault by some cell inmates had been so planned and orchestrated by the defendant's employees and if so, the quantum that should be awarded to the plaintiff and finally whether or not his dignity was violated and if so, the amount of damages that should be awarded to him.
- (20) It will be recalled that Pilusa has already accepted responsibility for the arrest and detention of the plaintiff. Again it must be recalled that, according to the plaintiff, his arrest and detention was unlawful because there were no prospects that, arising from the allegations that he had assaulted someone, he could be successfully prosecuted. He has accepted the responsibility further for the plaintiff being driven from one place to another and testified that this was done at his instance in his honest attempts to bring the plaintiff before court as soon as possible so that he could be released on bail. I will deal with this aspect broadly later in the judgment.
- (21) The basic principle of our law is that where the defendant admits arrest, there is a duty to on him prove that such arrest was lawful. "*The onus of proving the lawfulness of the arrest and detention rests on the first and second defendants.*" See *Mabona and Another v Minister of Law and Order* and

Others 1988 (2) SA 654 at page 656. In his plea the defendant insisted that the arrest and detention of the plaintiff was lawful and the police officers who arrested him had reasonable grounds to arrest and charge him.

- (22) In the discharge of the onus that rests on him, the defendant seeks to rely on the provisions of section 40 of the Criminal Procedure Act NO. 51 of 1977 (“the CPA”), which deal with the circumstances under which an arrest without a warrant of arrest can be executed. It is common cause between the parties and it is also clear from the evidence that the arrest of the plaintiff by Pilusa and Jacobs was executed without a warrant. Accordingly section 40 (1) (b) of the CPA is the relevant subsection on the basis of which the issue should be determined. The said section provides as follows:

“40 (1) A peace officer may without warrant arrest any person.

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from legal custody.”

- (23) According to the plaintiff’s warning statement, which *ex facie* was completed at 08h15, the plaintiff was formally informed that the Police were investigating the offences of attempted murder or assault with the intent to do grievous bodily harm against him. Attempted murder and assault with the intent to do grievous bodily harm are among the offences listed in Schedule 1. At the time Pilusa arrested the Plaintiff, he held the rank of inspector. He was a police officer and accordingly a peace officer in terms of the provisions of section 1 of the CPA. At the time he testified in this case, he was a captain in the defendant’s service. Accordingly a policeman would have acted in terms of the provisions of Section 40 (1) (b) if he arrested someone he suspected on reasonable grounds of having committed either attempted murder or assault with the intent to do grievous bodily harm, without a warrant.

- (24) The test employed in the determination of whether or not a peace officer acted lawfully when he arrested someone without a warrant is objective. The crucial question would be whether or not the circumstances prevailing at

the time the policeman effected an arrest without a warrant were such that a reasonable man finding himself in the same situation as the policeman involved would form an opinion reasonably that the plaintiff has committed an offence listed in Schedule 1. The policeman shall consider the situation, assess it and decide objectively whether it warrants an arrest.

“The test of whether a suspicion is reasonably entertained within the meaning of section 40 (1) (b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the Plaintiff were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen.” See Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 SECLD at 658 D-F. See also Duncan v Minister of Law and Order 1986 (2) SA 808 (A) at 814 D-E where the court stated that:

“It was common cause that the question whether a Police officer reasonably suspects a person of having committed an offence within the meaning of section 40 (1) (b) of the Act is objectively justiciable. And it seems clear that the test is not whether a Policeman believes that he has a reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion (CF Watson v Commissioner of Customs and Excise 1960 (3) SA 312 (N) at 216; R v Van Heerden 1958 (3) SA 150 (T) at 152; Wisner v. Molomo 1983 (3) SA 151 (A) at 159.” See also Le Roux v Minister of Safety and Security and Another 2009(2) SA 252 (KZP) at page 258 paragraph 23 (“Le Roux”) where Madondo J stated the following:

“Section 40(1)(b) provides that the arresting officer must have a reasonable suspicion that the suspect has committed an offence referred to in Schedule 1 to the Act. The test as to whether “reasonable suspicion” could have existed and did exist is to be determined by an objective standard, namely that of a reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer. An exercise of power will be unlawful if the arrester knowingly invokes the power to arrest for a purpose not contemplated by the legislature. The proper onus of establishing the improper object of the arrester will rest on the arrestee.”

- (25) I now turn to analysing the evidence of Pilusa. It is clear that on 11 August 2004 he and the plaintiff in their search for the plaintiff's tools and the people who had stolen them ended up visiting certain houses. He asked the plaintiff for an opportunity to speak to the informer that the plaintiff had mentioned but the plaintiff told him that the informer was lying in the hospital. Although the reason his informer was lying at the hospital was clearly within the knowledge of the plaintiff, he did not disclose it to the Pilusa. The following morning Pilusa received information that the very same person whom the plaintiff had labelled an informer and whom he wanted to interview about the theft of the plaintiff's tools was under police guard at the local hospital. Even more importantly, he was informed that the said person had been severely assaulted.
- (26) He decided that he was going to interview that person. During cross-examination he testified further that, after he had received the report about this person and his condition, he immediately went to visit him at the hospital where he had been admitted. He went to the hospital and found the person lying in a hospital bed. He interviewed him and, during this interview, discovered that the person had been so severely assaulted that he had suffered serious bodily injuries which included fractured hands. At this point he decided that he had heard and seen enough and that he would open or lay a charge of attempted murder or assault with intent to do grievous bodily harm against the plaintiff.
- (27) After had laid charges against him, he also decided that he was going to arrest the plaintiff without a warrant of arrest, mainly because of the seriousness of the injuries sustained by Nkuna and his fear that the plaintiff might interfere with Nkuna while he lay in the hospital. The reasonableness of Pilusa's suspicion was based on the information that he had received from the person who had been assaulted and his own observation of the magnitude of the injuries that person had sustained and his fear of the prospect of the plaintiff's interference with a prospective state key witness. In Mabona's case, the court stated the following about section 40 (1) (b):

"The section requires suspicion but not certainty. However, this suspicion must be based upon solid grounds." See p. 658 H.

- (27) Accordingly, it is not necessary that, before a peace officer can arrest a person without a warrant he should be certain that such a person has committed an offence in Schedule 1. For the purposes of this section it is sufficient if such a peace officer suspects and such suspicion is based on reasonable grounds. What is very important, in my view, is whether or not Pilusa entertained any suspicion based on reasonable grounds before he executed the plaintiff's arrest on 12 August 2004 and, in my view, he did. This is what Madondo J stated in Le Roux's case *supra* at paragraph 24 at page 259:

"However the arresting officer must have good and sufficient grounds for suspecting that a suspect is guilty of the offence for which he or she seeks to arrest him. He must analyse and assess the quality of the information at his disposal critically. He must not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he must allow himself to entertain a suspicion which will justify an arrest. See Mabona and Another v Minister of Law and order and others 1988 (2) SA 654(SE) at page 658H. However, this does not mean that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is guilty. Suffice to say that the suspicion must be based on solid grounds, otherwise it would be flighty or arbitrary, and not a reasonable suspicion. See Gellman v Minister of Safety and Security 2008(1) SACR 446(W) paragraph 72 at page 460e."

In my view, and this has not been challenged by the plaintiff's counsel, Pilusa and Jacobs have satisfied the test laid down by Le Roux.

- (28) During cross-examination, when he was asked to furnish a very good reason for arresting the plaintiff, he specifically mentioned that he could not warn the plaintiff to appear at court because of the seriousness of the offence he was suspected of having committed. This question seemed to suggest that the plaintiff should not have been arrested but could have been warned to appear at court. The discretion to arrest or not is purely the policeman's. He cannot be faulted for arresting a person in circumstances where objectively

another policeman would not have arrested the same person for the same offence under the same factual background.

“Once the Police Officer has formed a reasonable suspicion for the arrest, it was held in Ramakulukusha, supra that it was settled law that the court would be unable to interfere with a due and honest exercise of discretion, when it was considered inequitable and wrong. See also Nevhutalu and Others v Minister of Police and Another 1986 (4) SA 822 (V) at 830I-832B and Farisani v Minister of Justice and Others 1987 (2), SA 321(V) at 325D-F.” See Le Roux’s matter at page 259 paragraph 25.

(29) During cross-examination the plaintiff was asked why Pilusa could not arrest him and he responded by saying that Pilusa should have warned him to appear at court the following day. When he was asked whether or not he wanted special treatment, he simply said that Pilusa should have followed Police guidelines. It is important to state at the outset that the letter date 9 May 2005 allegedly sent by the then National Commissioner had not assumed the status of law. Such considerations as the fact that he knew the plaintiff since 1981; that the Plaintiff was, at the time of his arrest, a businessman and that he knew it are, in my view, not considerations that should influence the reasonableness of his suspicion. After all, section 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone is equal before the law. At the same time section 9 (3) prohibits the state from unlawfully discriminating directly or indirectly against any one on more of the grounds set out in the said section.

(30) In Le Roux the court quoted with approval the following passage from *Ralekwa v Minister of Safety and Security* 2004(1) SACR 131 (T) at page 136a: *“We have moved from the past characterised by much which was arbitrary and unequal in the operation of the law to present and future in a Constitutional State where the Constitution is to lead the way from a culture of authority to a culture of justification.”*

By “the Constitution” in the above passage is meant the Constitution of the Republic of South Africa Act NO.108 of 1996. This is the supreme law of the country. It is interesting to note that the said Constitution has not outlawed arrest and in fact acknowledges that people may be arrested. Section 35 of

the Constitution provides for arrested, detained and accused persons. It provides as follows in subsection (1):

“Everyone who is arrested for allegedly committing an offence has a right:

- (a) to remain silent;*
- (b) to be informed promptly –*
 - (i) of the right to remain silent; and*
 - (ii) of the consequences of not remaining silent;*
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;*
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”*

(31) In *S v Dlamini, S v Dladia and Others, S v Joubert, Sv Schietekat* 1999(4) SA 623 CC at page 636 paragraph 6, in dealing with the laws applicable in bail proceedings, Kriegler J stated that:

“Section 35(1)(f) in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for committing offences, and may for that reason be detained in custody. The Constitution itself places a limitation on the liberty interest protected by section 12. The second is that notwithstanding lawful arrest, the person concerned has a right but a circumscribed one, to be released from custody subject to reasonable conditions.”

(32) In *Charles v Minister of Safety* 2007 (2) SACR 137 (W) at page 144B-D, a matter that was decided long after the current case had been launched, Goldblatt J, as he then was, in upholding the approach adopted in *Tsose v The Minister of Justice and Others* 1951 (3) SA 10 (A) and rejecting the trend set out in *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (TPD)(“Louw”), and by implication as followed by *Le Roux*, stated that:

“The Legislature having granted a peace officer the right to make an arrest in circumstances set out in s 40 has created a situation where due compliance with such section by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. In my view, the court has

no right to impose further conditions on such persons. To do so would open a Pandora's box where the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further where peace officers would be called upon to make value judgments every time they effect an arrest in terms of s 40. These judgments which they would have to make would later have to be considered and tested by judicial officers attempting to place themselves in the shoes of the arresting officer."

In Tsose's case, the court had, among others, stated that:

"An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it unlawful under a statutory provision to arrest a person as a means of bringing him to court, such arrest is not unlawful even if it is made because the arrestor believes that the arrest will be more harassing than the summons. For just as the bets motive will not cure an otherwise illegal arrest....

What I have said must not be understood to as conveying approval of the use of arrest where there is not urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used. But there is no law that requires the milder method of bringing a person to court to be used whenever it would be trying offence."

(33) It is for this reason that Goldblatt did not agree with the reasoning of the court in Louw's case and in fact rejected it on the basis that, according to him, it had been wrongly decided. He did not approve the approach advocated Louw and le Roux that it is not sufficient to merely comply with the provisions of section 40 (1) (b) of the CPA and that the court must look further than due compliance with the provisions of the said section.

(34) I have perused the cases of Le Roux and Louw and several other foreign cases referred to and applied in Le Roux. If anything these cases clearly demonstrate that each case should be decided on the merits of its own facts. The facts of the abovementioned cases are clearly distinguishable from the facts of the current case. In Louw the court acknowledged and hit the nail on

the head when it restated the law as contained in section 40 of Act 51 of 1977. For instance it stated the following at p183e-f:

"...in the absence of a warrant, an arrest was lawful only if it was effected in terms of s 40 of the Criminal Procedure Act 51 of 1977, and if the person arrested had committed a crime listed in Schedule 1 to the Act or was reasonable suspected of having committed such a crime. (State v. Shirinda 1984(1) SA 573T)."

(35) I will come back to Shirinda case supra in the course of the judgment. Suffice to mention that the court in Louw adjudged the arrest of the plaintiffs unlawful and furnished at least four reasons why in its view such arrest and detention was unlawful. In a word the reasons that the said court gave are the following:

*"...the real reason for the arrest was a desire on his part (referring to Sergeant De Beer) to teach the plaintiffs a lesson for their allegedly unacceptable behaviour toward the Badenhorsts."*See p 183j-184 b; secondly, the police officer who arrested the plaintiffs acted with malice:

*"The fact that De Beer and his colleagues acted with malice is further evidenced by his failure to acquaint himself with the content of Mr Badenhorst's statement, which records no accusation of theft at all."*See p 184a-b; thirdly, that there was no *prima facie* case that an offence listed in the First Schedule had been committed:

*"Had he stopped to consider what the Badenhorsts told him, he would have known that there was no prima facie case of the commission of a crime contained in the First Schedule."*See p 184 b-c; lastly and fourthly, because of the fraudulent action of the Police in the relevant case docket:

*"Worse was to come. The Police docket was, sometime after the arrest, interfered with in a fraudulent fashion."*see page 184e-f

(36) The reasons mentioned above might not have been the only ground that the court took into account in the determination of whether or not the plaintiffs' arrest and detention in Louw was unlawful but they nevertheless show a clear distinction from the current case. Furthermore I agree that, based on the facts of the Louw's case, the arrest and detention of the

plaintiffs in that case was unlawful and, for that reason, I would agree with the Court's finding in that particular matter.

(37) In *State v Shirinda* 1986(1) SA 573 SA (T) the issue involved was whether a traffic officer could effect an arrest in terms of the provisions of section 40 of the CPA. The court found that section 40 of the said Act provided that a person could only effect such an arrest if he was a “*peace officer*” appointed in terms of the provisions of section 334 of the said Act.

(38) The court found that a traffic officer was not a “*peace officer*” and that he did not have the powers vested in a peace officer by the provisions of section 40 of the Act to effect an arrest without a warrant. As this authority dealt essentially with the question who can effect an arrest in terms of section 40 of the CPA, it is not of any assistance to the current matter in the light of the fact that, in the current matter, it is not in dispute that both Pilusa and Jacobs were peace officers at the time of the arrest and detention of the plaintiff.

(39) In *R v Waterfield*; *R v Lynn* (1964) QB 164 (CCA) (1963) 3 All ER 659. This case quintessentially demonstrates that each case should be decided on the merits of its own facts. It is important that a principle should be understood within the context of the facts of the matter in which it was uttered. In my view, there must be a relevant connection between the facts of the case and the principle relied upon. The principle must be supported by the facts of the case. The facts of the *Waterfield* and *Lynn* case are aptly encapsulated in the following paragraph:

“In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such

conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.” See p.661G-H

(40) The court found that the arrest of Waterfield and Lynn was unlawful by reason of the fact that:

“... for the purposes of the present appeal it is sufficient to say that in the view of this court the two police constables were not acting in the due execution of their duty at common law when they detained the motor vehicle.” See p.662D

That they were not acting in due execution of their duties when they detained the car is ably demonstrated by the following passage:

*“In the present case it is plain that the police constables Willis and Brown, no doubt acting in obedience to the orders of their superior officer, were preventing Lynn and Waterfield taking the car away and were thereby interfering with them and with the car. It is to be noted that neither of the appellants had been charged nor was under arrest and, accordingly, the decision in *Dillon v O'Brien and Davis* (10) does not assist the prosecution. It was contended that the two police constables were acting in execution of a duty to preserve for use in court evidence of crime, and in a sense they were, but the execution of that duty did not in the view of this court authorise them to prevent removal of the car in the circumstances.”(my own underlining) See p.662B-C*

(41) Accordingly, I am of the view that the case does not assist the plaintiff's case. The facts of this case are clearly distinguishable from the current case. Lastly the court stated in the Waterfield case that:

“In the course of argument instances were suggested where difficulty might arise if a police officer were not entitled to prevent removal of an article which had been used in the course of a crime, for example, an axe used by a murderer and thrown away by him. Such a case can be decided if and when it arises; for the purposes of the present appeal it is sufficient to say that in the view of this court the two police constables were not acting in the due execution of their duty at common law when they detained the car.” See p.662C-D

This is the basis on which the court in the Waterfield case decided that the arrest of Lynn and Waterfield was unlawful.

(42) In conclusion I have no doubt about the correctness of the approach in Charles' case and would be too slow to differ from it. On the facts of this case, I am unable to find that the arrest and detention of the plaintiff by the defendant's employees was unlawful.

(43) I now wish to turn to the plaintiff's complaint that, because he was kept in a police van and taken from one place to another, he had been deprived of his liberty. In the first place, once this court reaches a conclusion that he was lawfully arrested, it follows automatically that his detention was also lawful. Of course it goes without saying that the consequences of lawful arrest are the deprivation of liberty.

(44) There is however more to the plaintiff's deprivation of liberty than meets the eye. Because Pilusa knew the plaintiff well and also knew the fact that the plaintiff was a businessman and, furthermore, because he had no objection to the plaintiff being released on bail on the same day of his arrest, he arranged that the plaintiff be taken to court at Low's Creek for that purpose. Here I wish to pause and to regurgitate the provisions of section 50 (1) (a) of the CPA which provides that:

"Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to the Police station, or in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant."

(45) It is unfortunate that the public prosecutor at Low's Creek Periodical Court decided against taking the case. It is clear however that it was late already. The public prosecutor's refusal to take the case meant that the plaintiff had to be conveyed back to Komatipoort Police Station where he had to be detained without having appeared in court.

- (46) It has not been suggested by counsel for the plaintiff that the plaintiff, who was under arrest, could have been left freely to travel in any transport other than the Police transport from Komatipoort Police Station to Low's Creek Court and back to Komatipoort Police Station. For as long as he was under arrest he was always in the custody of the Police and they alone were responsible for conveying him from one place to another. This obviously means that his movement had been lawfully restricted following his lawful arrest and genuine attempts to bring him before court.
- (47) Again it must be recalled that Michael Mashaba was called by his commander, withdrawn from his shift or what he was doing at the time or busy with at the time and instructed to convey the two suspects, one of whom was the plaintiff to Low's Creek Periodical Court where he only arrived between 13h20 and 13h30. On his arrival he found that the court was still or already busy. He waited for it to adjourn and during adjournment, approached the public prosecutor with the docket and spoke to him about the docket and the two suspects he was conveying. The public prosecutor told him that, as they would be holding court at Komatipoort the following day, they should drive back with both the docket and the suspects and bring them back to court the following day at Komatipoort. The plaintiff admitted during cross-examination that no time was wasted in taking him to court. This was in contrast to the statement put to Mashaba by plaintiff's counsel that Mashaba wasted time in town before proceeding to Low's Creek Periodical Court.
- (48) Section 35 (1) (e) of the Constitution states that:
- "35(1) everyone who is arrested for allegedly committing an offence has the right –*
- (d) To be brought before a court as soon as reasonably possible, but not later than 48 hours after his arrest."*
- It is clear that Pilusa tried his best to bring the plaintiff before Court as soon as possible. It is not his fault that the public prosecutor was not keen to accept the docket because it was brought to him late. In my view, there were justifiable grounds for depriving the Plaintiff of his liberty and the complaint

that the Plaintiff was deprived of his liberty under these circumstances is without any merit. Moreover Pilusa has complied with the provisions of section 35 (1) (d) of the Constitution. A person cannot complain about being deprived of his liberty where a law requires that he be deprived of his liberty or whilst there is justification for such deprivation.

- (49) It is not in dispute between the parties that in the evening of 12 August 2004 the plaintiff was detained in cell 7 of the Komatipoort Police Station and that while he was in that particular cell, he was severely assaulted, with his own shoes by other cell inmates; nor is it in dispute that as a consequence of the said assault he sustained certain bodily injuries. What needs to be investigated however is firstly the reason why he was kept in cell 7 where he was assaulted and secondly why he was assaulted while he was in cell 7.
- (50) It will be recalled that Pilusa testified that he was surprised when, during a telephone conversation he had with a colleague of his just after 20h00 on 12 August 2004, it was reported to him by his colleague that the plaintiff was in the cells and furthermore that he had a complaint. He was stunned to learn that the plaintiff was in the cells because he had thought that he had been released on bail during the day.
- (51) He drove to the Police Station where, on his arrival he was taken to the Police cells. In cell 4 he found the plaintiff and interviewed him in there. During this interview the plaintiff complained to him that he had been assaulted in cell 7. He gave instructions that the plaintiff should be kept out of cell 7 which he described as a cell in which people who had committed serious offences were kept. He did not indicate what a serious offence could be nor did he give any example of such.
- (52) It is obvious from the foregoing that although Pilusa was tasked with the investigation of the criminal case for which the plaintiff had been arrested and detained at the police cells, he had no control over where detainees were placed. There is also no suggestion that he was involved in any manner with the placing of inmates in the police cells. In fact he testified, during

cross-examination, and this was not challenged, that it was the duty of the C.I.D., whatever that means, to place people in the cells. During his examination-in-chief the plaintiff testified that whilst he was in the cells no policeman visited the cells and furthermore no policeman came to his rescue. This version seems to be inconsistent with the facts of what happened in the cells. If the plaintiff was placed in cell 7 initially, he must explain how he happened to be in cell 4 where Pilusa found him, if he was not put there by a policeman. He could only have been removed from cell 7 to cell 4 by a policeman who gone to visit the cells.

(53) Stanley Pumulane Makwenyane's ("Makwenyane") evidence that he visited the cells at 20h50 has not been challenged. It will be recalled that he testified furthermore that as soon as he walked into cell 7 to check, the plaintiff complained to him that he had been ill treated. He told him that he had been assaulted. He then took him out of cell 7 and put him in a cell or place where there was nobody. In the premises the plaintiff's evidence that no policemen visited the cells and that no Policemen came to his rescue while he was in the cells could not have been correct. Makwenyane also testified that he could hear the noise in the cells and that accounts for the reason he visited the cells.

(54) While there is a duty on the defendant to prove that the arrest of the plaintiff was lawful, there is a duty on the plaintiff to prove that he was deliberately or purposely put in that particular cell so that he could be assaulted. The plaintiff was put in there where any arrested person, especially adult males had been kept as there was no other cell in which the plaintiff could be detained. In my view, the plaintiff has failed to prove that he was purposely put in that cell to be assaulted and that this assault on him by his co-detainees was orchestrated by the employees of the defendant.

(55) The Plaintiff's claim that he was denied the opportunity to go to the toilet seems doubtful. The evidence tendered in support of this claim is tenuous and inconsistent. According to the plaintiff, this evidence relates to what happened at Low's Creek Periodical Court after the driver of the Police van

had come back from the court building, and when he and Fernando Ngwani (“Fernando”), his witness, asked to be taken to the toilet. Fernando was allowed to go to the toilet but he was not. In fact, according to him, when he asked the Policemen for permission to go to the toilet they just kept quiet and as a result was never taken to the toilet. On Fernando’s return from the toilet the police put him (“Fernando”) in the back of the van and thereafter drove away.

- (56) Fernando, on the contrary, testified that at Low’s Creek Periodical Court both of them were let out of the back of the motor vehicle. Some gates were opened by the police to let them through but he alone was taken to the toilet. He left the plaintiff standing somewhere in the building while he alone went to the toilet. Under cross-examination Fernando was asked whether he heard the plaintiff asked the police to let him to go to the toilet. His response was that he did not hear the plaintiff ask to be left to go to the toilet because both of them were let out to go to the toilet. He never heard the plaintiff asked for food or water. It needs to be said though that Fernando did not make a good impression as a witness. To say the least he seemed to confuse the events he testified about, was evasive in his response to some of the material questions put to him and became impatient at times with defendant’s counsel while he did not demonstrate the same characteristics with plaintiff’s counsel.
- (57) In the premises, it would seem that there is no merit in the plaintiff’s claim that he was denied an opportunity to go to the toilet and also to have meals or water on that particular day. On the whole I am not satisfied that the plaintiff has discharged his onus in respect of the claims in respect of which the duty lies on him. The basic principle of our law with regard to the burden of proof is that he who alleges must prove. A classical application of this principle was clearly illustrated in *Pillay v Krishna* and another 1946 SA 946 AD at page 951 where Davis A.J.A., as he then was, stated that:

“It consequently becomes necessary at the outset to deal with the basic of rules which govern the incidence of the burden of proof – the onus probandi – for upon them the decision of this case must ultimately rest.

And it should be noted immediately that this is a matter of substantive law and not a question of evidence: Tregea and Another (1930, A.D. 16 at page 32). The first principle in regard to the burden of proof is thus stated in the Corpus Juris: “semper necessitas probandi incubit illi qui agit” (D.22.3.21). If a person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.”

He continued at Page 952 and stated that:

“He who asserts, proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied and that denial is absolute.”

(58) Now, turning to the evidence of the plaintiff, it is, in my opinion, riddled with improbabilities and inconsistencies. It is clear that according to him he found arresting him to be abominable simply because he had wanted special treatment, even though he denied this statement, because he was a businessman and known to the Police in that area. When he did not get this treatment he labelled his arrest unlawful.

(59) He gave no valid reasons why he could not be locked in cell 7 or why he could not be locked in the same cell as the other people. He unjustifiably accuses the Police of having deliberately put him in cell 7 so that he could be assaulted and humiliated. There is nothing in the evidence to suggest that the Police who put him in the cells were deliberate in putting him there so that he could be assaulted. He relied on it being common knowledge that such events occurred periodically or from time to time at Komatiepoort Police Station. This is not conclusive proof of any planned act on the part of the Police to put him where he could be assaulted. His evidence that no Policeman came to the cells or no Policeman visited the cells while he was in cell 7 has been proved to be untruth and a clear figment of his imagination. Over and above that it is inconsistent with the proven facts of the case.

(60) His complaint that he was never given food and water sounds hollow. There is in my view nothing to suggest that if he had asked for water and food the Police would not have provided him with same. He certainly did not expect the two policemen who were in his company to know that he wanted water

or food if he did not ask for water and food, nor did he expect them to provide him with water and food bought of their own money.

In the premises, the whole of his evidence leaves much to be desired and, in my view, his claim cannot succeed. Accordingly I make the following order:

“The plaintiff’s claim is dismissed with costs”.



P.M. MABUSE

ACTING JUDGE OF THE HIGH COURT

Appearances:*Plaintiff’s Attorneys:*

*Messrs De Swardt Vogel Myambo
Instructed by Piet Van Dyk Inc;*

Plaintiff’s Counsel:

*Adv. P. Kemp
With him Adv. Heinrichsen*

*Defendant’s Attorneys:**The State Attorney**Defendant’s Counsel:**Adv. G B Botha**Date Heard:**2009 November 16-23**Date of Judgment:**2010 April 17*