

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 2927/2010
Date heard: 27 - 30 August 2012
Date delivered: 13 December 2012

In the matter between:

ANTHONY ROMANAHENG MODIKOE

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

J U D G M E N T

DAMBUZA, J:

[1] This is a claim for damages suffered by the plaintiff as a result of his arrest and alleged assault by members of the South African Police Services (SAPS).

[2] At the start of the trial an application was brought, on behalf of both parties, for the issues relating to the defendant's liability for the damages claimed to be determined separately from the issues relating to the amount of damages claimed by the plaintiff. I granted the application and the trial proceeded accordingly. This judgment is therefore only on whether the

plaintiff's arrest was lawful and whether he was assaulted by members of the SAPS.

[3] On the pleadings it was common cause that the plaintiff was arrested by the police on 6 October 2007 and that he was kept in detention until 8 October 2007. The defendant admitted that the plaintiff was pepper sprayed, but denied that he was assaulted in any other way. At the trial the parties were in agreement that, as the arrest of the plaintiff by members of SAPS was common cause, the defendant bore the onus to prove the lawfulness thereof. They were also in agreement that the plaintiff had the onus to prove the alleged assault on him.

[4] The version of the plaintiff consisted of the evidence of the plaintiff himself, his sister, Tebogo Modikoe and Dr Buyile Tom who examined the plaintiff shortly after his release from police custody. The version of the defendant was tendered through the evidence of Constable Xolile Sobhuza, who was in charge of the police cells at KwaNobuhle Police Station, Uitenhage, when the plaintiff was brought in for incarceration after his arrest and Constable Thembelani Potwana, one of the two arresting officers. Potwana had been in the company of Sergeant Phungulwa on the day of the arrest.

[5] Although the versions of the parties regarding the arrest the plaintiff's arrest is broadly similar, they differ on the finer and decisive details on how

the incident unfolded. For that reason it is necessary that I set out in full, the evidence led by each witness.

[6] It is common cause that at the time of his arrest, the plaintiff was in the company of his 13 year old son. The arrest took place in the vicinity of Mdledle and Jongilanga Streets in KwaNobuhle Township, Uitenhage. He was arrested by Constables Potwana and Phungulwa and was then detained in police custody at Mkoko Police Station, KwaNobuhle, Uitenhage from the Saturday morning, 6 October 2007, until the following Monday morning, 8 October 2007, when he was released.

[7] The plaintiff's evidence was that he was walking together with his son who was carrying a bottle of Old Brown Sherry in his hands. A marked police vehicle (a van), stopped next to them. One of the police officers, indentified at the trial as Sergeant Phungulwa called the plaintiff's son to him, took the bottle of Old Brown Sherry which the plaintiff's son was carrying and poured the contents out onto the ground. Thereafter the police vehicle drove on and the plaintiff and his son also went about their own way.

[8] The plaintiff and his son then went to the plaintiff's parental home in Jongilanga Street and later left to go back to the plaintiff's house. On the way they came across the same police vehicle that had earlier stopped next to them. It was parked in front of a shop in Mdledle Street. The plaintiff went to the police vehicle and confronted Sergeant Phungulwa who was in the vehicle on why he had thrown away his alcohol. An argument ensued between the

plaintiff and the two police officers. The police officers then alighted from their vehicle, upon which the plaintiff and his son ran away. The police officers gave chase. The plaintiff's son managed to outrun the police officers. The plaintiff, however, fell and the police officers caught up with him. He attempted to apologise for having "*disturbed them*". However they would not listen, they, instead, handcuffed him and tripped him such that he fell onto the ground. He tried to get up and tried to loosen himself from the handcuffs. One of the police officers then took out pepper spray and sprayed the plaintiff and thereafter dragged him to the police vehicle. The plaintiff lost his sight for a while as his eyes were burning and watering, but later regained vision. The police officers threw the plaintiff into the police van. While he was at the back of the police van he heard the voice of his sisters who had, apparently, been alerted to what had happened. He could hear his sisters' voices saying that they would be going to Mkoko Police Station.

[9] At the police station the plaintiff was taken to a certain room not far from the reception area. In that room the two police officers who had arrested him assaulted him using a cricket bat, a baton and assaulting him with fists and booted feet. All this whilst his hands were still in handcuffs. At some stage a second pair of police officers also came into the room and also participated in the assault on him. The police officers also burnt the plaintiff's left hand with a cigarette. He was then left on his own for about three hours, after which another police officer took him to the police cells. He spent the following day, a Sunday, in the police cells. On Monday, he was

taken to court where he was released without being formally charged; presumably the release was at the instance of the public prosecutor.

[10] Tebogo Modikoe, the plaintiff's sister testified that on the day in question she was about to go to work at Pick 'n Pay in Uitenhage when she received a report from the plaintiff's son. She then rushed to the scene together with her sister. On their arrival at the scene she saw the police vehicle and two police officers pushing the plaintiff into the police van. When she asked the police officers as to what was going on, she was told to go to Mkoko Police Station. On her arrival at Mkoko Police Station she could hear her brother's voice crying out, from somewhere in the police station building, asking for forgiveness. During the course of that weekend, and in particular on the Sunday, she secured services of an attorney, Mr Faltein who tried in vain to have the plaintiff released on bail. The plaintiff remained in the police cells until he was released on Monday morning.

[11] Dr Buyile Tom gave evidence on the injuries sustained by the plaintiff. He examined the plaintiff on 8 October 2007 at 12:00 noon; this was shortly after the plaintiff's release from police custody. Dr Tom's observations are recorded on a J88 form which is part of the bundle of documents handed into court by both the parties. According to Dr Tom's evidence the plaintiff sustained numerous lacerations, bruises and abrasions all over his body, on his head, his chest, his arm and lower back. He also sustained swollen wrists, a fracture on left elbow, a fracture on the right ankle and a laceration on the lower lip.

[12] Constable Xolile Sobhuza testified that on the morning of the incident he was on duty at the Mkoko Police Station and was placed at the police cells as Cell Commander. His duties included opening the main police station door leading to the police cells for new arrestees to be brought in. If a prisoner was injured it was his duty to record any injuries on the arrestee in the Occurrence Book. On the day of the incident, he was on duty from 6:00 in the morning to 6:00 in the early evening. He could recall the plaintiff being brought into the cells by Constables Potwana and Phungulwa. According to him, when the plaintiff was brought into the police cells he was drunk and his lower lip was *“a bit swollen as if he had fallen”*. Sobhuza did not notice any other injuries on the plaintiff except the swollen lip. Throughout the day as he was in charge of the police cells, the plaintiff was never assaulted. He denied the allegations by the plaintiff that he was assaulted with a cricket bat and a baton.

[13] Constable Thembelani Potwana testified that he was the driver of the police van that stopped next to the plaintiff and his son on the day of the incident. He was in the company of Sergeant Phungulwa and they were on their way to buy bread for detainees and to pick up Mrs Maneli who was a matron at the police station at the time. On their way they came across the plaintiff who was in the company of his young son. The plaintiff was drinking alcohol from a bottle. At Phungulwa's suggestion Potwana stopped the vehicle. Phungulwa took the bottle containing alcohol and emptied its content onto the ground, admonishing the plaintiff on what he (the plaintiff) was teaching young children by drinking alcohol as he was doing. Thereafter the

police officers proceeded to pick up Mrs Maneli and then drove to the shops. Whilst the police vehicle was parked in front of the shops the plaintiff approached it and confronted Phungulwa, asking him why he had thrown away his alcohol. The plaintiff hit Phungulwa with a fist on the face. Potwana alighted from the police vehicle and, as he was doing so, the plaintiff ran away. The two police officers then gave chase. The plaintiff ran towards the houses, but before he reached the houses, he tripped and fell, and the police officers caught up with him and apprehended him. As they tried to handcuff the plaintiff he fought back, tearing Potwana's jacket in the process. The plaintiff also hit Potwana with a fist on the face. It is at this stage that Potwana pepper sprayed the plaintiff. Ultimately the police were successful in handcuffing the plaintiff who had not stopped fighting back. Phungulwa's spectacles broke in the process.

[14] Potwana went to fetch the police vehicle which was parked some distance away so that they could load the plaintiff in it. However, on his way back he saw the plaintiff running away, with his hands still in handcuffs. The two police officers had to chase the plaintiff again. The plaintiff jumped over a fence and fell down on the other side thereof. It turned out that as he (the plaintiff) jumped to the ground, on the other side of the fence, his face had hit a pole, resulting in a bruise. The policeman caught up with the plaintiff again and loaded him onto the police vehicle. This was, once more, not without a struggle, as the plaintiff resisted being placed into the police vehicle. According to Potwana, the plaintiff refused to pull his legs onto the back of the police vehicle, such that Phungulwa had to hit them with the back door of the

vehicle as he was trying to close same. It was, only after the plaintiff had been hit with the door of vehicle several times that he eventually pulled his legs up and into the police vehicle. The plaintiff was then taken to Mkoko Police Station. At some stage prior to being put in the police cells the plaintiff tried to bribe Phungulwa and Potwana, promising to give them R1,000.00 and apologising for having assaulted a policeman.

[15] Potwana denied that they had at any stage, assaulted the plaintiff, and insisted that any injuries that the plaintiff might have suffered, must have been sustained either when he fell as he was being chased by the police officers, particularly when he jumped over the fence, or as he was hit by the backdoor of the police vehicle during the struggle to load him into the police vehicle.

[16] According to Potwana, at the police cells the plaintiff was charged with an assault on a police officer. Thereafter the two police officers left the plaintiff who was, at that stage, well and walking on his own, albeit with a slight limp.

[17] There are therefore two different versions before me regarding (1) how the arrest took place and the reason therefore; and (2) how the plaintiff sustained the injuries on his body. It is not in dispute that the plaintiff did sustain the injuries; what is in dispute is whether the injuries were inflicted on him by the police. It therefore becomes necessary that I evaluate the evidence before me to determine whether the parties have discharged the onus resting upon them.

[18] The plaintiff was, in my view, a good witness. His evidence was clear and consistent. He made a number of admissions which, in my view indicate sincerity. Firstly, he admitted that his conduct of giving his 13 year old son alcohol to carry was reprehensible. Further, he admitted that he confronted the police in front of the shops whilst they were in their vehicle. He also admitted that he then ran away when they alighted from their vehicle. Even further, and perhaps more importantly repeatedly admitted, without hesitation that he strenuously resisted arrest and that he *"fought back"* in the hope that he could delay his arrest until his sisters arrived at the scene.

[19] The version tendered on behalf of the defendant on the other hand was, generally of a poor quality. It was riddled with contradictions and improbabilities. On Potwana's version the plaintiff sustained injuries at the scene where he was arrested and when he was being loaded into the police vehicle. According to him the cause of the injuries sustained by the plaintiff was the plaintiff's own conduct of resisting arrest. He denied that the plaintiff was assaulted with a baton, cricket bat, fists and booted shoes or in any manner at the police station. But Potwana's evidence does not account for the nature, the number and location of the injuries on the plaintiff's body. For example, Potwana's version does not account for the laceration on the plaintiff's lower lip; his version also does not account for the cigarette burn injury on the plaintiff's left hand (which supports the plaintiff's version that he was burnt with (a) cigarette(s)). The swollen left hand thumb, the fractured ankle, and bruises all over the body, which are clearly visible from the photographs that were taken a few hours after the plaintiff's release, cannot

be explained on the version tendered on behalf of the defendant. There is no explanation as to why Sobhuza would not have observed the injuries sustained when the plaintiff was brought into the police station if he sustained them during his arrest. As I have stated it was Sobhuza's evidence that when an injured arrestee is brought into the police station an entry is made in the Occurrence Book regarding any injury the arrestee has. During cross-examination Sobhuza attempted to qualify his evidence by stating that only serious injuries are recorded in the Occurrence Book. This is improbable. Firstly police officers, not being doctors, would be in no position to assess "*seriousness*" of injuries that would warrant recordal in the Occurrence Book. Further, it was put to the plaintiff, during cross-examination that Potwana and Phungulwa offered to take him for medical examination prior to taking him to the police cells, but the plaintiff refused. This implies that the two arresting police officers were aware of the injuries prior to taking the plaintiff to the police station and considered them sufficiently serious to require the attention of a medical practitioner. If the plaintiff was already injured when he was taken to the police station, to the extent that he was given an option of being taken for medical examination, Sobhuza's attention would have been drawn to the injuries. I am of the view that the injuries sustained support the plaintiff's version that he was assaulted at the police station. Hence Sobhuza's evidence that the plaintiff was walking "*normally*" when he arrived at the police station.

[20] It is also significant that the police officer whose alleged assault by the plaintiff was the cause for the arrest, did not give any evidence. There is no

explanation as to why Phungulwa did not testify. The two police officers who testified were, in my view, not honest in the evidence they gave. They contradicted each other and their evidence does not translate to any intelligible version. Their evidence is not consistent with other objective evidence in the case. I do not intend to speculate as to the true reason why Phungulwa and Potwana deemed it necessary to arrest and detain the plaintiff. But Potwana's evidence was so poor and unreliable that I am unable to find that the plaintiff did assault Phungulwa and that the arrest was therefore lawful in terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977, as the defendant pleaded. In fact, what the defendant pleaded was that the plaintiff assaulted both Constable Potwana and Sergeant Phungulwa while they were performing their official duties. As I have stated, Potwana's evidence was that the reason for the arrest was an assault on Phungulwa. The version tendered on behalf of the defendant fails to discharge the onus on the defendant to prove that the arrest and detention of the plaintiff was justified.

[21] Regarding the assault on the plaintiff, I am satisfied that the plaintiff sustained the injuries referred to at the hands of the police.

[22] The following order shall therefore issue:

- (a) The defendant is ordered to pay to the plaintiff such amount in damages as the plaintiff may prove to have suffered as a result of:

- (i) the plaintiff's arrest and detention from 6 December 2007 to 8 December 2007;
 - (ii) the assault on the plaintiff by members of the South African Police Services on 6 December 2007;
- (b) The defendant is ordered to pay the plaintiff's costs of the trial.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:

Adv H. Ayerst

Instructed by Daniel Saks Inc, Port Elizabeth

For the defendant:

Adv N. Gqamana

Instructed by The State Attorney, Port Elizabeth