

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case no: 01/2015

**Date heard: 17.11.2016;
21 to 24.11.2016; 5.12.2016
and 7.12.2016**

Date delivered: 9.3.2017

In the matter between:

LUVUYO FUNDILE DUNJANA	First Plaintiff
SAMKELISIWE MZAMO HOPA	Second Plaintiff
CHUMA FUYISIZWE KOSANA	Third Plaintiff
SINEKAYA MCOPELA	Fourth Plaintiff
LUYANDA NZO	Fifth Plaintiff
SINETHEMBA PAYI	Sixth Plaintiff
MELIKHAYA TANCA	Seventh Plaintiff

VS

THE MINISTER OF POLICE	Defendant
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JUDGMENT

TSHIKI J:

[1] In this action the seven plaintiffs have sued the defendant for their arrest and detention which they contend were wrongful and unlawful. The plaintiffs also

contend that during their arrest and detention they were assaulted by the members of the police whilst in their custody. Therefore, in the process their constitutional rights were infringed.

[2] The first witness called for the defendant was *Mr Jacobus Botha*. He testified to the effect that on the 15th June 2013 the plaintiffs in this matter were arrested by the police. The witness was the arresting officer who, after the event made a statement recording the arrest and what followed. He was also on duty with *Constable Mali* and *Warrant Officer Mfukuli*. At that time, he was stationed at Kwazakhele task team. He also informed the Court that he received information that eight persons were involved in an armed robbery at a Spar in Gelvandale. However, he did not go to the scene but travelled around the area where he happened to see a white Nissan bakkie parked in a suspicious manner. He obtained information that the said vehicle was stolen and matched the description of a vehicle that was seen leaving the scene of robbery. Surprisingly there was no evidence led to link the white Nissan bakkie to the plaintiffs in this trial.

[3] *Botha's* evidence is also that approximately fifteen minutes into his inspection of the white Nissan vehicle, an unknown person, who did not wish to be named, approached him and provided him with information that he had seen the white Nissan bakkie leave the robbery scene. And that he had also seen the occupants of the Nissan bakkie climb into a silver VW motor vehicle and leave the area. The same individual provided *Botha* with a partial registration number of [F....], without the numbers. According to *Botha* he provided this information to his informants which then led to him receiving information. That information directed him to the plaintiffs in this case who were in New Brighton at the time.

[4] *Botha's* further testimony is a search of the two vehicles on the scene and house which occurred as a result when certain items of clothing were found in the house. This revealed that a police officer, *Jasper Dippenaar* informed him that he said clothing was similar to certain clothing worn by the armed robbers seen in the video footage viewed by *Dippenaar*. *Botha* did not view the said video and that such clothes were not worn by the plaintiffs at the time.

[5] What is important though is that the evidence of *Dippenaar* who was called as a witness by the defendant contradicted the evidence of *Botha* in material aspects.

[6] I agree with *Mr Moorhouse* that the suspicion formed by *Botha* was not reasonable nor objectively sustainable.

[7] The next witness for the defendant was *Jasper Ziegfried Dippenaar*. His evidence was that he is a member of the South African Police Service (SAPS) and is a Captain by rank. His position in the detectives is that of a group commander captain. He did visit the scene of the robbery. On the date in issue he visited the scene with the purpose of securing the scene and also to ascertain where the suspects could be. He was able to see the video footage at the scene. They also were able to help the cashiers who were pointed with guns. He remained on the scene and was later called to attend at Ngalo Street in New Brighton. He saw some of the suspects who were lying on the ground. He also identified the jacket that he had seen in the video. The video also showed pictures of the firearms.

[8] The next witness called by *Mr Wolmarans* was *Willem Patrace Erasmus* who is a warrant officer in the SAPS. There was an interim investigation until he was

appointed. On receipt of the docket he started his duties as the investigating officer. He then compiled a photo identity album of the plaintiffs. At the time when the events occurred on the Saturday evening the 15th June 2013 he was at St Francis. He, however, happened to hear about the matter and that he would be the investigator of this case. On Monday he bought the newspaper at a local shop in St Francis and he saw on the front of the page of the events what happened in Gelvandale at the Spar. He came to know about this robbery at that happened and he decided to start his investigation of the case which he gave it the urgency it deserved. He came to know from the contents of the docket that some people whom he was looking for were detained at Kwazakhele. He then called *Warrant Officer Smith* who was one of his team who assisted him. They then compiled a photo of the ID album. They went to the Spar where he interviewed some witnesses that were involved in the armed robbery. His team was already aware that the arrest by *Warrant Officer Botha* and others was based on the clothing worn by the robbers. The photographs they took were of the suspects in the clothing that they wore on the Saturday evening of their arrest. It is exactly what he showed to the witnesses at the Spar. He then booked out all seven of the plaintiffs. He introduced himself to them and the reason why he was there. He explained to them that he will be the investigating officer and told them that he was going to release them because at that stage of the investigation there was not enough to charge them and bring them before Court. He then took all of their fingerprints, their details which he documented into his docket and then released them. The plaintiffs were caused to sign all the necessary documents before they were released. The plaintiffs did not give any explanation to him what the alibi or any other explanation of their whereabouts for that evening and why they would say they did not commit the robbery. The only explanation by the plaintiffs about their whereabouts for that evening was to say that

it was the 21st birthday of one of them and that they were at Nando's in Standford Road. The witness then released them. The witness then also said:

"I think I did ask you earlier, I just want to make sure, because of the time where was urgency with you as regards the decision to prosecute them, to charge them ... That is correct."

"Did you feel that you needed further investigation before you could charge them? Yes" (Therefore the release appears to have been provisional).

"If you should continue your investigation and find evidence with which to charge them would you not then do that? Is that what happens in the normal course of events? ... That is correct."

[9] When cross-examined by *Mr Moorhouse* he conceded that he was not involved in the initial arrest and detention of the plaintiffs. Therefore, he could not comment on what may have occurred at that point. The witness did not dispute that the plaintiffs will give evidence that their arrest and detention was wrongful and unlawful. Moreover, there was no reasonable cause for them to be arrested, and they will also give evidence that at the time of their arrest that they were in fact assaulted, "but you were not there, you cannot comment on that ...no".

[10] At this stage, the plaintiffs opened their case led by the first plaintiff *Luvuyo Fundile Dunjana*. *Mr Dunjana* testified that he was born on the 2nd January 1991. He is currently employed as a sales executive at Melsa. At the time of the incident at hand, on the 15th June 2013, he was then already employed as a sales rep at Vodacom. His qualifications are National Diploma in Marketing obtained from the Nelson Mandela Metropolitan University which he achieved in 2013. He was currently still studying. On the date of their arrest they went out at Summerstand at his girlfriend's house. They proceeded to Nando's to have dinner as it was to be the

birthday of *Sinekhaya Mchophela*. They had dinner for about 20 minutes and thereafter proceeded to *Nkosana* who is the third plaintiff.

[11] Whilst they were enjoying themselves at about 21h00 some of them watching a soccer match they saw a police vehicle driving past. Later after 10-20 minutes they saw an unmarked VW Citigolf speeding behind. The police officers came out of that vehicle and parked. There was chaos as the police officers were armed with firearms and they were vulgar and were aggressive towards them. Each police officer had a firearm and used vulgar language. The police said "get the fuck up out of the car" while others were screaming with their hands up. There was chaos as other people like *Nzo* ran away. The police started kicking the door and had firearms like R5 rifles. The first plaintiff and others were told to lift up their hands and they were grabbed with a collar by one of the police officers. He was dragged out of the vehicle on the ground. The witness laid down on the ground .

[12] According to the plaintiff they had done nothing wrong to provoke the policemen. The police kicked the plaintiff with booted feet on his ribs. One of the policemen asked what had they done (referring to the plaintiffs) to rob them. Some neighbours came and that was when the assault stopped. They were on the ground for about 2-3 hours. The kicking and assault stopped when the rowed came. They did not know what they had done to the police officers for them to be assaulted and humiliated in that matter.

[13] Thereafter the plaintiffs were arrested and detained in custody. They were kept to stay in a dirty and dark cell. About 30 minutes later the plaintiffs were given a piece of paper. On that note the plaintiffs were arrested and detained.

[14] According to the first plaintiff, the police were not even apologetic for what they have done to the plaintiffs. The police were referring to the cells as Somalians. The plaintiffs were told to lie on the floor in a cell which had an unbearable smell. They were detained from the 15th June 2013 and were held in detention until the 17th June 2013.

[15] Each plaintiff was treated in the same manner by the police. I do not have to deal with the evidence of all the plaintiffs. I say so, because their evidence is the same and is consistent in that they were unlawfully arrested and detained as well as assaulted by the members of the South African Police. In the process their constitutional rights were infringed upon by the members of the police. The main evidence of each plaintiff is sufficient for this Court to make a conclusive decision. I say so, because all the plaintiffs had given their evidence satisfactorily.

[16] The evidence of Botha was that the plaintiffs were made to lie on the tarred road, under the police guard for about three hours prior to having been formally arrested. This was done with disregard of their constitutional rights having been explained to them. I must also emphasize that the manner in which the defendants' employees had disregarded the plaintiff's rights is as if the citizens of this Country have no constitutional rights. From the evidence there is no justification for the defendants' to assault and detain the plaintiffs. There is also no explanation by the defendant why the plaintiffs had to be made to lie on the tarred road for no apparent reason. This is more so when this treatment has to be done for about three hours.

[17] In his address on quantum *Mr Wolmarans*, has indicated that he had an emotional evidence in this trial. He said:

“We’ve a lot of emotional evidence in this trial. We’ve first had it now from Mr Hopa again repeatedly saying what good boys these are and the good homes they come out of and they could never have committed an offence like this and why they be arrested. I didn’t argue with that. I mean we saw all of them here in the witness box. They were all clearly nice young men. But that is not the question for Your Lordship to answer as regards the arrest.”

[18] Indeed as *Mr Wolmarans* has indicated this Court is not here to prove or disprove that they robbed the Spar. We were here to determine whether the arrest was justified, whether there was a reasonable suspicion that is what we look at.

[19] Indeed there can be no doubt on what *Mr Moorhouse* has said that it is pertinent to note that the arrestor must entertain a suspicion and that such suspicion must rest on reasonable grounds. There must be evidence that the arresting officer formed a suspicion that is objectively sustainable and is of such a nature that a reasonable person would have held such a suspicion (***R v Van Heerden 1958(3) SA 150(T)***, ***Duncan v Minister of Law and Order 1986(2) SA 805 (A)***, ***S v Reabow 2007(2) SACR 292 (E)*** at 297).

[20] In addition, where an arrest has occurred in circumstances where the arresting officer did not form his or her own suspicion, but relied on the opinion of somebody else, such arrest is unlawful (***Ralekwa v Minister of Safety and Security 2004(1) SACR 131 (T)*** paras [11, 12 and 14]).

[21] It follows that sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the

freedom and the rights of an individual (see ***Thandani v Minister of Law and Order* 1991(1) SA 702 (E) at 707B**).

[22] As *Mr Moorhouse* has contended in the present matter the suspicion formed by *Botha* was not reasonable nor objectively sustainable particularly in that:

[22.1] *Botha's* evidence regarding receiving information from unknown persons and informants is not plausible and clearly a fabrication after the fact.

[22.2] The information received by *Botha* regarding the description of the vehicle was only that it was a silver VW motor vehicle with registration numbers contained [F....]. This was not sufficient information to inform his alleged suspicion, particularly in circumstances where the plaintiffs' evidence was quite clearly that *Mcophela's* vehicle was not silver in colour.

[23] It follows that the arrestor in the shoes of *Mr Botha* must entertain a suspicion and that such suspicion must rest on reasonable grounds. In ***Minister of Safety and Security v Sekhoto and Another* 2011(1) SACR 315 (SCA)** at para [6] Harm DP had this to say:

"As was held in *Duncan v Minister of Law and Order*, the jurisdictional facts for a s 40(1)(b) defence are that:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- (iv) the suspicion must rest on reasonable grounds."

[24] If one of the requirements are lacking the requirements are not sufficient. It follows in this case that the listed grounds for suspicion listed in the ***Minister of***

Safety and Security and Another *supra* have not been satisfied in this case. This is so because every deprivation of liberty is presumed to be unlawful especially in circumstances where the arrest and detention of the plaintiff is admitted. The defendant has failed the onus in this case because it has failed the test as prescribed above.

[25] It follows in this case that the arrestor did not prove all the jurisdictional facts as stated above.

[26] Therefore, during the arrest of the plaintiffs their arrest and detention was wrongful and unlawful. In addition according to the evidence of the plaintiffs they were assaulted and their constitutional rights were infringed upon.

[27] It, therefore, follows that, having regard to:

[27.1] the nature and manner of the treatment suffered by the plaintiffs;

[27.2] the standing and social status of the plaintiffs;

[27.3] the fact that their treatment was in full view of the members of the public and the plaintiffs family members;

[27.4] the fact that none of the plaintiffs had been arrested and detained before this incident;

[27.5] the nature of the verbal abuse suffered by the plaintiffs;

[27.6] the fact that they were forced to lie on a tarred road, in view of the community for three hours;

[27.7] the period over which the plaintiffs suffered from the injuries sustained;

[27.8] the fact that they were threatened with firearms;

[27.9] the psychological effects suffered by the plaintiffs as well as the humiliation degradation and loss of dignity they experienced and the period of detention;
 [27.10] the filthy and the inhumane conditions in which the plaintiffs were detained and the lack of apology in respect of their treatment;
 [27.11] the gross failure of the defendant to comply with its legal duties;
 [27.12] the grave infringements of the plaintiffs' constitutional and private law rights;
 [27.13] the quantum of the general damages claimed by each plaintiff herein is just and equitable.

[28] The claim of the plaintiffs is successful. What next follows will be the determination of quantum.

P.W. TSHIKI
 JUDGE OF THE HIGH COURT

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