

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 30286/2020

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

...08 APRIL 2024.....
DATE

...
SIGNATURE

SELLO NELSON MONAHENG

Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

**THE NATIONAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICES**

2nd Defendant

**THE GAUTENG PROVINCIAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICE**

3rd Defendant

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 08 April 2024 at 10h00.

JUDGMENT

JORDAAN AJ

INTRODUCTION

[1] This is an action for damages in the amount of R1 500 000.00 (One million five hundred thousand rand), arising from the arrest and detention of the Plaintiff, Mr. Sello Nelson Monaheng, as well as his alleged assault by members of the Defendant, acting within the course and scope of their duty on the 12th of June 2019.

[2] The Plaintiff in his particulars of claim in essence pleaded that on or about 12 June 2019, between the hours of 08h20 and 09h00, he was on duty as a security officer at Impson Logistics (Pty) Ltd warehouse, when a white VW Golf GTI driven by Warrant Officer Johannes Hennie Last ("W.O Last"), approached the Impson Logistics (Pty) Ltd warehouse entrance for whom he opened the gate and provided entrance. W.O Last did not introduce himself to the plaintiff nor did she show the plaintiff his

appointment card. When it became apparent to the Plaintiff that W.O Last was neither a client nor part of the employed personnel, the Plaintiff instructed W.O Last to leave the premises however, he disregarded the instructions and demanded access to the warehouse instead.¹

[3] Upon the arrival of backup police officers at the warehouse whose identities are unknown to the Plaintiff, W.O Last demanded that the Plaintiff hand over his smartphone. The Plaintiff's request for reasons for the request and his constitutional rights in the handing over of his personal smartphone was met by a failure by W.O Last to respond to the Plaintiff's reasonable request, W/O Last instead used maximum force by forcefully grabbing the Plaintiff by the throat and taking the Plaintiff's smartphone without the Plaintiff's consent and proceeded to arrest the Plaintiff without any reasonable cause and transported him to Boksburg North Police Station, where he was charged with the offence of Common Assault of a Police Officer and Obstructing the Police in executing their duties and unlawfully detained. The Plaintiff was on the 13th of June 2019 transported to Boksburg Magistrate Court and at approximately 10h00am released from the court's holding cells, without appearing before the Magistrate.²

[4] Defendant defends the action on the basis that the Plaintiff's arrest and detention was justified in terms of Section 40(1)(a) and (b) and section

¹ CaseLines: Particulars of Claim pages 009-8 to 009-9 paragraphs 6 and 8

² CaseLines: Particulars of Claim pages 009-9 to 009-10 paragraphs 10, 11, 13 and 15

50(1) of the Criminal Procedure Act 51 of 1977 ("the Act"), and further plead that the confiscation of the Plaintiff's cellphone with the necessary force was justified in terms of section 22(b) and section 27 of the Act.³

[5] From the pleadings it was not in dispute that:

- 5.1 The Plaintiff was arrested on the 12th of June 2019 by members of the South African Police Service (Police Officers)
- 5.2 The Plaintiff was held in custody at Boksburg North Police Station for one day and one night
- 5.3 The Plaintiff was transported to the Boksburg Magistrates Court on 13th of June 2019 where he was released from the court's holding cells without any court appearance
- 5.4 The Police Officers were acting within the course and scope of their duty when effecting the arrest of the Plaintiff
- 5.5 The Police Officers used necessary force in confiscating the Plaintiff's cellphone

[6] The issues remaining for determination by court:

- 6.1 Whether the Plaintiff was assaulted by the Police Officers
- 6.2 Whether or not the Plaintiff's arrest and detention was justified in terms of section 40 of the Act, and if not
- 6.3 The quantum of the damages.

³ CaseLines: Defendant's Plea pages 006-3 to 006-4 paragraphs 8 and 9

[7] The Plaintiff attracted the onus of proving the assault, while the defendant had to prove the arrest and detention was justified. For these reasons and on a balance of convenience having regard to the issues, the court ruled that the Plaintiff bore the duty to begin.

[8] The Plaintiff, Mr. Sello Monaheng, was the only witness to testify in his case. It was his evidence that he grants access by opening the gate and registering vehicles of persons who come the warehouse. On the 12th of June 2019, thinking it was a person who works on the premises he opened the gate and let W/O Last in. On approaching the vehicle W/O Last produced his police card and stated that he was there for investigation, the Plaintiff did however not see his name, but he saw the police badge. The Plaintiff then requested W/O Last to reverse out of the premises upon which the Plaintiff called a manager who spoke to W/O Last. The Plaintiff then saw the legal representatives of the warehouse arriving and the manager opened the gate for them, he was not part of the conversation between them, W/O Last and the manager. The Police back-up then arrived. It was the Plaintiff evidence that W/O Last then requested him to open the gate, the Plaintiff however stated that he does not have the remote. It was his evidence further that W/O Last then jumped at him, searched him without consent and removed his cellphone stating that he is taking the phone for investigation. He further testified that W/O Last then grabbed his neck and pushed him to the car and a friend of W/O Last, whom the Plaintiff thinks the manager opened the gate for, came and pushed him to the ground, this

is the same man who tried to open the gate with a crowbar. The Plaintiff further testified that he took his phone from the back seat of the car.

[9] It was his evidence that the cell was dirty, smelly, was overcrowded, had rats and the shower had only cold water. He was never the same again and left his job as a security officer a month later and never got his phone back. He felt that his arrest was racially motivated as the others were not cuffed and arrested. He is now working as a sausage maker.

[10] During X-examination it was his evidence that W/O Last stated that he was a Police Officer and showed him his police badge, informing him that he is there for investigation. It was his evidence further that W/O Last patted him down and took his phone and walked off. The Plaintiff testified that he could not stand still, he followed W/O Last for his phone and asked his phone back. It was the Plaintiff's version during cross examination that he has a video of the occurrence. The Plaintiff testified that he did not have documents to take his phone and admitted that he was angry in the video. When confronted further that it was after the second attack on W/O Last that the Plaintiff was arrested, the Plaintiff replied that he does not recall attacking W/O Last.

[11] W/O Last testified that he was on the basis of evidence gathered, investigating the illegal sale of liquor meant for exporting. On entering the yard, he showed his identification card, identified himself and stated that

he was there on investigations, when the Plaintiff ordered him to leave the premises, upon which he requested to speak to the manager and requested the Plaintiff's PSIRA registration which the Plaintiff did not provide. It was his evidence that he was justified in his actions as the Plaintiff was in a customs area, by section 20 and 26 of the Act. His communications with the manager and the legal representatives grounded his suspicions further that the parties might tamper with the scene. He thus requested that the gate be opened to allow his back-up to secure the scene, while he leaves to get a search warrant, however the Plaintiff did not open the gate. In order to prevent his further obstruction by the Plaintiff, he searched the plaintiff in order to get the remote for the gate as he opened the gate for W/O Last, when he came across the phone of the accused and confiscated it as it may contain information of recordings relevant to the investigation. That is when the accused advanced on him demanding his phone, while W/O Last held him away. It was his testimony that it was impossible to choke such a big man as the Plaintiff while searching him. It was his evidence that the Plaintiff was disruptive and attacked him on two occasions, thus he had to arrest the Plaintiff for obstruction and so informed the Plaintiff then handed him over to Dorfling. The witness testified that the video footage will show that the Plaintiff attacked him.

[12] During cross examination he testified, that he was on the premises to obtain a statement with regard to the liquor disposal and inspect the documents from the person responsible therefore at the premises, Preston,

who was later charged in the Middelburg case. It was his evidence when parties demanded a search warrant, he needed to get out and let his back-up into the premises to ensure that evidence is destroyed, however the Plaintiff did not open the gate hence he searched the Plaintiff for the remote. It was his evidence that the Plaintiff had opened the gate for him, further legal representatives came in subsequently, but when the witness asked to be opened for to fetch the warrant the Plaintiff did not have the remote, that was the obstruction caused. On searching the Plaintiff, W/O Last did not find the remote but the cellphone which he confiscated and it was booked into the SAP13 but not by him as he was not at the police station. He replied with regard to the contents of the video, which he testified shows him warding off the attack from the Plaintiff on him by blocking and warding him off with his arm and it shows how the man at the gate comes to assist the witness as the Plaintiff was strangling him and Adv Dorfling can be heard saying "Nelson leave him". The witness testified that the legal representatives' phones were also confiscated as they were fueling the situation with recordings without his permission. The Plaintiff was admonished by his own legal representative to stop, but he was excessive in his obstruction of W/O Last. He assaulted the witness and he knocked the cellphones from the witness' hand, hence he was arrested. It was confirmed that the video only shows the witness holding the Plaintiff away from him while the Plaintiff wants to take his cellphone from the witness, the voice saying "Nelson leave him" and it shows a man simultaneously advancing from the gate at that time pulling and pushing the Plaintiff away

from the witness, but it does not show what was happening when the voice is heard other than the man advancing then showing the pulling away from the witness. It was his evidence that he had just had a stomach operation, he was skinnier and could not fight back hence the man from the gate advance to help him. It was his evidence further that he cannot testify with regard to the condition of the police cells and that the investigating officer never contacted him, the case can be re-opened at any time.

[13] The video footage was submitted by agreement and accepted as Exhibit "1".

[14] Captain Renier Dorfling testified that on receiving a call for back-up, he arrived at the premises where the Plaintiff refused them access. He testified that he was able to see into the yard and heard W/O Last state that the Plaintiff must give him the cellphone and he observed the Plaintiff push W/O Last on the chest and choked him while requesting his cellphone. It was his evidence that he shouted that the Plaintiff must leave W/O Last as he is a police officer performing his duty. It was his evidence that the gate was taken off its rails and they gained entrance.

[15] He was confronted that W/O Last testified that he did not ask for the cellphone, which the witness answered that is what he heard. He testified that he booked the cellphone into the SAP13, but he did not record the

SAP13 number in his affidavit. It was his evidence that he cannot testify to the conditions of the police cells.

[16] Section 40(1)(a) and (b) of the Act reads as following:

"40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

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

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

[17] It is trite⁴ that there are four jurisdictional facts that has to be proved in justification of a section 40(1)(b) defense, namely:

17.1 The arrestor must be a peace officer;

17.2 The arrestor must entertain a suspicion;

17.3 The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

⁴ Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G.

17.4 The suspicion must rest on reasonable grounds

[18] Section 20 of the Act provides:

"26 Entering of premises for purposes of obtaining evidence

Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof"

[19] Section 22 of the Act provides for circumstances under which an article may be seized with a search warrant as following:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises

consents to such search and the seizure of the article in question; or

(b) if he reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[20] Section 27 of the Act provides for resistance against entry or search as following:

"(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises."

[21] The determination whether a peace officer acted lawfully when he arrested someone without a warrant is objective- thus whether, on an objective approach, the arresting officer in fact has reasonable grounds to arrest the Plaintiff. The onus rests on the arrestor to show that the arrest

was objectively lawful, if the arrest is unlawful, it follows that the subsequent detention must also be unlawful.⁵

[22] The approach to resolving two irreconcilable, mutually destructive factual versions is well-established and bears no need of reciting.⁶ Based on this framework of principles, an assessment of the evidence follows in regard to the issues to be determined. Cases must always be evaluated having regard to the totality of the evidence.

[23] The Plaintiff bore the onus to prove that he was assaulted on a balance of probabilities. It was the Plaintiff's evidence that W/O Last indeed introduced himself as a Police officer that he was there for investigation and produced his police card. This evidence indicates that the Plaintiff was aware that W/O Last is a police officer on duty on that day. It is common cause that the Plaintiff was in charge of the gate letting people in and out and that he indeed gave W/O Last access on the said day, it is thus not unreasonable in the circumstances that W/O Last ask the Plaintiff to open the gate for him to leave and obtain a search warrant and for his back-up to come in and secure the premises to expect him to open the gate, but the Plaintiff in the circumstances simply stated he does not have the remote and did not open the gate. W/O Last in the circumstances searching the person he knew opened the gate for him for the remote is

⁵ Minister of Safety and Security v Tyokwana 2015 (1) SACR 597 SCA

⁶ Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others 2003(1) SA 11 (SCA), at paragraph [5]

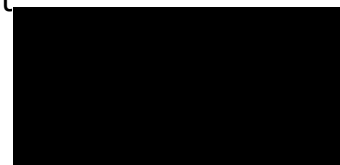
justified, as he was obstructed in him the performance of his duty and this happened in his presence. The Plaintiff's evidence is that he pursued the recovery of his cellphone and there was a struggle during which he was assaulted in that he was choked around his neck and the video footage will show same. The video footage showed the contrary, it showed that the Plaintiff was being held away at arm's length as he continuously advance on W/O Last; it shows the Plaintiff being reprimanded by a voice which was not disputed to be the voice of the Plaintiff's employer's council, Adv Dorfling, to leave W/O Last and simultaneous with the reprimand a man runs towards what is then seen as the Plaintiff being pulled back from W/O Last, W/O Last testify that he was being choked by the Plaintiff at that stage. The objective evidence produced in Exhibit "1", did not just show that there was indeed no assault on the Plaintiff, but rather, that the Plaintiff was the aggressor and attacked W/O Last. In the circumstances the Plaintiff allegations of assault is irrefutably shown to be false and the Plaintiff thus failed to discharge the onus of proving the assault on him by the Police Officers.

[24] The Defendant bore the onus to prove that the arrest of the Plaintiff was lawful and relied on both section 40(1)(a) and (b) of the Act. The Plaintiff was arrested for obstruction of the police in the performance of their duty and for assault common, amongst other charges which were later appearing on the docket. It was the evidence of W/O Last that he was attacked and choked by the Plaintiff. The objective evidence in Exhibit "1"

does not show the actual visual of the W/O Last being choked, however having regard to the evidence depicted in it as well as the audio reprimand by Adv Dorfling with the simultaneous visual of the Plaintiff being pulled back from W/O Last and the Plaintiff's own concession that he was angry, gives credence to the evidence of W/O Last of an assault on him by the Plaintiff. His evidence of an assault on him by the Plaintiff is also corroborated by Capt. Dorfling. It was not disputed that W/O Last was obstructed in his duty, it was rather contended that W/O Last was biased as he did not arrest the other persons who also obstructed him, W/O Last answered this by stating that he applied his discretion as to the extent of the obstruction, the Plaintiff was persistent and became violent. This in circumstances where the Plaintiff knew that W/O Last was a police officer acting in his professional capacity on duty. This court finds, that the Defendant proved that the arrest of the Plaintiff in the circumstances was justified and lawful.

[25] For the reasons stated above, the Plaintiff claim must therefore fail and I therefore make the following order:

25.1 The Plaintiff's claim is dismissed with cost



M T Jordaan

Acting Judge of the High Court,

Johannesburg

FOR THE PLAINTIFF

INSTRUCTED BY

Email

ADV F MAHOME

OKAFOR MA ATTORNEYS

info@omalaw.co.za

FOR THE DEFENDANT

INSTRUCTED BY

Email

PasMokoena@justice.gov.za

Adv F MAGANO

THE STATE ATTORNEYS

Brdupreez@justice.gov.za;

