



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MTHATHA)**

CASE NO.: CA08/2022

Matter heard on: 13 February 2023

Judgement delivered on: 25 April 2023

In the matter between: -

YONGAMA NQADALA

Appellant

and

MINISTER OF POLICE

Respondent

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

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Signature

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Date

JUDGMENT

SMITH J:

[1] This is an appeal against the judgment of Tokota ADJP, delivered on 5 October 2021, and dismissing the appellant's claim for damages arising from his alleged assault and unlawful arrest and detention by a member of the South African Police Services at Cala on 16 November 2017. In his particulars of claim the appellant alleged that he was wounded in the legs by the police officer who fired shots at him while he was running away. He was thereafter unlawfully arrested and taken to a hospital where he was admitted and eventually discharged on 7 December 2017. After his discharge from hospital he was detained in police cells and eventually only released on 31 January 2018. The learned judge granted leave to appeal against the dismissal of the assault claim and the finding that the appellant's detention from 7 December 2017 to 17 January 2018 was lawful. He refused leave to appeal in respect of the finding regarding the lawfulness of the detention from 17 January 2018 to 31 January 2018.

[2] Tokota ADJP was justifiably critical of the manner in which the appellant pleaded his case and described his particulars of claim as 'a rambling preview of the evidence proposed to be adduced at trial [rather] than a statement of the material facts relied upon'. Because it was drafted in the form of an affidavit, the particulars of claim contain a plethora of unnecessary factual averments that constitute evidentiary matter instead of the concise and succinct statement of material facts required to sustain a cause of action. The learned judge nevertheless found that the pleading, reasonably construed, set out a valid cause of action with sufficient clarity to enable the respondent to plead thereto. The respondent did not lodge a counter-appeal against that finding and the matter must therefore be decided on the basis that the appellant's case was properly pleaded. In the event, the respondent pleaded to both claims, admitting the assault, but averring that a police officer, namely Siyamcela Mendu (Mendu) was acting in self-defence against the appellant who attacked him with a knife. In respect of the unlawful arrest and detention claim the defendant averred that the appellant was arrested in terms of a warrant of arrest issued when he failed to appear in court on the trial date. His case was remanded *in absentia* while he was in hospital, and after his discharge the investigating officer consulted a prosecutor who determined that the appellant must be brought before court on the remand date, namely 17 January 2018. The appellant did eventually appear before a magistrate on that day and the enquiry into his failure to appear in court was commenced, but not finalised. It was eventually only finalised on 31 January 2018, when his explanation was accepted and he was released from custody.

[3] The pre-trial minutes evince that the respondent admitted 'the assault arrest and detention, which actions the Defendant considers as justified under the circumstances'. The issues which fell for determination were defined as '[w]hether the Plaintiff's assault, arrest

and detention by Police on 16 November 2017 were unlawful in the circumstances'. The parties also agreed to separate the issues of liability and quantum, and in respect of the duty to begin they agreed that '[t]he Plaintiff bears the onus to begin, and the onus of proof in respect of the assault on 11 July 2017, which onus will shift to the Defendant in respect of the assault, arrest and detention on 16 November 2017.' The claim in respect of the assault that allegedly took place on 11 July 2017 was abandoned at the commencement of the trial, leaving the respondent with the onus of justifying the assault that allegedly took place on 16 November 2017.

[4] It is established law that once a defendant admits an assault but pleads justification by way of self-defence, the onus shifts to him or her to prove on a balance of probabilities that he or she was acting in self-defence and that the force used to repel the attack was reasonable and commensurate with the plaintiff's aggression. (*Mabaso v Felix* 1981 (3) SA 865 AD)

[5] An interference with a person's physical liberty is also prima facie unlawful. 'Thus once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground for justification'. (*Zealand v Minister of Justice* 2008 (6) BCLR 601 CC). These principles, are unquestionably of application in the present matter.

[6] The pre-trial agreement to the effect that the appellant bore the onus to begin was therefore inconsequential and the respondent indubitably bore the onus in respect of both claims. Tokota ADJP's statement to the effect that 'the onus to prove that the plaintiff was unlawfully assaulted rested on him' is therefore at odds both with established legal principles and the abovementioned binding pre-trial agreements. As I shall demonstrate below, this unfortunate misdirection on the part of the learned judge had profound consequences for the basis on which he evaluated the evidence and his extensive credibility findings. To this end, a brief exposition of the material facts will suffice.

[7] The appellant testified and also called three witnesses, namely his friends Sandla Maholwana (Maholwana) and NkosiyoXolo Mabhuti Gamzana (Mabhuti), as well as his sister, Nohuthula Nqadala. While the evidence of Maholwana and Mabhuti related to the circumstances of the shooting and the appellant's arrest, Ms Nqadala testified only regarding her attempts to persuade the police to take the appellant to court after his discharge from hospital.

[8] The appellant testified that he, together with Maholwana and Mabhuti were walking to a friend's house in Cala, Extension 51, when they came across an unmarked police vehicle driven by Mendu. He had known Mendu well since they had previously worked together. Mendu instructed him to stop, but he refused. He said that Mendu and other police officers had previously assaulted him and he feared a repetition if he complied with the former's instruction. He then fled. Mendu gave chase and fired shots at him, hitting him in the legs while he was in the process of mounting a fence. After he was hit his legs felt weak and he raised his arms in surrender. Mendu then caught up with him, instructed him to lie down and handcuffed his arms behind his back. Mendu then fired more shots at him while he was lying on the ground. Mabhuti interposed himself between the appellant and Mendu saying that Mendu should rather shoot him. Mendu had fired five shots and the firearm jammed when he attempted to fire the sixth shot. Another police officer then arrived in a marked police vehicle and the appellant was transported to the police station. At the police station he saw Mendu going into his office. Upon his return Mendu was wearing plastic gloves and carried an Okapi knife. The police attempted to make him take hold of the knife, but he refused. Mabhuti pleaded with Mendu not to stab the appellant.

[9] The appellant was then taken to the Cala Hospital where he was admitted. He was eventually transferred to the Frere Hospital and discharged on 7 December 2017. His wounds were serious and there was a possibility that his leg might be amputated. Upon his discharge from hospital he was first kept in the Fleet Street holding cells and thereafter transferred to the Cala police cells where he was kept from 9 December 2017 until his release on 31 January 2018. On 17 January 2018, he appeared in court and his case was postponed to 31 January 2018 for further enquiry into his failure to appear in court. The enquiry was completed on 31 January and he was released on warning.

[10] Maholwana and Mabhuti corroborated the appellant's testimony in all material respects. They confirmed that they were present when the appellant was shot while running away from Mendu; that Mendu did fire shots at the appellant after he had been handcuffed and was lying on the ground; that Mabhuti had tried to intervene on behalf of the appellant; and that the appellant did not carry a knife. They also corroborated the appellant's testimony regarding the attempt by Mendu to plant a knife on the appellant at the police station. As mentioned, Ms Nqadala's uncontested testimony related mainly to her attempts to persuade the police to take the appellant to court after his discharge from hospital on 7 December 2017.

[11] Mendu was the only witness to testify on behalf of the respondent. He is a detective constable and stationed at Cala. During the absence of the investigating officer in a murder case in which the appellant was one of the accused, he was tasked with the responsibility of continuing with the investigations. As part of his duties he was called upon to arrest the appellant in terms of a warrant of arrest that was issued after he had failed to appear in court.

[12] On 16 November 2017 he received a call from Maholwana who informed him that the appellant was at his house. He and one Constable Tikana, then proceeded to Maholwana's house. On their way there they saw the appellant and Mabhuti walking in the street. He stopped the vehicle next to them and requested the appellant to stop. The appellant, however, did not comply and instead fled. He gave chase and followed the appellant into the yard of a nearby house. He eventually caught up with the appellant and explained to him that he was a police officer and that he had a warrant for his arrest. He told the appellant to raise his arms and took out his handcuffs, holding them in his right hand and his firearm in his left hand. He then saw the appellant advancing towards him while wielding a knife in a stabbing position. He retreated while firing a warning shot. The appellant was, however, undeterred. Realising that his life was in danger, he fired shots at the appellant, aiming for his legs. He had no option but to shoot the appellant since he was cornered and his life was threatened. The knife was taken from the appellant and handed to one Warrant Officer Kiwana. He confirmed the appellant's testimony regarding his admission to the Cala and Frere hospitals and his subsequent appearance in court. He said that after the appellant was discharged from hospital on 7 December 2017, he discussed the matter with the prosecutor who told him that the case had already been remanded to 17 January 2018 and that the appellant should be taken to court on that day.

[13] The court a quo's judgment reflects a misapprehension regarding the evidentiary burden which resulted in an overly critical analysis of the evidence adduced by and on behalf of the appellant. It commences with an analysis of the evidence on the basis that 'the starting point is the evidence of the plaintiff and his witnesses', and conveys in sweeping terms that they were 'prone to exaggeration to the extent that the court wondered if some of the stories were figments of imagination making it difficult to distinguish the truth from fiction'. Examples mentioned of this inclination to exaggerate are the appellant's assertion regarding the threat of amputation (but for his mother's intervention) and the evidence that Mabhuti had thrown himself onto the appellant in an attempt to stop Mendu from shooting him. The judgment then concludes that by 'merely looking at the injuries' it is clear that the evidence regarding the possibility of amputation was 'far from the truth', and that the evidence relating

to Mabhuti's alleged intervention was false 'if regard is had to the evidence of Mabhuti who denied that'.

[14] Mr *Cole* SC, who together with Mr *Mbembe*, appeared for the appellant, correctly submitted that it was not possible to exclude the possibility of amputation merely by looking at the J88 form. That form reflects that the appellant sustained severe injuries to the lower limbs. There were multiple wounds on the lateral aspect of the left leg, two wounds on the lateral aspect of the right thigh and two wounds on the medial aspect of the thigh as well as a comminuted fracture of the distal femur. Thus, if anything, the medical evidence tended to support the evidence regarding the possibility of an amputation.

[15] The finding that Mabhuti had denied that he had thrown himself onto the appellant suggesting that he should rather be shot, is, with respect, also factually incorrect. Mabhuti had confirmed that he attempted to intervene in the line of fire in order to shield the appellant. In fact, the judgment correctly states at para 26 that Mabhuti had testified that Mendu had 'attempted to push him away as he was trying to body shield the plaintiff'.

[16] Augmenting the criticism of the appellant and his witnesses' testimonies, the judgment points out the following 'contradictions within and outside the plaintiff's evidence':

- (a) they all testified that the police vehicle was unmarked while in the particulars of claim it is averred that it was a marked vehicle;
- (b) the appellant had said that Maholwana tried to stop him from running away, while Maholwana denied this;
- (c) in the particulars of claim it is averred that Mendu insulted the appellant while Maholwana denied that this had happened;
- (d) the appellant conceded that he ran around the house when he was chased by Mendu but Maholwana denied it;
- (e) the appellant had testified that Mabhuti had thrown himself on top of him but Mabhuti denied this;
- (f) in the particulars of claim it is stated that Mendu took the firearm from another police officer, but this averment was contradicted in their testimonies; and

(g) Maholwana denied the appellant's testimony that the firearm had jammed when Mendu attempted to fire the sixth shot.

[17] Apart from the fact that generally minor and insignificant discrepancies between the oral testimony of a witness and factual averments in pleadings cannot serve as justification for rejecting a witness's testimony, all the discrepancies mentioned in the judgment by the learned trial judge are immaterial and inconsequential. To my mind it is unimportant whether the police vehicle was marked or unmarked since it was common cause that Mendu arrived at the scene in a police vehicle. So also is the issue of where Mendu got the firearm. The fact that he had a firearm, had fired shots and wounded the appellant were not in dispute. It is also not necessary for the court to make any findings in respect of the issues relating to whether Mendu insulted the appellant, what Maholwana may or may not have said to the appellant and whether Maholwana had seen the appellant running around the house. These are, with respect, all peripheral and immaterial issues that should not have had any bearing on the learned judge's evaluation of the evidence.

[18] The impact of the court a quo's misdirection regarding the issue of the onus is further borne out by the brevity of its analysis of Mendu's testimony. Mendu's evidence is described in the judgment as 'simple and straightforward', even commenting that 'he was cool and collected and answered questions in a well-mannered fashion'. Manifestly absent from the judgment is the acknowledgement that Mendu's testimony had to be evaluated on the basis that the onus was on the respondent to justify the assault and that the appellant's testimony, corroborated by two witnesses, had established that the appellant did not carry a knife and that Mendu had attempted to plant a knife on the former. The issue of the knife was thus vitally important in the context of Mendu's version. Mendu had testified that he had shown the knife to Tikana and that the latter had taken it to the police station. It was common cause that Tikana had been available at all material times to give that vital evidence. He was not called and neither was there any attempt to explain why not. In these circumstances the court is justified in drawing the conclusion that the reason why Tikana was not called was because he would not have corroborated Mendu's version regarding the presence of a knife. (*Elgan Fire Clays v Webb* 1947 SA 744 AD at 750)

[19] Since the learned judge made various credibility findings against the appellant and his witnesses, it is perhaps necessary to restate the legal principles applicable to an appeal court's approach to factual and credibility findings by the trial court. In *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645e-f, the Supreme Court of Appeal stated that: 'In short, in the

absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'

[20] However, where the reasons for the findings are seriously flawed, a court of appeal should not overemphasize the advantages enjoyed by a trial court and shy away from interfering with those findings, so as to avoid rendering the appellant's right of appeal illusory. (*Santam v Biddulph* 2004 (5) 586 (SCA) at para 5)

[21] The learned trial judge criticised the appellant for being impatient, prone to exaggeration, being evasive and avoiding answering questions. It has already been demonstrated above that insofar as the contended tendency to exaggerate relates to the appellant's evidence in respect of the possibility of amputation of one of his limbs, that it is unjustified. Regarding the finding that he was evasive, Mr *Cole* has correctly pointed out that this finding is not supported by the recorded evidence. The criticism that he often complained about gestures made by Mendu is also without justification. The record clearly indicates that he was distracted by gestures made by Mendu and had sought to draw the presiding judge's attention to them. In addition, it is difficult to conceive how the observation that at times 'his eyes appeared to be somehow protruding from his face' can possibly provide the basis for an adverse credibility finding against the appellant. Similarly the finding by the court a quo that Maholwana had 'in most instances refused to answer questions' is also not borne out by the recorded evidence.

[22] Additionally, while also of the view that it was improbable that Mendu would have shot an unarmed man the court a quo, however, did not explain why it regarded as more probable the version that the appellant had charged at Mendu with a knife despite the fact that he had a firearm, literally having brought a knife to a gunfight. According to that version the appellant had strangely continued his charge despite the fact that Mendu was shooting directly at him and after being hit several times.

[23] In summary then: I am of the respectful view that the factual findings in the judgment of the court a quo were tainted by the court's misapprehension regarding the incidence of the onus; that the adverse credibility findings are not supported by the recorded evidence and that there was an impermissible justification for rejecting the evidence of the appellant and his witnesses on the basis of immaterial and inconsequential discrepancies. The findings that 'the plaintiff carries the burden to prove his case on a balance of probabilities that the injuries he sustained were as a result of an unlawful assault by the police' and that

'he failed to discharge that onus,' are with respect wrong in law and fundamentally undermines all the factual and credibility findings, as are manifest in the judgment. As mentioned above, it is trite that the respondent bore the onus of proving that Mendu had acted in self-defence and his failure to call Tikana or any other by-stander to corroborate his version that the appellant had carried a knife means that he had failed to discharge that onus.

[24] I now turn to consider the claim for unlawful arrest and detention. While the appellant initially asserted that his detention was unlawful for the entire period following his arrest, during the course of the trial his claim was limited to the period following his discharge from hospital until his release on 31 January 2018. It is common cause that Ms Nqadala had pleaded with the police to arrange for the appellant to appear in court immediately after his discharge on 7 December 2017. Mendu had testified that he consulted the prosecutor on 7 December 2017 and that the latter told him that the case had already been remanded *in absentia* and the appellant should therefore be brought to court on the remand date, namely 17 January 2018. It is common cause that he was in fact brought before a magistrate on that day and the inquiry into his failure to appear in court commenced but could not be finalized. His case was then postponed to 31 January 2018, when the enquiry was finalized and he was released.

[25] Tokota ADJP, relying on a dictum in *R v Holliday* 1924 AD 250 regarding the independence and responsibilities of prosecutors, held that Mendu was entitled to rely on the prosecutor to determine the next step after the appellant was discharged from hospital. The prosecutor, being responsible for the institution of prosecutions and their conduct, was empowered to determine when the appellant would appear in court. Mendu was accordingly entitled to detain the appellant in terms of the court order postponing his case to 31 January 2018, or so the learned judge reasoned.

[26] I respectfully disagree with this reasoning. It is trite that the only reason why the appellant was not taken to court within the constitutionally prescribed period was because he was in hospital. In the ordinary course of events he would have been brought before a magistrate for the enquiry into his failure to appear in court and would in all probability have been released on the same day. The warrant of arrest was specifically issued to secure the appellant's attendance at court in order for him to explain his failure to appear on the trial date. The police were accordingly constitutionally obligated to arrange for his appearance in court as soon as possible after he was discharged from hospital and, in any event, not later than 48 hours thereafter, in terms of section 35 (1) (d) of the Constitution. It is trite that this is

achieved by requisitioning a detainee for appearance in court. While it is the responsibility of the prosecutor to enrol the case for hearing, he or she has no power to make a determination regarding the timing of the appearance outside the prescribed time period or to declare that the appellant must wait for the remand date. Those are determinations that can only be made by a judicial officer. The chain of illegality could thus only be broken once the appellant had been brought before a magistrate for the enquiry into his failure to appear in court. (*De Klerk v The Minister of Police* 2020 (1) SACR 1 CC). The respondent is accordingly not entitled to rely on the prosecutor's overreach of his prosecutorial authority in order to escape liability.

[27] However, the appellant's contention that his detention was unlawful for the full period until his release on 31 January 2018 is untenable. It is common cause that he was lawfully arrested in terms of a valid warrant of arrest. There can accordingly be no basis for the contention that his detention was unlawful for the entire period up until his release from prison. The unlawfulness of his detention arose as result of the failure by the police to bring him before a magistrate within the constitutionally prescribed period after his discharge from hospital. It is common cause that he was brought before the magistrate on 17 January 2018 for the commencement of the enquiry into his failure to appear in court. The chain of illegality was accordingly broken at that point, at least insofar as the liability of the respondent is concerned.

[28] The failure by the police to bring the appellant before a magistrate despite repeated requests by his sister, Ms Nqadala, thus rendered unlawful his detention from 7 December 2017 until his appearance in court on 17 January 2018.

[29] The appeal accordingly succeeds and the following order issues:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo is hereby set aside and replaced with the following order:
 - (a) The defendant shall be liable for 100% of the Plaintiff's proven damages arising out of the injuries the Plaintiff sustained when he was shot by the police on 16 November 2017, and further arising out of his unlawful detention from 7 December 2017 to 17 January 2018.

(b) The defendant shall pay the Plaintiff's costs of suit.

(c) The quantification of the above damages is postponed *sine die*.

JE SMITH
JUDGE OF THE HIGH COURT

I agree.

S RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.

D POTGIETER
JUDGE OF THE HIGH COURT

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