

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: 33151/2016

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

23 July 2021

DATE

A handwritten signature in black ink, appearing to be "C. M.", is written over a horizontal line.

SIGNATURE

In the matter between:

LAWRENCE VUSIMUSI MAHLANGU

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or her

secretary. The date of this judgment is deemed to be 23 July 2021.

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present action the plaintiff issued summons against the defendant for damages resulting from his unlawful arrest, the subsequent detention (which he claims was also unlawful) and an alleged assault. The arrest allegedly occurred during the morning of 16 April 2015, by members of the South African Police Service, acting within their scope and employment with the Minister.

ISSUES FOR DETERMINATION

[2] At the commencement of the proceedings the parties informed the court that three issues are to be determined by the Court, namely:

2.1 Whether or not, the arrest and subsequent detention of the plaintiff was lawful;

2.2 whether members of the South African Police Service assaulted the plaintiff during his arrest; and

2.3 in the event of the court making a finding on the first two questions in favour of the plaintiff, what amount in damages, is to be awarded to the plaintiff.

ONUS

[3] It is trite that an arrest or detention is prima facie wrongful and unlawful. It is for the defendant to allege and prove that the arrest and the subsequent detention were lawful.¹ Therefore, a defendant who pleads justification for the arrest (*such as the present defendant*), as a result, does not only carry the *onus* to prove the lawfulness of such arrest² but also carries the *duty* to begin in as far as the arrest is concerned. In as far as the assault is concerned, the plaintiff carries the onus and has the duty to begin.

PLEADINGS

[4] The plaintiff before court is claiming damages in the amount of R400 000,00 which heads of damages is made up as follows:

4.1 Unlawful arrest	R100 000,00
4.2 Unlawful detention	R100 000,00
4.3 Unlawful assault, <i>injuria</i> and Contumelia	R200 000,00

[5] As per its Amended Plea, the defendant pleaded that the arrest and detention of the plaintiff were lawful, in that the plaintiff was arrested by members of the South African Police Service and a traffic official, who at the time of effecting the arrest, were acting within the scope of their employment. Furthermore, that the plaintiff was arrested for contravening Section 68 of the South African Police

¹ Lembo v African National Congress 2002 (5) SA 668 (SCA) at para 32

² Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (A)

Service Act, Act 68 of 1995 (impersonating a police officer).³ In its plea, the defendant denied having assaulted the plaintiff during such arrest.⁴

EXPOSITION OF EVIDENCE

[6] Briefly, the facts of this case can be summarized as follows: The plaintiff's witness Mr. Lawrence Mahlangu testified that he is 39 years old who is customarily married with three children. As at the time of the incident he was employed by the City of Tshwane as an Asset Controller and Shopsteward for the past 18 years. On the 16th of April 2015, he was on his way to Mpumalanga, accompanied by one Temba Nguni, a family friend to sell his motor vehicle (*a silver BMW*). The purpose of the trip was to meet a gentleman called Sibusiso. At the time the area they were to meet was experiencing load shedding and they were asked by Sibusiso to wait on him. Sibusiso, seems to have been delayed and eventually at around 14h00 they decided to return back to Gauteng. On his way home a blue Golf, unfamiliar to him, flashed lights from behind. He did not immediately pull over and when he eventually did, the occupants of the unmarked vehicle pointed a firearm at them, ordered them to alight from their vehicle and forced them to lie on the ground.

³ Exhibit A para 4.1 p 19

⁴ Exhibit A para 5 p 20

[7] On the day, he was dressed in a formal trouser and a grey shirt, and he was immediately questioned about the whereabouts of his firearm. He informed the officers that it was on his person. He then took out his license although it had expired and presented it to the officers. Thereafter he was then taken inside a marked police van and was further questioned by the police. Later they were both taken back to the area, where they had earlier been waiting for the person who was going to purchase his vehicle and also there they were further interrogated. Mr Mahlangu testified that in total approximately nine members of the South African Police Services had questioned the two of them. At this point in time, he was also kicked and assaulted by unknown officers who continued to assault him as he was lying on his stomach with his face turned to the ground. He testified further that as a result of the assault, his pants were torn open in the front. Eventually, he was arrested until he was released on 20 April 2015. Upon his release he then consulted his doctor who examined him and recorded in his medical report that he had sustained several soft tissue injuries that were very painful.⁵ As to the conditions he was kept in whilst in detention, he testified that the conditions in the cells were appalling, had an unbearable smell and that he shared this cell with three other occupants. Furthermore, he testified that the toilet inside this cell was not clean and it was blocked. During his detention, he was very worried about his family and his work. The day following his arrest, he was first taken to his house, which was searched by the police and on

⁵ Exhibit A p 8-12

the same day he was also taken to his place of employment to verify his employment. At his place of employment, he was humiliated as he was paraded in front of his colleagues in handcuffs, and his manager was also questioned by the arresting officer. As a result of his arrest, he was suspended for three months from work and a disciplinary hearing was also held. Although he was not found guilty of any misconduct, the disciplinary hearing caused him great embarrassment and traumatised his wife and children, for which he felt very sorry and it angered him that they were so badly affected. During his arrest, the police had confiscated his firearm, which to date, he has not yet received back from the SAPS.

[8] During cross-examination the defendant's version was put to the plaintiff, affording him an opportunity to respond thereto. When confronted with the defendant's version, the plaintiff could not deny that a report was given to the police that the persons who were travelling in the silver BMW motor vehicle such as his, attempted to rob Mr Dumisani Masilela and that these persons also pretended to Mr. Masilela, to be police officers. Mr Mahlangu however denied that it was him and his friend who pretended to be police officers and who in turn attempted to rob Mr. Dumisani Masilela. Furthermore, the plaintiff could also not deny the version of the defendant, that Mr Masonabo (the arresting officer) had earlier received a call from Mr Masilela, who identified to the arresting officer, that the occupants driving in a silver BMW, pretended to be police officers from Intelligence to Mr. Masilela and wanted to repossess his car.

Furthermore, the plaintiff could offer no explanation as to why he failed to report the assault perpetrated on him immediately to the police officers based at the station where he was brought for detention. He further could offer no explanation as to why he also failed to pursue reporting the actions of these alleged recalcitrant officers to the Independent Police Inspectorate Department (IPID), but instead elected to institute civil action against the police. The plaintiff also denied that he was ever asked by the police when his Notice of Rights was read out to him, as to whether he was assaulted, where his answer was recorded that he was not assaulted.⁶ This then was the totality of the evidence presented by the plaintiff.

[9] The defendant called two witnesses. The first witness was Mr. Dumisani Masilela, a Provincial Traffic Inspector. In brief he testified that on the day in question the plaintiff was travelling together with another man. They followed his vehicle to the local shopping complex while he was driving in a Mercedes Benz. He first collected his clothes from the dry cleaners and upon his return he started driving off. He was followed by this BMW vehicle and eventually stopped by it. After they have stopped him, they claimed that they were police officers from the Crime Intelligence and they wanted to repossess the plaintiff's car. He demanded that they show him their appointment cards as police officers as they were dressed in civilian

⁶ Exhibit C p 21

clothes. The plaintiff then showed him his firearm in his holster and then took it out of his holster and then he was ordered to get into their vehicle. He refused and proposed that he will rather drive his vehicle to the police station with them following him. Along the way he then turned off at the T-junction and the occupants of the BMW vehicle proceeded straight. It was at this time that he made a call to the local police to report to them what had occurred and gave them a description of the silver BMW vehicle and the location as to where he was driving, still pursuing the BMW vehicle at a distance. At the time when he made the call, he was speaking to Sergeant Masonabo when he made the report. Eventually he caught up with them, after the police had already affected an arrest of the occupants of the BMW vehicle.

[10] During cross-examination the witness conceded that at the time when he called the police to report the incident, the BMW vehicle had driven off in a different direction and that he was no longer in danger or at risk of his vehicle being taken. He further conceded that when he made the call to the police, that he merely gave a description of the motor vehicle as in make and colour of the motor vehicle, but that he was unable to give the police the registration number of the vehicle.

[11] The next witness for the defendant was Constable Masonabo. He testified that on the day in question he received a call from Mr Dumisani Masilela, an informant, that reported to him that there is a silver car that

has two occupants who have impersonated themselves to be police officers. Further that these occupants of the vehicle wanted to take/rob him of his motor vehicle. As a result of this report, he called for back-up and drove to Valbank Road. While they were on the road a BMW rushing at a speed came in, they stopped it, pulled it over and there were two occupants. One of the occupants identified himself as Laurence Mahlangu and he had a firearm on his person with an expired license. The other occupant identified himself as Mr. Temba Mnguni. Both occupants were then arrested on charges for pretending to be police officers, this after they were positively identified by Mr. Masilela. Both men were thereafter taken to the police station where they were first interviewed and thereafter detained. The next morning Constable Masonabo together with other members attended at the plaintiff's address in order to verify the place of arrest for the purpose of bail and they went to the city of Tshwane to verify their employment address. Constable Mosanabo denied that the plaintiff or his passenger was ever assaulted during their arrest.

[12] During cross-examination, Constable Masonabo conceded that he arrested the plaintiff for impersonating to be a police officer, having pointed a firearm at Mr Masilela and for wanting to have taken his motor vehicle. He further conceded that before he could effect the arrest in terms of section 40 of the Criminal Procedure Act, he ought to have formed a reasonable suspicion of the arrestee having committed an offence. He further corrected his earlier evidence in chief, that when he

was called by Mr Masilela, that he was given the registration number of the BMW vehicle by Mr Masilela. Lastly, he confirmed that the plaintiff was only charged with the offence of impersonating himself to be a police officer, and not for attempted robbery or for having pointed Mr. Masilela with a firearm.

THE LAW

[13] As mentioned previously, the defendant carried the onus, to prove the lawfulness of the arrest, whereas the plaintiff carried the onus, to prove that an assault was perpetrated on him.

[14] In *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F. Rabie CJ stated that "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law".

[15] It was therefore for the defendant to prove that their actions were justified. In order to determine this, the defendant carried the *onus* to establish that Sergeant Masanabo had reasonable grounds for arresting the plaintiff. In proving this, it must be established that he had formed a suspicion on which he acted, to arrest the Plaintiff, and that such suspicion was formed on reasonable grounds.

[16] Furthermore, in exercising that discretion, the arrestor must exercise his discretion before affecting an arrest and then also before exercising

the discretion to detain. In *Minister of Safety and Security v Sekoto 2011 (1) SARC 315 (SCA)*, Harms AJ sets out steps to be taken in the execution of that discretion namely; did he consider whether it was necessary to arrest without a warrant; did he consider explanations offered by the "offender"; did the offender present a danger to society; was not able or keen to disprove the allegations. And I submit *in casu* testing the version of the complainant before detaining or charging the Plaintiff. All of which I am sad to say did obviously not happen.

ANALYSIS OF EVIDENCE

[17] In the present instance the plaintiff made a favourable impression on the court. He was able to give a coherent and logical account of what had transpired on the day of his arrest and how it came about that he was arrested. From his evidence presented, he was clearly co-operative with the arresting officer, in that he accompanied them to his house and even his workplace to verify his address and place of employment. In as far as the assault perpetrated on him, he presented the medical report obtained the day after his release on bail, which report serves as objective corroboration of an assault on him. He came across as an honest witness, such as by conceding that as he was lying on the ground, when assaulted, and as such he was unable to confidently say, who has assaulted him on the ground whilst he was lying on the ground. His honesty is further demonstrated, in that he was able to produce an expired licence for his firearm, when he could just as well have said, that he does not own the firearm. This court could find no reason to reject his evidence.

[18] The same good qualities however displayed by the plaintiff during his testimony, was not exhibited by the witnesses who testified on behalf of the defendant. If one firstly considers the evidence of Mr Masilela, a number of shortcomings can be found in his testimony. By way of example, in cross examination Mr. Masilela could not remember the colour of the BMW vehicle, in which the purported offenders were to be driving, whereas, Sergeant Masanabo, had testified that he had been informed by Mr. Masilela, that the occupants were travelling in a silver-grey or iced white BMW vehicle. Furthermore, Mr Masilela gave evidence that the plaintiff had showed him his firearm at the time when he wanted to repossess his vehicle, whereas, Sergeant Masanabo had testified that it was reported to him, by Mr Masilela, that he was almost hijacked by the plaintiff and his occupant. Furthermore, given the gravity of the offences allegedly committed by the plaintiff, it seems rather improbable, that the police will in the end only charge the plaintiff with impersonating himself to be a police officer, premised only on the word of Mr Masilela, when no other evidence of such conduct (i.e Police uniform, or appointment cards) were retrieved from the vehicle of the plaintiff in support of this offence and that sole reliance for this was placed on the report so made by Mr. Masilela.

[19] Both witnesses also contradicted each other as to whether a registration number of the vehicle of the plaintiff was given to the arresting officer, when the purported crime was reported by Mr Masilela.

[20] On the conspectus of evidence presented, the probabilities rather dictate, that the arresting officer failed to verify the necessary facts, when clearly ample opportunity existed, before he effected the arrest. Instead, it rather points to the fact that as Mr Masilela was known to the arresting officer and that his mere reporting made to Sergeant Masanabo was sufficient to effect the arrest on the plaintiff.

[21] Given these glaring shortcomings in the testimonies of the defendants' witnesses, I find it difficult to place reliance on their evidence and in the circumstances, the arrest of the plaintiff could not have occurred with Sergeant Masanabo having formed a reasonable suspicion. For this reason, the plaintiff therefore must succeed with his claim.

QUANTUM

[22] In the present instance Mr Mahlangu gave evidence as to the trauma, humiliation and bodily injuries sustained as a result of the unlawful actions of the Defendants employees' actions. He further gave

evidence as to his social standing, and his conditions of detention. In this regard, no evidence in rebuttal was presented by the defendant.

[23] Counsel on either side, had referred this court to previous awards having been made in this regard to utilise a reference in determining an appropriate award to be made in the present matter. These cases so referred to, it should be mentioned, merely serves as a guide to this court and that each case should nevertheless be determined on its own merits.

COSTS

[24] In as far as costs is concerned, it is settled law, to award costs to the successful party in these proceedings. In this regard counsel for the plaintiff had submitted that this court should award the plaintiff in the event of being successful, costs on an Attorney and Client High Court scale, inclusive of costs in the cause and costs of counsel. In addition, thereto, that the plaintiff should also be awarded all costs previously reserved in these proceedings.

[25] In opposition however, the defendant had argued that the plaintiff even when successful should only be awarded costs on a Magistrates Court scale given the quantum of the claim as at date of institution of

these proceedings having fallen within the monetary jurisdiction of the Magistrates Court scale.

[26] In the present matter, I cannot find a basis, to deprive the plaintiff of awarding costs on a High Court scale, albeit that the practice should certainly be discouraged going forward, as it unduly burdens this Court's already heavy court roll.

ORDER

[27] Given the totality of the evidence presented before this court and having regard to the relevant case law on point, I am of the opinion that the following award would be appropriate under the circumstances:

27.1 The defendant will be liable to pay the plaintiff the amount of R 350 000 within (30) thirty calendar days, in respect of the plaintiff's claim.

27.2 Furthermore, the defendant shall be liable for interest on the said amount at the prevailing interest rate, calculated a *tempore morae* from 28 July 2015, to date of final payment.

27.3 The defendant shall pay the plaintiff's costs of suit on a party and party High Court scale, including costs of counsel and costs previously reserved in these proceedings.



C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff	: Adv. M. De Meyer
Attorney for the Plaintiff	: SD Nel Attorneys
For the Defendant	: Adv. L. Kalashe
Attorney for the Defendant	: Office of the State Attorneys Pretoria
Date of Hearing	: 14-15 October 2019, 9 February 2021, 24 February 2021
Date of Judgment	: 23 July 2021

Judgment transmitted electronically.