

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

[Not Reportable]

CASE NO: 1780/12

Delivered on: 25/06/19

In the matter between:

BOTHA DAMANE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

[1] The plaintiff claims payment of damages against the defendant under four heads, namely:

- | | | |
|-------|--|---------------|
| (i) | Wrongful arrest and detention | : R400 000,00 |
| (ii) | Impairment of dignity and reputation and humiliation | : R900 000,00 |
| (iii) | Legal costs incurred as a result of litigation in the criminal court | : R 10 000,00 |
| (iv) | Assault | : R100 000,00 |

The action is defended by the minister.

[2] The claim premised on an alleged wrongful arrest and detention is the main claim. Claims in (ii) and (iii) are a sequel thereto. The claim arising from assault is an independent one.

[3] As instructed by the Appellate Division (it was then) in *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A) at 587-589 for the minister to succeed to a ward off the claim for wrongful arrest and detention it must prove that its employee(s) who arrested and detained a suspect without a warrant was justified to do so as is envisaged in s 40 (1)(b) of the Criminal Procedure Act 51 of 1977 (the Act); in that the employee(s) was a peace officer at the time of effecting arrest; who entertained a suspicion; that the plaintiff committed a Schedule 1 offence; and that the suspicion rested on reasonable grounds. Proving the existence of these jurisdictional factors calls for the minister to present evidence of the arresting officer.

[4] Miss Fusi Gloria Ramotlole, a Constable in the SAPS attached to Avondale Police Station, Mt Fletcher, testified that on 15 January 2012 she and Constable Siyabusa Lwandle, her colleague, received a telephone report whilst they were at the police station that the plaintiff was harassing one Miss Mampomatseng Petros at Mangopeng Location, Mt Fletcher. They decided to drive to the plaintiff's homestead with and intention to remonstrate the plaintiff. Having arrived at the homestead of the plaintiff they found him being in company of two unknown male persons sitting in the yard. Mr Lwandle asked for the plaintiff who, having identified himself, was informed that Mr Lwandle and Miss Ramotlole were the members of the SAPS who were investigating the complaint. Instead of engaging the police on the complaint the plaintiff suddenly reacted by grabbing Mr Lwandle by a collar of his uniform. In the process of a struggle that had ensued the plaintiff assaulted Mr Lwandle with a hard object on his arm causing him serious bodily injuries. Miss Ramotlole intervened by pleading with the plaintiff not to assault a policeman who was engaged in the exercise of police duties. When Mr Lwandle was freed from the grip he and the witness retreated to the police vehicle and called for reinforcement so that the plaintiff was arrested to answer to a charge of

assaulting Mr Lwandle. Mr Phillip Dongwe, Mr Thamsanqa Sobhuza and three others, the policemen, soon arrived at the time when the plaintiff had retreated into a roundavel. As the police approached the plaintiff to effect arrest he picked up a gas cylinder, pointed it in the direction of the members of the police and released the gas as a declaration of his intention to resist arrest by burning the police. In fear of imminent harm the police were forced to stop their pursuit and retreated to their vehicles. Many local people, including the uncle of the plaintiff had been drawn into the homestead by the pandemonium that the plaintiff's resistance had caused. Ultimately, the intervention by the members of the community and the plaintiff's uncle yielded to the plaintiff surrendering himself to Miss Ramotlole. Pursuant thereto the plaintiff was arrested and driven to the police station where he was charged, detained and caused to appear before court. The magistrate granted him bail. Thereafter, he attended court on numerous occasions on the orders of the magistrate. On 04 April 2012 the plaintiff again appeared before the magistrate for trial, but to his benefit the magistrate made an order terminating the criminal proceedings.

[5] The police statement of Ms Ramotlole with which she was confronted during cross-examination is the confirmation of the evidence aforementioned in material respects.

[6] The contradictory version of the plaintiff put to Ms Ramotlole was that the plaintiff never resisted arrest by assaulting Mr Lwandle, or in any other manner. Instead, Mr Lwandle assaulted the plaintiff by means of spraying tear-gas from a canister into his face to force him to obey the instruction that the plaintiff must get into the police vehicle. Ms Ramotlole flatly denied the plaintiff's version.

[7] Mr Phillips Dongwe was called to testify on behalf of the defendant as well. He confirmed that on 15 January 2012 he was urged to visit the plaintiff's home to provide assistance to Mr Lwandle and Ms Ramotlole who were being overwhelmed by plaintiff's resistance to arrest using violent means as explained in the evidence of Ms Ramotlole. Three other policemen who accompanied the witness were Mr Sobhuza, Mr Tsonyana and Mr Manwana who were also the

members of the SAPS. He stated that on arrival at the plaintiff's homestead they, together with Ms Ramotlole proceeded towards the roundavel with the purpose of effecting arrest on him but were stopped by the plaintiff who had come out of the roundavel carrying the gas cylinder and matches preparing to light gas that had been released to burn the members of the police. Faced with the life threatening attack the police retreated back to their motor vehicles to solicit assistance from the members of the community. Such intervention was to prove fruitful because the local people succeeded in bringing the plaintiff to his senses that the people he was obstructing were the members of the SAPS whose duty it was to arrest him to face the law. As a result the plaintiff surrendered himself to the police. At the police station a docket on assault charge was opened against the plaintiff.

[8] Mr Dongwe testified further that on 18 January 2012 Mr Lwandle was taken to Joshua Ranga for medical examination of injuries which he had sustained as a result of assault by the plaintiff. The witness referred the supporting J88 medical report to the attention of the court.

[9] When cross-examined Mr Dongwe confirmed that the plaintiff using gas drove him, Ms Ramatlole and other members of the SAPS present at the plaintiff's homestead back to their vehicles. He told the court that he was not present at the scene when the plaintiff assaulted Mr Lwandle.

[10] The defendant's case was closed at the conclusion of Mr Dongwe's evidence.

[11] The plaintiff testified that when Mr Lwandle and Ms Ramatlole arrived at his home Mr Lwandle merely issued instructions that he must go with them to the police station. When asked for a reason Mr Lwandle drew out a pepper spray, pointed it at him and sprayed it on his eyes. Further, and without any reaction, Mr Lwandle pulled out a service firearm and pointed it at him. Thereafter, Mr Lwandle made utterances that he would call for re-inforcement if he did not follow instructions that he must go with him to Avondale Police

Station. Soon thereafter, five other policemen arrived when he was standing at the door line of his roundavel carrying a gas cylinder which he intended to use to defend himself against certain people he saw in his yard carrying sticks and sjamboks posing a threat to attack him. He told the court that as the police were approaching it occurred to him that since he had a disagreement with Mr Lwandle he must prevent them from gaining entry into the roundavel by releasing gas from the cylinder and blow it in their direction. According to the plaintiff the police were indeed prevented from reaching him due to the intervention of Mr Ndefa Musi, his uncle, who asked the police not to assault the plaintiff. That intervention coupled with the advice from Mr Musi that he must surrender himself to the police led him to leave the roundavel and go to the police who ultimately took him away to the police station. There, he was locked up into a holding cell that had: six inmates; no bed on which to sleep; insufficient blankets; and food of very poor quality to feed him with. At night time three men arrived in the cell, hand-cuffed him and took him out to a room where he was caused to kneel on the floor and subjected to assault with sticks and sjamboks. As a result he sustained injuries on the wrists and shoulders. After that ordeal, he was returned to the holding cell. On the next day, dated 17 January 2012, he was taken to the magistrates' court where he was admitted to bail. The uncle of the plaintiff also played a pivotal role in ensuring that the plaintiff surrendered himself to the police.

[12] The evidence that has been led by the witnesses for the defendant and the plaintiff discloses contradicting versions. According to the witnesses for the defendant the police went to the homestead of the plaintiff to remonstrate him. On the other hand, the plaintiff says that the original intention of the police was to arrest him, *albeit* without any legal basis; hence he resisted to be arrested. For those reasons there is a need to assess the probabilities of each of the opposing versions in order to ascertain the truth and, finally to decide whether the conduct of the police officers pass muster in terms of s 40 (1)(b) of the CPA.

[13] In assessing the probabilities of the opposing versions the court will be guided by the principles that were articulated in *Stellenbosch Farmers' Winery*

Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA) as follows at page 14, para [5]:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[14] I have no difficulty in accepting the evidence of Ms Ramotlole and Mr Dongwe because their evidence was straightforward and free of contradictions. And on the critical issue of whether Mr Lwandle was assaulted by the plaintiff the two witnesses corroborated each other and even said that Mr Lwandle had to be examined by a doctor who confirmed the injuries. The plaintiff did not challenge the fact that Mr Lwandle sustained injuries whilst he was at his homestead on 15 January 2012. Ms Ramotlole was confronted with the version that the police assaulted the plaintiff with tear-gas, yet the plaintiff stated that a pepper spray was used. It was never put to the police officers that they assaulted the plaintiff with sticks and sjamboks. It was only when the plaintiff testified that such a manner of assault was mentioned. Even when that

happened the assault incident was embellished with a further untested version that the police had threatened to shoot him with a firearm. Given the existence of such inherent defects in the evidence of the plaintiff coupled with the absence of corroborating evidence, the version of the plaintiff cannot be relied upon. In comparative terms whereas the evidence of the defendant's witnesses is probable, that of the plaintiff is not. That much threshold of the evidence is the test that the defendant had to meet in order to bolster its defence to the plaintiff's claim.

[15] Consequently the claims for unlawful arrest and detention fall to be dismissed. The same outcome must apply to the claims based on impairment of dignity and reputation.

[16] The claim for legal costs is inextricably linked to that for wrongful arrest and detention in that such costs would have been incurred in the cause of litigation in the criminal court. In the event this claim cannot succeed.

[17] In the amended particulars of plaintiff's claim there is pleaded a claim for wrongful assault, to which the defendant pleaded that its employees did not assault the plaintiff. But the evidence of the plaintiff, which is not challenged by the defendant, is that on 15 January 2012 and at mid-night three male persons opened his cell, woke him up and led him to a certain office that is situated within the precincts of Avondale Police Station. He was questioned as to why he had undermined the authority of the police when he resisted arrest by Mr Lwandle. For that conduct the plaintiff was placed in a lavatory, knelt on the floor with arms hand-cuffed from the back and assaulted. One of the three men also jumped ten times on the hand-cuffs causing severe injuries and pain to the plaintiff. The medical report of Dr Jwili of Taylor Bequest Hospital, prove that the plaintiff sustained bodily injuries. In my view the plaintiff succeeded to discharge the *onus* of proof that the defendant is delictually liable to pay damages for wrongful assault.

[18] It came as a surprise to find in the heads of argument a submission that this Court may still find that the police could have exercised discretion to bring the plaintiff before the criminal court in a way different from arresting and detaining him. Reliance for this submission was made based on the case of the *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA). However, in this case a determination of the kind as urged to be made is not possible due to the fact that the plaintiff neither confronted the police witnesses with a version that they could have opted for a different method of dealing with the plaintiff than they did, nor did the plaintiff adduce evidence in that regard. The pleadings too are silent.

[19] For the reason already stated a need to assess the *quantum* of damages to be paid to the plaintiff will not arise in respect of the claims for unlawful arrest and detention; impairment of dignity and reputation as well as for humiliation. The same holds true for the claim for litigation costs. The amount of compensation for wrongful assault remains to be quantified.

[20] The J88 filed of court in respect of the plaintiff reveals that the plaintiff sustained serious injuries as follows: (a) multiple bodily injuries and complaining of pain at the back; (b) multiple bruises on the body; (c) soft tissue injury. He was treated with brufen and paracetamol.

[21] The injuries as aforementioned are not permanent in nature. Mr Mnge, counsel for the plaintiff, submitted that the case of *Daniels And Others v Minister of Police* (GP) unreported case no: 50047/2012; 50055/2012; 50049/2012; 50050/2012 of 26 February 2015 benchmarks the appropriate *quantum* of damages in the sum of R90 000,00 that may be awarded in this case. In *Daniels*, although it was proved that the plaintiff had sustained injuries which were not of permanent nature the court held that the injuries were sufficiently serious to warrant redress by compensation in the sum of R90 000,00. The assessment was done with due regard to comparable awards made in previous cases, inflation and the liberal approach as called for in the

Bill of Rights. See: *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170, para [27] where the new approach is stated in the following terms:

“In the *Wright* case (*Corbett and Honey* vol 4 E3-36), Broome DJP stated:

‘I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries’.”

[22] This Court is enjoined to apply the aforementioned *dicta* of the *Marunga* case.

[23] The defendant launched a hugely successful defence to the plaintiff’s claims. The margin of success achieved by the plaintiff on the claim based on wrongful assault is, in my opinion, comparatively negligible. But the defendant could still settle the claim for wrongful assault to which it had no answer. For these reasons a cost order limited to R10 000,00 should be appropriate.

[24] In the result the following order shall issue:

1. The claims for wrongful arrest and detention, impairment of dignity and reputation and litigation costs incurred in the magistrates’ court be and are hereby dismissed.
2. The defendant shall pay R90 000,00 as compensation for wrongful assault.
3. The defendant shall pay costs in a limited sum of R10 000,00.

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
MTHATHA

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