

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO.: EL 354/2018

In the matter between:

LUYOLO DAMISE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MBENENGE JP

[1] The plaintiff had gone to Kidd's Beach Police Station to report an accident in which he had been involved whilst driving a motor vehicle. The motor vehicle accident occurred two days prior to the plaintiff's visit to the police station. He ended up being detained by the police on that day. The detention spanned approximately two days, after which the plaintiff was released on bail upon appearing in court.

[2] This action is for recovery of damages against the defendant, sued on a vicarious liability basis, in the sum of R1 650 000.00, made up as follows:

"9.1	Unlawful arrest	R500 000.00
9.2	Unlawful detention	R450 000.00
9.3	Pain and suffering	R500 000.00
9.4	<i>Contumelia</i>	R200 000.00"

[3] Besides specially pleading that there was non-compliance with section 3 of Act 40 of 2002¹ resulting from the prescribed notice not having been served on the defendant timeously, the defendant pleaded that the plaintiff was, in terms of section 40(1)² of the Criminal Procedure Act 51 of 1977,³ arrested by a peace officer entertaining a reasonable suspicion that the plaintiff had committed murder. The information leading to the suspicion was gleaned from statements deposed to by persons who witnessed the incident that culminated in the impugned arrest.

[4] Despite the trite legal position to the contrary, the plea is supine in relation to why the detention was justified. It is a mere bold denial, couched, in the relevant paragraph, as follows:

“The defendant denies that the plaintiff’s arrest and ... subsequent detention [were] either wrongful and/or unlawful.”⁴

This manner of pleading leaves much to be desired. A detention constitutes a distinct and separate act from an arrest and is, in and by itself, *prima facie* wrongful.⁵ Even at pleading stage, it is incumbent on the defendant to make allegations to justify the detention.

[5] Before the commencement of the hearing, counsel for the plaintiff, Ms *Mqobi*, successfully applied for condonation of the plaintiff’s non-compliance with section 3 of Act 40 of 2002. The action thereupon proceeded to trial for a determination of both liability and *quantum*, with counsel for the defendant, Mr *Swartboo*i, accepting that the defendant bore the onus to justify the arrest and the detention, and thus the duty to adduce evidence first.

[6] Lieutenant Colonel⁶ Harold Nxafani, who was, during the time in question, the Station Commander at Kidd’s Beach Police Station holding the rank of Captain, testified that he issued the instruction for one of his subordinates, Sergeant Berashe, to detain the plaintiff and that, in so doing, he took into account:

¹ The Institution of Legal Proceedings against Certain Organs of State Act, 2002 (Act 40 of 2002).

² No specificity is provided in the defendant’s plea regarding which of the 17 paragraphs in section (40)(1)(a) –(q) of the Criminal Procedure Act 51 of 1977 is relied on.

³ The Criminal Procedure Act 51 of 1977.

⁴ Paragraph 4.4 of the defendant’s plea-over.

⁵ *Raduvha v Minister of Safety and Security* (CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016) at para 39 (*Raduvha*).

⁶ Lieutenant Colonel Harold Nxafani hereinafter conveniently referred to as *Lt Col Nxafani*.

- (a) information gleaned from statements enclosed in the relevant police docket implicating the plaintiff as having been part of a group that was involved in a fight on the day in question; and
- (b) the fact that the plaintiff had pursued members of the other group with the bakkie he was driving and, in the course of the chase, ran down one of them, fatally injuring him.

[7] The explanation *Lt Col Nxafani* gave for the instruction that the plaintiff be detained - and not arrested - was that “[*the plaintiff*] was already at the police station.” *Lt Col Nxafani* was also of the view that the case was not merely about “an accident”, but a “murder case”, adding:

“It was a murder case based on the evidence that was led or [what] Mr [Pala] [had] asked from the crime scene was [whether] there was a chase, [or whether] it was a fight between the two groups. So these people were chased with this bakkie and then the bakkie [ran]- initially from our side when we are dealing with the crime scene and ... we thought it was just a mere accident. Then it was discovered later, and also there was no report of any accident which occurred in the area at that time. So immediately we found out that the bakkie has run over the body. That was the need for the investigation, to investigate and enquire on the accident. Because if it was just an accident, you could just do the normal accident and open up a culpable homicide [case], but *in this case there was evidence that this bakkie chased these people*. Also on the previous day there was a complaint of fighting but we could not be able to link it with the accident. It was then after the accident that this information was recovered that we linked the complaint with which came through the previous day, the fighting.” (Own emphasis)

[8] The following excerpt from the transcript of these proceedings, capturing part of the cross examination of the plaintiff, is of significance:

“MS MQOBI: The plaintiff’s version is that he went to the police station to report an accident that had occurred because he had run over the deceased when they were blocking his vehicle, accidentally so. Can you dispute that?

MR NXAFANI: I don’t dispute that but I was having the problem ... why can he run over a person and go to the police station on the following day?”

[9] Upon the closure of the defendant’s case, the plaintiff testified. On the day in question, whilst loading some commuters onto his bakkie, he was pounced upon and slapped with an open hand by somebody who suddenly emerged where he was.

When enquiring as to what the matter was, his assailant once again slapped him. A fight between the plaintiff and the assailant ensued.

[10] Thereafter, the plaintiff and the commuters were attacked by a group of persons, one of whom was the assailant who had slapped the plaintiff. No details of how the attack was meted out were given. Whilst the plaintiff was escaping from the scene in the bakkie, the group blocked his path of travel. In the course of that, he ran down a member of the other group. He eventually escaped the wrath of the assailants and disappeared from the scene.

[11] The incident occurred in the early hours of Sunday 25 October 2015. Later that same day, the plaintiff went to report the “*accident*” at the Lloyd Police Station, but was referred to Kidd’s Beach Police Station where he proceeded to in the afternoon of the following day, 26 October 2015.

[12] On arrival at Kidd’s Beach Police Station, being in the company of one Luyanda, the plaintiff introduced himself to the police. He then stated that he had come to report an accident that had taken place at Ncerha. The police said “*here are these people of this green bakkie that had killed a child at Ncerha.*” He was told to sit down. No one had ever told him the police had been looking for him. It came as a shock for him to learn that somebody had died “*in that accident.*”

[13] The police caused the plaintiff and Luyanda to sit next to each other and asked them to wait. Thereafter, the police came back informing Luyanda and the plaintiff they were being arrested. Some “*rules were read*” in the plaintiff’s hearing, with the police official concerned stating that he had been sent to arrest him and that he and Luyanda were in fact being arrested.

[14] The plaintiff further explained:

“I also did not ask why he is saying that I am being arrested. After he had read what was on this paper he wrote something on it and then he told me to sign and I signed and gave him. Now he took me and there was another guy that was handcuffed on his feet. Now he took the one side of the cuffs and he added me to this guy and locked me or putting these cuffs on me. We were told to wait for the van, we then sat and waited for the van until it arrived. We were then taken through to Fleet Street Police Station. Now that police official when we arrived at the police station he said to me that he was asked to take us – now that police official said that it is not him that is arresting me, he was told to arrest me. So therefore I should not include him in whatever might happen after this... we were then taken and we were detained in the cells. I

was therefore detained with this guy that I was handcuffed with from the police station up until we reached Fleet Street Police Station.”

[15] Under cross-examination, the plaintiff said he knew he had run down somebody at the scene on the day in question. He, however, could not stop to assess the situation because he was threatened by a “*weapons*” wielding angry mob; his group comprised mainly females who were just screaming. He therefore did not reach out to the person he had run down to establish her or his condition. When afforded the opportunity to give his version of what occurred on the fateful day, the plaintiff elected to remain silent. He is on record as having said he would make a statement “*with [his] legal adviser of [his] choice.*”

[16] The court must now decide whether—

- (a) the plaintiff’s arrest was justified;
- (b) the ensuing detention of the plaintiff was justified; and
- (c) the amount of damages to be awarded the plaintiff.

[17] By virtue of his position,⁷ it was permissible for *Lt Col Nxafani* to instruct one of his subordinates to arrest the plaintiff on condition that he (*Lt Col Nxafani*) harboured a reasonable suspicion that the plaintiff had committed an offence listed in Schedule 1 to the Criminal Procedure Act, in this instance, murder.

[18] In *Ndala*⁸ it was held that where a police official carries out the physical part of an arrest on the command of another police official under whom he serves, and who makes the requisite notification to him, it is actually the superior who carries out the arrest and who must harbour the reasonable suspicion.⁹

[19] I am satisfied that *Lt Col Nxafani* did harbour a reasonable suspicion that the plaintiff had committed murder. Based on the information, to which *Lt Col Nxafani* was privy and contained in the police docket, the plaintiff had chased members of the other group at the scene with his motor vehicle. It was never disputed that there were statements in the police docket implicating the plaintiff. The plaintiff never

⁷ At this time *Lt Col Nxafani* was Station Commander at Kidd’s Beach Police Station, occupying the rank of Captain, which qualifies him to be “a peace officer” within the meaning and contemplation of section 40(1) of the Criminal Procedure Act 51 of 1977.

⁸ *Minister of Justice v Ndala* 1956 (2) SA 777 (T) at 780.

⁹ See also *Bhika v Minister of Justice and another* 1965 (4) SA 399 (W), at 400G.

bothered to follow up on what eventually became of the person he had run down even after the threatening atmosphere had waned. He also did not proffer any explanation in relation to why he did not proceed to any police station immediately after the accident had occurred, in circumstances where he knew he had run down a person. I should also highlight that the *Lt Col* did not have to consider whether the plaintiff might indeed eventually be convicted of murder or, for that matter, culpable homicide which is also a Schedule 1 offence and a competent verdict to a charge of murder. All he had to harbour is a reasonable suspicion of the commission of a Schedule 1 offence.

[20] The parties made the arrest of the plaintiff common cause, leaving it to the Court to determine whether the arrest was justified. The plaintiff's testimony brought completeness to the process; he says he was in fact placed under arrest by a police official who said he had been instructed to arrest him. This lent support to the testimony of *Lt Col Nxafani* in a material respect.

[21] I am also satisfied that the arrest was justified in terms of section 40(1)(b) of the Criminal Procedure Act. To hold otherwise, would be to unnecessarily hamper the power of the police to arrest without a warrant by creating extra limitations not intended by the legislature.¹⁰

[22] In *Raduvha* the Constitutional Court found that an "*arrest and detention are separate legal processes. The fact that both result in someone being deprived of his or her liberty, does not make them one legal process.*"¹¹ Whilst the arrest may be lawful, the detention may be unlawful. It therefore remains to consider whether, in this instance, the detention was justified.

[23] In the first place, regard being had to the fact that a detention and an arrest are separate legal processes, the defendant's plea lacked averments necessary to sustain a defence in relation to the impugned detention. For that reason, any evidence led in support of the defence to the impugned detention was irrelevant. In any event, and quite apart from this conclusion, it remains to be seen whether the detention was justified.

¹⁰ *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) 466.

¹¹ *Raduvha*.

[24] In *Mvu*,¹² Willis J held that even where an arrest had been lawful, a police officer had to apply his mind to the question of whether the detention of a suspect was necessary at all. An arresting officer should always consider avoiding detention either by releasing the suspect on warning or on bail depending on the particular circumstances of the particular case. In the instant matter, *Lt Col Nxafani* did not testify to having applied his mind to the question of whether the detention was necessary in order to secure the attendance of the plaintiff in court. The police official who detained the plaintiff was not called to testify in relation to this. In fact on the plaintiff's showing, the detention was effected purely on the instructions of another police official. All that *Lt Col Nxafani* contented himself with was that further investigations had yet to be conducted, which does not suffice, given the appropriate test to be invoked before a detention can be effected. In any event, there is a drought of information in relation to what remained to be investigated at the point the impugned detention was effected.

[25] In all these circumstances, I am of the view that the defendant has not discharged the onus to justify the detention, with the result that the detention was unlawful.

[26] It remains for this Court to determine the *quantum* of damages to which the plaintiff is entitled. *Nel*¹³ and the cases cited therein with approval, provide guidance on the exercise of discretion when *quantum* is being considered. In particular, it should be borne in mind that the amount of award is not susceptible of precise calculation; it is arrived at in the exercise of a broad discretion.

[27] The plaintiff was detained from the afternoon of 26 October 2015, and released from custody when he appeared in court on 28 October 2015. There was no specificity in relation to the precise times at which the plaintiff was detained and released. He was handcuffed together with Luyanda from Kidd's Beach to Fleet Street Police Station where he was incarcerated. They were supplied with blankets and mattresses. He described the blankets as having been in such a state that he could not even cover himself therewith. The toilets were filthy, causing an unbearable stench. Because of the stench he did not partake of any food. He

¹² *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 (GSJ).

¹³ *Nel v Minister of Police* (CA 62/2017) [2018] ZAECGHC 1.

described the experience as having been traumatic because he was being detained for the first time.

[28] Taking into account awards previously made and bearing in mind that each case must be considered on its own merits, as against a flat rate per day, a fair and reasonable amount in the circumstances of this case is R40 000.

[29] The plaintiff has attained substantial victory, and there is no reason why costs should not follow the result.

[30] The following order is made:

1. **The defendant shall pay the plaintiff R40 000 as and for damages arising from the plaintiff's detention from 26 to 28 October 2015.**
2. **The defendant shall pay interest on the amount referred to in paragraph 1 above at the prescribed legal rate with effect from today to date of payment.**
3. **The defendant shall pay the costs of this action, such costs to bear interest from a date 14 days of the Taxing Master's allocator to date of payment.**

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the plaintiff : *T Mqobi*
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Date heard : 04 and 05 November 2019

Date judgment delivered : 12 December 2019