



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 3920/2014

10/1/18

[1] REPORTABLE: YES/NO
[2] OF INTEREST TO THE JUDGES: YES/NO
[3] REVISED.

DATE: 10/01/18

SIGNATURE: *E. Eugene*

In the matter between:-

AYUB MOHAMMED

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

INTRODUCTION

- [1] **Mr Ayub Mohammed ("plaintiff")**, an immigrant from **Somalia**, was arrested on the **16th April 2012** by members of the **South African Police Services**. He was later taken into custody and detained for approximately **5(five) hours** in Police cells at **Albertinia Police Station** in the **Western Cape**.
- [2] As a result of the arrest, plaintiff instituted legal proceedings against the Minister of Police. In the particulars of claim, he alleges that **Officer CJ Van der Bergh**, with member number: **04495373**, a member of the **South African Police Services** and stationed at **Albertinia**, unlawfully entered and searched his property without any authorisation, verbally assaulted him whilst performing an arrest, illegally arrested him and illegally took him into custody.
- [3] The **Minister of Police** (defendant) defended the action and filed a plea. In the plea, the defendant admitted that the plaintiff was arrested by members of the **South African Police Services** stationed at **Albertinia**. He (the defendant) however denied that the plaintiff was arrested by **CJ Van der Bergh** and specifically pleaded that the arrest was effected by **Constable R.D. Jansen**. The defendant further denied that the arrest was unlawful and averred that it was executed by a peace officer in terms of **Section 40(1)(a) of the Criminal Procedure Act 51 of 1977** as

the plaintiff committed an offence in the presence of the arresting peace officer. The defendant further contended in the plea that the subsequent detention of the plaintiff was not unlawful as it followed upon a lawful arrest and complied with the requirements of **Section 50 of the Criminal Procedure Act 51 of 1977**.

[4] Counsel advised me at the commencement of the trial that a pre-trial conference was held and the minutes will be made available to me later in the day. Same was never given. At the end of the plaintiff's case, **Advocate W. Dreyer** indicated that the parties had agreed that the matter would proceed on merits only and accordingly did not find it necessary to lead evidence on quantum. **Advocate Botma** for the defendant was not impressed with the turn of events as according to her, there was no reason for the issues to be separated. Owing to the lateness of the hour and the unavailability of witnesses, I gave a ruling that I will consider the evidence on merits and depending on the outcome, quantum evidence will be presented later.

[5] In view of the fact that the defendant had admitted the arrest, the onus was on him to prove the lawfulness thereof. Accordingly he also had the duty to begin. He called **two witness**, namely **constable Rolando David (Jansen)** and **constable Jacob (Matlolané)**.

[6] Jansen testified that he is an officer in the SAPS and has been a constable for 11 years. On the 16th April 2012 he was on duty with Matiolane, carrying on their duties around Albertinia where they were inspecting the permits of the immigrants. In the course of performance of their duties, they approached a shop in Albertinia, apparently owned by the plaintiff. They got into the shop and found another person whom they said was a brother to the plaintiff. They asked to see his permit. They saw the documents and found everything to be in order. They then left the shop. As they were approaching their vehicle, the plaintiff who was on the street yelled at them for no reason and was very aggressive. He asked for his papers and insisted that they be shown to him.

[7] The plaintiff was un-co-operative and he told him that he is a police officer and if he asks for papers, he should show them to him. He told him that if he fails to show him the papers, he will arrest him. At that stage the plaintiff was fighting and he told him that he is under arrest and read him his rights.

[8] The plaintiff resisted arrest and he asked constable Matiolane to assist him to get the plaintiff into the back of the van. After his arrest, plaintiff's brother who was in the shop came running and showed him plaintiff's papers, he found them to be in order. He then continued with the arrest

and proceeded to the Police Station where he put him into the cells. When asked for what offence did he arrest him, he testified that, it was for a riotous behavior.

[9] Under cross-examination, it was put to him that the plaintiff never resisted the arrest and was in fact never on the street. It was further put to him that it was improbable that the plaintiff would resist arrest in the manner described by him and not sustain injuries. He was further asked to comment on why it took them about 2 hours to travel a 3-4 kilo meters to the Police Station after arrest. The answers he gave were incomprehensible and at times did not even make sense. I cannot understand what was the reason was for effecting an arrest on a person only to have him released at 01h00 a.m and not even offer transport to take him home. The witness was evasive and tended to shift the blame on other officers at the Police Station regarding what happened to the plaintiff after arrest.

[10] The Second witness to testify for the defendant was constable Matiolane. He corroborated the evidence of constable Jansen to a greater extent. He testified that the plaintiff was arrested for swearing at them and not the contravention of the bye-law as explained by constable Jansen. He further testified that the plaintiff was talking to him and not constable Jansen.

- [11] The plaintiff testified that he is from **Somalia** and is in South Africa legally. He is in possession of refugee permit. In **2012** he was operating a shop in Albertinia and is currently studying at **Nelson Mandela University** where he is a **student in nature conservation**.
- [12] On the **16th April 2012** he was in his shop with his employee when two police officers came in around **19h00 – 20h00**. He identified them as police officers because they were in police marked vehicle. Upon their arrival in the shop, they asked about the permit, he produced it and they found it to be ok after checking it. They then asked if he is selling drugs or illegal stuff. He answered no and allowed them to search around. After searching, they found nothing. The conversation then moved towards the profitability of the business and how come he came to own a shop or run a business at the age of **20 year**. He did not answer the questions regarding the profit as he was fearful that the questions may lead to his attack. He was also uncomfortable with the questions as they had nothing to do with his permit. The two police officers became agitated and told him that they are police officers and whenever they ask questions, he should answer. They further told him that he is an immigrant and threatened to arrest him. They then started to pull him out and ultimately put him into the van. He was never told why he was being arrested and after his arrest,

the police officers drove around with him and at some stage, he did not even know where he was. He was later taken to the police station, locked into the cells and was released after 01h00 a.m. The person who released him told him to report at Court the following day. He did not pay bail or anything.

[13] Under cross-examination, he maintained his version that he was in the shop and never on the street as averred by the police officers. He further denied that he insulted or fought with the police officers or used any abusive language towards them. He said being an Immigrant, he needed police protection and understood that he should obey the laws of the country. He had no reason to create a problem for himself. He further testified that he is not that well-conversant with Afrikaans language except for the purpose of communicating with the customers.

[14] Under cross-examination he maintained that he was in the shop and not on the street when the police officers came. He had no business quarrelling with the police as he understood that they were doing their job. It was not for the first time that police visited his shop and he always approached them with calmness. He did not sustain any injuries. He denied that he resisted the arrest nor did he at any stage demonstrate any

riotous behavior towards the police. As far as he is aware, he was arrested for refusing to disclose his personal finances.

[15] **Mr Kilass** gave evidence in support of the version by the plaintiff and stated that he is not related to the plaintiff in any way other than as an employee. He maintained that the police found him and the plaintiff in the shop and he saw everything and heard the whole conversation between plaintiff and the police officers. He did not see any riotous behavior nor did he see plaintiff fight with the police.

[16] It is common cause that generally police officers have the power to effect an arrest with or without warrant subject to compliance with certain requirements. One of the requirements relevant for this case is that an arrested person must be informed of the reason for his or her arrest. **Section 40(1)(a) of the Criminal Procedure Act** provides that :-

***"Every Peace Officer may,
without warrant arrest any
person".***

***(a) Who commits or attempts to
commit an offence in his
presence.***

[17] In order to uphold the defendant's reliance on **Section 40(1)(a)** of the **Criminal Procedure Act**, I am ineluctably required to make a determination whether the plaintiff was on the street at the time of the arrest as the defendant alleges. If I arrive at a decision that he was on the street, I will further need to make a determination whether the arresting officers were justified in effecting an arrest for what they regarded as a riotous behavior.

[18] The crisp issue for determination is therefore whether the arrest was unlawful given the circumstances under which it was effected. The parties have presented conflicting versions which I find to be mutually destructive. I should therefore remind myself that when evaluating evidence, this must be done in such a way as to guard against a peace-meal evaluation. Evidence must be considered in its totality.

[19] The determination of the issue is largely factual and is dependent upon what actually happened. The credibility of the witnesses is going to play a pivotal and decisive role in the adjudication of the dispute. In such circumstances the proper approach is to weigh up and test the allegations

against the general probabilities. In **National Employers General Insurance Co Ltd v Jagers, 1984 (4) of 437, Eskeen AJP** (as he then was) expressed the Court's approach where is faced with mutually destructive version as follows:-

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a balance of probabilities that his version is

true and accurate and therefore acceptable and the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case anymore than they do the

Defendant, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false".

[20] The defendant bears the onus to prove that the plaintiff committed an offence in the presence of the peace officer and therefore that the arrest was lawful. The court _____ put the position as follows in the case of **Minister of Law and Order and another vs Dempley 1988 (3) SA 19(A)** "I accept of course that the onus to justify an arrest is on the party who alleges that it was lawfully made and since an arrest can only be justified on the basis of statutory authority, that the onus can only be discharged by showing that it was made within the ambit of the relevant statute". The constitutional court confirmed the correctness of the position in **Zealand v Minister of Justice and Constitutional Development, 2008 (4) SA 458** when it said.

[21] The version presented by the defendant that the plaintiff was riotous and contravened the municipal by-law is farfetched and an after -thought by the defendant who sought to avoid liability for what I regard as an unnecessary demonstration of power. For the record, I do not accept that

the plaintiff was on the street as at the time that he was required to produce his papers. I also find it highly improbable that plaintiff will without provocation hurl insults on the police whom he had acknowledged that they perform random searches for permits in order to protect them and their property.

- [22] Considering the evidence in its totality, there is no doubt in my mind that the defendant's evidence was tailored to fit into **Section 40(1) (a)**. It lacked coherence and was contradictory on the material aspect relating to the arrest. Constable Jansen gave an impression to the Court that the plaintiff was violent and aggressive towards them and was fighting and resisting arrest such that it required him to be assisted by Constable Matiolane. His words were that **"He was fighting us", it was not a walk in park. It was quite a scuffle"**. On the other hand, Constable Matiolane testified that he is the one who was talking to the Plaintiff when the Plaintiff said **"you fucking police always looking for papers"**. Constable Jansen said to him that he should not talk to him like that because he might arrest him. Under cross-examination he (Matiolane) crucially said that plaintiff was arrested for swearing at the police. This is important in that swearing at police officers is a different offence from fighting or acting in a riotous manner. I am consequently

unable to find that the plaintiff had indeed committed an offence in the presence of the police as alleged by the defendant. The defendant has therefore failed to discharge his onus on this aspect and the arrest is unjustifiable and consequently unlawful.

[23] The plaintiff was in my view a candid and honest witness. He answered questions with ease, without hesitation and in a convincing manner. This was despite the fact that English was a second language to him. Plaintiff's witness, **Mr Kilass** also came out as an impressive witness. He had no reason to lie nor was there any proposition put to him why he would choose to favour the plaintiff against the defendant. I consequently cannot find any fault with his evidence. The fact that he was an employee for the plaintiff can hardly be a reason for the court to view his evidence with suspicion. I therefore accept his evidence as being correct and truthful.

[24] The constitution enshrines the right to freedom and security of a person, including the right not to be deprived of freedom arbitrarily or without just cause as well as the founding value of freedom. Accordingly, it was sufficient for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is 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 of justification.

[26] In the premise, I find that the defendant has failed to discharge his onus to prove the lawfulness of the arrest and therefore the arrest of the plaintiff and the subsequent detention were unlawful.

[27] The defendant is liable for plaintiff's proven damages arising out of the arrest and detention.



MABOKU ISAAC MANGENA
ACTING JUDGE OF THE
HIGH COURT, PRETORIA