

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

CASE NO.: 1042/2013

In the matter between:

BONKE SIDLAYIYA

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

NTSEPE AJ

- [1] In these trial proceedings the plaintiff is claiming for damages arising from an alleged unlawful arrest, detention and assault.
- [2] The parties sought an order for the separation of issues; I accordingly granted an order separating merits and quantification in terms of rule 33 (4) of the Rules of Court.

[3] In his particulars of claim, the plaintiff alleges that :

- “4. On or around the 6th November 2012 at around 21h00 in the evening, near circus triangle, Mthatha plaintiff was unlawful assaulted and arrested by the members of the South African Police Services who are known to him.
5. Subsequent to the unlawful arrest and assault plaintiff was unlawfully detained at Madeira police station in the early hours of the 7th November 2012 and at all material times plaintiff was handcuffed and handcuffs were tightened to inject pain. Plaintiff was caused to sleep in a cement floor with no mattress and with one thin blanket and it was very cold at night. Plaintiff was detained in a congested cell where there were many in mates and toilet room was in one place with their sleeping room. It was very terrible and unbearable condition. Plaintiff was released at around 7am on the 7th November 2012, when an ambulance summoned by police took him to Mthatha General Hospital.
6. As a result of the unlawfully assault by members of South African Police Services plaintiff suffered physical injuries and had to be examined by the doctors see annexures “BSI”.
7. At the time of the unlawful arrest, assault and detention plaintiff had not committed any offence as stipulated in Schedule 1 of the Criminal Procedure Act 51 of 1977. The arrest, assault and detention were unlawful, wrongful and without juritification.” (sic)

[4] The defendant, in its amended plea, denies the foregoing as follows:

- “4. The contents contained herein are denied in amplification the defendant avers that on 7th November 2012 round about 4h45 a.m the employees of the defendant received a complaint from the workers at BP Garage that there is a man hiding in the bathroom. In response to that employees of the defendant attended a scene and they found Bonke Sidlayiya in the bathroom covered with blood and further took him to the Police Station wherein an ambulance was called because at the Police Station and transported to hospital, what transpired thereafter is unknown to the defendant.” (sic)

- [5] The parties correctly agreed that the plaintiff bore the onus and duty to begin; in line with that agreement the plaintiff lead evidence first and testified in support of his claim.
- [6] The material aspects of the plaintiff's testimony can be summarized as follows:
- 6.1 He is a 44 year old unemployed male. On 6 November 2012, at approximately 21:00 pm, he was hitch hiking to his home village of Ngqeleni at or near a BP garage in Circus Triangle, Umtata;
- 6.2 A vehicle had stopped a distance away from where he and other persons were hitch hiking and he went to the said vehicle to establish whether it was travelling in the direction of Ngqeleni; the vehicle was not travelling to where he was going and so he walked back to his initial hitch hiking spot (hiking spot);
- 6.3 Whilst he was walking back to the hiking spot he was accosted by three male persons who stabbed him on the head and robbed him of his jacket, wallet, phone and ran away disappearing into the darkness. He initially gave chase but decided to retreat in fear of his life. Whilst retreating he saw police approaching on foot. The police asked him why he was running away. He told them he was not running away but had in fact been robbed.
- 6.5 The police questioned him about the people running away and he told them that he did not know the people that were running away, that

they had robbed him of his belongings and that he was injured. The police produced cuffs threatening to arrest him if he did not tell them who the people that ran away are. The plaintiff testified that he told the police that he knows his rights and challenged their intention to arrest him, he none the less was hand cuffed by the police. Whilst in cuffs one of the police hit him with an open hand on his face which angered him and he told the police that they were behaving like the police from the "*oppressive era*". This infuriated the police who accused the plaintiff of insulting them. As result the cuffs that were on the plaintiff were tightened to inflict pain.

- 6.7 Plaintiff was placed on the ground and was lying on his stomach as the police assaulted him. Plaintiff stated that he was hit with a baton, taken to the police vehicle (referred to in the evidence a Quantum).
- 6.8 The plaintiff resisted when the police were placing him in the vehicle and he was shoved in, he fell on his back with his body weight on the tightened cuffs.
- 6.9 The police drove off but did not go to the police station, instead attended to different complaints in Mthatha. The plaintiff sat in the vehicle pleading for the cuffs to be loosened to which a female police officer responded that he swore at them.
- 6.10 The police eventually arrived at the police station at approximately 5:00 am after they had taken the plaintiff from the hiking spot at approximately 10:00pm. At the police station he was told to get out of the vehicle, due to his injuries he was unable to and the police left him outside. He got up with the assistance of a person who was standing

outside the police station. He eventually got inside the police station and saw the members who had arrested him at the reception counter, he approached them and asked what would happen to him and he was told to go home. He told the police he cannot walk and requested that they call an ambulance. An ambulance was called and approximately 1 hour after it was called, the ambulance arrived and took plaintiff to hospital.

6.11 At the hospital, the plaintiff was attended to by a nurse who stitched his head wound, he was later also treated for his injuries at St Mary's Private Hospital and the said injuries were recorded in the so-called J88.

[7] A copy of J88 was admitted by agreement between the parties; Mr Rili, who appeared for the defendant placed on record that the correctness of the contents of the J88 were admitted by the defendant.

[8] According to the J88 general examination the plaintiff had the following injuries when he was examined by a Dr C W W Mtshabe:

8.1 a "sutured wound" on the head;

8.2 "swollen and tender wrists-right and left;

8.3 "handcuff markings";

8.4 "extensive bruising of the back and loin due to beatings"; and

8.5 "Fractures" to the left and right hands."

- [9] The plaintiff was cross-examined by Mr Rili and it was put to him that the above mentioned injuries were not inflicted by the police but that the police had found the plaintiff so injured. The plaintiff admitted that he had a stab wound on his head when the police arrested him however he stood by his version that the police had assaulted him and as a result of that assault he sustained the further injuries noted by the doctor on the J88.
- [10] The plaintiff was referred to the defendant's version at paragraph 4 of the amended plea; referred to herein above which version was denied by the plaintiff. The plaintiff challenged the probabilities of the defendant's version, particularly paragraph 4 to which the plaintiff was referred, stating that even if he was the person hiding in the bathroom as alleged, he was, on the defendant's version, drunk and injured and as such would have posed no danger to the BP garage employees or the police.
- [11] Mr Rili also referred the plaintiff to paragraphs 4 and 5 of the particulars of claim, as quoted herein above, and pointed out the glaring difference between the plaintiff's version per his claim and the plaintiff's *viva voce* evidence. The plaintiff confirmed that he lost conscience when he was shoved into the vehicle at or near the hiking spot as alleged in the claim. However, regarding the pleaded allegation that he was placed in a congested cell and caused to sleep on a cement floor, the plaintiff denied same; stating he was only in the reception area of the police station.
- [12] The plaintiff did not call further witnesses and closed his case.

- [13] The defendant also called one witness, Constable Thobela Fortein, a member of the South African Police Services who is stationed at Madiera Police Station, Umthatha.
- [14] The material aspects of Fortein's evidence can be summarized as follows:
- 14.1 He was on duty on the 6th of November 2012 and was the driver of a marked police vehicle;
 - 14.2 At approximately 04:45 am they received a complaint, *via* 10111, from workers at a local BP garage about a person in the bathroom and that they were scared;
 - 14.3 They attended BP garage and found a man in the toilet. The man was the plaintiff, he was drunk and bleeding. After they removed him from the bathroom he became aggressive. He charged at the police, swinging fists and insulting the police, as a result they had to use force to subdue him;
 - 14.4 The plaintiff was handcuffed and taken to the police station where an ambulance was called. Fortein denied that they arrested the plaintiff and testified that "*we had no reason to arrest and detain him*".
- [15] After the defense concluded leading Fortein in chief, Mr Rili sought to have admitted onto the record as copy of the SAP10/Occurrence Book (OB) from Madiera police station for 6-7 November 2012. Mr Luzipho, for the plaintiff, had no objections and agreed to have the SAP10 admitted as what it purports to be. The SAP10 was admitted and marked exhibit "B".

- [16] In cross examination, the plaintiff's counsel referred Fortein to entry 187 of the SAP10 dated 7 November 2012; which records the time of entry as 04:45 and reads as follows:

"Reported: Cst Fortien and Cst Baca. Proceeded to BP garage where they received a complaint that there is a guy who stabbed an A/male when we got the we found an A/male by the name of Bonke Sidlayiya laying in the toilet garage he had a head injury and also complained of chest pain he fought with the police and we handcuffed him. On the arrival at the Police station an Ambulance was called for him." (sic)

- [17] According to Fortein, when they received the 10111 complaint, they contacted the station and informed one Tyali of the complaint; it was therefore Tyali who had made entry 187 on information given to him by Fortein and his partner.
- [18] Much was made by plaintiff's counsel about the fact that there was no statement taken from any complainant and that entry 187 was made at 04:45 which meant the incident could not have occurred at 04:45 as alleged by Fortein. Fortein conceded that no statement was taken and gave no reasons why a statement was not taken from the employees of BP. However a material and relevant concession by Fortein, under cross examination, was in answer to plaintiff's counsel on the use of force implemented by the police to which Fortein answered *"Yes, we used force in arresting him"*.
- [19] Even upon questions by the court Fortein confirmed that they had effected an arrest on the plaintiff and that the reasons for arresting the plaintiff was because he was aggressive and they required back up and they wanted to call an ambulance for him. However, he confirmed that no charges were or would be preferred against the plaintiff and that the plaintiff was released at the police station.

[20] He denied the plaintiff's version and any assault by the police on the plaintiff whereafter the defense closed its case.

[21] The plaintiff and the defense versions are mutually destructive. The stance that a Court ought to take when dealing with mutually destructive versions was set out in *National Employers General Insurance Association v Gany* 1931 AD 187 as follows:

“Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told... is not satisfactory in every respect, it must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version ...”

[22] In these proceedings the Defendant denied the arrest and detention. The Plaintiff therefore bears the onus to prove the arrest and once the arrest has been established, the Defendant must justify same. The Plaintiff also bears the onus of establishing facts which objectively indicate an assault.

[23] In *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 D the court held that the approach to dealing with onus and probabilities as:

“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 the 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 preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version adduced by the defendant is therefore false and 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 the witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favour 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 any more than they do the defendant's, 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."

- [24] The Plaintiff's evidence was given in a clear and concise manner. There were no material contradictions between his evidence in chief and the evidence that he led under cross-examination. He held a composed demeanor and impressed the court with the objective manner in which he relayed the events of the night in question. He answered the Defendant's questions with clarity; challenging that which he insisted was false. His overall demeanor in the witness stand and the manner in which he testified was reliable and satisfactory.

[25] His evidence was found to be particularly reliable in view of the evidence contained in the J88. According to the doctor's findings, which findings have been admitted by the Defendant, the Plaintiff had handcuff marks on his wrists; which lends corroboration to the plaintiff's version that the police had deliberately tightened the cuffs to inflict pain on him. Further corroboration of the Plaintiff's version are the injuries to his back which are consistent with how the Plaintiff alleges he was placed in the police vehicle and how he had been shoved into the vehicle by the police.

[26] If one contrasts the Plaintiff's evidence with the evidence of Constable Fortein who testified for the Defendant, it becomes clear that the Defendant's case is improbable and cannot be accepted as true for the following reasons:

26.1 Fortein throughout his testimony was reluctant to admit even the most obvious of facts;

26.2 He contradicted himself materially by initially denying that they had arrested the Plaintiff insisting that there was no reason for them to arrest the Plaintiff. Later in his testimony, when cornered by the established facts put to him, he had no choice but to concede that there was an arrest effected on the Plaintiff but conveniently tenders a reason that the arrest was effected because the Plaintiff was aggressive and/or violent towards the police;

26.3 Even his reasons that he tendered for the arrest changed when convenient as he initially had stated that the reason for arresting the Plaintiff was to obtain an ambulance for him, this later changed to the police required backup from other members of SAPS that were at the police station, which ultimately changed to the need to remove the Plaintiff from the scene for his own safety; and

26.4 He was disingenuous in an attempt to mislead the court preferring to refer to the arrest as “*we took the Plaintiff*”.

[27] Furthermore, the probabilities of the version tendered by the Defendant are trumped by those of the version tendered by the Plaintiff. Firstly, the Plaintiff denies ever being at the BP Garage and/or having been found by the police at the BP Garage testifying that he had in fact been hitchhiking at the time of the arrest. The police are adamant that the Plaintiff was at the BP Garage and that they had attended the scene at the request of the employees of the BP Garage. However no statements are taken from any employee of the BP Garage relating to the so-called complaint. Even in the circumstances where a statement could not be taken, the police ought to have the names of the persons they dealt with at the scene in their pocket books; not even the names of those persons who had laid the alleged complaint are tendered by the Defendant in any of the documents before Court or in Fortein’s evidence before Court. The Defendant also failed to call any of the ‘complainants’ as witnesses in these proceedings. The absence of information of any

complainant in my view is consistent with the Plaintiff's version that he was never at the BP Garage.

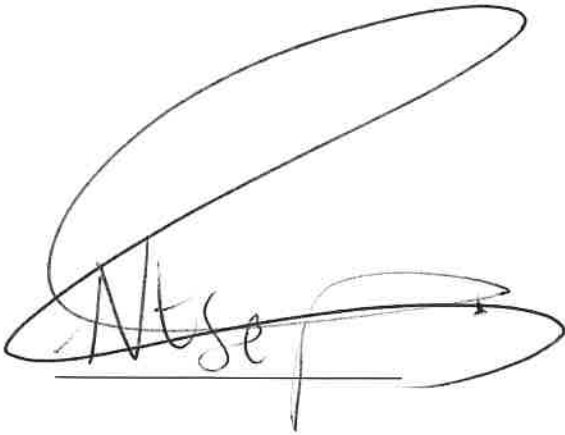
[28] The only 'record' of the incident is entry 187 in the SAP 10, which *ex facie*, the document was information relayed to Tyali by the police who allegedly arrested the Plaintiff. This piece of evidence is unreliable as it cannot be corroborated by any objective facts and is nothing short of 'self-corroboration'. Furthermore, the time the alleged report was made contradicts Fortein's evidence as he testified that the complaint was received at 04:45 am whereas the entry suggests that the incident occurred prior 04:45 am when it was reported. If Fortein's evidence were to be accepted as accurate, the time reflected on entry 187 ought to be later than 04:45 am. The time, however seems to be consistent with the Plaintiff's version that he was taken to the police station around 5:00 am and an ambulance was called.

[29] In all the circumstances, I find that the Plaintiff was arrested and assaulted by the police as alleged. It is trite law that the object of the arrest must be to bring the arrested person to justice and not for any other purpose that is not intended by legislation. (*Minister of Safety and Security v Sekhoto* [2011] 2 All SA 157 (SCA) [31]).

[30] On the Defendant's version alone the Plaintiff was arrested for purpose not intended by legislation and there was never an intention to bring the Plaintiff to Court. Furthermore, on the Defendant's version the police found a drunk and injured person; as the Plaintiff correctly put it in his cross-examination,

such a person could not have posed a danger on either the employees of the BP Garage or the police as the evidence of Fortuin was that the person was intoxicated and the state described in the evidence cannot warrant or justify the force and arrest that was executed by the police on the day in question. In any event, in the totality of the evidence, whether it be on the version of the Plaintiff or that of the Defendant what becomes clear is that the police actions were wrongful in the extreme and that that they had employed arrest in circumstances that did not warrant an arrest.

[31] In the result, judgment is entered in favour of the Plaintiff for the unlawful arrest, detention and assault with costs.

A handwritten signature in black ink, appearing to read 'Ntsepe', is written over a horizontal line. The signature is stylized with a large, sweeping loop above the name.

N Ntsepe

Acting Judge of the High Court

Counsel for the Plaintiff: Mr Luzipho
Instructed by Mjulelwa Inc Attorneys, Mthatha

Counsel for the Defendant: Mr Rili
Instructed by the State Attorney, Mthatha

Dates heard: 8 and 9 May 2018

Delivered: 11 September 2018