

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

CASE NO: 426/2014

**Heard on: 14 October 2015
Delivered on: 10 March 2016**

In the matter between:

KHONAYE DLOKOLO

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The plaintiff in his amended particulars of claim dated 2 October 2014 claimed the following damages arising out of his arrest on 19 July 2013 by the defendant's employees:

“10.

As a result of the foregoing Plaintiff suffered damages in the sum R450 000.00
(Four Hundred Fifty Thousand Rand) calculated as follows:

10.1	Unlawful Arrest	=	R100 000.00.
10.2	Unlawful Detention	=	R100 000.00.
10.3	Contumelia, shock and trauma	=	R100 000.00.
10.4	Unlawful Assault	=	R150 000.00.
	Total	=	R450 000.00.”

[2] The defendant in its plea denies liability. The plaintiff called the evidence of three witnesses viz, (a) Khonaye Dlokolo (*Khonaye*), the plaintiff; (b) Galifike Dlokolo (*Galifike*), plaintiff's father; and (c) Mzameni Bekedana (*Mzameni*).

[3] The plaintiff testified that on 19 July 2013 while at Mamela Taxi Rank, in Mthatha, where he works as a taxi driver, he was arrested by the members of the defendant for possession of an unlicensed fire-arm. He testified that the police officers arrived in 3 motor vehicles, present amongst them was Mabhiza Mkhondo an acquaintance. The police handcuffed assaulted him by kicking him with feet, strangling him and assaulting him with open hands. He sustained injuries on his wrists as a result of tight handcuffs. The police enquired about a fire-arm. He told them that it was at Sabe locality. The

police put him inside the vehicle and proceeded to Sabe locality to look for Mzameni who had bought the fire-arm. On arrival at Sabe locality they could not find Mzameni. The police left a message that Mzameni should bring the fire-arm to the police station.

[4] The plaintiff denies that he went to his home to retrieve the fire-arm as alleged by the defendant. He states that he did not have the fire-arm in his possession nor did he have it at his place but the fire-arm was with Mzameni because he had bought the fire-arm on behalf of Mzameni.

[6] By way of background, the plaintiff testified that he was approached by Mzameni to organise him a fire-arm. He approached Mabhiza who charged a sum of R1000.00 for the fire-arm. On a certain day he proceeded with Mzameni to Mabhiza to get the fire-arm. On arrival Mzameni gave him a R1 000.00 which he in turn handed to Mabhiza. Mabhiza produced a fire-arm and gave it to Mzameni and they went back to their locality. He denied that he saw the fire-arm. It was handed to Mzameni by Mabhiza.

[7] Subsequent to his arrest he was detained from Friday until he was released on Monday. Later on the case was withdrawn against him by the police.

[8] The evidence of the plaintiff was less convincing and not believable. For example, he testified that he was assaulted by the police when they arrested him at Mamela taxi rank. Under cross-examination he changed to

say that the police did not assault him at the time of arrest but stopped next to Decolleen on their way to Sabe locality and assaulted him. He testified that at Mamela taxi rank, he readily told the police that he knew about the fire-arm and that it was with Mzameni at Sabe locality. Strangely, the police at Decolleen assaulted him telling him to tell the truth. When cross-examined about this, the plaintiff could not explain why the police were asking for truth because at the time they were on the way to fetch the fire-arm from Mzameni. This too is not convincing.

[9] Furthermore, as shall be seen below, the evidence of the plaintiff differs remarkably from that of Mzameni as to how the fire-arm came to the latter's possession. The plaintiff testified that he never handled nor saw the fire-arm because Mabhiza gave it to Mzameni. That evidence is in direct contrast with the evidence of Mzameni that the plaintiff gave him the fire-arm when they were inside the car on their way home.

[10] Mzameni testified that during 2013 he approached the plaintiff asking him to arrange a fire-arm for him. The plaintiff informed him that he must come to his place. On his arrival the plaintiff told him that he had sought a fire-arm from Mabhiza for an amount of R1 000.00. They both travelled to Mabhiza's place. He gave the R1 000.00 to the plaintiff. On arrival at Mabiza's home the plaintiff handed over the money to Mabhiza. On their way home, the plaintiff telephoned him asking whether he still had the fire-arm to which he responded yes. He asked the plaintiff what the problem was. The plaintiff told him that there was a problem at his locality. He went to the

plaintiff's home in possession of the fire-arm. The plaintiff was not at home. He handed over the fire-arm to the plaintiff's father. He confirmed that earlier on he spoke to the police who were enquiring about the fire-arm. He denied that he received the fire-arm from Mabhiza but as earlier stated he got it from the plaintiff. He insisted that the plaintiff was not telling the truth that he did not see the fire-arm. He further testified that he knew at the time when he obtained the fire-arm that it was an unlicensed fire-arm. He remained adamant that he gave the fire-arm to the plaintiff's father and not to the police.

[11] Galefike testified that on a certain day he was at his home when he received a phone call from the plaintiff saying that he had been arrested by the police. Immediately thereafter Mzameni arrived at his home and left a fire-arm with him. The following morning he went to Central police station Mthatha, and left the fire-arm with the police who were present at the charge office or Community Service Centre. He denies that the fire-arm was retrieved by the plaintiff in the company of the police at his home from a mealie tank. He does not know the police officer who took the fire-arm from him. No statement was obtained from him.

[12] Under cross-examination he could not explain why he did not tell the police that the fire-arm was from Mzameni. He further could not explain why he did not tell Mzameni to take the fire-arm to the police himself. He says he never thought about telling Mzameni that. He conceded that he made a mistake for not doing so and for not saying to the police that the person who knew about the fire-arm and who brought it to him was Mzameni so that the

plaintiff should be released. He further could not proffer any reasonable explanation as to why he did not make it clear to the police or seek the release of the plaintiff on the basis of the fire-arm being brought by Mzameni. As expected, he did not know why an entry was made on the occurrence book. The plaintiff did not call any further evidence.

[13] The defendant called the evidence of Lusanda Olive Dyani who testified that during the period she worked as a detective at Mqanduli police station. On 19 July 2013 which was a Friday she left Mqanduli early in the morning with Captain Soqinase and Constable Maxhayi. They were pursuing information in connection with the robberies which had occurred. She was pursuing leads about a fire-arm which was used in one of the robberies.

[14] Mabhiza Mkhondo who informed her that one of the fire-arms involved in the robberies was with the plaintiff. Mabhiza told them that the plaintiff was working as a taxi driver at Mamela taxi rank in Mthatha. They proceeded there looking for the plaintiff. They found the plaintiff at the taxi rank. Galifike was also present at Mamela taxi rank. They were travelling in one motor vehicle which was a Navara bakkie. They questioned the plaintiff about the fire-arm. He told them that it was at his home. They proceeded to his home. The father of the plaintiff was also present. On arrival at his home, the plaintiff led them to a mealie tank which was in his homestead. The plaintiff took out a plastic bag from the mealie tank which contained the fire-arm and gave the fire-arm to Captain Soqinase. The plaintiff could not produce a licence to possess that fire-arm. They then arrested him. She denied that they

assaulted the plaintiff at any stage up until his detention. She testified that there could not have been a reason to assault him especially because he was co-operating with their investigations. She learnt at a later stage that the case against the plaintiff was struck off the roll due to the fact that there was no ballistic report. She conceded under cross-examination that she did not mention in her statement that she was with Constable Maxhayi. It was brought to her attention that on the investigating diary, Captain Soqinase wrote that the fire-arm was booked on 20 July 2013. She testified that, that could have been an error on the part of Captain Soqinase. She was further asked about what was contained in the warning statement of the plaintiff.

[15] She further testified that it was a mistake that it was not appearing on her statement and even on the statement of Captain Soqinase that plaintiff's father was present at Mamela taxi rank. She confronted about the fact that she, as well as Captain Soqinase, did not mention in their statements that the serial number on the fire-arm was erased. To this, she said it was a mistake because the fire-arm's serial number was erased. Apart from what has been highlighted above nothing turns on her cross-examination.

[16] It is improbable that Galifike would involve himself by taking an unlicensed fire-arm, which he knew nothing about, especially that his son had been arrested in connection with. It boggles the mind why he did not go to the police with Mzameni. It is further unbelievable that the police would just accept a fire-arm without making enquiries about it. It is worse that no entry was made either on the occurrence book or any relevant register. The

evidence of Galifike should be viewed against the entry made by Soqinase on the exhibit register albeit a wrong date was written.

[17] The evidence of Dyani is clear and straight forward. They were looking for a fire-arm. The information they had led them to the plaintiff. The plaintiff confirmed that he had knowledge of the fire-arm and led them to where the fire-arm was. They recovered the fire-arm and arrested the plaintiff. It cannot be said therefore that the arrest was unlawful.

[18] Even in respect of the assault the evidence of the plaintiff is not probable because (a) he initially said he was assaulted at Mamela taxi rank and later changed to say on the way to Sabe locality, (b) what would be the reason for his assault if he was leading the police to where the fire-arm was. Certainly, there could have been no reason for the assault. The plaintiff alleged that he had injuries on his wrists. No such injuries were proved.

[19] On the evidence, I am satisfied that the arrest was not unlawful and consequently, I make the following order:

(a) The action against the defendant is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances:

Plaintiff: Adv Calaza *instructed by*
 Mjulelwa Inc Attorneys
 Office No 207A 2nd Floor
 Metropolitan Place

MTHATHA

Defendant: Ms Madyibi *instructed by*
 Mvuzo Notyesi Inc
 2nd Floor, T-H Madala Chambers
 No 4 Durham Street

MTHATHA