

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT DIVISION, PRETORIA

5/3/15

Case No.: 8540/2012

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

05/03/2015



In the matter between:

MOHALENYANA ELLIOT PHUTHI

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

MNGQIBISA-THUSI, J

1. The plaintiff has instituted an action for damages for unlawful arrest and detention (claim 1); malicious prosecution (claim 2) and assault (claim 3).
2. The claims arise from events that occurred on 31 July 2010 when the plaintiff was arrested and detained by members of the South African Police Service ("SAPS"), an alleged assault by the police whilst plaintiff was in police custody and appearing in court on several occasions.
3. The plaintiff is claiming, as damages amounts of R120 000 (claim 1); R60 000.00 (claim 2) and R60 000.00 (claim 3).
4. The parties agreed on a separation of issues in terms of Rule 33 (4) of the Rules of Court. Accordingly, the matter proceeded on merits only.
5. The defendant has admitted the arrest and detention of the plaintiff. In its plea the defendant relied on section 40(1)(a) of the **Criminal Procedure Act** 51 of 1977 ("the Act") by alleging that the arrest of the plaintiff was lawful since he had sworn at the police officers and their intention in arresting him was to charge him with the offence of *crimen injuria*. *Crimen injuria* is defined in Snyman, **Criminal Law** at page 469 as consisting of the unlawful, intentional and serious violation of the dignity or privacy of another.

6. In terms of section 40(1) (a) of the Act, a peace officer may arrest a person who commits or attempts to commit a crime in his presence. Wrongful arrest consists in the wrongful deprivation of a person of his liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at 154E-157C. *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139D.

It is the defendant's version that on 31 July 2010 members of the SAPS were assisting a certain woman who wanted to serve a court order on the plaintiff's father by accompanying her to the plaintiff's house. On arrival at the plaintiff's home, they met his mother who informed them that his husband was not at home, but that they could talk with the plaintiff. The plaintiff had hurled insults not only at the complainant but also at the police officers accompanying her. After failing to heed warnings not to insult the complainant and the police officers, the attempts by the police officers to arrest the plaintiff were resisted by the plaintiff leading to back-up being called, which led ultimately to the arrest and detention of the plaintiff. After his arrest and detention, the plaintiff appeared in court within 48 hours of being arrested. Thereafter the plaintiff's case was postponed on several occasions until the charges against him were provisionally withdrawn. Further, the defendant denies that the plaintiff was assaulted by the police while in custody and that the defendant was responsible for the prosecution of the plaintiff.

7. With regard to claim 1, the parties are in agreement that that the *onus* rests with the defendant to prove that the arrest of the plaintiff was not

unlawful. If the arrest were unlawful, the subsequent detention of the plaintiff would automatically be unlawful. There is also agreement that the plaintiff bears the *onus* of proving that he was assaulted by members of the defendant and that his prosecution was malicious and instigated by members of the defendant.

8. The following facts are common cause:

- 8.1 that on 31 July 2010 (on a Friday) members of the SAPS arrested the plaintiff at his home in Phuthaditjhaba, Free State;
- 8.2 that after his arrest on 31 July 2010 the plaintiff appeared in court on 2 August 2010 (on a Monday) and his matter was postponed for a bail hearing;
- 8.3 that the plaintiff subsequently appeared in court on three occasions and at the last appearance (on 17 March 2011), the charges against him were withdrawn.

9. There is a dispute as to the events that led to the arrest of the plaintiff; his alleged assault by police officers and his prosecution.

10. The first witness to testify for the defendant was Constable Eric Sefatsa ("Sefatsa"). Sefatsa's evidence is as follows. On 31 July 2010, he and Captain Lempetje (who is now deceased) accompanied one Mamokete to the plaintiff's home as she had requested them to accompany her in order to serve a court order on the plaintiff's father for the return of items listed in the court order. Apparently, Mamokete was married to the plaintiff's deceased twin brother with whom he had stayed at

plaintiff's parental home. On arriving at the plaintiff's home, the police found the plaintiff's mother in the yard. They introduced themselves and informed her of the purpose of their visit. As they were talking to the plaintiff's mother, the plaintiff entered the yard and the mother referred them to him. On seeing Mamokete, plaintiff started hurling insults at Mamokete. The police admonished him but he continued swearing at Mamokete and also swore at them. As he was swearing, the plaintiff was also pushing Lempetje and Mamokete out of the yard. Sefatsa testified that they informed the plaintiff of the purpose of their visit and warned him that he was interfering with the performance of their duties. As the plaintiff continued swearing and shoving Lempetje and Mamokete, the police attempted to arrest him. His younger brother, Raphael Mphuthi ("Mphuthi"), who was busy fixing something in one of the rooms of the house, came holding a trowel. Mphuthi tried to intervene in the scuffle between the plaintiff and the police but was warned not to interfere as he would also be arrested. In spite of being warned Mphuthi stabbed Sefatsa with the trowel on his chest. Fortunately Sefatsa was wearing a bulletproof vest and the tip of the trowel did not penetrate the vest. Back-up was called and on its arrival the plaintiff and his brother were placed inside a police van, taken to the Phuthaditjhaba Police Station and kept in custody until their appearance in court on the following Monday.

11. During cross-examination Sefatsa maintained that the proper procedures for the arrest of the plaintiff and his brother were followed in that the plaintiff was informed of the reason for his arrest. Sefatsa

denied the plaintiff's version that he had asked the police officers if they had a warrant to be on the premises and when they told him that they had a court order for a certain 'Mujeri', he had told them that there was no such person at the premises, at which stage the officers became aggressive and assaulted him. Furthermore, Sefatsa denied the plaintiff's version that his brother never assaulted the officers. Sefatsa further denied that the plaintiff was bundled into the back of the police van in such a way that he bumped his head against the van's canopy and was also injured because of the way the van was driven on its way to the police station. Sefatsa testified that it was the plaintiff who informed them that 'Mujeri' was his father's nickname. Sefatsa further denied noticing any injuries on the plaintiff.

12. The next witness called by the defendant was Mamokete Mita Motloun ("Mamokete"), the widow of the plaintiff's deceased brother. Mamokete corroborated Sefatsa's evidence in all material respects as regards the facts leading to the arrest of the plaintiff and his brother. She further testified that she had gone to the police station to seek protection when serving the order on 'Mujeri' as the Mphuthi family had previously made it clear to her that they did not want her on their premises as she was accused her of 'killing' her husband. During cross-examination, Mamokete testified that she did not seek the assistance of a sheriff as set out in paragraph 3 of the order as there were no sheriffs within the Qwaqwa area where the order was to be served. According to Mamokete, the nearest sheriff's office is found in

Bethlehem and usually takes a long time before orders are executed within the area.

13. Constable Samuel Motlatsi Nkopane ("Nkopane") corroborated the evidence of Sefatsa with regard to the arrest of the plaintiff. He was part of the officers called by Sefatsa as back up. During cross-examination Nkopane testified that he was not aware that the plaintiff's brother (Mphuthi) was also arrested although he was informed by Sefatsa that someone had stabbed him and was saved by his bulletproof vest.
14. Warrant Officer Ben Hlatshwayo ("Hlatshwayo"), the investigating officer in the criminal matter, testified as follows. On 2 August 2010 the plaintiff appeared for the first time in court and his case was postponed to 13 August 2010 for a bail application. He testified that the plaintiff was held in custody because of the seriousness of the offence he was charged with. He confirmed that on the day of the plaintiff's arrest bail was set at R200.00 and when the docket was sent to the prosecutor, the issue of bail was contained in the docket. He denied that he had requested the prosecutor to postpone the matter for bail when the plaintiff appeared in court on 2 August 2010 and reiterated that he was not opposed to the plaintiff being granted bail on that day. Hlatshwayo further testified that he did not notice any injuries on the plaintiff when he interviewed him on the day of his arrest. Furthermore, Hlatshwayo testified that after explaining to the plaintiff his constitutional rights, the plaintiff informed him that he would present his statement in court.

15. During cross-examination, Hlatshwayo could not remember whether he consulted with the prosecutor before 13 August 2010 or when the plaintiff was released from custody. He testified that Sefatsa had informed him that the reason for them going to the Mphuthi household was that Mamokete had a court order, which was to be served on one of the Mphuthi's. He further testified that it was normal occurrence for police to accompany a complainant who needed to serve a court order even if the court had given that authority to the sheriff.
16. The plaintiff's evidence is as follows. On the relevant day on his return from town, he found four police officers in the yard of his parental home. He inquired from them if he could be of assistance. They told him that they had a court order in terms of which certain items were to be handed over to Mamokete who was in their company. He told them that there was no problem; Mamokete could get the listed items. Curiously plaintiff testified that he told the officers that before his brother died, he had divorced Mamokete and was living with another woman and was not sure if he could not give them the items since they could be those of the other woman. He then requested to look at the court order, which he read, and pointed out to the officers that the order was supposed to be served by a sheriff. He also informed them that he did not know of a 'Mujeri' since his father's name was David. When Lempetje asked him if he was going to hand over the listed items or not, he gave them an opportunity of looking at his identity document as he thought that the officers suspected that he was actually Mujeri. The plaintiff further testified that on requesting the police to leave the

premises as the person they were looking for was unknown to them, Sefatsa accused him of trying to be smart and demanded to know where he was employed. On telling him that he was a traffic officer and giving Sefatsa his appointment card, Sefatsa, after looking at the card, threw it on the ground. Thereafter Sefatsa and Lempetje manhandled him, pushing him towards a tree. Thereafter the officers momentarily left the premises and he got inside a shack within the premises where he prepared water to wash himself as he intended to travel to Cape Town shortly. As he was washing, he heard a knock and Lempetje entered the shack and dragged him outside. He testified that he was assaulted by one group of police officers whilst the other group went to the garage where Mphuthi was busy fixing a door, dragged Mphuthi towards one of the police vehicles, which were outside. On reaching the police van, Lempetje had banged his head against the van's canopy before he was thrown into the back of the van. On its way to the police station, the van was recklessly driven which resulted in him sustaining an injury to his head. At the police station he was taken into a separate room from the one his brother was. As he was passing the room in which Mphuthi was, he saw him lying on the ground whilst being assaulted by officers who had encircled him. At a later stage he was also taken into the same room where Mphuthi was, assaulted with fists and booted feet and as a result his face and mouth were swollen and he was bleeding from his mouth and nose. He had to wash himself in a tap in an adjoining room. Although the plaintiff initially testified that his legal representative was in court at his first

appearance in court, he subsequently changed his evidence and testified that he had legal representation. He also denied that his constitutional rights were read to him when he was arrested. Plaintiff further testified that he was denied medical assistance or access to his pills (which were at home) even though he had informed the police that he was diabetic.

17. During cross-examination, the plaintiff conceded that, as part of his version, the following facts were not put to the defendant's witnesses, that:

17.1 one of the officers had asked him if he was Mujeri and he had said no;

17.2 he had explained to the officers that Mamokete and his brother had been divorced for four years before he died and at the time of his death, the brother was staying with another woman;

17.3 the police officers gave him the court order and he read it;

17.4 he would dispute Mamokete's version that when Mamokete and the police were at his parental home, Mamokete was the one in possession of the court order;

17.5 whilst in the room at the police station where he alleges he was assaulted, one of the police officers had butted him with a rifle behind his right ear;

17.6 Sefatsa had inquired about his employment and after looking at his appointment card had thrown it to the ground.

18. The plaintiff's response was that either he had told his counsel or he might have left the facts out during consultation with his counsel or had no comment.
19. Further during cross-examination, the plaintiff conceded that:
 - 19.1 after reading the court order, he understood from paragraph 3 of the order that the sheriff was authorised to fetch Mamokete's goods if she personally failed to recover the goods;
 - 19.2 after reading and understanding the court order, he should have allowed Mamokete to recover her goods;
 - 19.3 the presence of Mamokete and the police officers was in terms of the order, and therefore there was nothing wrong in Mamokete being accompanied by the police;
 - 19.4 he could only be granted bail in court;
 - 19.5 the prosecutor and the Magistrate are the ones who denied him bail although the police were not opposing bail.
20. Furthermore and during cross-examination, the plaintiff admitted that the signature on the warning statement was his but denied that the contents of the statement were his, barring his personal details. He also did not deny that he was asked to make a statement or to sign the pages preceding the last page of his statement.
21. The plaintiff further testified that although he opened a case of assault against the police who allegedly assaulted him at the Tseki police station, he did not find any joy from the police handling his case. Further that the Independent Complaint's Directorate's report

concluded that there was no wrongdoing on the side of the police. He furthermore testified that on 2 August 2010 he did inform his legal representative about being assaulted and his injuries were still visible.

22. The next witness called by the plaintiff was Mphuthi, the plaintiff's younger brother. His evidence is as follows. On the day of the arrest he was busy fitting windows in the dining room when four police officers (inclusive of Sefatsa and Lempetje) approached him and inquired about the elders. He informed them that his mother was at the back of the house. He later heard a commotion and went to investigate. He saw the police assaulting the plaintiff by banging him against a tree and hitting him with open hands. Lempetje warned him to go back inside the house, which he did. The police then left the premises for a short while and returned with other police officers. On their return they started hitting the plaintiff with fists whilst pushing the plaintiff towards the gate where two police vans were parked, banging his head against the van. Sefatsa then came to him and tripped him and as he fell to the ground the police officers trampled him. Both he and the plaintiff were put into the van and taken to court the following Monday and were released on 4/5 August 2010. Mphuthi further testified that he was able to see what was going on outside in the yard as the house was still under construction and had no windows. He denied assaulting Sefatsa with a trowel. He testified that at the police station he was the first to be assaulted by being slapped and banged against a wall. Thereafter the plaintiff was also assaulted. In contradiction to his earlier evidence

that he and the plaintiff were put in a van, Mphuthi later in his evidence in chief testified that they were put in different vehicles.

23. During cross-examination, Mphuthi initially said that he did not know why Mamokete and the police were at his home but immediately conceded that he knew that they were there to serve a court order. He denied that the first person the police officers spoke to was his mother as testified to by Sefatsa and Mamokete. Mphuthi further contradicted the plaintiff's evidence that he found the police and Mamokete already at his home. According to Mphuthi, the plaintiff was at home when the police arrived. He further testified that it was not only Lempetje but also his brother who chased him away when he came out of the house to investigate the commotion outside. He denied stabbing Sefatsa and said that Sefatsa had wrestled with him for the trowel and took it away. He could not explain why Sefatsa would suddenly wrestle with him for the trowel. He denied that when he was arrested he was inside the garage as testified to by the plaintiff and said that he was in an open space next to the dining room. He further denied being read his rights on either arrest or when he was locked in the cells. Although in his evidence in chief he said that when they were taken to the police station, they were put in different vehicles, during cross-examination Mphuthi testified that they were put inside the same vehicle, with him sitting at the back of the bakkie and the plaintiff in the passenger seat, with two police officers on each side. Confusingly Mphuthi testified that before leaving his parental home, the plaintiff was initially put at the back of the van, at which stage his head was banged against the van,

and later brought to the front of the van. He denied that Lempetje at any stage assaulted the plaintiff whilst they were still at home. Lempetje only participated in the assault of the plaintiff at the police station. He admitted signing a statement but testified that he did not know what he was signing as he was confused after the assault and could not remember if his constitutional rights were read to him.

24. The plaintiff called his mother, Anna Mmathebeletso Mphuthi ("MaMphuthi") to testify. MaMphuthi testified that when the police arrived at her house, they asked for Mujeri and she told them that he does not know him but knows of Mokgoeseng. The police phoned the plaintiff to come and assist. However, Mmaphuthi later testified that it was Mphuthi who phoned the police. When the plaintiff arrived, Lempetje showed him a document and there was an exchange of words, which culminated in a scuffle between the plaintiff and the police. MmaMphuthi further testified that the police assaulted the plaintiff and pushed him outside the yard, banging his head against a vehicle. She further testified that she got back into the yard in order to assist Mphuthi who was being manhandled by one of the officers when he tried to assist his elder brother. She was warned by the officer to back off. The police then took Mphuthi outside to one of the vans. Contrary to Mphuthi's evidence, MmaMphuthi testified that Lempetje assaulted the plaintiff by; inter alia, banging his head against a van.
25. The version of the plaintiff and the defendant as to whether the plaintiff swore at the police and/or was assaulted by the police is mutually

destructive. In *National Employers' General Insurance Co Ltd v Jagers* 1984(4) SA 437 (E) the court stated at 440D –G:

“... that in any civil case, as in any criminal case, the onus can ordinarily 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 rest 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 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 probabilities favour the plaintiff, 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 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.”

26. The defendant's version, as presented by Sefatsa and Mamokete, is that when the plaintiff found the police and Mamokete at his home, he initially swore at Mamokete and then at the police when they reprimanded him for swearing at Mamokete.
27. Mamokete corroborated Sefatsa's version as to the swearing, the remonstrations between the plaintiff and the police. None of the defendant's witnesses' versions was faulted during cross-examination. Both witnesses were credible and honest witnesses whose evidence can be relied upon. Their version is credible and probable. Nkopane

also corroborated the evidence of Sefatsa with regard to the arrest of the plaintiff. His evidence in this regard ought to be accepted.

28. The plaintiff and his witnesses were not impressive. When being asked a question during cross-examination, in particular, the plaintiff and Mphuthi were uncomfortable. Mmaphuthi appeared not confident of the version she was to present to court. The evidence of the plaintiff and Mphuthi was full of contradictions and inconsistencies. Their version seems highly improbable that the police officers would have arrested and assaulted the plaintiff merely because he thought he was smart. Further, their evidence is improbable in view of the concessions made by the plaintiff. Plaintiff seemed to tailor his evidence to the defendant's witnesses' evidence particularly since he was present in court during the defence case. According to Sefatsa and Mamokete, the police did not assault the plaintiff in the manner he alleges. Their evidence is that when the plaintiff became obstructive, the police tried to restrain and arrest him, but he resisted. This led to the police using some force to take him to the police vehicle.

29. I am also not convinced that the plaintiff was assaulted at the police station. Bearing in mind the manner in which he alleges he was assaulted and the injuries allegedly sustained, it is highly unlikely that his legal representative, Hlatshwayo and for that matter the presiding officer at his first court appearance would not have noticed his injuries. The plaintiff's evidence with regard to the assault falls to be rejected as false.

30. On probabilities, I am satisfied that the defendant's version as to the events leading to the arrest and detention of the plaintiff is more probable and should be accepted. With regard to the alleged assault I am of the view that the plaintiff has not proven on a balance of probabilities that the assault actually took place.

31. I also found Hlatshwayo' to be a credible witness. His evidence that he was not opposed to the plaintiff being granted bail and had actually set bail at R200.00, should be accepted. Once the docket was sent to the prosecutor, it was not Hlatshwayo's call whether the plaintiff should be granted bail or whether he should be prosecuted. According to Hlatshwayo, the proposed bail amount was reflected in the docket and it was up to the State prosecutor to act on it. I am therefore satisfied that the plaintiff has shown not sufficient cause why the defendant should be held liable for malicious prosecution.

32. Accordingly I make the following order:

'The plaintiff's action on all three claims is dismissed with costs.'

A handwritten signature in black ink, consisting of a stylized 'N' and 'P' followed by a surname, enclosed within a large, loopy oval shape.

N P Mngqibisa-Thusi

Judge of the High Court

Appearances:

For Plaintiff: Adv Zietsman

Instructed by: Loubser Van der Walt Inc.

For Defendant: Adv Mangolele

Instructed by: State Attorney