



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

NOT REPORTABLE
Case No: 458/2010

In the matter between:

NHLAKANIPHO PHILANI KHUMALO

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

Gorven J:

[1] On 13 November 2009, at about 23h30, the police attended to a complaint of disturbing the peace at a residential home occupied as communal lodgings. The members of the Berea police station had requested the assistance of the Public Order Policing Unit (the Unit). On their arrival, loud music was emanating from the premises. After the police had intervened, three people were arrested and taken to the Berea police station and some sound equipment was taken as an exhibit. One of those arrested was the plaintiff who was arrested by Sergeant Pitt of the Unit. The latter preferred charges against the plaintiff, one of which was

that he had obstructed the course of justice. Two of them were released on bail after being charged at the Berea police station. The plaintiff was taken from there to CR Swart Square, held overnight, returned to the Berea police station the following morning and released on bail. The charges against him were not pursued.

[2] The plaintiff claimed damages arising from the incident in the sum of R200 200.00 made up as follows:

a.	General damages for past pain and shock, deprivation of his liberty, impairment of his dignity and self-esteem, assault and contumelia	R100 000.00
b.	Malicious arrest, detention and prosecution	R100 000.00
c.	Past medical expenses	R 200.00
	TOTAL	<u>R200 200.00</u>

[3] Two entirely different stories emerged as to the events relating to the arrest, with virtually no intersection between them. The version of the defendant, who began leading evidence, was testified to by Sgt Pitt. Another police member gave evidence but this related largely to formal evidence of the music equipment being entered into the exhibit register and the like. He could add nothing to the circumstances of the arrest of the plaintiff.

[4] Sgt Pitt said that, on his arrival, many people were milling around the street and excessively loud music was being played. They entered the premises and requested the Disc Jockey to switch off the music. They also requested the partygoers to disperse. The plaintiff, however, intervened, using a barrage of abuse, including calling the police 'pigs' and inciting the crowd to carry on partying and not to disperse. The plaintiff was told not to interfere and the police

went to switch off the music themselves and close the party down but the plaintiff interfered and pushed Sgt Pitt. The latter warned him that if he continued, he would be arrested but the plaintiff continued to push him. Sgt Pitt then informed him that he was being placed under arrest whereupon the plaintiff turned tail and ran out of the back door of the house into the back yard. Sgt Pitt followed and tackled him, causing him to fall onto the grass. The plaintiff then started fighting with Sgt Pitt and, with assistance from other police members, the plaintiff was handcuffed. He was then placed in a van from the Berea police station and taken to that station which was about 100 metres away. There Sgt Pitt communicated his constitutional rights to him, made a statement and charged him. Sgt Pitt then left him at that police station and had nothing more to do with him.

[5] The plaintiff's version was that he and a friend went to the property in question at about 19h00 that evening but, after a short while, he left and visited his girlfriend. He returned later and found police vehicles outside and police members in the lounge where they were disconnecting the speakers from the sound system and arresting the owner of the sound equipment. They were wearing bullet proof jackets and carrying AK47 weapons. The owner was pleading with the police to consider making other arrangements but his pleas were falling on deaf ears. The plaintiff then intervened and asked the police what was going on. They did not reply and just carried on. He told the police that what they were doing did not look right. One of the police said that it appeared that the plaintiff was a big mouth. He told the police not to call him a big mouth; he was asking a simple question as to what was going on. Sgt Pitt then pushed him with a speaker that he was carrying at the time. At this stage another police member struck him a backhanded blow on his upper lip.

[6] The plaintiff then raised his voice and took out his cellphone, telling the police that he was recording them and daring them to hit him again whilst he was

recording the incident. The police just continued taking out the equipment but one of them told the plaintiff to put the cellphone away. He retorted that, if they were doing things that were above board, they would not fear him recording the events. The police then turned around and advanced towards the plaintiff who retreated and began dialling his father's number. This prompted Sgt Pitt to grab his hand and push him out of the back door into the back yard. When the plaintiff stood at bay with his back to the property wall, the other police gathered around him in a semi-circle while Sgt Pitt tripped him, dived on him and started strangling him from behind while the two of them were on the ground. He tried to dislodge the grip but it tightened and he feigned unconsciousness causing Sgt Pitt to relax his grip. When he tried to escape, Sgt Pitt again tightened his grip until the plaintiff lost consciousness. The next thing he knew was that he was being kicked and police were telling him to wake up. He could not see who or how many were kicking him. He was pulled to his feet and taken towards the kitchen door, at which point a police member attempted to spray him with pepper spray.

[7] He was then taken to a police vehicle. En route to the police vehicle, a friend tried to intercede on behalf of the plaintiff and he was also arrested. The plaintiff was placed in the police vehicle with this friend, the two of them joining the owner of the music equipment who was already in the vehicle. The journey to the police station was characterised by fast driving and hard braking, causing the occupants of the van to be thrown around. At the police station the other two apologised and were released on bail but the plaintiff did not think he had done anything wrong so refused to apologise. Other friends asked why the plaintiff was not being released and were told that it was because he was a big mouth. After Sgt Pitt left, the plaintiff was taken to CR Swart police station where he spent the night. He realised that no-one knew where he was being kept and raised this predicament with a police member the following morning. That member phoned his father and thereafter his aunt after which the plaintiff was taken back

to the Berea police station. His aunt arranged bail for him and he was released at about 07h00.

[8] The evidence of the plaintiff concerning the arrest and assault is fraught with inconsistencies. In the first place, only the very bare bones of his version were put to Sgt Pitt. It was not put to him that he strangled the plaintiff, let alone twice. Although it was put to him that the plaintiff was pepper sprayed and became unconscious, it was not put to him that his strangulation of the plaintiff caused him to become unconscious. The implication was that the application of pepper spray caused this. No detail was given as to when or where the pepper spray was applied. No mention was made that the other two who were arrested on the scene had apologised at the police station or that he had been called a big mouth twice. It was put to Sgt Pitt that it was he who had applied pepper spray but the plaintiff's evidence was that it was not Sgt Pitt but a police member whom he could not identify. It was put to Sgt Pitt that the plaintiff was assaulted by four police members but this was not the evidence of the plaintiff, who said there were six members of police involved. It was not put to Sgt Pitt that the plaintiff was kicked. It was not put to Sgt Pitt that he had been carrying a speaker and had pushed the plaintiff with the speaker. After the plaintiff was recalled to give evidence on the issue of quantum, he gave a different version still. He testified that he, an unidentified policeman and Sgt Pitt were leaving the premises when the policeman walking in front of him turned around, swung his arm and hit him on the lip. Sgt Pitt, who was walking behind him, then struck him on his back with a speaker. He also said that, after he had taken out his cellphone and begun videoing what the police were doing, one of them grabbed his arm and removed the cellphone. This was entirely new evidence. In addition, he testified that his arm was injured when, after entering the police vehicle, he had indicated that the handcuff was too tight, the police undertook to loosen it but in fact tightened it so that it caused the injury. None of this was put to either of the

police witnesses called by the defendant. The evidence of Sgt Pitt that the Berea police were the ones who handled the equipment and that he had nothing to do with it was not challenged but was contradicted by the plaintiff during the latter's evidence.

[9] The evidence of the plaintiff had other difficulties. He said that when he arrived in the lounge, the police members were all carrying AK 47 firearms but, in the same breath, he said that Sgt Pitt was carrying a speaker. He did not explain how this could be possible. Also, the owner of the equipment was pleading with the police not to take the equipment but, when asked in cross examination whether others were present to witness the assault, he said that all the others had left the house. The plaintiff also rambled on despite being asked on numerous occasions to speak slowly in short sentences. Even taking into account the trauma he would have experienced if events had unfolded as he testified, one would have expected more clarity on at least some of these matters. There are further aspects in which the evidence of the plaintiff fell short but the above aspects suffice to show that he was an unreliable witness.

[10] In contrast to the evidence of the plaintiff, that of Sgt Pitt was clear and satisfactory. He conceded that he did not explain the plaintiff's rights to him at the time of his arrest. He said that this could not be done with the very loud music at the property and that he did not deem it safe with the inflammatory situation and the plaintiff's incitement of the crowds. He said that he knew that the police station was a mere 100 metres away where it could be done in safety. The picture painted was one of a late night party where the partygoers did not want to accede to the request of the police to turn off the music. It seems almost incomprehensible that, absent other motivations, the police would go so far as to confiscate the music equipment if the partygoers were compliant. The overwhelming probability is that the music continued unabated and at a high

decibel level until disconnected and that the plaintiff interfered with the police in the execution of their duty. Sgt Pitt answered questions directly, kept to the point and made concessions where these were appropriate. His evidence had the ring of truth and his demeanour was excellent.

[11] The onus is on the defendant to show that the arrest and detention was lawful.¹ The onus to show that an assault took place is on the plaintiff. In my view the evidence of the defendant as to disputed events should be accepted as being more probable than that of the plaintiff for the reasons set out above.

[12] Sections 40(1)(a) and (j) of the Criminal Procedure Act 51 of 1977 provide:

‘(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

...

(j) who wilfully obstructs him in the execution of his duty’.

The lawfulness or otherwise of the arrest is resolved by which version is accepted. If the evidence of Sgt Pitt is accepted, the plaintiff wilfully obstructed him in the execution of his duty and, in addition, committed other offences in his presence. I have already indicated why I accept the evidence of Sgt Pitt rather than that of the plaintiff. This brings the arrest within the ambit of s 40(1)(a) and (j). It was submitted for the plaintiff that measures short of arrest would have been equally effective in bringing the plaintiff to court. In the light of the evidence of the defendant, that is not the case. It has in any event been held that, commendable as it may be to use alternative measures to obtain the attendance of a suspect at court, if an arrest is made in terms of s 40(1)(a) rather than using an alternative, it does not render the arrest or subsequent detention unlawful.² That

¹ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) paras 24 and 25; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 14.

² *National Commissioner of Police & another v Coetzee* 2013 (1) SACR 358 (SCA) para 13.

being the case, the defendant discharged the onus on that issue. The arrest was therefore a lawful one.

[13] For the same evidential reasons, the plaintiff failed to discharge the onus to prove that an assault took place. It is clear that force was used to effect the arrest and, on the facts, it is clear that the force used was reasonable and not excessive. As regards the evidence of the plaintiff that the tightening of the handcuffs, done after he was in the police van caused the injury to his right forearm, this, if found to be correct, would mean that that force was not used in order to effect an arrest and amounted to an assault. However, that version was not put to the two police witnesses. In addition, the plaintiff did not say that he had observed his wrists at the time the handcuffs were tightened. He cannot, therefore, say when the injury occurred. On the version accepted above, this most probably took place while the handcuffs were being applied at the time he was resisting arrest. In my view the plaintiff did not prove that an assault took place.

[14] This leaves the question of unlawful detention. The defendant admitted formally that the plaintiff was detained from the time of his arrest until the following morning. No further evidence was led by the defendant. The plaintiff was deprived of his liberty for that period. In *Minister of Law and Order & others v Hurley & another*,³ the following was said of arrest:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.’

This applies equally to detention.

[15] The question is whether the detention was lawful. No evidence was led by the defendant as to why it was necessary to detain him after he had been charged

³ *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A) at 589

at the Berea police station. The plaintiff gave uncontested and uncontroversial evidence of what happened after he was charged at the Berea police station. He was taken to CR Swart police station and searched. His possessions were removed and he was taken to a room where others were waiting. After about 11 or 12 people had collected in that room, they were walked, via a storeroom where they were each given a blanket, to an empty cell with a concrete floor where they spent the night. He was scared because he knew no-one and one of the persons detained with him had tattoos and made threatening noises about prison gangs. His friends had been told at the Berea police station that he would be kept there overnight and he was concerned that they would not be able to trace him.

[16] The crisp question is why the plaintiff was detained overnight at all. His companions had been released on bail by the police. He was released on bail by the police the following morning without any indication that circumstances had changed. It is not as if he could have continued making trouble since the evidence was clear that the music equipment had been removed from the premises where the party had been held and the people had dispersed. In those circumstances, the defendant cannot be said to have discharged the onus to prove that his detention was lawful. This was conceded by the defendant's counsel in argument. In my view, the concession was correct.

[17] The question, then, is what damages should be awarded for the unlawful detention. Previous awards were reviewed in *Minister of Safety and Security v Seymour*,⁴ which concluded that the only discernable pattern was that courts are not extravagant in such awards.⁵ The facts of each case must be evaluated on

⁴*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA).

⁵ Para 20.

their own merits because few cases are directly comparable. The facts in *Seymour* were summarised in *Woji v The Minister of Police*,⁶ in the following terms:

‘In *Seymour*, the respondent was detained for five days at a police station, during which time he had free access to his family and medical advisor. He suffered no degradation beyond that which was inherent in being arrested and detained. After the first period of 24 hours the remainder of the detention was in a hospital bed at the Rand Clinic. This court reduced the award of damages from R500 000 to R90 000.’

[18] The present matter can also be said to have been unremarkable, save for the degradation inherent in being detained. The detention endured seven or eight hours overnight. It was clearly traumatic for the plaintiff. Taking all of the above factors into account, it seems to me that an award of R50 000 is appropriate. In the light of the measure of damages, it is clear, as was conceded by counsel for the plaintiff, that costs should be limited to the magistrates’ court scale.

[19] No prosecution took place so that claim must fail. In addition, although the plaintiff gave evidence that he consulted a doctor, he did so for purposes of lodging the claim and not for medical treatment. In any event, he testified that he did not incur any expenses so the claim for R200 was not proved.

[20] The summons was served on 10 March 2011. This is the date from which interest begins to run. The prescribed rate of interest was decreased from 15.5 per cent per annum to 9 per cent per annum as from 1 August 2014.⁷ The rate prescribed at the time when interest begins to run (ie. 15.5 per cent) governs the calculation of interest and does not vary if the prescribed rate is adjusted in the interim.⁸

⁶ *Woji v The Minister of Police* (92/201’2) [2014] ZASCA 108 (20 August 2014) para 39.

⁷ Government Gazette No 37831 dated 18 July 2014.

⁸ *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 300G-302A.

[21] Mention needs to be made about the manner in which the trial was conducted. Witnesses were not available at the time they were needed and admissions were not properly formulated, with the result that one of the sets of admissions had to be revisited on three occasions before it was correctly formulated. This is because the formulation in the first two iterations was so unclear that the parties could not agree on precisely what had supposedly been admitted. In addition, it was indicated that the plaintiff would rely on a doctor's report covered by an affidavit which could be handed in by consent. When I enquired as to the attitude of the defendant, this was confirmed but, when I asked what the status of these documents would be, it became clear that the report was contested. This necessitated an adjournment to procure his evidence. The adjournment turned out to be a lengthy one as a result of my duties having taken me away from the court concerned for over a year. On resumption, the plaintiff did not call the doctor. Had the matter been properly conducted and the provisions of rule 37 complied with, the admissions, including those relating to the doctor's report, could have been formulated clearly and the parties would have been able to assess precisely what evidence was needed.

Judgment is granted in favour of the plaintiff for:

- 1 Payment of the sum of R50 000.
- 2 Interest on the said sum of R50 000 at the rate of 15.5% per annum from 10 March 2011 to date of payment.
- 3 Costs of suit, including those reserved on 30 January 2014, on the magistrates' court scale, including the costs of counsel and preparation.

GORVEN J

DATE OF HEARING: 29 & 30 January 2014; 3 & 4 June 2015.

DATE OF JUDGMENT: 4 June 2015.

FOR THE PLAINTIFF: A Matlamela (on 29 & 30 January 2014) and
ME Mbambo (on 3 and 4 June 2015) instructed
by CHILIZA DLAMINI ATTORNEYS.

FOR THE DEFENDANTS: SP Khumalo instructed by the STATE
ATTORNEY (KZN).