



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: CA&R 76/13

Heard On: 18/08/2014

Delivered: 31/10/2014

In the matter between:

FERNANDO THEODORE KIVEDO Appellant/Plaintiff

AND

MINISTER OF SAFETY First Respondent/Defendant

& SECURITY

DANZEL LANSBERG Second Respondent/Defendant

Coram: Lacock J et Pakati J

JUDGMENT ON APPEAL

PAKATI J

- [1] The appellant, Mr Fernando Theodore Kivedo, was the plaintiff in an action in which he sues for damages in the amount of R100 000.00 against the defendant/respondent, the Minister of Safety and Security of

the Republic of South Africa (“the Minister”), for alleged assault, unlawful arrest and detention. In para 9 of the Particulars of Claim the plaintiff/appellant pleaded as follows:

“As a result of the unlawful assault, arrest and detention, the plaintiff suffered grave distress and inconveniences, was severely humiliated and was gravely injured in his dignity and suffered general damages in the amount of R100 000.00 (One Hundred Thousand Rand).”

- [2] At the conclusion of the trial the Magistrate, Ms M Qomoyi, made the following order:

“The Plaintiff’s claim against the 1st and 2nd Defendant for unlawful arrest, unlawful detention and assault is dismissed with costs.”

- [3] Aggrieved by the aforesaid order the plaintiff appealed to this Court on the following grounds:

- “1. The learned Magistrate erred in dismissing the Plaintiff’s claim with costs.*
- 2. The learned Magistrate erred in finding that the Defendant’s witnesses corroborated each other in material respects.*
- 3. The learned Magistrate erred in finding that the evidence of Kola and Lansberg was uncontroverted.*
- 4. The Magistrate erred in finding that the Plaintiff swore at the police officers and further pointed fingers at them.*
- 5. The Magistrate erred in finding that the Plaintiff acted riotously aggressively and pointed fingers.*
- 6. The learned Magistrate erred in finding that the contradictions between the testimonies of the defendant’s witnesses were not material.*

7. *The learned Magistrate erred in finding that the situation was confrontational and some of them [the protagonists] were carrying beer bottles and stones.*
8. *The Magistrate erred in finding that the behaviour of the plaintiff led to his arrest.*
9. *The Magistrate erred in finding that it was not surprising that the witnesses' recollection of events is not always perfect.*
10. *The Magistrate erred in finding that the mistake [in] names of the plaintiff, the time of the arrest and detention etc are unimportant.*
11. *The Magistrate erred in failing to make a negative credibility finding against the defendant's witnesses.*
12. *The Magistrate erred in totally disregarding the evidence of the Plaintiff.*
13. *The Magistrate erred in finding that Kola honestly and reasonably came to the conclusion that a crime was being committed by the plaintiff and others in his presence given the plaintiff's conduct.*
14. *The Magistrate erred in finding that there is no evidence to suggest that the reason for the arrest was other than for the lawful purpose of charging the plaintiff.*
15. *The Magistrate further erred in finding that the further detention of the plaintiff for a period of 4 (four) hours was to calm him down.*
16. *The Magistrate erred in finding that the defendants acted within the ambit section 40(1) (a) and 40(1) (f) of the Criminal Procedure Act [Act 51 of 1977].*
17. *The Magistrate erred in not believing the testimony of the Plaintiff.*
18. *The Magistrate erred in finding that it did not make sense for the plaintiff to be the only one to be assaulted.*

19. *The Magistrate erred in finding that the possibility of sustaining the injuries during the fight cannot be ruled out.*
20. *The Magistrate erred in emphasizing that the plaintiff was a single witness.*
21. *The Magistrate erred in finding that the plaintiff ought to have called witnesses to support him.*
22. *The Magistrate erred in finding that the plaintiff failed to prove its case on a balance of probability that he was [assaulted] by the police.”*

[4] The defendant admitted the arrest and detention but pleaded that they were lawful. In paras 2 and 3 of the plea it is stated:

“AD PARAGRAPH 5 THEREOF

...The defendants will aver that [they], together with other members, were informed of a fight in the street by three unknown men.

It later transpired that [the] Plaintiff was one of the three guys. Second Defendant and other police arrested all three guys for they were riotously behaving and a report received was [that] they had already damaged by throwing stones at an ambulance driven by one Mrs Petronella Margaretha Fourie and OB 1594/08/2010 was later opened to that effect.

Further Second Defendant will aver that at the time of arrest [the] Plaintiff had some bruises at the time which might be as a result of the fight with other guys. [The] Plaintiff is put to proof of his allegation.

AD PARAGRAPH 6 THEREOF

3. The Second Defendant admits that [the] Plaintiff was arrested without any warrant. [The] Defendants will further aver that they lawfully arrested [the] Plaintiff for he committed an offence in their presence as they did not stop to throw stones, swearing at each other and the police.

Second Defendant will further aver that, as a result of the report as stated above in paragraph 2, there was reasonable suspicion that [the] Plaintiff and other two guys have committed an offence referred to in Schedule 1. In the premise the arrest was lawful.”

The defendant denied the assault on the plaintiff.

- [5] Based on the admission quoted above, as pleaded by the Minister, that his employees arrested and detained the plaintiff the duty to begin to adduce evidence and the *onus* to justify such conduct rested upon the Minister. In **MINISTER OF LAW AND ORDER v DEMPSEY 1988 (3) SA 19 (A)** at 38B-C Hefer JA stated:

“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.”

- [6] **Consequently Mr Boco, on behalf of the Minister, took the first turn by adducing the evidence of constables Aubrey Kola and Danzel Lansberg of the South African Police Services (SAPS).** The ground of Appeal in para 22 reads as follows:

*“22. The Magistrate erred in finding that the plaintiff failed to prove its case on a balance of probability that he was **arrested by the police.**”*

- [7] **Relative to this ground the Magistrate remarked in the following manner in her judgment:**

“For the reasons given above, the plaintiff did not succeed in proving on a balance of probabilities that he was assaulted by the police.”

This is clearly an error on the part of the plaintiff because the Magistrate wrote “assaulted” and not “arrested” as it appears on the Notice of

Appeal. The Magistrate therefore did not commit a misdirection in this regard.

- [8] On 27 August 2010 constables Kola and Rasekoai, members of the Flying Squad, were doing patrol duties in Phakamile Mabija Road. They were stopped and informed by a certain towing service man that there was a gang-fight in progress at the corner of Phakamile Mabija Road and Mathews Street. They immediately proceeded to the scene where they noticed a Netcare 911 ambulance which was damaged. Ms Petronella Fourie, its driver, was at the scene. On noticing the police some people fled from the scene and the fighting stopped. Consts Kola and Rasekoai approached Const Lansberg who was already at the scene. Const Lansberg was surrounded by the plaintiff and two other males, later identified as Mr Theomur “Pidoi” Cupido, the plaintiff’s cousin and Mr Dimitri Kochling. Const Kola enquired from them what was happening. They were shouting, swearing and were armed with stones. One of them was armed with a beer bottle. The plaintiff complained that they had been beaten up but the police arrested them instead. Because the situation was getting out of hand the police decided to arrest the plaintiff, Cupido and Kochling with the assistance of W/O Oliphant as the arrestees became aggressive. They were nevertheless arrested for public violence and transported to the police station.
- [9] Upon arrival at the police station Const Kola charged them with the offence of causing a nuisance in contravention of Reg 15(e) of the Sol Plaatjie Municipal Law Enforcement By-law, 1 of 2006, which stipulates that:

“15(e) No person shall, in, on or at a public place-

[F]ight, threaten anyone with violence or disturb other persons by shouting or arguing.”

- [10] Const Kola in an attempt to justify the police action testified that they acted in terms of s 40(1) (a) of the Criminal Procedure Act, 51 of 1977 (“the CPA”) in that the plaintiff committed the alleged offence in their presence. It is common cause the detention lasted four hours.

10.1 S40 (1) (a) of the CPA provides that:

“40 Arrest by peace officer without a warrant

(1) A peace officer may without a warrant arrest any person –

(a) Who commits or attempts to commit any offence in his presence.”

10.2 S40 (1) (f) of the CPA referred to in para 16 of the plaintiff’s/appellant’s grounds of Appeal reads:

“40(1) (f) A peace officer may without warrant arrest any person- who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence.”

- [11] Const Kola disputed the assault on the plaintiff either by himself or any other police officer in his presence. He explained that in terms of the quoted by-law their practise was to detain offenders for four hours with the intention of calming them down. He gave the plaintiff a J534 (Notice to appear in court) which they normally issue to arrestees to enable them to pay an admission of guilt fine on the strength thereof.

- [12] Const Kola admitted that the plaintiff had some fresh bruises on his face which he noticed when he detained him. He stated that the said injuries were sustained during their street fight. He was evasive as to who of the

three suspects bore the injuries. He was subsequently uncertain if the plaintiff was one of those that sustained injuries. When asked under cross-examination to explain why he testified earlier that the injuries were sustained during the fight he said:

“Ja I found them fighting, so I noticed at the cells – by the time I put him in the van, I’ve never looked at them, but I’ve never saw – I’ve never noticed that they have bruises, I’ve noticed at the cell.”

When asked who was fighting when he arrived at the scene he stated:

“As I say those three, the others ran away, there’s the three left, then those three were shouting and what, what, what, what, then we managed to take them to the cells, that’s why I noticed there’s a – some of them there is blood and bruises in their faces.”

- [13] Const Lansberg testified that he was doing crime prevention duties in the company of W/O Oliphant. He corroborated the evidence of Const Kola that the plaintiff was involved in a street fight. He added that when he and W/O Oliphant approached the scene the crowd dispersed. As Const Lansberg was busy inspecting the damage to the ambulance the factions resumed the fight. He got into his vehicle and drove in between them, separating them. He noticed three men running towards him. He brought the vehicle to a halt and ordered the fugitives to stop. The plaintiff was one of them. He asked why they were fleeing. The plaintiff insulted him and pointed a finger at him. An argument ensued between the plaintiff and the members of the Flying Squad (Kola and Rasekoai). The plaintiff, Kochling and Cupido were then arrested.

That concluded the case for the defendant.

- [14] The plaintiff, an employee at the Deeds Office, Kimberley, testified that on 27 August 2010 at about 23h30 he was at home at No. 21 Lawrence Street, Kimberley, in bed with his girlfriend. They were woken up by the noise of people screaming outside, calling the name of his brother, Seun. He went to investigate. He saw Seun picking up stones and chased after two men. The plaintiff and his cousin, Cupido, followed Seun. He reprimanded Seun to stop the fight and go home. It is at that stage that a police vehicle and an ER24 ambulance arrived. Two police officers alighted. Const Lansberg grabbed him by his clothes on his chest and bumped him against the police vehicle, slapped him with an open hand and threw him into the back of the police van. Cupido and Kochling were also arrested.
- [15] The plaintiff testified that en-route to the police station he noticed a vehicle belonging to the Flying Squad that had stopped at the robot. He reported to those officers that they were unlawfully arrested and about to be detained. He threatened to report the matter to the Director of Public Prosecutions. Const Lansberg drove to the back of the police station. As the plaintiff alighted from the police vehicle Const Lansberg slapped him again with an open hand. Two other police officers approached him. One of them struck him with a fist and slapped him four times. He ran about three metres but was caught, thrown to the ground and kicked him with booted feet several times in his face. He begged him to stop. Const Lansberg intervened. He did not know the name of the police officer who assaulted him. He knew Const Lansberg because he wore a name tag. He was thereafter detained in the police cells for four or five hours and released.

[16] At home he took photos (Exhibit “A1”-“A12”) of his injuries using his cell phone. He sustained bruises on his face, on the left side of his forehead, on his cheek and on his head. He had scratch marks on his nose and between his eyes. His mouth was swollen and he had a deep bruise next to the left ear. The plaintiff received medical attention by Dr LW Venter. The doctor did not testify but the medical report, the J88 was admitted by consent as Exhibit “B” and records as follows:

“Skaafwonde aan voorkop, neus, temporale area en linkerwang; en dan...(onhoorbaar) tussenribspiere, regter, sonder enige merke”.

The doctor’s conclusion was noted as follows:

“Beserings pas in met trap of skopmerke in die gesig.”

[17] The plaintiff disputed being part of the people who fought in the street or acting violently or aggressively against the police officers. He stated that he was unarmed and played no part in the damage to the ambulance. He also disputed reporting to the police: *“Ons is gemoer en julle kom net hier, julle kom arresteer ons vir niks.”* According to him he was arrested by Const Lansberg and did not resist arrest nor argue with him at any stage. No witness was called to support the plaintiff.

[18] It is common cause that the plaintiff never appeared in court on any charges nor did he pay any admission of guilt fine in terms of s 57 of the CPA. This is the case notwithstanding the fact that the J534 Notice in relevant part required him to pay the admission of guilt fine to the Clerk of the Magistrates Court having jurisdiction in respect of the offence in question or at any police station within the area of jurisdiction of the said court on or before 06 September 2010.

That concluded the plaintiff’s case pertaining to the assault.

- [19] Section 12(1) (a) (b) and (c) of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; and to be free from all forms of violence from either public or private sources. Kriegler J in **EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S v WALTERS 2002 (2) SACR 105 (CC)** at 123 para 30 enunciated:

“[30] ...The arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity. Where in addition, it is accompanied by the use of force, the impairment of these rights is all the greater, and, ultimately, the use of potentially lethal force jeopardises the most important of all individual rights, the right to life itself.”

- [20] Regarding the arrest, Consts Kola and Lansberg corroborated each other that there was a factional gang-fight in the street. Upon their arrival the fighters dispersed and the fight stopped. Const Lansberg said:

“Ons was nog besig, om die skade [to the ambulance] te kyk, toe wat ek skielik hoor die klippe en die vloekery, dit lyk my die persone het nou weer bymekaar gekom, hulle het weer mekaar heen en weergevloek. Die persone was, as ek die Engelse woord gebruik, was so determined gewees, hulle het nie ontsag gehad vir die polisie terwyl ons daar gestaan het nie. Ek het toe weer in my voertuig geklim, ge-reverse en probeer tussen die twee groepe parkeer. Die groep aan my regterkant het toe weer in die rigting van Kim-By Nitght en Shell en daai garage, Boncho gehardloop.”

This was not disputed by the plaintiff. Const Kola went on to say:

“From a distance I just saw there were too many of them and you can just see that they were handling each other, you can see other one throws, so it was fight like that.”

The plaintiff did not take cognisance of the police because he continued to shout, hurl insults and pointed fingers at them. Everyone else ran away but for the plaintiff and the two others. In my view the police officers were justified in apprehending the plaintiff.

- [21] Const Kola explained that it is their practise to arrest offenders for causing nuisance for four hours. Mr Kgotlagomang, for the appellant, submitted that when the plaintiff was detained there was no intention to bring him to court. Mr Khokho, for the Minister, conceded this but submitted that the intention was to calm the plaintiff down. In **ZEALAND v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2008 (2) SACR 1 (CC)** at paras 24 and 25 Langa CJ enunciated:

“[24] There is another, more important reason why this court should rule in the applicant’s favour. The Constitution enshrines the right to freedom and security of the 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 in this case 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.”

- [22] The question that arises is whether the plaintiff was deprived of freedom. In my view, he was. He was issued with a J534 (a Written Notice to Appear in Court (section 56 of the CPA) but was nevertheless detained. There is no evidence that he was violent en-route to the charge office and at the charge office. Const Kola conceded that *“At the police station they were not such a loud noise so that I get a chance to talk, to tell them what I’ve arrested them for, for what.”* There was no reason to calm him down as alleged by Const Kola. S 56 (1) and (2) of the CPA provides:

“56 Written notice as method of securing attendance of accused in magistrate’s court

(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate’s court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall –*

- (a) Specify the name, the residential address and the occupation or status of the accused;*
- (b) Call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer to a charge of having committed the offence in question;*
- (c) Contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that*

he may pay a stipulated fine in respect thereof without appearing in court; and

(d) Contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

(e) If the accused is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody. ”

The Magistrate therefore misdirected herself when she found that the detention of the plaintiff was lawful. She added:

“There is moreover no evidence to suggest that the reason for the arrest was other than for the lawful purpose of charging the plaintiff, hence the issuing of the J534. The 4 hour detention was to calm them down.”

His detention was therefore unreasonable and infringed his Constitutional rights under s12 (1) (a).

- [23] In his Particulars of Claim the plaintiff alleged that he was assaulted by the second defendant (Const Lansberg) in the presence of other unknown officers. Const Lansberg denied having anything to do with the assault on the plaintiff. When asked whether it was necessary to arrest the plaintiff after he had conducted himself as described. He said: *“I did not arrest the person”*. He added: *“For me there was no need Your Worship.”* Const Lansberg stated that when he reached the charge office he and W/O Oliphant took Kochling and Cupido inside. The plaintiff came in after about five to ten minutes later with Constables Kola and Rasekoai. When Const Lansberg noticed the plaintiff for the first time at the charge office he said:

“Op daardie oomblik was dit nou eerste keer wat ek nou beserings in sy gesig – ek weet nou nie, dis nou nie blou oë of bloed mond nie, maar daar was ‘n paar skrapies gewees. Ek kan nie nou presies onthou waar in sy gesig nie.”

[24] The plaintiff testified as follows:

“The one grabbed me in front of the chest, threw me against the Police vehicle – after he threw me against the Police vehicle, he took me from the side of the vehicle to the back of the vehicle. That person I can recall now was Constable Lansberg. I can remember his face clearly. He took me to the back of the vehicle...(interjection).

...The reason why I knew [who] that was, at the Police Station I tried to make sure now who is who of the people that assaulted me and I could see on his name tag that his name was Lansberg. I could put his face to his name.”

[25] Mr Kgotlagomang conceded that the abovementioned version was never put to Const Lansberg during cross-examination. He instead put the following questions to him:

Q. “If the plaintiff at the scene did not have any ...(inaudible) and at all material times he was in your presence, for the five to ten minutes when you did not see him, what could have caused - between for that five to ten minutes, what could have caused the injuries to his face? === Edlagbare, ek was mos nou nie teenwoordig gewees nie maar ek – hy het nie beserings gehad toe ek hom sien nie en toe ek geloop het, het hy nie beserings gehad nie. En toe ek hom in die selle sien, het hy beserings gehad, so.

Q. You will agree with me that these injuries he ought to have sustained during this five to ten minutes when you were away from him? === Hy

het nie beserings gehad toe ek selle toe gaan met – ek meen, my lede selle toe gaan nie. Ek het opgelet hy het beserings toe ek hom in die selle sien.

Q. Yes, but what I’m saying is during the five to ten minutes when he was not in your view, that’s the time that he ought to have sustained the injuries. === Dit moes gewees het.

Q. That’s the only logical conclusion. === Dit is so Edelagbare.

Q: Alright. Now if he was in the company of Rasekoai and Kola, those are the only people who must be ... (inaudible) the injuries, the cause of the injuries. Do you agree with me? === Korrek Edelagbare.”

Kola corroborated this evidence and said: “...Cupido and maybe Dimitri [Kochling] were with Lansberg in front of us, then I and Constable Rasekoai came along with one Kivedo.”

- [26] Though Const Kola was not sure whether he noticed the injuries on the plaintiff at the scene or at the cells or whether or not he was injured does not take this matter any further. What is important is that throughout the cross-examination by Mr Kgotlagomang of Kola he never put it to him that he assaulted the plaintiff. Mr Kgotlagomang put the following question to Kola:

“...[T]he plaintiff will say before this Court that on the 27th of August 2010 at approximately midnight near Lawrence Road, Kimberley, within the jurisdiction of the honourable Court, he was assaulted and arrested by Lansberg, alternatively by other members of the SA Police Services whose names and details are unknown to him, in the presence of other officers who are also unknown to him. What is your reaction thereto?”

[27] It was also never put to Const Lansberg that he was the one who assaulted the plaintiff because the plaintiff noticed his name tag and that is why he knew him. The Constitutional Court in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000 (1) SA 1 (CC)** at paras 61 and 63 it was held:

“[61] The institution of cross-examination not only constitutes as a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct.

...

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”

[28] The plaintiff bore an *onus* of establishing the assault claim. It must be borne in mind that there had been some fighting between the rival factions before the police arrived. It is probable that the plaintiff sustained the injuries at that stage and now conveniently substitutes the assault by his assailant for that of the police. I am satisfied that the plaintiff failed to discharge this *onus*. This claim cannot succeed.

On the matter of costs

[29] The principle relating to the issue of costs is that the awarding thereof is within the discretion of the court. The plaintiff has been substantially successful in litigation. In my view awarding him 75% of his legal costs would be fair and reasonable to both parties.

In the result, I make the following order.

1. The appeal by the appellant succeeds to the following extent:

The order of the court *a quo* is set aside and is replaced with the following:

“1. The detention of the plaintiff was unlawful.

The claim in respect of the unlawful arrest and the assault claim is dismissed.

The first defendant is ordered to pay 75% of the legal costs of the plaintiff.”

2. The matter is remitted to the trial Magistrate to deal with the aspect of quantum in terms of the Rules of Court.

3. The first defendant/respondent (the Minister of Safety and Security) is ordered to pay 75% of the appellant’s costs of appeal.

BM PAKATI
JUDGE

I concur

H LACOCK
JUDGE

On Behalf of the Appellant:
Instructed by:

MR KGOTLAGOMANG
TOWELL & GROENEWALDT ATTORNEYS

On Behalf of the Respondent:
Instructed by:

ADV KHOKHO
OFFICE OF THE STATE ATTORNEY

