

IN THE KWAZULU NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE: 7567/2007

In the matter between:

UGOCHUKUWU OKUDO

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

MOKGOHLOA J

[1] The plaintiff, Ugochukuwu Okudo, instituted action against the defendant, The Minister of Safety and Security, for damages suffered by him when he was arrested, assaulted, and detained by the police, who acted within the cause and scope of their employment with the defendant. The incident occurred on 30 July 2006 at Point Area in Durban. As a direct consequence of the police conduct, the plaintiff was prosecuted for dealing in drugs and these charges were subsequently withdrawn against him.

[2] The plaintiff testified that on Sunday, 30 July 2006, at around 11h15 he was walking along Gillespie Street in Point area. Whilst walking as aforesaid, he heard somebody whistle. He turned around and saw one Jabulani Ngcobo ('Ngcobo') who signalled to the plaintiff to stop. The plaintiff stopped and Ngcobo approached him. The plaintiff testified that he knows Ngcobo as a police officer attached to the Dog Unit in Durban. Ngcobo was wearing a full police uniform.

[3] Ngcobo approached the plaintiff and pushed him against the wall of a

building called ER Medical Centre. He started assaulting the plaintiff with open hands. At that time, a police vehicle came and the driver of that police vehicle alighted. The driver was known to the plaintiff as Tyson, who later during the trial introduced himself as Kelvin Shanmugan. The driver alighted from the vehicle and walked towards Ngcobo and the plaintiff. Ngcobo told the driver that the plaintiff who is an Nigerian has to be taught a lesson. Shanmugan and Ngcobo dragged the plaintiff and put him into the police vehicle. The plaintiff was made to sit on the front seat between Shanmugan and Ngcobo. Ngcobo continued to use vulgar words at the plaintiff and continued to assault him whilst they were still in the police vehicle. They drove to CR Swart Square, where the offices of the dog unit are situated. When they arrived at the CR Swart Square, Ngcobo and Shanmugan alighted from the vehicle and ordered the plaintiff to alight. As soon as the plaintiff alighted from the vehicle; Ngcobo handcuffed him. They then pushed the plaintiff into their office. Once inside the office, Ngcobo and Shanmugan took out a baseball bat and a wooden stick that looked like a leg of a table from the locker and started hitting the plaintiff using those weapons all over his body. The plaintiff tried to defend himself but could not as his hands were handcuffed. They continued to assault him until the plaintiff managed to run out of the office hoping that he would attract someone's attention and get help.

[4] Outside the office the plaintiff saw another police vehicle and asked the driver of that vehicle to assist him. Unfortunately the driver of that vehicle alighted from the vehicle and he started to kick the plaintiff who was on his knees pleading for help. He kicked him on his shoulders and stamped him to the ground. The other person who was in the passenger seat of the other police vehicle, also alighted from the vehicle. They pushed the plaintiff down and let the dogs out of the vehicle and instructed the dogs to attack him. At that stage the dogs approached him these two police officers pulled these dogs back with a leash. The plaintiff testified that he was scared.

[5] Ngcobo and Shanmugan came out of the office and took the plaintiff back into the office and asked him if he was ready for a second round. They continued to assault him and the other police officers from outside came inside the office and watched as Ngcobo and Shanmugan were assaulting the plaintiff. One of the police officers took out the teargas or pepper spray and sprayed it in the plaintiff's eyes. Ngcobo took out his gun and assaulted the plaintiff further with the butt of the gun. The plaintiff was further ordered to take off his trousers and his underwear and to turn around, from Ngcobo and Shanmugan. They made the plaintiff to bend down and took pictures of his butt and his penis. After the pictures were taken using the cellphone the police officers started watching those photos and laughed. Ngcobo told the plaintiff that he needed to make arrangements to pay them an amount of R5000.00 otherwise they would open a charge of possession of drugs against him. The plaintiff told them that he did not have money. Ngcobo brought a small silver briefcase and placed it on top of the table. He opened the briefcase and took out a plastic and there was some substance in that plastic. Ngcobo took out a pen and paper and thereafter he gave the plaintiff that paper, and the plaintiff realised from that paper that he was being charged with possession drugs. Ngcobo had actually searched the plaintiff and had removed some of the items, which included money, cellphone and his house keys

[6] The plaintiff was further put into the dog unit vehicle and he was transported to the Point Police Station. At the police station the plaintiff requested that Ngcobo hand him back his items and Ngcobo threw the plaintiff's cellphone at him. Another police officer took the plaintiff into the holding cells but the plaintiff pleaded and told the police officer that he needed to go and consult a doctor because he was feeling pains all over his body and that his arm was injured. The police officer did not want to listen to the plaintiff but he pulled him and put him into the police holding cells. The plaintiff screamed and pleaded to be taken to the doctor. After some time another police officer

came and that was when the plaintiff was taken to Addington Hospital. He was detained at Addington Hospital for a period of eight days and he was kept under police guard. On the day of his discharge from Addington Hospital he was kept at the Point police station over night and was taken to the Magistrate Court the following day where he was released on bail. On his second appearance at court the charges against him were withdrawn.

[7] The plaintiff stated that as a result of the charges being preferred against him and his subsequent appearance at the magistrate court, he engaged services of a lawyer and paid an amount of R1000.00 for the legal fees.

[8] Doctor R Moodley who treated the plaintiff at Addington Hospital also testified. He confirmed that on the 30 July 2006 at 15h20 he consulted with plaintiff and completed a J88 medical form. The J88 was handed in as an Exhibit. Dr Moodley recorded that the plaintiff informed him that he was assaulted by the police using the baseball bat and further complained of pains and swelling on various parts of his body including the left elbow, the left wrist, left thigh and right jaw.

[9] Doctor JR Domingo an orthopaedic surgeon testified that he consulted with the plaintiff and prepared a medico legal report in respect of the injuries that the plaintiff suffered. The medico legal report was handed in as an exhibit. In his report Dr Domingo recorded that he examined the plaintiff on 15 November 2007 and completed his report 26 November 2007. The summary of his report is that the plaintiff sustained a fracture on left elbow and left forearm as well as multiple tissue injuries. The forearm fracture was healed without any complications but the left elbow fracture has resulted in permanent loss of some movement. The loss of some movement according

to Dr Domingo will gradually increase as the plaintiff developed post traumatic arthritis of the elbow. Dr Domingo also testified that he relied on the medical report that he received from Addington Hospital.

Defendant's case

[10] Kelvin Shanmugan testified on behalf of the defendant. He is a warrant officer with the South African Police Service attached to the dog unit. He confirmed that on the 30 July 2006 he was in a company of Ngcobo and was patrolling within the Point area. He also confirmed that they were driving a police vehicle which is a sedan and that they had two kennels with at the back. He stated that while patrolling they noticed a black male who was walking along the Gillespie Road, and that this black male, upon noticing the police vehicle turned his path of direction and started walking in the opposite direction. This black male was to the plaintiff in this matter. Shanmugan confirmed that he was the driver of the police vehicle. According to him, he immediately pulled the vehicle off the road and Ngcobo alighted and they approached the plaintiff. They introduced themselves to the plaintiff as police officers. They were clad in their full police uniform and asked the plaintiff to put his hands up. Ngcobo searched the plaintiff who had a newspaper in his hand. Inside the newspaper was a white plastic wrap containing cocaine powder. They arrested the plaintiff and informed him of his constitutional rights. They handcuffed him and put him in the police vehicle and drove with him to the CR Swart building where their dog unit is situated. According to Shanmugan the reason they proceeded with the plaintiff to their offices was to compile their administrative documents relating to this case before they could detain the plaintiff at the Point Police Station. After completing the necessary documentation, Shanmugan and Ngcobo took the plaintiff to the police station where the plaintiff was detained. According to Shanmugan the cocaine that was found in possession of the plaintiff was left at the police station and it was recorded in the SAP13 and sealed in the forensic bag.

[11] Shanmugan denied that he or Ngcobo ever assaulted the plaintiff in

any way. He further denied that the plaintiff was ever assaulted in his presence. He stated when he left the plaintiff at the Point Police Station the plaintiff had no injuries. Shanmugan further denied having taken any pictures of the plaintiff at the CR Swart building. He further denied that Ngcobo demanded an amount of R5000.00 from the plaintiff. Shanmugan denied that they kept a baseball bat or wooden stick in their unit.

[12] It is not in dispute that the plaintiff was arrested, detained and that charges against him were subsequently withdrawn. It is further not in dispute that the plaintiff suffered injuries certain whilst in the police custody and that this led him to be taken to Addington Hospital where he was detained for eight days and also kept under police guard. What is in dispute is , who assaulted the plaintiff; whether Ngcobo and Shanmugan acted unlawfully in arresting and detaining the plaintiff; and whether Ngcobo and Shanmugan acted wrongfully and malicious in setting the law in motion by laying a charges of possession of drugs against the plaintiff.

Wrongful Arrest and Detention

[13] In terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act):

- “(1) A peace officer may without warrant arrest any person-.....
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody”

[14] In *Duncan v Minister of Law and Order 1986 (2) SA 805 (A)*, **Van Heerden JA** stated that in order to enjoy the protection of section 40(1)(b) of the Act, an arrestor must establish the following four requirements:

- (i) The arrestor must be a peace officer;
- (ii) He must entertain a suspicion;
- (iii) It must be a suspicion that the arrested committed an offence referred to in Schedule 1 of the Act;

(iv) The suspicion must rest on reasonable grounds (at 818 G-H).

[15] The requirement that the suspicion must rest on reasonable grounds, is objectively justifiable. The test to be applied is not whether a police officer believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. (*Duncan v Minister of Law and Order (supra)* at 814 D-E).

[16] *In casu*, Shanmugan's testimony is that he noticed the plaintiff walking along Gillespie Road. The plaintiff changed his direction and walked away from the police. According to Shanmugan, this made him form a suspicion which made him to stop the plaintiff and search him. The question therefore is can a reasonable police officer with 12 years experience arrest a person without a warrant only because that person changed his path of direction upon noticing the police?

I do not think that, this is reasonable suspicion. Furthermore Shanmugan contradicted himself in his testimony regarding who found the alleged cocaine on the plaintiff. He first stated that it was Ngcobo but later changed stating that it was him. I find this to be a material contradiction which makes his evidence to be unreliable and untrustworthy. Therefore I find that the defendant failed to discharge the onus of justifying the lawfulness of the arrest.

Assault

[17] I now turn to with the issue of assault. The plaintiff gave a detailed testimony as to where and how he was assaulted by Ngcobo and Shanmugan. Shanmugan on the other hand denied that he and Ngcobo assaulted the plaintiff at all. According to him, the plaintiff was handed in at the Point Police Station free of any injuries.

[18] These two versions are mutually destructive in the sense that the acceptance of the one must necessarily lead to the rejection of the other. In deciding which version to accept and which one to reject, **Eksteen AJP** (as he then was) stated that the following in *National Employers' General Insurance v Jagers 1984 (4) SA 437 (E)* at 440 E – G:

“...where there are two mutually destructive stories, (the plaintiff) can only succeed if he satisfied 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 balance of probabilities favours 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 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.”

[19] **Nieber J** went further in *Stellenbosch Farmers' Winery Group Ltd and Another v Martel et CIE and Others 2003 (1) SA 11 (SCA)* at 14J and stated:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of various factual witnesses, (b) their reliability; and (c) the probabilities.”

The learned judge stated further at p15 D that:

“In the light of its assessment of (a), (b) and (c) the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

[20] The burden of proof is always on the plaintiff to prove his case on a balance of probabilities. In evaluating the plaintiff's evidence, I find him to be credible. His evidence was straightforward. He testified in detailed terms how he was arrested, assaulted, detained and later taken to the Addington hospital. His injuries recorded in the J88 medical form completed by Dr R Moodley are consistent with his evidence relating to the assault. The evidence of Shanmugan on the other hand is riddled with contradictions. He testified that it was Ngcobo who found drugs on the plaintiff and later changed and stated that it was him who found those drugs. His explanation of taking the plaintiff to CR Swart building before taking him to the police station is unconvincing and farfetched. Instead I am satisfied that the reason for taking the plaintiff to CR Swart building was to assault him as they did.

Damages

[21] It is not in dispute that the plaintiff was arrested and detained in hospital under police guard for a period of eight (8) days and a further day in the police cells. It is further not in dispute that the plaintiff appeared in court and was granted bail and charges against were subsequently withdrawn.

Furthermore, it is not in dispute the plaintiff suffered injuries as recorded in the medico legal report compiled by Dr Domingo. However the defendant did not argue what would constitute fair and reasonable compensation for the plaintiff. Counsel for the plaintiff on the other hand referred me to some decided cases. I found the following comparable cases to be more illuminating and helpful in my assessment of plaintiff's damages.

[22.1] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813. The plaintiff in this matter suffered painful lungs and sinuses, bruises on most parts of the body, right shoulder dislocated and wrists and ankles were swollen. He was arrested and detained for 13 days. He was prosecuted and

acquitted at the end of the state's case. The court awarded him R100 000.00 (in 2011 terms) for wrongful arrest and detention; R100 000.00 (in 2011 terms) for assault; and R30 000.00 (in 1987 terms) for malicious prosecution.

[22.2] In *Bentley and Another v McPherson* 1999 (3) SA 854 the plaintiff was wrongfully arrested and detained for approximately 9 hours. The appeal court confirmed an award of R15 000.00.

[23] The courts have repeatedly stated that the exercise of assessing and awarding damages for bodily injuries is less exact and *in arbitrio iudicis*. See *Passenger Transport v Franzen* reported in *Corbett & Honey Vol II* at 426. As **Watermeyer JA** (as he then was) aptly put it in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD at 199:

“It must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him with money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending on the judge's view of what is fair, in all circumstances of the case.”

I am in respectful agreement with this dictum.

[24] In determining a fair compensation, the courts have regard to a number of factors such as, awards in comparable cases, inflation and changes in the value of money and problems arising from collateral benefits. It is abundantly clear from the above cases that all the plaintiffs suffered injuries

to varying degrees. The sequelae and aftermaths of their injuries also differ in a marked degree. However all of them suffered disability, though temporary, endured pain and suffering and discomfort although to varying degrees.

[25] In the present case the plaintiff suffered serious injuries to his left hand. Dr Domingo stated in his report that the plaintiff suffered,

- a fracture on his left elbow and the fracture extended from the outer surface of the elbow to the joint. This caused the plaintiff to loose some movement in the elbow joint.
- fracture on left forearm bones i.e ulna. This caused a slight loss of rotation of the forearm.

[26] Having taken all the relevant facts and various factors referred to above into account, I am satisfied that the following amounts constitute the fair and reasonable compensation for the plaintiff:

Wrongful arrest and detention	R 80 000.00
Pain and suffering for assault	R 50 000.00
Legal Fees	<u>R 1 000.00</u>
TOTAL	<u>R131 000.00</u>

ORDER

1. The defendant is to make payment to the plaintiff in the amount of R131 000.00.

2. Interest thereon at the rate of 15.5% per annum from 14 (fourteen) days of date of judgment to date of final payment.
3. The defendant is to pay the plaintiff's costs of suit, including qualifying fees of Dr Domingo.

MOKGOHLOA J

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Date of hearing: 11 August 2011

Date of Judgment: 3 October 2011