

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1360/2007

In matter between:

JOSE MANUEL SANTOS PASTANA GARCES

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY
JOSHUA SELLO SEFATSA

1ST Defendant

2ND Defendant

HEARD ON: 18 - 21 November 2008

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 5 March 2009

[1] This is a claim for damages. The plaintiff Mr Jose Manuel Santos Pestana Garces, alleges that he was unlawfully arrested, assaulted, detained and defamed by Inspector Joshua Sello Sefatsa (the second defendant) at all relevant times, an employee of the first defendant. It is not in dispute that the second defendant acted in the course and scope of his employment.

[2] The plaintiff testified that on 15 October 2006 he was at his business premises, Three Rivers Multi Market, at Bethlehem. At approximately 06H00, a male person bought 6 bags of medium size potatoes from him. A few hours later, a boy entered the shop and complained that he bought medium potatoes but was given small ones. He requested a swop. The plaintiff obliged. Approximately one hour later the same boy entered the shop with an elderly lady. They had four bags of small potatoes and requested that those bags be swopped for medium sized potatoes. The plaintiff demurred and told them that the price difference between small and medium potatoes is R2.00 a bag. He informed them that he would swop the potatoes if he was paid R2.00 extra per bag. The lady and the boy left the shop.

[3] They later returned with the second defendant and his colleague, Inspector Nhlapo. The police officers did not introduce themselves. They were wearing police uniform. The lady again asked for a swop and he reiterated that she should pay R2.00 per bag extra. The second defendant started speaking loud saying "there is law in this land and people can't do as they wish". The second defendant

became unruly. He requested him (second defendant) to stop making noise and leave the shop. He did not listen. Plaintiff moved towards the storeroom. The second defendant followed him, held him by his arm and told him that he is under arrest for resisting authority. He held unto a door handle and the second defendant pulled him loose and dragged him to the police van. He lost a shoe in the process. At the police van the second defendant threw him into the bakkie. His legs hanged out whilst his torso was already in the bakkie. The second defendant took his legs and threw it in the bakkie saying “get inside you dog”. Second defendant closed the door. There was a man and a woman in the back of the police van. The second defendant then drove away and returned to collect Nhlapo. On his return at the shop he said to Nhlapo “get in the car leave those dogs”. Nhlapo, the lady and boy got into the front of the police van.

- [4] The second defendant drove to the Zenex filling station and bought petrol. He then called the petrol attendants and members of the public nearer and said to them “come and

see the monkey that I have arrested today and I am going back to arrest the other one”.

[5] He was then taken to Bohlokong police Station. Whilst he took his property from his pockets a police officer noticed that he had a lot of money in his possession and commented that if he has so much money why didn't he give the customers the potatoes or their money. He told him that the money does not belong to the business. He was put in a cell with 26 other persons. He was held from 12H30 until 17H30. Although he felt the pain on his legs he did not check what the source of the pain was. The next day he went to court where he was told that the case had been withdrawn. The afternoon he consulted doctor Van Schalkwyk who treated the injuries that he sustained.

[6] He testified that this incident has affected his physical and mental health. His blood pressure is high and he also consulted a psychologist on two occasions. He does not know how much he paid for the medical and psychological interventions.

- [7] Nicolette Becker testified that she is employed at the Three Rivers Multi Market since July 2005 as a cashier. She was in the shop when the police entered with a lady and a child. They approached the plaintiff. She heard the plaintiff and the second defendant talking loudly to each other. Nobody was pushed or pulled. She heard the second defendant screaming but can't remember what he said. She heard the plaintiff telling the police officers to leave the shop.
- [8] The plaintiff walked towards the storeroom. The second defendant followed him and told him that he is under arrest. The plaintiff asked why he is placed under arrest but the second defendant did not tell him. The plaintiff was pulled to the police van. He sat at the edge of the police van's door, the second defendant took his legs and put them in the van. The second defendant drove away and returned to fetch his colleague, who was talking to the co-owner of the shop. Second defendant then said that this is his country and he can do as he pleases.
- [9] She also testified that the plaintiff who was outgoing is now reserved.

[10] Mr Barend Petrus van der Merwe testified that on 15 October 2005 he was at Three Rivers Multi Market, where he works as a car guard. On arrival at the shop he saw how the second defendant was pulling the plaintiff to the police van. The second defendant opened the police van and knocked the plaintiff in the van. The plaintiff bumped his head and fell backwards at the door of the van. The second defendant then took his legs and threw it into the police van. Second defendant closed the police van's door, whereafter he took a walk. On his return he requested the lady and the boy to get into the police van. He drove away and returned. On his return, he spoke in Sesotho. He then said in Afrikaans that this is the new South Africa; this is "their" or "our" land.

[11] Dr Eben Herman Van Schalkwyk is a qualified medical practitioner, for the past 44 years. He confirmed that the plaintiff has problems with his varicose veins. His skin, on his legs, was of a very bad quality.

[12] On 16 October 2006 he examined the plaintiff. He saw that the plaintiff presented injuries on both his ankles. He also had a bruise on his left hip. He was very tense. He

prescribed bandages and antibiotic cream. He saw the plaintiff a few times thereafter and the wounds responded well to treatment.

[13] He also referred the plaintiff to a clinical psychologist due to what he diagnosed as post traumatic stress disorder. He also noted that the plaintiff has undergone a personality change after the incident. The plaintiff has physically healed 100% but not psychologically.

[14] Inspector Sello Joshua Sefatsa, the second defendant confirmed that on 15 October 2006 he was on duty. He testified that he and Nhlapo found the lady (complainant) and her son at the charge office. The complainant told them that she sent her child to the plaintiff's business to buy medium potatoes but that he was given small potatoes.

[15] They went to the plaintiff's shop. At the shop the child pointed out the plaintiff as the person from whom he bought the potatoes. He tried to explain the reason for their presence to the plaintiff. The plaintiff raised his voice and was unco-operative. He explained to the plaintiff that they

came in connection with the potatoes and the plaintiff said he does not want to talk to Bamboos. He understood this to be insultative and referring to him as a baboon.

[16] The plaintiff requested them to leave his business premises. The plaintiff then pushed him on his chest with both hands. He informed him that he is arresting him for assault on a police officer. The plaintiff ran towards the storeroom and held unto the doorframe. He again informed him that he is under arrest and explained his rights to him. The plaintiff tried to get into the storeroom. He explained to him that he is resisting arrest, which is a second offence.

[17] He forcefully loosened the plaintiff's grip and forcefully, whilst he was resisting, removed him to the police van. At the police van he requested him to get in, but he refused. He used force to get him into the police van. After he closed the police van the plaintiff kicked the door whilst shouting open the door, open the door.

[18] Nhlapo was talking to the co-owner of the shop and he called Nhlapo. Nhlapo got in and they drove to Bohlokong police

station, where the plaintiff's rights were explained. Inspector Dlamini asked the plaintiff whether he had any injuries and he said no. Inspector Dlamini then asked the plaintiff about his money because he had approximately R5000.00. Dlamini asked him whether all the money was his and he said yes. The plaintiff had shoes on.

[19] He denied swearing at the plaintiff. He also denied stopping at the Zenex filling station.

[20] Nhlapo confirmed that he was at the plaintiff's shop with the second defendant, after a complaint relating to potatoes. Before they could properly explain the reason for their visit the plaintiff gestigulated that he does not want to talk to them. He went to speak to the co-owner of the shop whilst the second defendant went to the plaintiff. It was clear that the plaintiff was angry and talking loud. The second defendant moved towards him saying Sir listen. The plaintiff then pushed the second defendant and ran towards the storeroom. The second defendant followed him and held him so that he could not enter the storeroom. The second defendant then told him that he is under arrest for assaulting

a police officer and for obstructing the police in the execution of their duties. The plaintiff said he will not be arrested by nincompoops or baboons or words to that effect.

[21] At the storeroom's door the second defendant forcefully loosened the plaintiff's hold and pushed him to the police van. At the police van, the plaintiff did not want to enter and he was holding unto the frame of the door looking inside the van. The second defendant removed his hands and put him in the van. His torso was in the van and the second defendant put his feet, which were hanging out, in the van. The plaintiff had shoes on at that stage. After the door was closed, the plaintiff kicked the door. The second defendant called him, he got into the police van and they drove to Bohlokong police station.

[22] He also denied that there were insults hurled at the plaintiff. He denied that they stopped at the Zenex garage.

[23] At the police station they explained to the plaintiff that the people only wanted the right potatoes or their money back. The second defendant also told the plaintiff that he did not

mind what the plaintiff did to him. The plaintiff was charged with *inter alia* assault on a police officer.

- [24] It is not in dispute that the plaintiff was arrested by the second defendant. The second defendant alleges that the arrest was lawful because he acted in terms of section 40 (1) (a) and (j) of the **Criminal Procedure Act** 51 of 1977. Section 40 (1)(a) and (j) reads as follows:

“40 (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...”

- [25] The onus of establishing that the offence was committed in his presence rests upon the second defendant. Likewise the defendants bears the onus of proving that the arrest was justified in law. See **Minister of Law and Order v Hurley and Another** 1986 (3) 568 AD at 589 D – G. **Brand v Minister of Justice and Another** 1959 (4) SA 712 at 714 F – H.

[26] Mr Jordaan SC on behalf of the plaintiff argued that the issue of the potatoes, which led to the police going to the plaintiff's business was a civil issue and the police had no business to investigate it. I don't agree with Mr Jordaan. The police, as the second defendant testified, have a duty to prevent crime. In **Minister Van Polisie v Ewels** 1975 (3) SA 590 (A) at 597 G –H it was said:

“Wat misdaad betref, is die polisieman nie met afskrikker of opspoorder nie, maar ook beskermer.”

All members of the SAPS are required to sign a code of conduct. See **Government Gazette** No. 27642 of 10 June 2005. In terms of the said code of conduct, a replica of which was handed in as exhibit C, all members of the SAPS must commit themselves:

“to creating a safe and secure environment for all the people in South Africa by –

- (a) participating in endeavours aimed at addressing crime;
- (b) preventing all acts which may threaten the safety or security of any community and

- (c) investigating criminal conduct which endangers the safety or security of the community and bringing the perpetrators to justice...”

In terms of section 205 (3) of the **Constitution of the Republic of South Africa** 108 of 1996 the objects of the police service are:

“to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

[27] In *casu* the second defendant received information from the complainant that they paid for medium size potatoes and were given small size potatoes. They went to the plaintiff’s shop to investigate the complaint with a view of attempting to solve the problem in order to prevent it from ballooning into crime and secondly because the revelations made by the complainant, properly construed, revealed that she or her son was defrauded the difference between the medium and small potatoes. Although nothing much turns on this point it

is clear that the police went to the plaintiff's shop for a valid reason.

[28] The evidence in relation to what happened inside the shop and thereafter is riddled with contradictions and is mutually destructive.

[29] The plaintiff did not impress me as a reliable witness. According to him the second defendant created unrest in his shop. He asked the second defendant to leave the shop. Whilst he was walking towards the back of the shop the second defendant grabbed him and told him that he was under arrest. This is improbable. Something must have happened for the second defendant to arrest the plaintiff. In his statement dated 2 November 2006 the plaintiff stated that:

“Before I could say anything one (policemen) became very loud and aggressive and at the top of his voice shouted at me about not changing (the) potatoes. In English he screamed and said I must go back to my country and said “This country has laws.” There was no

way that I could speak to him or give any response. He, without any provocation, pushed me with both his hands on the chest and I almost tripped and fell.”

His evidence in court however was that he told the police officers that if the complainant pays the extra R2.00 he will swap the small potatoes for medium size potatoes. He even showed the police where the medium size potatoes were packed. At no stage did he testify that the second defendant pushed him with both his hands on his chest.

[30] The plaintiff was clearly not forthcoming with evidence as to what precipitated his arrest. According to the second defendant, it is the assault on him that precipitated the arrest. Nicolette Becker did not see anyone pushing another. Ms Becker testified that the plaintiff asked the second defendant why is he arresting him but he received no reply. This is in line with what the plaintiff stated in his aforementioned statement. The plaintiff however testified that the second defendant informed him, *albeit* whilst dragging him, that he is under arrest for “resisting authority”.

[31] The plaintiff testified that the second defendant threw him in the police van and shouted “get inside you dog.” In his statement he stated that “the policemen in the loudest of words shouted “in you go, you dog.” I do not have a problem with the fact that the plaintiff did not recall the exact words used. What I find strange is that neither Ms Becker nor Mr van der Merwe heard the second defendant calling the plaintiff a dog or words to that effect.

[32] Likewise the plaintiff testified that the second defendant said to his colleague “get in the car leave these dogs.” In his statement he stated that the second defendant “shouted at his partner in the shop “lets go, lets go leave the dogs behind; and after driving of he returned and in the same loud and shouting voice he told the partner that there was nothing to listern to or to discuss with “those dogs” and that he should come.

Again, neither Ms Becker nor Mr van der Merwe heard the second defendant shouting those words or any words to that effect. If those words were used one would have expected Ms Becker and/or Mr van der Merwe to have testified about

it. Ms Becker testified that the second defendant called his partner and said this is his country and he can do as he pleases. Mr van der Merwe on the other hand heard him say in Afrikaans this is the new South Africa and it is our country.

[33] It is clear to me that the plaintiff is embellishing his evidence in relation to the swearing incidents. There was just no swearing. His evidence in relation to what happened at the Zenex filling station is not corroborated. Both the second defendant and his colleague deny the incident. I find it improbable that the second defendant would specifically drive to the filling station just to show the petrol attendants and members of the public that he had arrested the plaintiff. The arrest at the shop was done in public. Members of the public saw the second defendant arresting the plaintiff. There would be no need for him to go and boast about the arrest at the filling station. In my view, this is another attempt by the plaintiff to embellish his evidence.

[34] I find it strange that the plaintiff did not call any of the petrol attendants who were on duty to corroborate his version.

[35] The plaintiff's version in relation to the two other detained people who were in the back of the police van is also not corroborated by any of the witnesses who testified on his behalf nor is it corroborated by any or the witnesses that testified on behalf of the defendants.

[36] It is clear that the plaintiff's evidence is unreliable. I reject his evidence.

[37] Ms Becker tried her best to give a coherent account of what happened there. She was busy with her duties and could not see everything that transpired there. She could not hear what the second defendant said in the shop. Her evidence is that he spoke loudly but she could not hear what he said because she was busy with customers. However, she says categorically that no one pushed or pulled ("stamp or ruk") another. This cannot be, because the plaintiff stated that the second defendant pushed him whilst the second defendant said the plaintiff pushed him. Because Ms Becker was busy and did not take proper notice of what was happening there, it would be risky to decide this matter on her evidence. Her evidence in relation to what precipitated the arrest is in any

event vague and contradicts the plaintiff's evidence. Her evidence is that the plaintiff moved towards the storeroom. The second defendant followed him. The plaintiff stood and was busy with something when the second defendant told him that he is under arrest. The plaintiff testified that he was grabbed whilst walking to the back. I also find it strange that she heard everything that the plaintiff said but could not hear anything that the second defendant, who according to her was speaking loudly, said.

[38] Mr van der Merwe's evidence does not take the matter any further. He was not in the shop when the arrest was effected. His evidence is in any event of a very poor quality. Mr Jordaan conceded this in argument.

[39] The second defendant was not the best of witnesses either. He was rightfully criticized by Mr Jordaan as being a shrewd witness. He evaded some questions. He continually repeated questions before answering them. He was vague in relation to the information they received from the complainant before going to the shop. Despite all these deficiencies in his evidence, his evidence is in sync with the

probabilities in relation to what precipitated the plaintiff's arrest. His evidence that the plaintiff pushed him is corroborated by his colleague. He would in any event have had no legal reason to effect an arrest if nothing happened between him and the plaintiff. It is clear from inspector Nhlapo's evidence that the second defendant tried to speak to the plaintiff but the plaintiff did not want to engage him. He (Nhlapo) went to speak to the co-owner of the shop whilst seeing and hearing what is happening between the plaintiff and the second defendant.

- [40] Nhlapo and the second defendant testified that the plaintiff insulted them. Exactly when this happened is not clear because according to the second defendant the plaintiff said he does not want to talk to baboons whereas Nhlapo testified that the plaintiff said he will not be arrested by Bambuse or nincompoops or words to that effect. According to both the second defendant and Nhlapo the plaintiff only ran towards the storeroom after he pushed the second defendant. Nhlapo and second defendant corroborated each other in all material respects. Nhlapo was a very frank and forthright witness. His evidence was also not criticized by Mr Jordaan.

Mr Motlounq on behalf of the defendants also pointed out that Nhlapo was a good witness. He further stressed that the second defendant would not have said to the plaintiff that he (plaintiff) is crossing the line if the plaintiff did nothing. I accept the version of the second defendant and Nhlapo. I accept that the plaintiff pushed the second defendant and that, that action precipitated the arrest. The question is whether the arrest was lawful.

[41] The second defendant relies on section 40 (1)(a) and (j) of the **Criminal Procedure Act**, 51 of 1977 for the lawfulness of the arrest. It is common cause that the second defendant is a peace officer and that the plaintiff was arrested without a warrant.

[42] What has to be determined is whether an offence was committed in the presence of the second defendant. The onus, as stated above rests on the defendants to show that the arrest was lawful. They bear the onus to show that the jurisdictional facts contained in section 40 (1)(a) and (j) of Act 51 of 1977 were present. In **Minister of Law and Order**

v Dempsey 1988 (3) SA 19 (AD) at 38 B – D Hefer JA said the following in this regard:

“I accept, of course, that the onus to justify 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. Any statutory function can, after all, only be validly performed within the limits prescribed by the statute itself and, where a fact or state of affairs is prescribed as a precondition to the performance of the function (so called jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed.”

[43] In this matter the pushing of the second defendant led to his arrest. Mr Jordaan did not dispute that such pushing constituted an assault. He however argued that there was no need to arrest the plaintiff because he was a known businessman in Bethlehem and less intrusive means other than arrest could have been used. This is true but does it make the arrest unlawful? In my view it does not. The enabling statute prescribes that the second defendant may without warrant arrest a person that commits an offence in

his presence. The offence in *casu* was committed in the second defendant's presence. He had the right to arrest the plaintiff without a warrant. Moreover the plaintiff was released on the same day and warned to appear in Court the next day. Was it necessary for the second defendant to use force to effect the arrest?

Section 49 (2) of Act 51 of 1977 provides that:

“If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flew, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing...”

Section 39 (1) reads as follows:

“An arrest shall be effected with or without a warrant, and unless the person to be arrested submits to custody, by

actually touching his body or, if the circumstances so require, by forcibly confining the body...

[44] It has repeatedly been said that the purpose of an arrest is to ensure that the suspect is taken to Court to answer to the charge or charges. See **Kruger: Hiemstra's Criminal Procedure Lexis Nexis** 2008 at 5 – 20 to 5 – 21 [issue 1].

[45] It is not in dispute in this matter that the plaintiff resisted arrest. On the plaintiff's version because he did not know why he is being arrested. On the defendant's version because he deliberately did not want to cooperate with the police. The police were entitled to use reasonable and proportional force to effect the arrest. What is reasonable and proportional force will depend on the facts and circumstances of each particular case.

[46] In this case it has not been argued that the force that was used was unreasonable or disproportionate. If one has regard to the totality of the evidence and the prevailing circumstances in the shop, I can't find that the force used was disproportional or unreasonable. The plaintiff resisted

arrest. The second defendant loosened his grip from the doorframe or handle. The plaintiff did not want to walk voluntarily to the police vehicle. The second defendant took him by force and in the process dragged him to the police vehicle. The plaintiff has a sensitive skin and a pre existing condition. The injuries that he sustained is not indicative of the amount of force used. In my view the force used was in the circumstances reasonable and proportional.

[47] It is my considered opinion that the claim ought not to succeed.

[48] The defendants were successful in defending the claim. There is no reason why a costs order in their favour should not be made.

[49] **I accordingly make the following order.**

The claim is dismissed with costs.

C.J. MUSI, J

On behalf of the Plaintiff:

Adv. A.F. Jordaan SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the Defendant:

Adv. S.E. Motloun
Instructed by:
State Attorney
BLOEMFONTEIN

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