



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE:.....8 May 2024

SIGNATURE:.....

Case No. A92/2023

In the matter between:

MULLER, HELGA

FIRST APPELLANT

BELL, YOLANDI

SECOND APPELLANT

And

THE MINISTER OF POLICE

RESPONDENT

Coram: Ledwaba DJP, Millar *et* Flatela JJ

Heard on: 5 March 2024

Delivered: 8 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 May 2024.

ORDER

It is Ordered:

- [1] The appeal is upheld with costs.
- [2] The order of the court a quo is set aside and replaced with the following:

"The defendant is ordered to pay:

- 1. To the first plaintiff the sum of R102 000.00.*
- 2. To the second plaintiff the sum of R70 000.00.*
- 3. The defendant is to pay the plaintiffs costs of the action."*

JUDGMENT

MILLAR J (LEDWABA DJP & FLATELA J CONCURRING)

- [1] This is an appeal against the dismissal of an action for damages for unlawful arrest and detention brought by the appellants against the respondent in the Magistrate's Court for the District of Tshwane Central on 8 December 2022.

- [2] During the late evening and early hours of the morning of 27 and 28 April 2017, the appellants were driving in a motor vehicle in the area of John Vorster Avenue in Centurion. They were pulled over by members of the South African Police Service.
- [3] The only evidence of what unfolded was that was led of the first appellant (Ms. Muller) and of the second appellant (Ms. Bell). The respondent closed its case without leading any evidence.
- [4] Ms. Muller testified that she had been the driver of the vehicle in which Ms. Bell was a passenger. They were on their way home. It was the late evening or early hours of the morning. While driving, she noticed a police vehicle behind her with its bright lights on. She put her hazard lights on to signal to them to switch off the bright lights as she could not look in her mirrors as their lights were blinding her. The bright lights on the police vehicle were switched off and the blue lights were then switched on. She pulled her car over to the side of the road and remained in the car. Two police officers approached them.
- [5] One of the police officers that approached was a male officer and the other a female. The male officer went to the passenger side of the vehicle and the female to the driver's side. Ms. Muller spoke to the female officer. She was asked where she was going and where she lived. The female officer told her that she was from Hammanskraal and that the two police stations (Lyttleton and Hammanskraal) were working together to combat drunk driving on Wednesdays and Fridays. She then went back to her vehicle and returned with a breathalyzer. When she returned with the breathalyzer, she asked Ms. Muller to blow into it, which she did.
- [6] After blowing into the breathalyzer, Ms. Muller was informed that the reading was 0.35. She asked to see the reading. The officer refused to show her the reading and at this point informed her that she was arresting her for driving under the

influence. Ms. Muller was told that she would have to go with the officer in the police vehicle and that the male police officer would drive her vehicle with Ms. Bell inside it.

- [7] Ms. Muller then asked her friend to phone her father and to bring her her cell phone. It was at this point that the female officer grabbed her by the arm and forcefully pulled her towards the police vehicle. A short while later, the male officer brought her phone to her.
- [8] Ms. Muller and the female officer got into the police vehicle. The female officer was driving recklessly, proceeding through red traffic lights. She then informed her that they would not be going to the Lyttleton police station because it was full but that instead she would be taken to the Sunnyside police station. It was at this juncture that the female officer then began driving very slowly. While this was taking place, Ms. Muller was trying to telephone her father. When she was asked why she wanted to call her father, she said that she was scared. The female officer told her that no-one could help her except her.
- [9] Ms. Muller was asked if she knew how much the bail would be and when she said she did not, she was told that it would be R6 000.00. The officer said that in order to avoid being taken to the Sunnyside police station, Ms. Muller would have to give her R6 000.00. Ms. Muller told her that she was not prepared to pay a bribe and the officer informed her that if she did not, she would be locked up. They continued driving around and while doing so, the officer then began discussing a reduction in the amount that she would accept in order not to take Ms. Muller to the Sunnyside police station.
- [10] The amount that she was prepared to accept dropped from R6 000.00 to R3 500.00 and eventually to R2 000.00. Ms. Muller was told by the officer that if she did not pay the R2 000.00 she was going to the Sunnyside police station. The vehicle pulled over.

- [11] Ms. Muller evidence was that *"I started panicking because I know the Sunnyside area and I was so scared that she would in fact take me there, and she told me to get out of the car and walk over to my vehicle."* She got out of the police vehicle and went to her vehicle where the male officer handed her the keys. The area where they had stopped was an open area. The female officer told her that she needed to go in her own vehicle to the nearest ATM and that she would only release Ms. Bell back to her once she had withdrawn the money and come back. Her evidence was *"she then said I can get into my car, go to the ATM because I have to come back with the R2 000.00, otherwise it is Sunnyside for me and if I do not come back, she is going to take my friend to Sunnyside. So, I should not have any ideas to leave."*
- [12] Ms. Muller then went to an ATM and withdrew the money and then went back to where the police officers and Ms. Bell were waiting. She testified that when she got back, *"I parked my car on the one side of the street, gave my keys to the male police officer, walked over to the lady in the police car and she instructed me to put the money in the cubbyhole. She then instructed me to get out of the car and go back to my car and I refused."* She testified that the reason for her refusal was because she feared that once she got behind the wheel of her vehicle again, she would be subjected to the same treatment again. She asked the police officer to driver her to her home, which the officer reluctantly agreed to do. The journey to her home was harrowing as the officer drove at a very high speed, not bothering to stop at red traffic lights. Ms. Bell was in her car with the male officer following behind.
- [13] Ms. Muller testified that she and Ms. Bell had been detained for between 3 and 4 hours on consequence of the conduct of the police officers. Her evidence, besides in regard to how she was manhandled, was that *"I have honestly never been that scared in my entire life, because I was unsure of what the next step was going to be, because I could not go to Sunnyside. I knew how dangerous it was there, and she kept on threatening me with it, and now after the incident, I find myself, even if I drive past a traffic officer, I get panic attacks, and it is starting to affect my mental health to be*

honest, because I had to go get a stamp on my ID from the police station, and the lady inside was so rude to me that I actually just started crying, because I thought I could trust the police, because they are there to help us when something goes wrong. I do not think I will ever be able to phone the police if anything else had to ever happen to me. I do not trust that system at all anymore, not after being held against my will for 4 hours in the winter, just so that she could get R2 000.00.”

- [14] The cross examination of Ms. Muller was confined to a single issue – whether or not it was in fact the police who had arrested and detained her. Her evidence was that *“They were wearing the blue outfits that I recognized as police officers. So, I am a hundred percent sure they were police officers”*. The cross examination was based on the fact that in both the pleadings and the notice of the institution of legal proceedings¹ against the respondent, there had been a reference to the vehicle being driven by the police officers as being a *“Metro Police”* vehicle. When asked she testified that the reference to the vehicle as being a Metro Police vehicle and not a Police vehicle was a mistake.
- [15] Ms. Bell testified that she had been travelling as a passenger in Ms. Muller’s car on the evening in question. She testified that there had been a vehicle with bright lights on behind them and that after Ms. Muller had put on her hazards, the bright lights had gone off and the blue lights of the following vehicle had gone on. They pulled over.
- [16] Two police officers, a male and a female, got out of the vehicle and came to Ms. Muller’s car. The female police officer asked Ms. Muller to get out of the vehicle as she wanted to administer a breathalyzer test. Ms. Bell remained sitting in the vehicle. She testified that she did not know what happened outside the vehicle. She overheard the female officer telling Ms. Muller that they were going to be taken to Sunnyside. At some point, Ms. Muller asked her to please telephone her father on her phone but she could not unlock the phone. The male officer took

¹ Notice given in terms of Section 3(1)(a) of the Institution of Proceedings Against Certain Organs of State Act No. 40 of 2002.

the phone from her and gave it to Ms. Muller. Ms. Bell remained in the vehicle and the male officer returned and got in to drive and they followed the police vehicle. When they stopped, they were next to an open field. They all got out of the vehicles. Ms. Muller then left in her vehicle. She was left alone with both officers standing by the side of the road.

- [17] After a short while, the female officer got into the police vehicle and drove away, and she was left alone with the male officer next to the road in the dark. A short while later, the female officer returned and instructed her to phone Ms. Muller and to tell her that she must be quick. She was told that if Ms. Muller did not come back, that she, Ms. Bell, would be taken to jail. She was told to check if her friend was *"coming right with the withdrawal"*. Ms. Bell was told that *"I must wait for my friend, if my friend is not going to return, they were going to take me to jail and to Sunnyside jail – the specific words"*. Shortly thereafter, Ms. Muller arrived back.
- [18] Once Ms. Muller had arrived back, the female officer told them that they could go but Ms. Muller had insisted that the police officers take them home, which they had done. Ms. Muller had driven in the police vehicle with the female police officer and Ms. Bell in Ms. Muller's vehicle with the male police officer. She testified that while she had been with the male officer, he had not said much but from what he had said, it had seemed to her that he did not approve of the way in which the female officer had been driving the police vehicle.
- [19] Ms. Bell testified that in regard to what had transpired, *"I cannot even drive . . . I have moved to the area at Kerk Sonder Mure and I cannot even drive at night anymore, because I am so furious of being pulling [sic] off and I am a single mom. I cannot have any record or even go to jail for no reason only for one night and be sorted out the next morning – what about my kids? So, it affected me a lot and it was a very difficult time that I went through, emotional, and it affected me that I do not drive at night anymore because I am too scared. I cannot see police people, I have never phoned them for help, I would rather phone my security company. . . I am scared of them."*

- [20] The cross examination of Ms. Bell was also confined to the single issue of whether or not it was in fact the police who had detained her. Her evidence was that the officers concerned were definitely police officers and when asked if she was “*absolutely a hundred percent sure about it*”, her answer was in the affirmative.
- [21] The evidence of Ms. Bell was clear and unequivocal – the persons who had detained them were South African police officers and their vehicle was a police vehicle. Although they were pressed on the issue of the vehicle, there was no evidence led by the respondent to demonstrate the difference, if there was any, between the two.
- [22] The evidence of both Ms. Muller and Ms. Bell was corroborative of each other in material respects. The evidence was unchallenged and undisturbed by cross examination. It follows that this appeal is to be decided exclusively on that evidence² which was the only evidence before the court.
- [23] The court *a quo* correctly found that the appellants had been stopped by members of the South African Police Service who had identified themselves as such. It also found that the conduct of the two officers was such that it established a delictual liability.
- [24] However, the court *a quo*, notwithstanding this, found that the principle that an employer is vicariously liable for the actions of his employees whilst they are acting within the course and scope of their employment, found no application in the present case because it was not sufficiently closely connected to the employment and that they had acted “*in pursuit of their own selfish interests.*”

² *Small v Smith* 1954 (3) SA 434 (SWA) at 434F-H. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [61].

- [25] The test to be applied in determining whether or not the respondent is liable for the actions of the police officers is set out in *Minister of Police v Rabie*³ in which it was held that:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of the servant does so fall some reference is to be made to the servant’s intention. . . . The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable”

- [27] In *Stallion Security (Pty) Ltd v Van Staden*⁴ the Supreme Court of Appeal considered the test set out in *Minister of Police v Rabie* and in subsequent judgments and found that:

“[19] It bears emphasising that a sufficiently close link must exist between the wrongful act of the employee on the one hand and the business or enterprise of the employer on the other. This supple concept accords with the objective nature of the second part of the test. The purpose of the development of the law in Rabie and K was to provide redress to a victim against an employer even though the wrongful act did not in any manner constitute the exercise of the duties or authorised acts of the employee, if it was objectively sufficiently linked to the business or enterprise of the employer. Thus, references to a link with the duties, authorised acts or employment of the employee should in this context be avoided.

[20] But when would a sufficiently close link with the business of the employer be established in matters of this kind? A convenient starting point is the

³ 1986 (1) SA 117 (A) at 134C-F.

⁴ 2020 (1) SA 64 (SCA) at par [19] – [21].

principle that this link would not be established when the business of the employer furnished the mere opportunity to the employee to commit the wrong. The enquiry may not be reduced to a mere 'but for' causation analysis. If, for example, an employee assaults a co employee or customer whilst on duty and at the workplace over an entirely private matter, the employer would in the absence of any other consideration not be vicariously liable.

[21] *Something more than a mere opportunity or 'but for' causal link is required. What that is, would depend on the factual circumstances and normative considerations relevant to each case and on whether, in the light thereof, the rule should be further developed. This brings me to a consideration of the role that should be played by the creation of the risk of harm by the business of the employer." (footnotes omitted)*

[28] It is in the evaluation of the evidence that I find that the learned Magistrate *a quo* misdirected herself. There are two misdirections. I intend dealing with each of these in turn.

[29] Firstly, in finding that because the female police officer had told Ms. Muller that she was from Hammanskraal as part of a joint task force that:

"From this set of facts one draws an inference that the Officers were not acting in the course and scope of their employment as it defies logic that the Members of the South African Police services from Hammanskraal would perform duties in Centurion whilst driving a metro police vehicle."

[30] The evidence of Ms. Muller that she had been informed by the female officer that she was from Hammanskraal was not evidence of anything more than what had been said to her. The inference that was drawn from this by the court *a quo* was in my view impermissibly drawn.

[31] Secondly, in drawing an adverse inference against the appellants for failing to go straight to a police station to make a report while events were unfolding, when

the evidence given by them explained clearly and unequivocally the reasons for why they had conducted themselves in the way they had was unchallenged. Similarly, their evidence that the matter had been reported to the Independent Police Investigation Directorate (IPID) was also unchallenged.

- [32] In respect of both misdirections, it was never put to either of the appellants by the court *a quo* that adverse inferences would be drawn in respect of their undisputed evidence.⁵ The credibility of neither appellants was challenged nor disturbed at any stage by the respondent and no such findings were made by the court *a quo*.
- [33] For this reason, the court *a quo* was obliged to decide the case on the evidence before it. It was not open to it to make findings in respect of matters that had not been put to either of the appellants or to draw inferences⁶ in circumstances where the parties against whom those inferences were to be drawn had not been given an opportunity to respond to them.⁷
- [34] The evidence establishes that two police officers on patrol stopped the appellants. Ms. Muller was arrested, and the Ms. Bell detained. Thereafter, while Ms. Muller was still under arrest and Ms. Bell still in detention, payment was extorted from Ms. Muller in order to secure the release of Ms. Bell.
- [35] Once the payment had been made, the officers, consonant and consistent with the duties of police officers, then saw both Ms. Muller and Ms. Bell safely home. It is obvious and undisputed that throughout the course of events, the officers represented themselves as police officers, exercised police powers of arrest and detention and arrested and detained Ms. Muller and Ms. Bell respectively and thereafter escorted them home. Their attire and their vehicle made clear to Ms. Muller and Ms. Bell that they were police officers and they informed them that they were carrying out police duties at the time that they stopped them.

⁵ *R v Dhlumayo* 1948 (2) SA 677 (A) at 705.

⁶ *S v Dlodlo* 1966 (2) SA 410 (A) at 405H. See also *R v Blom* 1939 AD 202-3.

⁷ *The Road Accident Fund v Taylor & Related Matters* 2023 (5) SA 147 (SCA) at para [33].

- [36] Both Ms. Muller and Ms. Bell complied at all times with instructions given to them by the officers (save when they asked to be taken home which the officers ultimately agreed to do) and in the circumstances of this case, there is to my mind no doubt that as far as Ms. Muller and Ms. Bell were concerned, there was a “sufficiently close connection”⁸ between the appearance and conduct of the officers on the evening in question and their work as police officers. It is for this reason that the respondent is liable for the conduct of the officers on the evening in question.
- [37] The evidence establishes that both Ms. Muller and Ms. Bell were detained for 3 to 4 hours. It also establishes that Ms. Muller, besides being arrested, was manhandled and extorted.
- [38] It was argued on behalf of the appellants that the conduct of the officers concerned had been high handed and was intended to both harass and frighten them.
- [39] In regard to the quantum of damages, the following authorities offer some guidance:
- [38.1] *Erasmus v MEC for Transport – Eastern Cape Province*⁹ where a person was arrested and detained by a traffic officer in order to teach her a lesson. In this matter, the court found that the traffic officer had acted in a high-handed manner and for an arrest and detention of 5,5 hours duration, awarded R75 000.00.
- [38.2] *Masisi v Minister of Safety and Security*¹⁰ where the court awarded R65 000.00 for an arrest and detention of 4 hours duration.

⁸ Para [27] *supra*.

⁹ 2011 (2) SACR 367 (ECM) at para [21].

¹⁰ 2011 (2) SACR 262 (GMP) at para [18].

[38.3] *Murrell and Another v Minister of Safety and Security*¹¹ where an amount of R90 000.00 was awarded for detention for 1 day.

[39] The appellants prosecuted three claims. The first for assault, the second for unlawful arrest and detention and the third for a repayment of the R2 000.00 which had been extorted. Ms. Muller, it was argued, had suffered and proven damages in respect of all three claims. Ms. Bell on the other hand, who was neither assaulted nor extorted, suffered and proved a claim for unlawful arrest and detention.

[40] The evidence of both Ms. Muller and Ms. Bell regarding what they experienced on the evening/early morning hours in question and continue to experience is clear and unequivocal. Women are particularly vulnerable in our society but especially in situations such as the one in which Ms. Muller and Ms. Bell found themselves. The way in which events unfolded is demonstrative of this.

[41] Dealing firstly with Ms. Muller. While the evidence does not establish that the assault was one of any consequence, it was nevertheless unlawful and perpetrated by a police officer at a time when she was under the direct control of that officer.

[42] The assault to my mind, cannot be separated from the continuum of events, which commenced with the stop, the arrest and detention, the assault and the subsequent extortion. An additional factor to be considered is that the only reason that Ms. Muller was extorted and did not simply leave the scene is because of her concern for Ms. Bell.

[43] This must also have weighed heavily on her and exacerbated her feelings at the time. Attempting, for purposes of an award of damages, to separate each occurrence into a discernable award is simply not practicable. The award to be

¹¹ [2010] ZAGPPHC 16 (22 February 2010).

made must be a composite one which is in respect of the arrest and detention, assault, and extortion. In my view, an appropriate award for damages in respect of the three claims proven by Ms. Muller is the sum of R102 000.00.

[44] Dealing now with Ms. Bell. The evidence established that she was neither assaulted nor extorted. However, she was left alone for an extended period of time, standing by the side of the road next to an open field in the early hours of the morning with an unknown male police officer. Her evidence about this ordeal is clear and unequivocal and unchallenged insofar as the effect it had and continues to have on her. In my view, an appropriate award for damages is R70 000.00.

[45] It was argued for the appellants that costs should follow the result. There is nothing in the present matter which justifies a deviation from this usual principle.

[46] In the circumstances, I propose the following order:

[46.1] The appeal is upheld with costs.

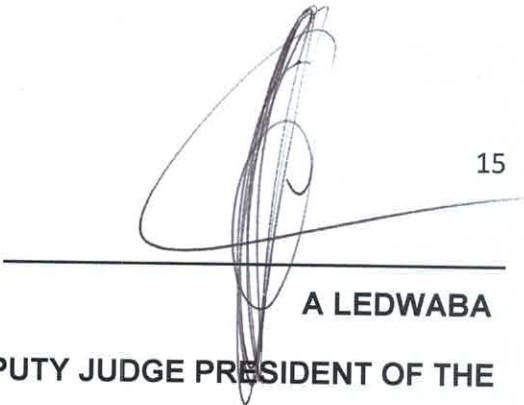
[46.2] The order of the court a quo is set aside and replaced with the following:

"The defendant is ordered to pay:

- 1. To the first plaintiff the sum of R102 000.00.*
- 2. To the second plaintiff the sum of R70 000.00.*
- 3. The defendant is to pay the plaintiffs costs of the action."*

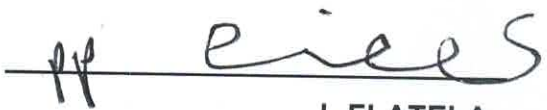
A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED



A LEDWABA
DEPUTY JUDGE PRESIDENT OF THE
HIGH COURT GAUTENG DIVISION,
PRETORIA

I AGREE



L FLATELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

5 MARCH 2024

JUDGMENT DELIVERED ON:

8 MAY 2024

COUNSEL FOR THE APPELLANTS:

ADV. C ZIETSMAN

INSTRUCTED BY:

LOUBSER VAN WYK INC.

REFERENCE:

MR. R VAN WYK

COUNSEL FOR THE RESPONDENT:

ADV. M HLUNGWANI

INSTRUCTED BY:

THE STATE ATTORNEY, PRETORIA

REFERENCE:

MR E SCHARFT