

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: 11 June 2024 Signature: _____

CASE NO: **A2023/133279**

In the matter between:

BOSAWA DIDI

Appellant

and

MINISTER OF POLICE

Respondent

Coram: Dlamini J (Van Vuuren AJ concurring)

Heard: 09 May 2024 (Courtroom 11A)

Delivered: 11 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *Case Lines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 11 June 2024

JUDGMENT

Introduction

- [1] This is in an application to appeal against the judgment and order of Magistrate Mr BL Leshilo, which was handed down on 24 November 2023.
- [2] The appellant had brought a claim for damages arising from his unlawful arrest and detention against the members of the South African Police Services ("SAPS") the respondent.
- [3] Upon hearing the matter on 14 April 2020, the Magistrate dismissed the appellant's claim with costs.
- [4] Not satisfied with this decision the appellant launched this appeal.
- [5] On 5 August 2021 leave to appeal was granted to the appellant by this Court to appeal to the full bench of this Court.

Background facts

- [6] I set out a summary of the relevant facts and circumstances that were presented at the trial.
- [7] The appellant testified and called his wife, Mrs Bosawa to testify on his behalf.
- [8] The appellant avers that on 28 August 2017 at Johannesburg, whilst meeting his friend Buto, he was arrested by what he alleges were members of SAPS. He says that upon his arrest he was taken by Buto and the alleged police officers and detained at his friend Buto's house in Elsburg, Germiston. Mr Bosawa avers that whilst detained at the aforesaid house, two other police officers arrived at the house. He says these two officers assaulted him and handcuffed him.
- [9] Mr Bosawa testified that he could identify these two officers. This is because the two SAPS members were in full police uniform. The appellant is adamant that he

could identify their names as he saw their names on their badges. The appellant avers that the two SAPS members are Constable Zulu and Mashabane. The officers gave him a cell phone to call his wife and to request his wife to bring money. He avers that the two officers told him that they were leaving and would come back at 4pm. They threatened him and told him that if his wife did not bring the money they were going to kill him.

[10] The appellant's version is that whilst communicating with his wife, he managed to inform his wife that he was kidnapped and detained at Buto's house in Elsburg and requested his wife to go to the Germiston Police Station to seek help. At around 5pm members of SAPS from Germiston came and rescued him at Elsburg.

[11] The appellant's wife, Mrs Bosawa testified and in sum her evidence corroborated the appellant's version that her husband called her and informed her that he had been arrested and kidnapped at Buto's house in Elsburg. She confirmed that she alerted the SAPS Germiston Station, whose members came and rescued the appellant. The appellant then closed his case.

[12] The respondent did not call any witnesses and also closed their case. This is even though on the record before us, it is evident that Constables Zulu and Mashashane are indeed police officers stationed at Katlehong.¹

[13] The issue for determination at the trial is whether the individuals who arrested the appellant on the day were police officers and if so, were those individuals acting within the course and scope of their duties, or whether the arrest was lawful.

[14] The court *a quo* after analysing the evidence, dismissed the appellant's claim and at [20] held that "*Having considered all the relevant facts of this matter the evidence of both witnesses for the plaintiff and the manner in which the plaintiff was arrested and detained as alleged I am of the strong view that the plaintiff*

¹ See their statement, volume I pages 65 - 78 (Zulu) and pages 79 - 93 (Mashashane).

failed to prove on a balance of probabilities that he was unlawfully arrested and detained by the members of the South African Police Services”.

[15] The nub of the appeal lies against the dismissal of the appellant’s claim.

Issue for determination

[16] The central question that stood to be determined in the court *a quo*, and that still arose in this appeal, is whether the individuals who arrested the appellant were peace officers.

[17] Section 40(1)(b) of the Criminal Procedure Act,² sets out the essential jurisdictional facts which have to be present to justify an arrest without a warrant. These are: -

[17.1] The arresting officer must be a peace officer;

[17.2] The arresting officer must entertain a suspicion;

[17.3] The suspicion must be that the suspect committed an offense referred to in Schedule 1; and

[17.4] The suspicion must be based on reasonable grounds.

[18] Before us, counsel for the appellant submitted that they were now only pursuing the requirements of paragraph 17.1, that is, whether the arresting officer/s were peace officers as defined in the Act.

[19] Advocate Billings conceded that it does not appear that the individuals who arrested the appellant at Bree Street were police officers. However, the appellant is adamant that the two individuals who handcuffed him and assaulted him at Elsburg were police officers.

[20] The appellant submitted that he had full sight of the two officers. He avers that the two officers were clad in full police uniform. Mr Bosawa insists that he had

² Act 51 of 1977

sight of their name tags and has identified them as Constables Zulu and Mashashane.

[21] As a result, the appellant argues that the court *a quo* misdirected itself when it concluded that the individuals who arrested the appellant at Elsburg were not police officers as defined in the Act.

[22] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. In *S v Francis*³ at 198 and 199, this approach was summarized as follows: -

“The powers of a Court of Appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of Appeal on adequate grounds that the trial Court was wrong in accepting the witness evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage a trial Court has of seeing, hearing, and appraising a witness. It is only in exceptional cases that the Court of Appeal will be entitled to interfere with the trial Court's evaluation of oral testimony”.

[23] In my view, the court *a quo* misdirected itself in concluding that the individuals who arrested and assaulted the appellant at Elsburg were police officers. This is because the appellant was standing next to the two officers. The appellant testified that the two officers were dressed in police uniforms. He saw and identified the names on their police badges as Constables Zulu and Mashashane.

[24] Significantly, after having been rescued at Elsburg and at the Germiston Police Station, Mr Bosawa gave the names of the two officers in his statement to the investigating officer.⁴ The importance of this crucial evidence is the following: first, the appellant did not know the two officers before his arrest and it was never put to him under cross-examination that he knew these officers before

³ 1991 (1) SACR 189 (A)

⁴ See volume 11 at 155

his arrest. Upon the evidence discovered, it turns out that indeed the names of the two officers are correct and significantly it also turns out that they were indeed police officers stationed at Katlehong, Germiston.

[25] Also, Mr Bosawa's version is corroborated in all material respects by the evidence of the investigating officer, warrant officer Anderson Mlandu who confirms that the appellant reported to him that Constables Zulu and Mashabane were the two officers who arrested and handcuffed him at Elsburg.⁵

[26] In my view, the fact that the two officers deny arresting the appellant is of no moment. The onus rested on the respondent to prove that the individuals who arrested the appellant were indeed police officers. However, the respondent did not provide any evidence and elected to close its case. This means that the appellant's version remains unchallenged and it must thus stand.

[27] On the evidence presented, including the documentary evidence, the probabilities established that the two individuals who arrested the appellant at Elsburg were indeed police officers. It follows that the order of the court *a quo* falls to be set aside and the appellant is entitled to relief that he seeks.

[28] In all the circumstances alluded to above, I am satisfied that the appeal on the merits ought to be upheld.

Quantum

[29] I now turn to the issue of quantum. The next issue for determination is what a just and equitable compensation to be awarded to the appellant would be. During the trial, the parties agreed that both the issues of merit and quantum will be dealt with in the trial. The appellant's counsel argued that should the appeal succeed on the merits, this court should proceed and make a determination on the quantum. The appellant's counsel further submitted that there exists sufficient evidence on the record, that will assist this court to make the award.

⁵ See volume 11 at pages 148 -151

- [30] The general approach regarding the amount of damages for unlawful arrest and detention was appropriately captured by Bosielo AJ in *Minister of Safety and Security v Tyulu*.⁶ At [26], the Judge remarked thus “*In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are consummate with the injury inflicted*”. Therefore, the correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.
- [31] Our courts have cautioned that previous awards in a claim for damages of this nature should only serve as a useful guide and should not be followed slavishly. In *Minister of Safety and Security v Seymour*.⁷ Nugent JA remarked at [17] that “*The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that*”.
- [32] The court went on and said at [20] that “*Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss....It needs to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection...*”
- [33] The appellant submits that he was unlawfully arrested and detained at Buto’s house in Elsburg for approximately five and a half hours. Mr Bosawa insists that the two officers assaulted and handcuffed him. As a result, the appellant submitted that he should be awarded a sum of R100 000.00. The appellant seeks reliance for this amount in *Bentley & Another v McPherson*,⁸ where the plaintiff who was detained for nine and a half hours was awarded the equivalent

⁶ 2009 (5) SA 85 SCA at [26]

⁷ (295/05) [2006] ZASCA 71; [2006] SCA 67 (RSA); [2007] 1 All SA 558 (SCA) (30 May 2006)

⁸ 1999 (3) SA 854 (E)

of R51 000 for unlawful arrest and detention. In *Tsuma and Another v Minister of Safety and Security*⁹ the plaintiff was awarded R65 000.00 for being detained for nine hours. The equivalent today amounts to R140 000.00.

[34] Mr Bosawa avers that he was assaulted in public and described this as torture. He insists that he suffered cuts and abrasions on his wrists as a result of being handcuffed by the two officers. The appellant, therefore argues that an amount of R100 000.00 will be reasonable and fair compensation for his assault.

[35] It is now a well-established principle of our law that a person's freedom and security are sacrosanct and are protected by our Constitution. In *Mahlangu and Another v Minister of Police*¹⁰ Tshiqi J captured this principle as follows at [43]: *"It is now trite that public policy is informed by the Constitution. Our Constitution values freedom, understandably so when regard is had to how, before the dawn of democracy, freedom for the majority of our people was close to non-existence. The primacy of "human dignity, the achievement of equality and the advancement of human rights and freedoms" is recognized in the founding values contained in section 1 of the Constitution..." These constitutional provisions and the protection in section 12 of the right of freedom and security of the person are at the heart of public policy consideration.*

[36] I have considered that the appellant's arrest, detention, and assault were unlawful. The appellant suffered great indignity and was detained for more than five hours in circumstances that can be termed as an unlawful and illegal kidnapping aided and abetted by the respondents who are tasked by law to protect citizens.

[37] In light of the above circumstances, the appellant's period of detention, the conditions of his detention, and the relevant awards in related cases, it is my considered view that an award of R150 000.00 is just and equitable.

⁹ See also, *Tsuma & Another v Minister of Safety and Security and Another* WLD 27661/2006

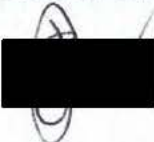
¹⁰ 2021 (2) SACR 595 (CC) at [43]

Costs

[38] Insofar as the costs of this appeal are concerned, I find no reason not to make an order that the costs of this appeal should follow the event. This also includes the costs in the court *a quo*.

ORDER

1. The appeal is upheld.
2. The order of the magistrate is set aside and substituted by the following order.
3. The appellant is awarded damages in the amount of R150 000.00.
4. The respondent is ordered to pay interest on the amount awarded from the date of institution of proceedings to the date of payment in terms of Section 2A of the Prescribed Rate of Interest Act of 1975.
5. The respondent shall pay the appellant's costs of suit for trial in the court *a quo*.
6. The respondent shall pay the costs of the appeal as taxed or agreed on the party and party scale, with costs of counsel, where applicable, taxable on scale A.



J DLAMINI

*Judge of the High Court
Gauteng Division, Johannesburg*

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