



**HIGH COURT OF SOUTH AFRICA, GAUTENG
DIVISION, JOHANNESBURG**

Case No.: 50725/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

26 June 2024

DATE

SIGNATURE

In the matter between:

DLAMINI AFRICA PHUMLANI

First Plaintiff

DLAMINI KHULEKANI

Second Plaintiff

NGWENYA MIKE

Third Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NHARMURAVATE AJ:

Unlawful arrest and detention –arrest admitted by the Defendant -onus on the Defendant to prove lawfulness of the arrest – assault GBH – action dismissed.

INTRODUCTION

- [1] This is an action wherein the Plaintiffs have instituted action proceedings against the Minister of Police for being unlawfully arrested and detained on the 21st of March 2021. The issue which this court has to determine is whether the Plaintiffs were arrested unlawfully and if so if the resultant detention was also unlawful. Further, the Plaintiffs seek to be awarded an amount of R150,000.00 each for the night spent in detention.
- [2] At the outset the Plaintiff's Counsel Mr. Muller informed this court that the second Defendant has since passed on therefore, his claim will be postponed. The matter will only continue at the instance of the First and the Third Plaintiff.
- [3] The Defendant bears the onus to prove the lawfulness of the arrest. Therefore they started leading evidence through Warrant Officer Oupa Dlamini and Nikelo Mvubu. In rebuttal the First and Third Plaintiff testified. The testimonies are summarised below as follows :

THE DEFENDANTS EVIDENCE

Evidence of Oupa Dlamini

- [4] Warrant Officer Dlamini has been working at the Zonkizizwe South African Police Services for at least 33 years on this particular day he met the Plaintiffs in his office. They had been charged with assault GBH inclusive of kidnapping and intimidation as a result of a charge laid by the complainant. He met the three Plaintiffs in his office on the 22nd of March 2021 around 9:10 am, and upon meeting them he explained the charges laid to them in line with the docket and inclusive of the statement from the complainant.
- [5] Thereafter, he called the complainants to come in (he did not take long to come in). The Warrant Officers' noticed that when the Complainant came in his office upon seeing the three Plaintiffs, he was very petrified he had to calm him down and tell him to come and sit closer to him. He noticed that upon his arrival the

Complainant had a swollen left eye which was closed and also had a laceration above the left eye. The complainant then identified the three Plaintiffs as being the people who had kidnapped him (by putting him inside a boot), assaulted and intimidated him by taking him to an open area where they threatened to kill him. He then inquired from the Plaintiffs if indeed they heard the allegations being made by the Complainant. All they did was to simply look at each other and laugh, that is when he realised that they indeed knew the complainant. The complainant then left.

[6] He then informed them that they were under arrest and explained the charges to them. Warrant officer Dlamini further testified that he explained their rights to them, and they confirmed knowing what he had explained to them. Subsequent to that he made means to try and call the prosecutor to try and get them bail. This was not successful due to the charge laid as it also included kidnapping as such under the circumstances they can only be offered bail by the court. He then took them to the cells.

[7] The Complainant did come around 13:30 to withdraw the charges laid against them. However, he informed the Plaintiffs that under such circumstances he could not release them as he had no power to do so at that point. All he could do was to ensure that the withdrawal statement is filed in the docket so that the Magistrate can make a decision in that regard.

Evidence by Sergeant Nikelo Mvubu

[8] Sergeant Mvubu's evidence was that he has been employed with SAPS for 14 years. At the time the Plaintiffs arrived in the office he was together with Warrant Officer Dlamini. According to Sergeant Mvubu the Plaintiffs walked in after being at the CSC's office, they sat down and individually introduced themselves. Warrant Officer Dlamini then informed them that they have been arrested for assault, intimidation and kidnapping. The Plaintiffs did not answer they just looked at each other. Thereafter, the Complainant Sihle walked in, and his left eye was swollen and closed and he had a bruise on top of his eye. He looked petrified of the three Plaintiffs to such an extent that he didn't want to walk in until

Warrant Officer Dlamini encouraged him to walk in. The complainant confirmed that the Plaintiffs are the ones who took him in their car against his will, and that he was taken to a certain place where he was assaulted by all three. Plaintiffs were asked if they had heard what the complainant had said they remained quiet. They never answered. They simply looked at each other and did not respond.

[9] The Plaintiffs were informed that they were being arrested for assaulting the complainant. They were read their rights. Thereafter, Sergeant Mvubu assisted in explaining their rights further to them. He even assisted them in attempting to get them bail. Sergeant Mvubu corroborated and confirmed that Warrant Officer Dlamini made a call to the prosecuting authority in trying to ascertain if it was possible for the Plaintiffs to be released on bail to which the prosecutor answered in the negative due to the nature of charges. As the charges fall under schedule one offences. For schedule one offences one can only be granted bail by the courts and that was the last time that Sergeant Mvubu saw the Plaintiffs.

[10] Sergeant Mvubu further confirmed that the complainant arrived after 13:30 to withdraw the charges. And further testifies that where the suspects had already been charged. It is not within their powers to issue bail under such circumstances.

THE PLAINTIFF'S EVIDENCE.

Evidence by Khulekani Dlamini

[11] Mr. Khulekani Dlamini confirmed that on the 22nd of March they had received a message from home that they were supposed to go and see Warrant officer Dlamini at the Zonkizizwe SAPS. Upon getting the message they immediately went to the police station. They knocked on Warrant officer Dlamini office door they found him sitting behind his desk and they also found the complainant standing in front of the desk. He did not have an opportunity to see his face nor did he have an opportunity to see if he had any body injuries. He testified that whilst in there Warrant Officer Dlamini asked the complainant if these were the

guys who had assaulted him to which the Complainant confirmed that these were indeed the people who had assaulted him.

[12] Subsequent to that the complainant left and Warrant Officer Dlamini locked the burglar door and told them that they were under arrest for assault GBH. They were there for a long time whilst the Warrant Officer was busy with paper work, they also had to have their thumb prints taken as well as their images. Later on, around 13:30 the Complainant came back to withdraw the charges against them. Once the charges were withdrawn, they tried making an inquiry with Warrant Officer Dlamini why he could not let them go or release them.

[13] Warrant Officer Dlamini informed them that they could not be released as the offence they had committed fell under the schedule one and could not offer them bail under such circumstances. They were then taken to the cells by Warrant Officer Dlamini. When they got to the cells Dlamini found urine on the floor, the toilet was blocked and had a foul smell. There were about eight or ten of them, they were all huddling in one corner due to the floor being wet. When he looked up he could see the sun.

[14] They were given very few blankets and he could not sleep because he was scared due to being shocked. He did not know what was happening. He recalls that some people were smoking inside the cell. He is not sure what they were smoking. There was also a mentally incapacitated person who was detained with them. In the morning they were then taken by a police van to the Magistrate court. There were about eight or ten of them in the van upon arrival at the Magistrate Court they were put in the court cells. In the court cells they were put together with other detainees who were coming from different prisons one of them being the Boksburg prison. These other inmates also threatened them as they wanted to take their shoes and clothes and also wanted money from them.

[15] They were in court cells for a long time, however, around 16:30 two police women called them and told them to go home. They had noted that if you were going to

court you would go upstairs but they were made to use the backdoor which is the door they had used when entering the court precinct.

The Evidence of Mike Ngwenya

[16] Mr. Mike Ngwenya confirmed being amongst the three Plaintiff's who had gone to see Warrant Officer Dlamini as per the instruction which was left for them at their home to see him. Upon getting into his office he made them sit down and called the Complainant by telephone to come to his office. Within a few minutes the Complainant entered the office. Upon his entry he enquired from him if indeed these were the perpetrators who assaulted him. The Complainant confirmed that this was correct. Thereafter, the Complainant was made to sign a document and subsequently left after 30 minutes.

[17] Thereafter, the Complainant came back with his parents, two women and one man to withdraw the charges made against them. They then enquired from Warrant Officer Dlamini why he was not releasing them. Warrant Officer Dlamini answered that it was not possible due to the offences they had committed. They were then sent to a detention cell which was stinky and cold, he recalls that there were eight of them in the cell. They were given three blankets and there was also a mentally incapacitated person. He recalled that he was scared, shocked and confused. He could not sleep because some people were smoking.

[18] The next morning they were taken by a police van to the court. Inside the police van it was eight of them. Upon their arrival in court they were taken to the court cells. Inside the court cells they met other inmates who kept threatening them wanting their clothes, shoes, shoelaces and money. They did not go to court, they were released through the back door which they had used when coming into court.

ANALYSIS OF THE MATTER

[19] Mr. Muller for the Plaintiffs argued that the reliance by the Defendants on section 40(1)(B) of the Criminal Procedure Act is flawed as at the time the Plaintiffs were

arrested assault GBH did not fall under schedule one offences. He supports his evidence based on the fact that the J88 noted soft tissue injuries and alludes to the fact that there was no dangerous wound inflicted for the arrest to satisfy these requirements.

[20] The onus thus rests on the Defendant to show that the arrest and detention were lawful. The plea filed amounts to a confession and avoidance which attracts the onus to prove the justification pleaded that is the lawfulness of the arrest on a balance of probabilities. The Defendant case pleaded s 40(1)(b) of the Criminal Procedure Act¹ which allows for an arrest by a peace officer without a warrant if the peace officer suspects that a person has committed a Schedule 1 offence.

[21] In *Duncan v Minister of Law and Order*² set out the requirement for an arrest in terms of s 40(1)(b), namely that:

“1. The arrestor must be a peace officer;

2. The arrestor must entertain a suspicion;

3. The suspicion must be that the suspect committed an offence referred to in Schedule 1; and

4. The suspicion must rest on reasonable grounds.”

[22] Mr Sibisi for the Defendant rightfully argued that the arresting officers were peace officers and when they made the arrest they had satisfied all jurisdictional requirements. This in fact is common cause and is not disputed by the Plaintiffs. The peace officers entertained a suspicion which was raised by the complaint who laid a charge against the Plaintiffs. The complainant did not only lay a charge he further pointed them in his presence as the perpetrators of the crime committed.

¹ 51 of 1977

² 1986 (6) SA 805 (A) at 818G-H

[23] The next inquiry is whether the perpetrator committed a schedule 1 offence. Assault with grievous bodily harm (GBH) means an assault that caused the serious physical harm. The evidence led by both police officers was that the Complainant's eye was swollen and closed, also he had a laceration on top of his eye. This was visible to them. This in my view is an injury which did amount to an injury that caused serious physical harm. The injury does not have to be permanent. Assault GBH must be caused either with an intent to cause some injury or with the knowledge that the injury will likely be inflicted. If the assault was committed with intent to cause GBH then the offence is more serious.

[24] In assault GBH, the offender must have intended to cause the Complainant grievous bodily harm. The enquiry into the existence of such an intent requires consideration of the following factors :

“a) The nature of the weapon used and in what manner it was used;

b) The degree of force used and how such force was used;

c) The part of the body aimed at; and

d) The nature of injury, if any, which was sustained.”³

[25] Assault GBH which was a charge that the Plaintiffs were arrested for in 2021 was not listed as a schedule 1 offence under the Criminal Procedure Act for which an arrest without a warrant may be justified under section 40(1)(b). Such an assault may be brought within the ambit of schedule 1 when a dangerous wound has been inflicted. In respect of the assault, this section requires the Defendant to establish on a balance of probabilities that the arresting officers held the suspicion on reasonable grounds that such a wound had been inflicted. It is not necessary to establish as a fact that he inflicted a wound that was dangerous. Suspicion implies an absence of certainty or adequate proof thus suspicion suspicion might be reasonable even if there is insufficient evidence for a prima facie case against the arrestee.⁴

³ S v Dipholo 1983(4) SA 757 (T) at 760

⁴ Mxolisi Mananga and Others v Minister of Police no 342/2020 [2021] ZASCA 71 (04 June 2021)

[26] The argument raised by Mr. Muller for the Plaintiffs that the Complainant suffered soft tissue injuries which was not a wound as envisaged in terms of schedule one. This argument is flawed in that in interpreting a statutory provision, language must be considered in the context in which it appears, in light of the ordinary rules of grammar. Where a provision is open to more than one interpretation a sensible meaning is to be preferred to the one that leads to an insensible or unbusiness like result. While a wound refers more often to a cut or a laceration, penetration of the skin may not be necessary⁵.

[27] The SCA⁶ in the Mananga judgement where in a question of what constitutes a dangerous wound was engaged in held that *“in applying the established approach to interpretation no logic reason commands itself for excluding an arrest warrant where a dangerous injury has been inflicted to a body of a victim with a pladge instrument, while permitting it when the injury is inflicted with a sharp object causing a laceration it is the potential consequence of the injury which justifies an arrest without a warrant”*. Therefore, both a swollen and a closed eye and the laceration over the eye of the Complainant are wounds as envisaged in the schedule.”

[28] In my view the wound inflicted on the Complainant was indeed dangerous as contemplated in the schedule. In *Jones*, the court remarked that: *“it seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ the officer affecting the arrest has only to have reasonable grounds to suspect that such a wound has been inflicted. This is an objective test.”*⁷

[29] In my view the swollen closed eye is a dangerous wound that can endanger the eye as an organ which can have dire consequences. The First Plaintiff testified that the incident between him and the Complainant occurred in one or two days

⁵ The new shorter oxford dictionary defines a laceration as an injury to body tissue caused by a cut, below, hard or sharp impact, an external injury.

⁶ Mananga Supra

⁷ Jones at 236 ,De Klerk v Minister of Police [2018] 2 All SA 597 (SCA) para 10

prior to a holiday. The arrest of the Plaintiffs took place on the 22nd of March 2021 officially it was a holiday as the previous day was Sunday a human rights day. The Complainant did not delay in laying a complaint against the Plaintiffs to the police as the encounter between him and the Plaintiffs had occurred on 20 March 2021. The police also acted swiftly by looking for the perpetrators timeously after the complaint was laid. The Mr. Dlamini also gave evidence that he could identify the Complainant when they arrived at the police station, despite the fact that the Complainant had his back towards them. He could identify the Complainant because he was still wearing the same clothes he had worn the previous day when they had an encounter with him. The court can then draw a clear inference that the Plaintiffs inflicted that injury.

[30] Further, Warrant Officer Dlamini testified that he acquainted himself with the contents of the docket which if read as a whole pointed to a charge of assault GBH, kidnapping and intimidation. He verified the information with the Complainant before making the arrest. It is also important to note that when the Complainant entered Warrant Officer Dlamini's office he was petrified of the Plaintiffs in such a manner that he did not even want to come inside the office. He had to be calmed and promised that nothing will happen to him. It would be going beyond the duties of being a police officer to examine a wound of a victim, in the same manner a doctor would. A police officer is merely required to have regard to the facts and the circumstances at his disposal at the time to satisfy himself of the merit thereof if, on a consideration thereof there are reasonable grounds to suspect that a dangerous wound has been inflicted, he is entitled to arrest the suspect without first obtaining a warrant.

[31] There are clear distinguishing factors between this matter and the *De klerk*⁸ matter in that there was no medical evidence which had been tendered, the report submitted was entirely ineligible and there was no reliance placed on the dangerous wound in the justification pleaded and the nature of the injury was not canvassed during evidence (which in the present case was canvassed by the

⁸ De Klerk v Minister of Police [2018] 2 ALL SA 597 (SCA)

police officers). There were no reasons demonstrated by the arresting officer to have suspected that the wound may have been dangerous.

[32] This matter is entirely different in that the arresting officer had every reason to suspect that the injuries which he observed physically had been inflicted by the Plaintiffs. He saw the a swollen, closed eye and the laceration above it. The injuries appeared severe to him in conjunction with the statement filed by the Complainant and the information on the face of the docket. It was reasonable of him to make an arrest in terms of section 40(1)(b). In my view the injuries sustained by the Complainant were not trivial especially on the left eye that was swollen and closed. It is even possible that the eye of the Complainant at that stage could have been permanently damage.

[33] It is important to also note that the issue of the Plaintiffs not being the ones who assaulted the Complainant was never canvased or put to the Defendants witnesses. It was never even established how they met or came across the Complainant during their examination in chief but only in cross examination. The issue concerning the Plaintiffs not being responsible for inflicting injuries on the Complainant was not even pleaded in the Plaintiffs particulars of claim. The Plaintiffs were very evasive and tried to act as if they did not see the injured face of the Complainant. This clearly demonstrates the fact that they knew how the Complainant got those injuries, otherwise they would have said something to the police on the spot when they were given an opportunity.

[34] The First Plaintiff testified that they were hungry since it was load shedding and they decided to buy meat between 22:30 and 23:00. By coincidence they met the Complainant whom they asked about the stolen steam washer machine as he was the last person to be in their yard that day. However, the First Plaintiff contradicted himself as they had been investigating the issue of the stolen washer machine on their own without the police. This led them to another person's house who alleged to have seen the Complainant with the steam washer machine and he was trying to sell it to him.

[35] Thereafter, the First Plaintiff started asking around the neighbourhood where he could find the Complainant and he was informed by the people where they could find the Complainant and where he usually hangs around. Their trip to “*shisanyama*” had ulterior motives from the evidence led. It was to find if not apprehend the Complainant. The First Plaintiff’s evidence was that he lived with his family, which includes his mother, wife and sisters . It was not his evidence that they had not cooked hence he went to “*shisanyama*” around 22:00 which indeed is an odd hour to visit such a place. In all probabilities the visit to “*shisanyama*” had nothing to do with hunger but it was simply because they were investigating the whereabouts of the Complainant, and were informed where they could find him. There was a clear motive in their visit to *shisanyama* at that time, and it was to perform functions/powers which are only bestowed to the police force of this country.

[36] They met with the Complainant who volunteered information that he can take them to his friend who was the one selling the steam washer machine. Instead of taking the Complainant to the police. The Plaintiffs went to their house first to fetch the older brother (the deceased) who was already sleeping. It is not clear why they had to wake him up to accompany them as opposed to going to the police. An inference is drawn by this court that it was to intimidate the Complainant as there was no evidence led by the Plaintiffs that the Complainant was a threat to their lives which would have warranted them having to fetch the deceased older brother for support. The Complainant at all material times was in the vehicle all by himself against the three Plaintiffs who were suspecting him of stealing their steam washer machine.

[37] This court can draw an inference that the trip to the Ngobese house must have been in the middle of the night. The Complainant was then taken to the Ngobese house, and this court is led to believe that the Complainant screamed and just jumped the wall for no apparent reason. All the probabilities point to a case of kidnapping. If indeed they did not kidnap, assault and intimidated the Complainant they would have mentioned it prior to their arrest when they were given an opportunity to respond as opposed to looking at each other. Even when

they were in Warrant Officer Dlamini's office they did not mention the stolen steam washer machine.

[38] There are also contradictions between Mr. Ngwenya and Mr. Dlamini's evidence. Mr. Dlamini's evidence is that the Complainant jumped the sidewalk whereas Mr. Ngwenya's evidence is that he jumped the back wall and fled as such they could not find him. This is a fabrication of the events as this was not even put to the Defendants witnesses as a version, if the Complainant indeed fled it was simply because they had assaulted him. The Plaintiff's evidence could have been strengthened by calling Mr. Ngobese who was said to be Mike Ngwenya's friend to confirm these events.

[39] Mr. Muller for the Plaintiff argued that the Plaintiffs were arrested for non-existent charges as the only charge laid against them was that of assault GBH. However, kidnapping, assault and intimidation was put to the Plaintiffs but they gave answers which were a bare denial. This was corroborated by Sgt Mvubu that Warrant Officer Dlamini and the Complainant did put the version of being kidnapped, intimidated and assaulted by the Plaintiffs and pointed at them as the perpetrators and the Plaintiffs did not say anything. This was not rebutted by the Plaintiffs at all. They were not even led to tell their side of the story as to how they encountered the Complainant. The First Plaintiff first denied knowing the Complainant but when he was pressed under cross examination it turned out that he knew him.

[40] *De Klerk v Minister of Police* set out the requirements for such a delictual claim to be successful:“(a) the plaintiff must establish that their liberty has been interfered with;(b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;(c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought⁹.”

⁹ [2019] ZACC 32

[41] This court is satisfied that once an arrest had been made under such circumstances it was no longer open for the arresting officer to grant police bail. Even after the Complainant returned in the afternoon to withdraw the charges. It was outside his powers to grant bail. Warrant Officer Dlamini rightfully explained to the Plaintiffs that they were arrested for serious offences as such he could not release them. All he could do was to include the withdrawal statement from the Complainant and it is for the court to make a judgment or decision thereon. This was corroborated by Sgt Mvubu.

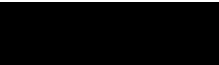
[42] The detention that resulted thereafter, was reasonable as when they were arrested it was officially a public holiday no courts were open since the holiday had fallen on a Sunday, as a norm it moved to the Monday which was the 22nd of March 2021. The Plaintiffs were transported to court the next day where they were later released which does not mean that they were not guilty of the offence/s committed. As per the statement of withdrawal, the only reason why the Complainant withdrew the charges is because the Plaintiffs promised not to intimidate or assault him. It was not a case of mistaken identity.

Conclusion

[43] The evidence led by the Defendant's witnesses is credible and it's believable under the circumstances as they corroborated each other, and did not contradict each other. The Defendants arrest was reasonable and lawful under the circumstances inclusive of the resultant detention.

[44] Therefore the following order is granted as follows:

1. The Plaintiffs claim is dismissed with costs on a party and party scale inclusive of Counsel fees on scale "B"



NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

For the Plaintiff: Adv. Muller

Instructed by : Jean Keyser Attorneys Inc.

For the Defendant : Adv. SF Sibisi

Instructed by: State Attorney Johannesburg

Date of Judgment: 26 June 2024