

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2016/13641

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
DATE 29 /08/2024	SIGNATURE

In the matter between:

VITERINO MARCELLINO MEYERS

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

FISHER J

Introduction

[1] This is an action for damages against the Minister of Police. The relief sought is divided into two claims labelled A and B respectively.

- [2] Claim A is for unlawful arrest and unlawful detention. The plaintiff claims also that the arrest and detention complained of was malicious. The plaintiff claims an amount of R 600 000 under this claim.
- [3] Claim B is for assault for which the plaintiff claims an amount of R 150 000.

The factual complex pleaded by the plaintiff

- [4] The plaintiff pleads that on 11 September 2015 at 18h00 and at Noordgesig, Johannesburg he was arrested without a warrant by police officers who were all members of the South African Police Services (SAPS) and whose full names and rank are unknown to him.
- [5] It is further pleaded that, subsequent to his arrest, the plaintiff was detained at the Noordgesig Police Station at the instance of these policeman as well as various other policemen whose names and identities are also unknown to the plaintiff.
- [6] As to claim B, the plaintiff pleads that he was assaulted by being punched in the face and grabbed and forced into a police vehicle. He pleads further that, as a result of the assault, he suffered bruises to his face and arm.

The defendant's pleadings

- [7] The defendant raised a special plea of failure to comply with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – but this was resolved between the parties and not persisted with.
- [8] The plea on the merits consisted in the defendant claiming no knowledge of the pleaded facts and the putting of the plaintiff to the proof thereof.
- [9] Subsequent to the plea the plaintiff sought the following particulars and documents for trial:

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1. On what date and time was the plaintiff arrested?
2. Where exactly was the plaintiff arrested?
3. Was the plaintiff arrested in a building? If so whose building?
4. Who arrested the plaintiff?
5. Was the arresting officer in uniform?
6. What is the name, rank and force number of the police officer who arrested plaintiff?
7. Did the arresting officer make an arrest statement, if so the plaintiff requires a copy of such statement?
8. Did the arresting officer record the events in his/her pocketbook, if so the plaintiff requires a copy of such pocketbook entries?
9. On what charge was the plaintiff arrested?
10. If the plaintiff was arrested on a charge of giving attitude, then defendant is required to state whether defendant relied on justification for the arrest under the provisions section 40 of Act 51 of 1977?
11. Is it the defendant's case that the plaintiff committed the crime of giving attitude if so then the defendant is required to state the following:
 - a. How did plaintiff commit the offence exactly?
 - b. To whom the attitude was given by the plaintiff?
 - c. What reasonable grounds for the suspicion existed at the time of plaintiff's arrest?
12. What evidence was available at the time of plaintiff's arrest indicating that the plaintiff has committed an offense of intimidation?
13. What was the purpose of plaintiff's arrest?
14. If the purpose of the arrest was to bring the plaintiff to court, then the defendant is requested to state whether the arresting officer made an arrest statement for purposes of presenting same to the Director of Public Prosecutions in order to consider prosecution? And if so, plaintiff requires a copy of said document.
15. Did the state prosecutor make a decision on the prosecution of plaintiff and if so was the plaintiff prosecuted or not?
16. In what fashion was the plaintiff arrested?
17. In what fashion was plaintiff transported to the police station?
18. At which police station was the plaintiff detained?
19. At what time did plaintiff arrive at the police station?

20. Was the plaintiff's name recorded in the police occurrence book (SAP 10) and if so then the plaintiff requests a copy of such register reflecting the time plaintiff arrived at the police station.
21. At what time was plaintiff placed into the holding cells?
22. Was the plaintiff charged, if so by whom and at what time?
23. Was a warning statement taken from plaintiff and if so plaintiff requests a copy of such document?
24. Was the plaintiff's constitutional rights explained to him and if so by whom and at what time?
25. Was the plaintiff's fingerprints taken?
26. Was it explained to plaintiff that he was entitled to apply for bail or to be released on warning and if so, by whom and at what time?
27. Was the plaintiff afforded an opportunity to read the statement?
28. Was the evidence placed in a bag in front of the plaintiff?
29. Was the evidence weighed in front of the plaintiff?
30. If so, why was the plaintiff not given an opportunity to sign for it?
31. Why was plaintiff's further detention necessary once he was charged?
32. Why was the plaintiff not released on warning or bail?
33. On what date and time was plaintiff released from detention at the relevant police cells?
34. What was the reason for plaintiff's release from detention?
35. To which court was the plaintiff's taken?
36. Did the plaintiff appear in court and if not why not?
37. At what date and time was the plaintiff eventually released from the court holding cells?
38. Was the time of plaintiff's release recorded in the court holding cell register (sap 14) and if so then the plaintiff requests a copy of such register reflecting the time and reason for plaintiff's release.
39. Who was the senior office on duty during plaintiff's detention?
40. Who was the investigating officer in plaintiff's case?"

[11] The defendant in reply to this request reminded the plaintiff that it had no knowledge of the arrest, detention and assault pleaded.

- [12] In response to the defendant's detailed request for further particulars, the plaintiff, essentially, stated that the requested particulars were matters of evidence; referred the defendant to its particulars of claim and stated that the defendant was the custodian of the documents relating to the arrest and the attendance register of the police officers on duty on the day of arrest.
- [13] The plaintiff, furthermore, persisted in seeking discovery of documents relating to the alleged arrest and detention. This position was maintained by the plaintiff notwithstanding that the defendant continued to be adamant that it had no record of any arrest and detention.
- [14] The day before the hearing, the defendant applied for an amendment to its plea. It was sought that the plea be amended to plead a denial of the facts pleaded and, in amplification of the denial, a pleading that, according to the records held at the Orlando Police Station, the plaintiff had attended at such police station to open a case of assault against police officers.
- [15] It is further pleaded by the defendant that, in support of the assault charge the plaintiff made a statement under oath in which he alleged that he was at a spaza shop playing arcade video games when he and the police engaged in a scuffle. According to the statement the plaintiff he was then put into a police van and driven to Noordgesig police station; on arrival at the Noordgesig police station, a policeman found at the police station refused to detain the plaintiff, whereupon he was spoken to whilst outside the station, apologised and walked home.
- [16] It was explained by Ms Chabalala who was instructed by the State Attorney for the defendant, that this charge and statement had been located shortly before the trial by means of a computer search which went beyond the data base relating to arrest and detention.
- [17] The amendment was not opposed and it was granted. The documents pertaining to the assault charge, which included the statement referred to in the amended plea, were also put into evidence without objection on behalf of the plaintiff.

The evidence for the plaintiff (the defendant calling no witnesses)

- [18] The plaintiff gave evidence himself and called the shopkeeper of the shop where he was allegedly assaulted by the police officers concerned.
- [19] The plaintiff testified as follows. On 11 September 2015 he visited the Ayoba spaza shop which was within walking distance of his home. He went there to play arcade type video games. The owner of the shop is known to him by the name "Sam".
- [20] The game machine required that money be inserted into it in order to start and continue the game. The plaintiff inserted the required money which was 50 cents and commenced playing the game.
- [21] Whilst he was so engaged, two policemen entered the shop and chatted with the shop owner. The policemen then, without any provocation or cause, demanded that the plaintiff leave the shop.
- [22] The plaintiff refused, wanting to finish his game. An argument ensued and the plaintiff was physically assaulted by one of the policemen. The assault entailed the policeman pushing him against the game machine and slapping him five times.
- [23] The shop owner intervened. He refunded the plaintiff his 50 cents which had been paid for the game so that he would leave. The plaintiff was then grabbed by the belt by one of the police officers and pulled outside the shop by the police officer.
- [24] The plaintiff's version of the progression of the assault is that, when he was outside, he fell to the ground, whereupon he was kicked in the face by the policemen "with boots". He was then, according to him, slapped about six to seven times. The assault which occurred outside the shop caused a "wound" above his eye.

- [25] He was then, according to him, placed in the back of the van being manned by the policemen, and driven around for approximately 30 minutes before being taken to a yard immediately adjacent to the station. He testified that the van was parked in this yard at a spot which was hidden.
- [26] On that night, the plaintiff was, he says, advised by his parents that he had cause to lay a criminal complaint at the Noordgesig Police Station. They accompanied him to the police station to lay the charge.
- [27] However, at the reception desk, he was informed that, as Noorgesig was a satellite police station, it was not tasked with opening cases. He was thus referred to Orlando Police Station.
- [28] At Orlando Police Station, the female office who was attending to him, upon hearing that he wished to lay a charge against police officers, "disappeared". He and his parents waited for over an hour and, when the police officer did not return, they decided to leave without a case being opened.
- [29] The next day (Saturday 12 September 2015) the plaintiff went to the Helen Joseph hospital to report his injuries. There, he was attended to by a doctor who completed a J88 Medico-legal form recording the plaintiff's injuries. The form was placed into evidence on the basis that it was what it purported to be. The recordal in the J88 form was of bruising on the head, neck, and forearm.
- [30] In his pleadings and notices, the plaintiff's version was that he did not know the identity of the police officers concerned. However, when laying the assault charge, he named them.
- [31] The plaintiff admitted in evidence that he was, in fact, not arrested at Noordgesig Police Station, contrary to his pleadings.
- [32] In cross examination, after being directed to his particulars of claim, the plaintiff, confirmed that the information contained in the particulars of claim was in accordance with his instructions to his attorneys.

[33] He also confirmed that he had laid the charge of assault pleaded by the defendant.

[34] His version in evidence as to the assault was that he was assailed “with several slaps” in the shop and then taken outside where he was hit “in front of everyone” and thereafter thrown into the back of a police van. He was, he said, then driven to Noordgesig satellite police station where he was allowed out of the police van at a yard outside of the police station. He was then hit again in the face and allowed to leave.

[35] He stated the following under oath in his sworn statement in relation to the identity of his alleged assailants:

“Although I do not know the policemen, I am able to point them [sic], if I see them again. I also went back to the shop; to check the register that they were signing and noticed that the names in the register were Cst Pateke and Cst Maluleke.”

[36] The plaintiff then called the second witness, Mr Mesey Zerum, known as “Sam” to the plaintiff and apparently in the community in which his shop is situated.

[37] Mr Zerum testified as follows. He is an Ethiopian national and the owner of the *Ayoba*, a spaza shop.

[38] On the day in question, he served customers while the plaintiff played an arcade video game in his shop.

[39] Two police officers arrived. They asked the plaintiff to leave the shop. The evidence of both the plaintiff and Mr Zerum is that these police officers were involved in performing monitored patrols organised by the police force in order to quell a spate of xenophobic violence in the area.

[40] The plaintiff refused the request by the police officers that he leave the shop, stating that he wished to complete the game as he had paid for it.

[41] In consequence of this refusal, an argument ensued between the policemen and the plaintiff.

- [42] In order to diffuse the situation, Mr Zerum refunded the 50 cents which the plaintiff had paid for the game. The police then took the plaintiff outside and left.
- [43] When questioned by the plaintiff's counsel, Mr Zerum described the situation vaguely as a "fight". He, pertinently, did not provide specifics as to whether it was physical or merely argumentative.
- [44] The court then adjourned for the day, after being informed that the plaintiff would call one further witness the following day, being the plaintiff's mother.
- [45] The following day the plaintiff's counsel, Mr Opperman indicated that he intended to amend the particulars of claim in accordance with a notice to amend which he wished to hand up. He said that he planned to lead his final witness, presumably the plaintiff's mother, whereafter he would move for the amendment in terms of rule 28(10).
- [46] Unsurprisingly, Ms Chabalala for the defendant objected. She stated that she had not had sight of the notice of intention to amend and argued that a substantive application for amendment should be brought. She argued that no further evidence should be led until after the determination of the application to amend.
- [47] I agreed that this was the correct approach and it was so ordered.

The application for amendment

- [48] The plaintiff then was given time to prepare a substantive amendment in terms of which he sought to plead a new factual complex. This was obviously done in order to attempt to mirror the evidence already provided by him.
- [49] The amendment sought to change the pleaded version from one which alleged that the plaintiff was arrested without a warrant by police officers; was detained

at the Noordgesig Police Station at the instance of these police officers as well as various other police officers whose names and identities were unknown to him; that he was assaulted by being punched in the face and grabbed and forced into a police vehicle as result of which he suffered bruises to his face and arm to one which alleged that he was detained in the police van and after being driven around for 30 minutes was left outside the Noordgesig Satellite Police Station.

- [50] Clearly the amendment sought to take into account the newly produced statement and assault charge which was significantly at odds with the pleaded case.
- [51] The fact that the police officers, whilst pleaded as unknown to the plaintiff, were named in the statement and traceable was also a factor which had only just come to light for the defendant.
- [52] The plaintiff had confirmed in his evidence that the identity of these police officers was discovered on the basis of the register kept at the shop which recorded the visits of policemen who were deployed routinely to inspect shops owned by foreigners during the period of xenophobic violence.
- [53] The substantive application for amendment was opposed. The defendant's attorney Mr Thabani Mpolo of the State Attorney made the affidavit in opposition.
- [54] Mr Mopollo pointed out that the action was issued on 21 April 2016 – i.e. more than eight years ago.
- [55] There followed a sequence of trial preparation which involved demand for the docket and even a compelling order that the docket be produced by the defendant.
- [56] Why these motions were gone through when the plaintiff knew he was not detained at the police station and that there was, in fact, no docket was not explained.

- [57] It is now well settled that amendment will always be allowed unless the application to amend is mala fide or will cause such injustice which cannot be compensated for by costs and/or a postponement.¹
- [58] Thus, simply put, the only limitation on a court's power to grant an amendment is an irremediable prejudice.
- [59] The defendant claims prejudice as follows. For years it has been dealing with a case which is to the effect that the plaintiff was arrested by unknown police officers and detained by unknown police officers at a police station.
- [60] This charade has been continued through the years by requests for the arrest docket and further particulars of the arrest. There was even an order that the defendant produce this non-existent docket.
- [61] The fact that the police officers involved were known to the plaintiff all along is of enormous significance. The defendant has been deprived of the opportunity to lead evidence and cross-examine.
- [62] One can only speculate as to the course the trial would have taken had the charges laid against the two police officers not been latterly found by the defendant.
- [63] This late intervention caused the plaintiff's pleaded case to unravel.
- [64] The defendant was thus called upon by the proposed amendment after eight years and after the case of the plaintiff had come to a close to meet an entirely new case.
- [65] I inquired of Mr Opperman whether he was suggesting that any prejudice to the defendant may be assuaged by the recalling of the plaintiff in order that the

¹ *Moolman v Estate Moolman* 1927 CPD 27 at 29.

discrepancies between the evidence and the pleaded case and the consequent decision to amend could be explained.

- [66] Mr Opperman, however, made clear that he had no intention of allowing the plaintiff to be recalled. One can only assume that it was thought, perhaps sensibly, that the recalling of the plaintiff to rehash and be cross-examined on the discrepancies would potentially cause more damage to the plaintiff's case.
- [67] There is obvious injustice inherent in a party being allowed to tailor his pleadings to evidence already led and cross-examined on.
- [68] Where the tailoring is such that it is explicable and is cogently explained, there may be a way to take account of it. This is not the case here.
- [69] The defendant pleaded the inconsistent version which had come to its attention by amendment at the beginning of the case. The plaintiff was thus not taken by surprise in relation to that inconsistency.
- [70] The eight-year delay in moving for the amendment was not explained nor is it explicable on any basis which was in accordance with good faith.
- [71] It is true that delay in bringing forward an amendment is, in itself, in the absence of prejudice, not a ground for refusing an amendment. However, a litigant who seeks to add new grounds of relief at a stage after the plaintiff's evidence has been led does not claim such an amendment as a matter of right.
- [72] The plaintiff should have explained the delay in seeking the amendment. As I have said, the delay is inexplicable other than on the basis that a false arrest case was pleaded.
- [73] The greater the disruption caused by the amendment, the greater the indulgence sought and the heavier the burden upon the person seeking amendment to convince the court to accommodate him.²

² *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 463E, 462J–463B and 464E–H.

[74] In all the circumstances, this is not a matter where it would be appropriate to allow the amendment.

[75] In any event, even if the amendment were allowed this would not change the fact of the previous inconsistent statement and other contradictions and deficiencies which must come to bear in the weighing up of the plaintiff's evidence.

The deficiencies in the evidence

[76] The evidence of Mr Zerum confirmed only that there was what he called "a fight" and that the police officers took the plaintiff away in their van. He did not confirm any assault.

[77] Thus, the plaintiff was a single witness as to the alleged assault which occurred outside the shop.

[78] On the plaintiff's version given in evidence, whilst outside the shop, he was knocked to the ground and kicked in the head whereupon he sustained a head wound. This version is significantly at odds with the pleaded version which is a punch in the face and a pushing into a police van. Both of these versions as well as being at odds with one another are at odds with the sworn statement made to found the assault. This latter statement describes the assault as a pushing against the arcade game machine in the shop and repeated slapping.

[79] The differences between a punch (pleaded) a slap (in sworn statement) and a knocking to the ground and being kicked in the head with booted feet (in oral evidence) hardly need analysis.

[80] The fact that the defendant has been deprived of the opportunity to meet the plaintiff's contradictory case is such that the proceedings are rendered unfair in relation to the defendant.

[81] There was an attempt to put into evidence a photograph which showed the plaintiff, apparently in a police station with a head wound above his eye. He

testified that his mother had taken the photograph inside the Orlando police station.

[82] It was initially stated that the plaintiff's mother would come and testify but she was not ultimately called.

[83] Mr Opperman for the plaintiff argued that I should ignore the contradictions and find that there was an arrest and detention on the basis of the detention in the van for 30 minutes.

[84] It is not however for this court to sift through the contradictions in the evidence to attempt to piece together some semblance of consistency for the plaintiff. This is especially so since the concealment of the assault charge of the identified police officers deprived the defendant of the opportunity to produce its version.

Conclusion

[85] In all the circumstances this court has no option but to reject the plaintiff's evidence.

Costs

[86] The costs are, to my mind, properly charged on the basis of the B parameter.

Order

[87] In the circumstances I make the following order:

The plaintiff's claims are dismissed with costs such costs to be calculated on the B scale.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 29 August 2024.

Heard: 23 to 25 July 2024

Delivered: 29 August 2024

APPEARANCES:

Plaintiff's counsel: Adv. F Opperman

Plaintiff's attorneys: Madelaine Gowrie Attorneys

Defendant's counsel: Adv. E Chabalala

Defendant's attorneys: State Attorney (Johannesburg)