

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 1867/2020

In the matter between:

SIBUSISO GWIJI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

RUSI J

[1] In an action for damages, the plaintiff sues the defendant for R500 000.00 as and for damages resulting from his unlawful arrest and subsequent detention on 15 November 2019. He holds the defendant liable for such damages on the basis that he was arrested by his members without a warrant of arrest and detained thereafter for ten (10) hours without a justifiable cause. The defendant resists the plaintiff's claim.

[2] In his amended particulars of claim dated 26 May 2022, the plaintiff alleges that on the already mentioned date he was at or near Magqirheni Street, Mandela Park, Mthatha when he was arrested without a warrant by two members of the South African Police Service (the SAPS) who were unknown to him. He was subsequently taken to Wellington Correctional Services, Mthatha, where he was detained for ten (10) hours and later

released after he promised to pay an amount of R500.00. He further alleges that it was not clear whether the R500.00 he was caused to pay was a fine or payment for his release on bail as he paid it without appearing in court and without being charged of any criminal offence or being informed of the reasons for his arrest.

[3] The plaintiff further avers that at the time of his arrest, he was with his family members; and his neighbours and community members witnessed the arrest which took place in broad daylight. His arrestors were on duty and acting within the course and scope of their employment as members of the SAPS. They had no justifiable basis to arrest him without a warrant as he had not committed any offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA) or attempted to commit such offence in their presence.

[4] It is the plaintiff's assertion further that his arrest was insulting and injurious to him and constituted an intentional and unjustifiable restraint of his personal liberty. It aggrieved him, impaired his integrity, dignity and self-esteem, and caused him embarrassment and humiliation as it took place in full view of the public who knew him well.

[5] The defendant denies in its plea that the plaintiff was arrested by his members on 15 November 2019 and detained at their instance. That the plaintiff paid an amount of R500.00, either as a fine or bail bond, is also denied by the defendant. The defendant pleaded, in the alternative, that if the plaintiff was indeed arrested by his members on 15 November 2019, such police officers were not on duty and not acting within the course and scope of their employment with the SAPS.

The material litigation background

[6] After the close of pleadings, the defendant requested the plaintiff, in terms of Uniform Rule 21(2), to furnish further particulars for trial purposes. Those particulars related to the police station where he was formally charged after his alleged arrest;

whether his arrestors were clad in police uniform and their identities; as well as the method of payment of the R500.00 he mentioned in his particulars of claim, and the identity of the person to whom he paid it.

[7] In reply to the defendant's request for trial particulars, the plaintiff alleged that he was arrested by ununiformed police officers who were stationed at the Mthatha Central Police Station and that is where he was charged. The police officers who arrested him were Sergeants Mtwana and Zweni and he made a payment of R300.00 at the Wellington Prison, Mthatha, as bail bond.

[8] A notice in terms of Rule 35(3) and (6) was also given by the plaintiff to the defendant on 22 September 2021, to make further and better discovery; and make available for inspection a copy of the police docket. In reply to this notice, the defendant's deponent stated in an affidavit that "*he has access to, and in control of all the documents in the defendant's possession in relation to this action, and the defendant was not in possession of, and never had in his possession the said police docket and its whereabouts were unknown.*"

The trial

[9] The trial of this matter proceeded both on the merits and *quantum* of the plaintiff's claim. Both parties discovered documents that they intended to use during trial. They agreed in a pre-trial minute dated 08 December 2021 and a further pre-trial minute dated 11 May 2023, respectively, that the discovered documents would be admitted in evidence without the need for their formal proof. The incidence of the onus of proof fell on the plaintiff since his arrest and detention are denied by the defendant.

The issues for the court's determination

[10] I was called upon to determine whether the plaintiff was arrested and detained by the defendant's members on 15 November 2019 as he alleged, and if so, whether his

arrest and detention were justified. As regards the *quantum* of the plaintiff's claim, if upheld, I would determine whether the amount of R500 000.00 that the plaintiff claims is appropriate compensation. These matters are dealt with in the parties' further pre-trial minute dated 11 May 2023.

The plaintiff's case

[11] The plaintiff, Mr Gwiji, testified that it was approximately at 07h00 on 15 November 2019 when two police officers arrived in an unmarked vehicle at his premises in Slovo Park where he rented three rooms. He later came to know the names of the two police officers to be Sergeants Zweni and Mtwla. At the time they approached him, he was conversing with a certain Mr Mashaba, who was a tenant at the same premises at the time. The two police officers who were in civilian clothing stated that they were looking for the home of 'Sibusiso Gwiji' and he replied that in as much as that was not Sibusiso Gwiji's home, he was Sibusiso Gwiji. At that same time the police officers asked if he and Mashaba knew where 'Nceba' was. He told them that they had no knowledge of Nceba's whereabouts.

[12] Sergeant Zweni and Mtwla ordered him to point out his rented house among those in the premises and they all went inside it. On entering the house which was one of the three that he rented as a home office, Sergeant Zweni took down what he thought to be a statement of Mashaba. Once Sergeant Zweni was done writing the statement, Sergeant Mtwla requested him to lock his house and come with them to the Mthatha Central Police Station. He obliged and Mashaba remained behind.

[13] To his dismay the police vehicle that he and the two police officers were travelling in was driven around Slovo Park and the police officers went around doing what appeared to him to be an investigation concerning other cases that were unrelated to him. This drive around Slovo Park in the police bakkie endured for approximately 40 minutes, and at all material times he was seated inside the bakkie at the backseat.

[14] He was ultimately brought to office number 102 at the Mthatha Central Police station where he was charged, and his photographs and fingerprints were taken. He was also issued with documents he thought to be 'the notice of constitutional rights' and 'warning to appear in court on 18 November 2019. It also appeared from these documents that he was charged with assault common. According to him, the assault charge related to an incident that took place in September 2019 during which he sprayed a person named 'Lwando' with pepper spray.

[15] Around 09h00 on the same day he was taken to the Mthatha Magistrates' court where he remained in custody in congested holding cells until he was caused to appear before a magistrate. Sergeants Zweni and Mtwana mistreated him as they escorted him to court by denying him an opportunity to use the bathroom when he needed to. The holding cell was filthy, and he could not eat the food he was served there. Upon appearance before a magistrate in court "F", he was asked how much he would afford for bail, and he indicated that he could afford R500.00. He was admitted to bail of R300.00.

[16] After his case was adjourned by the magistrate before whom he appeared, he was taken back to the holding cells. He could not pay bail immediately or make arrangements to pay it because his cellphone was taken by the police, apparently for safe keeping when he arrived at the court holding cells. While in the holding cells, he was with many other inmates who taunted him even though he managed to stave off their attempts to abuse him. He was subsequently conveyed in a police vehicle with other inmates to the Wellington Prison.

[17] At the Wellington Prison he waited in the prisoner reception area with other inmates to be lodged in. He resisted going to the prison cells as he feared being sexually abused. To save himself he showed the correctional officers who were receiving them the warning to appear in court, stating that he was not supposed to be detained to begin with.

[18] When the correctional officers saw the warning to appear in court, they resolved to put him in a cell with only two other inmates. While waiting to be taken to the prison cell

and having told the correctional officers that he had been admitted to bail of R300.00, they assisted in phoning his aunt, Ms Cynthia Kgaketsang Sigodi who arrived after 17h00 and paid on his behalf the amount R300.00 as bail.

[19] The bail receipt that the plaintiff relies on as proof of his arrest on 15 November 2019 is reproduced hereunder:

3.0007 C.P.H. A.B.H. J 309 (02/11/17) H 083052

DUPLIKAAT: Moet aan die Klerk van die Hof gestuur word.
DUPLICATE: To be forwarded to the Clerk of the Court.

BORGKWITANSIE - BAIL RECEIPT

Saak No. F1793/19
Case No. to at MTWATHA

Uitgestel tot Postponed until 06/12/2019 na Hof to Court C to at MTWATHA

Die Staat teen The State versus SIBUSISO GWILI 014733320

Ontvang van Received from CYNTHIA KGAKETSANG SIGODI

ID Nommer ID Number [REDACTED]

Adres Address [REDACTED]

Die bedrag van The amount of THREE HUNDRED Rand

R 300-00

ACCOUNTS OFFICE
Mthatha Remand Centre

2019 -11- 15

Handtekening van deposant
Signature of depositor [REDACTED]

Datumstempel/Date stamp

Private bagx5026 Mthatha
HABIBEN GABE Aangewese afdienaar/Prescribed officer

Hierdie kwitansie moet voorgelê word by aansoek om terugbetaling
This receipt must be produced on application for refund

CELL : 0 [REDACTED]

[20] He subsequently sought legal advice regarding the circumstances of his arrest and handed over to his legal representatives the constitutional rights notice and warning to appear in court which were issued to him at the time he was charged at the Mthatha Central Police Station.

[21] Asked in cross-examination why he did not discover the constitutional rights notice and the warning to appear in court, the plaintiff testified that this would be something that his legal representatives would know more about. Later on, during cross-examination, when pressed on his failure to discover the two documents, the plaintiff testified that he merely peeked at the documents whose content and purport was not explained to him and saw that they made reference to 'constitutional rights' and 'warning'. When cross-

examined further on this issue, his evidence was that he in fact obtained the two documents from another attorney, otherwise, they were never issued to him.

[22] Apart from the plaintiff's discovered copy of the bail receipt, which was admitted as an exhibit, no further evidence was adduced on his behalf.

The case for the defendant

[23] The defendant called the evidence of its only witness, Constable Mabutho whose testimony related, in the main, to the methods of securing the attendance of a person at court after his arrest. These methods are trite, I do not consider it expedient to repeat Constable Mabutho's evidence in this regard. He also testified regarding two documents that the defendant discovered, namely, the SAPS occurrence book for the events of 15 November 2019 from midnight (the SAPS 10 register) and the prisoner control register (the SAPS 14 register) which lists the detainees who attended court on the same day. These registers were similarly admitted in evidence, as agreed between the parties, without formal proof.

[24] The plaintiff's particulars do not appear on the two registers. Constable Mabutho was asked by Mr *Nonkelela* who represented the defendant whether there were other ways in which the record of the plaintiff's arrest could be secured from the electronic case management systems of the SAPS. He testified that if such a request would be made, the plaintiff's full names would assist in securing such information. He further testified that a case number which would have been ascribed to the plaintiff's case would be more accurate in generating particulars relating to his arrest.

The parties' submissions

[25] Mr *Mapekula*, counsel for the plaintiff submitted that even though the plaintiff's cause of action as pleaded in his amended particulars of claim differs from the evidence he gave in court, such evidence and the trial particulars he furnished to the defendant

have cured the variance. Relying on *Relyant Trading v Shongwe and Another*¹, Mr *Mapekula* further submitted that the conspectus of the evidence and the pleadings do establish that the plaintiff was arrested by the members of the defendant on 15 November 2019.

[26] As regards the non-availability of the police docket, Mr *Mapekula* submitted that the blame must be placed at the doorstep of the defendant as the custodian of the docket. Since the plaintiff's arrest has been established, he said, the court must find, from the evidence and pleadings, that the plaintiff's arrest was not justified. Referring to several previous damages awards, Mr *Mapekula* submitted that an amount of R25 000.00 is appropriate compensation to be awarded to the plaintiff for the damages he suffered resulting from his unlawful arrest.

[27] On behalf of the defendant, Mr *Nonkelela* submitted that the plaintiff's failure to discover the constitutional rights notice and the warning to appear in court should not be attributed to any act or omission on the part of the defendant. It was his submission on this score that it is the plaintiff who failed to furnish the defendant with these documents which would enable the defendant to secure the police docket if there was any regarding the assault charge. He further submitted that the plaintiff failed to establish through cogent evidence that he was arrested by the members of the defendant.

[28] It was Mr *Nonkelela*'s submission further, that the plaintiff's contradictory evidence regarding the constitutional rights notice and the warning to appear in court, which would have given clarity regarding the details of his arrest, must result in a finding that he failed to adduce sufficient evidence to prove his case.

[29] According to Mr *Nonkelela*, if the court upholds the plaintiff's claim, an appropriate award of damages ought to be limited to the two and a half hours he spent in the custody

¹ *Relyant Trading (Pty) Ltd. v Shongwe and Another* (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006).

of the members of the defendant from 07h00 to 09h30 when he was taken to court for his first appearance.

The Law

[30] It is trite that arrest is *prima facie* wrongful, and it is for the defendant to justify it.² A plaintiff need only therefore allege that his personal liberty was interfered with by the police.³ Wrongful deprivation of liberty consists in the unjustifiable and intentional infliction of a restraint upon the plaintiff's personal freedom.⁴

[31] A litigant who bears the onus of proof can only succeed if he satisfies the court, on a preponderance of probabilities, that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.⁵ In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities.

[32] Where there are two conflicting versions on the issues to be decided, the approach to be followed in assessing evidence was set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*⁶, where the court said:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's

² *Minister of Justice v Hofmeyer* 1993 (3) SA131(A); *Minister of Safety and Security v Sekhotho and Another* (2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10 (19 November 2010), para 7; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

³ *Zealand v Minister for Justice and Constitutional Development and Another* (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (11 March 2008), para 25.

⁴ *Newman v Prinsloo* 1973(1) SA 125 (W) 127-128; *Minister of Justice v Hofmeyer* (supra) at 154E-157C.

⁵ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440D – 441A, adopted by the SCA in *Baring Eiendom Bpk v Roux* 2001 (1) All SA 399 (SCA), para 6.

⁶ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98; 2003 (1) SA 11 SCA para 5; see also *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440D-G.

finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[33] And, in *National Employers' General Insurance Co Ltd v Jagers*⁷, EKSTEEN J said:

' . . . The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the

⁷1984 (4) SA 437 (ECD) at 440D – 441A, in which EKSTEEN J also referred to *Koster Ko-operatiewe Landboumaatskappy Bpk v SuidAfrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) at 426 – 427 and *African Eagle Assurance Co Ltd v Cainer* 1980 (2) 234 (W).

plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. . . . When in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.’ (references and footnotes omitted)

Discussion

[34] It can be accepted as a matter of common knowledge in the field of not only criminal litigation but civil litigation too, that when a crime has been detected or brought to the attention of the police, a docket is opened, and a distinct case number is allocated.⁸ A police docket constitutes an official record of the evidence collected pertaining to the crime which comprises, *inter alia*, of witness statements and other documentary and expert evidence and the investigation diary.

[35] Documents such as the notice of constitutional rights and a written notice to appear in court that a suspect is issued with subsequent to his/her arrest are also filed in the relevant clip of the docket.

[36] A litigant who wishes to pursue a delictual claim based on his/her arrest and detention must be armed with the relevant contents of the docket as an official journal of

⁸ That case number is referred to as ‘CAS’ number which in full means “*Crime Administrative System*” (this definition was sourced from https://www.saps.gov.za/services/report_crime.php accessed on 26 August 2024).

his arrest and detention. This is also generally known in the sphere of civil litigation. It must have been for these reasons that the plaintiff in this case demanded that the defendant make further and better discovery of, and make available for inspection, the police docket as a record of documents that could enable him to advance his case against the defendant.

[37] Even though constable Mabutho who gave evidence on behalf of the defendant testified that he was not at any stage involved in the process entailing the arrest and detention of the plaintiff, according to him, documents such as the notice of constitutional rights and warning to appear in court also bear the CAS number allocated to the docket and will only be issued to a suspect after a docket has been opened. This evidence was not challenged.

[38] The occurrence book or SAPS 10 register is the official record that the members of the SAPS use to record all the events relating to the detention of a suspect after his arrest. This is from the time the suspect is brought to the police station to be charged, up to the time he is taken to court to make his first appearance. When a detainee attends court, the SAPS 14 register is used to record his/her movements from the time he leaves the police cells to court, and back.

[39] In the instant case, no docket was discovered either by the defendant or the plaintiff. In his reply to the plaintiff's notice to make further and better discovery, and to make available for inspection the police docket, the defendant alleged in an affidavit under Uniform Rule 35(3) and (6), that he was never in possession of the docket concerning the arrest of the plaintiff. This must be in keeping with the defendant's assertion that the plaintiff was never arrested on 15 November 2019, or, if he was arrested, the persons who arrested him were not acting in the course and scope of employment with the SAPS.

[40] The plaintiff places reliance on a bail receipt with the already indicated particulars. No other evidence has been produced to establish a correlation between the bail receipt and his arrest by the members of the SAPS on 15 November 2019 as alleged by the

plaintiff. All that the information contained in the bail receipt conveys to a person reading it is that the plaintiff was admitted to bail of R300.00 following his arrest in relation to a criminal case under case number F1793/2019 that was opened against him in the name of the state. The bail money was deposited by Cynthia Kgaketsang Sigodi at the Mthatha Remand Centre on 15 November 2019. His release was conditional upon him appearing in court “C” on 06 December 2019.

[41] At most for the plaintiff in the absence of the docket for his assault case, the record of court proceedings and a copy of the charge sheet could shed some light on the details of his arrest including the offence he was charged with, the date of his arrest, the investigation officer of his case and the police station in which a docket was opened against him and its CAS number. These details are as a matter of form contained on the front of a charge sheet in the Magistrates’ court.

[42] Mr *Mapekula*’s contention that the defendant must carry the blame for the non-availability of the docket cannot assist the plaintiff. The plaintiff availed himself of the recourse provided for by the Rules of Court and demanded further and better discovery and an inspection of the docket for his assault case. As indeed held in *MV v Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others*⁹, discovery ranks with cross-examination as one of the two mightiest engines for the exposure of the truth as much as it can be a devastating tool.

[43] For his part in the discovery of documents, the defendant discovered the two SAPS registers (SAPS 10 and SAPS 14) for the date of 15 November 2019. I have already mentioned that in an affidavit in response to the notice to make available for inspection and to make further and better discovery, the defendant stated that he was never in possession of the docket in the case concerning the plaintiff.

[44] On his own showing, the plaintiff was handed a written notice to appear in court and a notice of his constitutional rights. It is from these documents that this court would

⁹ 1999 (3) SA 500 (C) at 513.

be able to assess the truth of the plaintiff's assertion that he was arrested by the members of the SAPS on 15 November 2019 in connection with the charge of assault.

[45] Rather problematic with the plaintiff's case is the fact that he gave two different versions in relation to these two documents. The impression that he initially gave was that after he was issued with these two documents at the Mthatha Central Police Station, he handed them to his attorneys of record. It was later during cross-examination that he changed his stance and testified that he had in fact obtained these documents from another unnamed attorney, otherwise, he was never issued with them when he was charged at the Mthatha Central Police Station. This contradiction is material to the version of the plaintiff.

[46] It is one thing for a witness to give an honest but imperfect recollection or reconstruction of the events forming the subject of his testimony. From such imperfections it can hardly be concluded that a witness is not credible. Contradictions by any particular witness or among witnesses cannot be avoided in any particular case as it should not be expected of a witness to give a blow-by-blow mental recording of an incident.

[47] As held in *S v Mkhohle*¹⁰, not every error made by a witness affects his credibility – in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and their bearing on other parts of the witnesses' evidence. These principles, though enunciated in the context of a criminal case, find application *in casu* by parity of reasoning.

[48] Where, on the other hand, a witness adapts his testimony in order to deflect the truth, the court would be justified in rejecting his or her evidence as being false. GREENBERG JA, in *Goodrich v Goodrich*¹¹ said the following of a witness who seeks to strengthen his case by lies:

¹⁰ 1990 (1) SACR 95 (A), at 98f – g.

¹¹ 1946 AD 390, at 396 – 397.

‘ . . . In each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove his belief that his case is ill-founded; and one should be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for his perjury. As a general rule, I think it can be said that a carefully prepared false statement . . . is more likely to be an indication of a consciousness of badness of the case than a lie told on the spur of the moment.’

[49] In his amended particulars of claim, the plaintiff pleaded that he was only released when he promised to pay an amount of R500.00. He did not know whether this amount was for a fine of bail since he was not caused to appear in court. Even after he furnished the trial particulars, there was no amendment to his particulars of claim. This version of the plaintiff’s case changed when the plaintiff was asked to furnish trial particulars.

[50] What is rather difficult to fathom is the fact that when he ultimately appeared in court after the picture he painted of his mistreatment by Sergeant Mtwa and Zweni as they escorted him to court, the plaintiff did not produce the warning document to the magistrate before whom he appeared. Even when, on his version, he was asked how much bail he could afford, he did not tell the magistrate that he had already been issued at the Mthatha Central Police Station with a warning to appear in court, not on the 15th, but 18th day of November 2019.

[51] This is the same person who, upon arrival at the Mthatha Wellington Prison, used the same warning document to escape detention in a congested cell. He told the correctional officers that he was not supposed to be there to begin with. I make a finding that the plaintiff embellished his evidence to support a case that he not only did not set out in his pleadings but sought to build through his trial particulars.

[52] Furthermore, the version put forward by the plaintiff during the trial of this case differed materially from what he pleaded with regards to the circumstances under which he was released and the payment of the amount of bail. Mr *Mapekula*, submitted that this

lacuna in the plaintiff's version has been cured by the trial particulars and the evidence. I disagree, and below I elaborate why.

[53] The starting point is that the plaintiff's trial particulars cannot take the place of the pleadings. Their purpose is to prevent the element of surprise and to enable the parties to know what the other party is going to prove. Trial particulars must relate to a matter that a party has pleaded. This will in turn enable the opposing party to prepare his case to combat counter allegations while also not meant to tie the other party down and limit his case unfairly at the trial.¹² In *Ruslyn Mining and Plant Hire*¹³, HEHER J put it is way:

‘ [F]urther particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: uniform rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one (as the trial judge appears to have believed). The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case. See for example, *Thompson v Barclays Bank DCO 1965 (1) SA 365 (W) at 369D-E*. Such particulars are only required if and when the other party asks for them and what will be furnished is to a large extent dependent on the skill and foresight adopted in the formulation of the request. Because they are not pleadings, they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause or defence and, save within the parameters set by the purpose of such particulars

¹² *Thompson v Barclays Bank D.C.O 1965(1) SA 365 (W) at 369 D-E*; see also *Samuels and Another v William Dunn and Co SA (Pty) Ltd 1949 (1) SA 1149 (T) at page 1158*; *Von Gordon v Von Gordon 1961 (4) 211 (T) at 213A*.

¹³ *Ruslyn Mining & Plant Hire v Alexkor (917/10) [2011] ZASCA 218 (29 November 2011)*, at para 18.

in so far as ensuring a fair trial is concerned, no stultification of that right should be permitted. . .’ (emphasis added)

[54] Pleadings form the foundation of the cause of action or defence that a party intends pursuing at trial and the importance of precision in drawing them can never be over emphasized. It is trite that a party cannot plead one case and seek to introduce another during trial. Nor is it permissible for the court to have recourse to issues falling outside the pleadings in deciding a case.¹⁴

[55] In the present case, the plaintiff pleaded one case and furnished trial particulars which related to a different case not pleaded. In his amended particulars of claim, he alleged that after his arrest, he was released without appearing in court when he promised to pay an amount of R500.00. He could not tell whether the amount he promised to pay would be a bail bond or a fine. In the trial particulars that he furnished, he stated that he was released in court on bail of R300.00.

[56] The trial particulars that the plaintiff furnished cannot constitute a cause of action which was not set out in his amended particulars of claim. Therefore, it cannot be correct that such particulars and the evidence that he adduced during trial cured the lacuna that is apparent from his amended particulars of claim, let alone constituting a new cause of action.

[57] It bears mentioning that the facts pleaded by the plaintiff and those stated in the trial particulars are far removed from each other – they depict a completely different picture of how he was dealt with after his alleged arrest by the members of the defendant.

[58] The variance between the facts pleaded and those stated in the trial particulars is not without significance since the plaintiff relies on the afore-reproduced bail receipt and nothing else to prove his arrest. That significance relates, in particular, to the important

¹⁴ *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009), para 11.

question whether the plaintiff's alleged appearance in court where bail of R300.00 was fixed by the court related to his arrest by the members of the defendant on 15 November 2019 as he alleges. In turn, they are relevant to the fact in issue, namely whether he was at all arrested by the members of the defendant on 15 November 2019.

[59] Even if this court were to accept, based on the particulars that appear on the bail receipt that the plaintiff relies on to prove his arrest, that on 15 November 2019 someone paid bail on his behalf, the question that arises is whether this would be sound basis for a finding that he had in fact appeared in court on 15 November 2019 in connection with the charge of assault for which he was arrested as he alleges. I think not. Such a finding would not be the only natural and plausible conclusion among other conceivable conclusions.

[60] It is not unusual for an accused to be granted bail at court on a particular day of his appearance in that court, but such bail is paid afterwards, either on the next court appearance or at the detention facility.

[61] Significantly in regard to the bail receipt that the plaintiff relies on to prove his arrest, the date on which he was arrested is not recorded thereon, nor does it appear on the face of it that he appeared in court on the same 15th day of November 2019. On the face of it, the bail receipt indicates that bail of R300.00 was paid, not at court, but at the Mthatha Correctional Services on 15 November 2019 and that the plaintiff was required to appear in court "C" on 06 December 2019.

[62] Regard must also be had to the fact that Mashaba who was in the presence of the plaintiff when he was allegedly taken away by the police was not called to confirm that two police officers arrived at the plaintiff's rented home and arrested the plaintiff.

[63] Even if it were to be said, as another possibility, that that the plaintiff was arrested by Sergeants Zweni and Mtwa who possibly used the machinery of the legal process with a malicious intent in imposing a restraint on the plaintiff's liberty, that is all it is, a possibility,

with no facts to substantiate it to the level of a probability. In fact, and most importantly, the plaintiff did not plead a case of *malicious arrest*. His particulars of claim were not amended after the defendant's plea to include a claim based on malicious arrest.

[64] On this score I must re-state that there is a distinction between a cause of action based on *malicious arrest*, and the one founded on *wrongful arrest*. In *Relyant Trading*, the Court said:

[4] Wrongful arrest consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. An arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. In both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity. In *Newman v Prinsloo and another* the distinction between wrongful arrest and malicious arrest was explained as follows:

'[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.'

(footnotes omitted)

[65] Apart from this distinction, the reliance by Mr *Mapekula* on *Relyant Trading v Shongwe and Another* as authority for the contention that the plaintiff as proved that he was unlawfully arrested is misplaced as that case is distinguishable from the present case on the facts.

[66] In *Relyant Trading*, there was no dispute regarding the arrest of the plaintiff, Mr Shongwe. Shongwe was pointed out to the police by one Mrs Mahlangu, an employee of

Relyant Trading (Pty) Ltd which was trading as Geen and Richards as a person who had committed fraud in relation to a hire purchase agreement. Through this hire purchase agreement, a computer was purchased by a person named Makgabo. Mrs Mahlangu's report to the police led to Shongwe's arrest. The SCA found that the police had reasonable grounds to suspect that the plaintiff had committed the theft. In upholding the appeal and thus dismissing Shongwe's claim against Geen and Richard, the court found that there was no basis for a conclusion that Mrs Mahlangu instigated the plaintiff's arrest as all she did was to provide the police with information. Emphasizing what Shongwe had to prove in order to succeed with his claim, MALAN AJA (as he then was) said:

'[t]he court a quo upheld the claim for wrongful arrest on the basis that the employees of Geen and Richards 'instigated' the arrest and prosecution. However, a claim for wrongful arrest can succeed only if it can be said that the defendant, or his or her agent, effected the arrest. On the evidence the claim for wrongful arrest against Geen and Richards must fail because the arrest was effected by the police, and not by Geen and Richards or their employees.' (emphasis added)

[67] Moreover, *ex facie* the two SAPS registers for 15 November 2019 that the defendant discovered, there are no details of the plaintiff as a suspect that was charged at the Mthatha Central Police Station on 15 November 2019 pursuant to his arrest on that day, and subsequently conveyed to court and back on the same day as he alleges. These are the control registers used by the SAPS to record all the processes that a given SAPS member undertook concerning an arrested person, as mentioned, from the time of arrival at the police station to the time of being taken out of detention to attend court.

Conclusion

[68] All of the foregoing being said, it does indeed follow from the particulars contained in the bail receipt that the plaintiff was arrested at a certain point in time during 2019. However, in the light of the defendant's denial of the fact that his members arrested the plaintiff on 15 November 2019, the onus rests on him to prove his arrest on 15 November

2019 by the members of the defendant. He persisted, instead, with his reliance solely on the bail receipt.

[69] I venture to state that in the absence of any other cogent evidence adduced by the plaintiff as proof of the disputed arrest, the particulars contained in the bail receipt could very well be in relation to any other case unrelated to the one to which his cause of action relates. Not only that – the plaintiff's arrest could have been effected by any other law enforcement agency other than the defendant in different circumstances for an offence other than assault.

[70] In the circumstances, a consideration of the defendant's alternative plea that if it is found that the plaintiff was arrested by his members on 15 November 2019 those members were not acting in the course and scope of their employment with the SAPS would then be abstract.

[71] I am not satisfied that the information in the bail receipt alone establishes what the plaintiff had to prove on a balance of probabilities – namely, that on 15 November 2019 he was arrested by the members of the defendant. As COETZEE J said in *African Eagle Life Assurance Co Ltd v Cainer*¹⁵, where there is no probability, there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person and disbelieve the other.

[72] When the pleadings and the entirety of the evidence adduced in these proceedings are considered, the versions put forward by the plaintiff and defendant are mutually destructive and I am unable to accept the version of the plaintiff as true and reject that of the defendant as false. Therefore, an appropriate order to make is that of absolution from the instance.

Costs

¹⁵ Supra, footnote 7, at 237H – 238A.

[73] In the light of the findings I have made, the defendant must be taken as being the successful party, costs must therefore follow the result.

[74] In the result, the following order shall issue:

1. The defendant is absolved from the instance.
2. The plaintiff shall pay the defendant's costs.

L. RUSI
JUDGE OF THE HIGH COURT

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Date heard : 29; 30 April 2024, and 02 May 2024
Date delivered : 27 August 2024