

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 36/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 20 FEBRUARY 2025 SIGNATURE.....

In the matter between:

SUSANNA CATHERINA PETRONELLA VAN DER ZEE

PLAINTIFF

-and-

MINISTER OF POLICE

FIRST DEFENDANT

MINISTER OF HOME AFFAIRS

SECOND DEFENDANT

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The matter came before court as a trial. The Plaintiff claims judgment against the First and Second Defendant, jointly and severally, for an amount of R450,000.00 in respect of damages suffered as a result of deprivation of liberty, inconvenience and *contumelia*.
- [2] What distinguishes this matter from other claims normally instituted as a result of an arrest and subsequent detention, is that the Defendants pertinently deny that there was either an arrest or any detention of the Plaintiff at any stage. Only four witnesses testified in the case on behalf of the Plaintiff, one of whom is the Plaintiff herself. The Defendants elected to close their case without calling any witnesses.
- [3] After the Plaintiff closed her case, the Defendant applied for absolution from the instance. The *crux* of the application was that the evidence led by the Plaintiff's own witnesses contradicted her evidence and the official South African Police Service (SAPS) records do not show any evidence of the Plaintiff's alleged arrest and detention. After having considered that further evidence might come to light should the Defendants present their case, this Court refused the application for absolution.
- [4] As stated herein before, the Defendants then elected to close their case without calling any further witnesses.

Issues that require determination:

- [5] Having regard to the position as postulated by the pleadings, this Court is therefore called upon to determine if the Plaintiff was indeed arrested and detained and, if so, if damages were suffered as a consequence thereof.

The Plaintiff's testimony:

- [6] The Plaintiff testified that on the day of the alleged incident, being the 29th of October 2018, she was present in her shop situated at Tzaneen, Limpopo Province. At approximately between the hours of 12:00 and 13:00, officials employed by the First Defendant, accompanied by officials from the Second Defendant, approached her in her shop, informed her she is being arrested and demanded that she must 'get into their vehicle' so that she can be taken to the Tzaneen Police Station. When asked for a reason, they informed her that her 'working permits' had expired. She could not recall if their clothes were blue or brown.
- [7] The Plaintiff informed them that she had her keys with her and that she can drive to the Police station herself. They refused. When asked if she can collect her cell phone, this request was also refused. She was then obliged to get into the back of the vehicle with two other ladies being Irene Mfishane and Patience Mawadze.
- [8] They were taken to the Tzaneen Police Station around the back where the Police cells are. At the Police station, they were kept in deplorable circumstances. They

were shackled and had chains on their hands and feet. When one of the detainees asked to make use of the restroom, this request was blatantly ignored. The Plaintiff told this detainee to 'go on the floor'.

- [9] The police station had two holding cells. One was presumably utilised for men and the other for women. The cell was approximately 4 – 5 square metres. The cell was extremely dirty and had no toilet. The area was smelly and noisy.
- [10] They were not provided with any food or water for the duration of her detention. She was not willing to make use of the amenities, save for the toilet, which she was obliged to make use of.
- [11] Later during the testimony of the Plaintiff, she testified that she had her cell phone with her in the holding cell. Her phone was utilised to take the pictures that were admitted into evidence. She could not identify the person that took the photos.
- [12] As to her demeanour on the photos, the Plaintiff testified that she wanted to keep the spirits of her workers high and to pacify them. It was not an expression of her true emotional state.
- [13] The Plaintiff furthermore testified that she did not utilise her phone to contact her husband or any third party. She did not ask any questions or approached any officials whilst being detained at the Police station as she was too shocked and emotional.

- [14] After 17:00 the Plaintiff's staff informed her children that she was at the Police station. She was then only released after dark – the Plaintiff could not recall the exact time but approximated it to be after 19:00.
- [15] During cross examination, it was put to the Defendant that all detainees are kept in the reception cell pending processing. All their personal effects are to be handed over to the SAPS for safe keeping. The Plaintiff could not indicate why she served as the exception in so far as she retained her cell phone.
- [16] It was put to the Plaintiff that she was able to make a call to a third party as she had her phone with her – in response she stated that she did not want to unnecessarily involve her children and her husband, hence she did not call them.
- [17] In response to the submission from counsel that she would only have been allowed to retain her cell phone if she was merely a visitor, the Plaintiff posed the question as to how else she would have travelled to the Police Station without her car.
- [18] During re-examination, the Plaintiff persisted in her version that she was arrested and detained and not simply visiting her employees.
- [19] She also stated during cross examination that she did not sit with Ms Mfishane and Ms Mawadze – there were a few people between them. She did not see any officials visiting the cell as she just sat there crying.
- [20] The difficulty with the testimony of the Plaintiff lies in the fact that her recollection of the incident, appears to be selective. She recalls pertinent details like a noisy environment, interactions with individual detainees, and particulars like the two

mattresses and the dirty shower. She is however unable to recall the colour of the uniforms of the alleged arresting officers. This court is also not satisfied with her explanation that she did not use her cell phone to call family members as she was 'embarrassed'. One would assume that, at the very least, she would approach an official and ask for the reason for her alleged arrest and detention. This seems to be the more natural expected reaction. According to her, she did not approach anybody, did not speak to anybody and was not addressed by anybody, yet she was simply 'released' later that night without explanation. One would also assume that, if she took the pains to take photo's to bolster her employees' morale, she would have at least taken the effort of talking to them. It appears however from her testimony that she simply stayed quiet.

- [21] As will be evidenced from what is stated herein after, her evidence was also contradicted by her employees in several respects. Although counsel for the Plaintiff argued that her emotional state tainted her testimony to a certain extent, the different versions cannot simply be ignored. The concession in itself, in so far as it presupposes that the evidence might not be a true recollection, casts doubt on the Plaintiff's version.

The testimony of Patience Mawadze:

- [22] Ms Mawadze confirmed that she has been employed by the Plaintiff since 2015. She furthermore confirmed that she was present on the 29th of October 2018 when the incident transpired.

- [23] She recalled that the incident in question transpired sometime after 12:00 in the afternoon. Police officials (the First Defendant's representatives) dressed in blue uniforms and Home Affairs officials (the Second Defendant's representatives) dressed in khaki uniforms entered the shop.
- [24] The First Defendant's representative requested a copy of her passport and identity document. They then informed her that they were going to arrest her and take her to the Police station.
- [25] She was told to get into the one Police vehicle (a police van). She was later joined by Ms Mfishane in the Police vehicle whereafter they were taken to Tzaneen Police station. Upon their arrival, the Plaintiff was not there. She only arrived later and then joined them. The Plaintiff stayed with them for quite some time. They were not shackled.
- [26] At the Police station, they were told to wait. After a period of time, Ms Mawedze and Ms Mfishane were processed and their fingerprints taken. They were then taken to an alternative holding cell and 'locked up'. They were not accompanied by the Plaintiff. She only saw the Plaintiff the next day and after their release.
- [27] The witness was not able to indicate how long this process took as cell phone was taken by the First Defendant upon her arrival at the Police station. This aligns with the statement put to the Plaintiff that personal belongings are removed and not retained by detainees.
- [28] Curiously, and contrary to the testimony of the Plaintiff, she testified that Exhibit B is a photo taken of herself, Ms Mfishane and the Plaintiff when they were 'taken to

the toilet'. It was pertinently testified by the Plaintiff that the First Defendant ignored the request from some of the individuals to make use of the facilities, resulting in her telling a detainee to 'go on the floor'.

[29] During cross examination, Ms Mawedze remained steadfast in her testimony as to her personal experience. She was not willing to speculate on the position of the Plaintiff or any allegations regarding incidents that transpired in her absence.

[30] Having considered the testimony as a whole, this Court found Ms Mawedze a credible witness. Her answers did not appear contrived or dramatized in any respect.

The testimony of Ms Mapula Rachel Mangena:

[31] Ms Mangena confirmed that she is an employee of the Plaintiff. She testified that members of the First and Second Defendant came to their place of employment on the 29th of October 2018. She confirmed that the Plaintiff was informed that she was being arrested and that they are taking her with them.

[32] She took the car keys from the Plaintiff and handed her, her cell phone.

[33] She did not witness the Plaintiff leave with the Police vehicle, but she assumed she went as she did not see the Plaintiff for the rest of the day.

[34] She confirmed that the Plaintiff returned to work on the next day and appeared to be troubled. The Plaintiff did not however discuss the incident with Mr Mangena.

- [35] During cross examination, she reiterated that she did not remain outside and can therefore not testify as to what transpired after she left.
- [36] The evidence of the witness was consistent. She did not venture into the arena of speculation or opinion and remained steadfast in her conviction that she cannot testify on events that she did not observe.
- [37] Nothing much however turns on her testimony save in so far as she confirmed that the Plaintiff was in possession of her cell phone.

The testimony of Irene Mfishane:

- [38] Ms Mfishane confirmed that she is employed by the Plaintiff and that she was involved in the incident that took place on the 29th of October 2018. She confirmed the testimony of the Plaintiff and Ms Mawadze that the officials from the First and Second Defendant attended their workplace shortly after 12:00 noon. She also testified that the officials indicated that the purpose of the attendance is to inspect their work permits.
- [39] She confirmed that both her and Ms Mawadze were arrested and told to enter the Police vehicle (the Police van). Contrary to the testimony of the Plaintiff, Ms Mfishane testified that, at the time they were taken into custody by the officials, the Plaintiff was 'inside' (the shop). She was adamant that she could not testify as to what transpired in the shop as she was not present.

- [40] She confirmed the testimony of Ms Mawadze to the effect that they were both taken to the Police station in the same vehicle and that the Plaintiff only followed approximately 10 – 15 minutes later.
- [41] She could not confirm if the Plaintiff was accompanied by a member of the First Defendant but did indicate that the Plaintiff shared a bench with her and Ms Mawadze.
- [42] Ms Mfishane confirmed that there were no facilities where they were sitting. Again, contrary to the testimony of the Plaintiff, she stated that when asked to use the facilities, the officials obliged by taking them in a group together.
- [43] When being shown the photos that were admitted into evidence, Ms Mfishane confirmed that same was taken outside of the facilities when they were taken as a group to use it.
- [44] Approximately after 16:00 in the afternoon, they were taken to the second cell where they were locked in for the evening. The Plaintiff did not accompany them. In the second cell, they were provided with supper. They were also given toiletries like soap and toothbrushes.
- [45] As to being left without food and water for the full duration of the detention, as was testified by the Plaintiff, she stated that she was too stressed to ask for water so she cannot confirm that the First Defendant denied them water or food.

- [46] During cross examination, she confirmed that the Plaintiff did not accompany them in the same vehicle. She corroborated the evidence of Ms Mawadze and contradicted the Plaintiff in this regard.
- [47] She also contradicted the evidence of the Plaintiff to the extent that she confirmed that they did not share a cell but that the Plaintiff was sitting at the part where there was a bench. She also confirmed that she did receive toiletries, and that the Plaintiff would not receive same as she was not taken to the cells with Ms Mawadze and her.
- [48] In so far as the testimony of Ms Mawadze and Ms Mfishane were consistent and, to a large extent, very similar, this court do not doubt that the evidence presented by Ms Mfishane was also truthful. Their testimony also conforms with the statements made by the Defendants' counsel as to the normal procedures followed in arresting and detaining a suspect. The Court therefore has not reservation in finding her to be a credible witness.
- [49] It is therefore, at the very least, common cause between the parties that Ms Mawedze and Ms Mfishane were arrested and detained. This is corroborated by *inter alia* the SAPS 10 form that forms part of the proceedings.
- [50] It also appears from the testimony of Ms Mawedze and Ms Mfishane that the Plaintiff was treated differently to a large extent. She was not placed with them in the same Police vehicle, she was not expected to provide her fingerprints or complete any forms, she retained her cell phone during the course of the alleged arrest and

detention, she was not removed to the second cell and locked up, she was not provided with food or toiletries and she was not detained overnight.

Applicable law:

[51] The Plaintiff submitted in its Heads of Argument that the Defendant failed to raise any defence to justify the arrest and detention. This Court disagrees. It is not common cause that there was, indeed, an arrest and detention of the Plaintiff. The Defendants' defence is just that: a denial of the arrest and detention as opposed to justifying an admitted arrest and detention.

[52] The cause of action in respect of an unlawful arrest and detention is the *actio iniuriarum*.¹ To succeed with the claim, the Plaintiff must therefore prove causation, wrongfulness, fault and harm.² A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the Plaintiff on the other hand. This is the 'but-for' test. Legal causation must be established on a balance of probabilities.

[53] It is trite law that the Plaintiff must prove arrest and detention – unlawfulness is then assumed, and the *onus* is on the Defendant to prove lawfulness.³

¹ *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 373

² *Oppelt v Head: Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) at par 34

³ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)

- [54] Arrest takes place as soon as the police assume control over the person's movements.⁴ Can it be said that the First Defendant 'assumed control' over the movements of the Plaintiff?
- [55] The Plaintiff's testimony is that a member of the First Defendant (presumably) approached her in the shop and informed her that she was being arrested. He accompanied her to the police vehicle and told her to 'get in'. The impression was created that this transpired more or less simultaneous with the arrest of the other individuals as they were 'detained' in the same vehicle, according to the Plaintiff. This version was rejected by both Ms Mfishane and Ms. Mbawedze.
- [56] Ms. Mangena, contrary hereto, testified that the interaction took place whilst she was standing outside when the Plaintiff was informed that she was being arrested. She took the Plaintiff's keys and went inside to collect the Plaintiff's cell phone, which she handed to the Plaintiff (presumably outside) whereafter she returned inside. She did not see the Plaintiff leave.
- [57] There are just one too many anomalies in the testimonies of the Plaintiff and her witnesses. The Plaintiff was not re-called to verify these different versions, nor was these witnesses declared to be hostile or uncooperative. There is no reason to reject their testimony to the effect that control was not assumed over her.
- [58] It was never put to Ms Mawadze and Ms Mfishane that their arrest and detention was flawed. It is simply unfathomable that three people will be arrested

⁴ *R v Mazena* 1942 (2) SA 152 (E) at 154

simultaneously, but the process followed in only one is fatally flawed to the extent that absolutely no record of her arrest and detention exists.

[59] As to her alleged detention, this Court is similarly of the view that, having regard to the vast difference between her version, and that of Ms Mawadze and Ms Mfishane, that the Plaintiff was not detained. The fact that she did not request any person to leave, does not justify a finding that she was not able to leave as and when she wished. Coupled with the discrepancies in the Plaintiff's testimony highlighted herein before, it rendered her testimony less than satisfactory.

[60] The Plaintiff argued that a negative inference must be drawn from the fact that the Defendants did not call any witnesses. Having regard to the Heads of Argument, it appears that the Plaintiff wants to make out a case that in the absence of witnesses rebutting the Plaintiff's testimony, it must be accepted as the truth. It is this Court's view that the Plaintiff failed to appreciate that her own witnesses damaged her credibility.

[61] The Defendant made reference to the matter of **Briers N.O. and Others v Salmon N.O. and Others**⁵ where the Court stated the following:

*'[6] The general rule regarding the drawing of inferences is trite. The inference that is sought to be drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn.'*⁶ The position was summarised as follows in *S A Post Office v Delacy and Another*:

⁵ 2023 JDR 0431 (WCC) at [6]

⁶ With reference to *S A Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35. *R v Blom* 1939 AD 188 at 202-203.

'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities.'

[7] 'Plausible' in this context means 'acceptable, credible, suitable'.⁷ It has also been stated that, where one or more inferences are possible, a court must satisfy itself that the inference sought to be drawn is the most plausible or probable, even if that conclusion may not be the only one.⁸

[8] If there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.⁹

[62] In lieu of the above authorities, this court is of the view that nothing turns on the fact that no witnesses were called on behalf of the Defendant. In this matter, the Defendants did not carry any *onus* as the Plaintiff first had to prove that an arrest and detention in actual fact took place.

⁷ With reference to ***Ocean Accident and Guarantee Corporation Ltd v Koch*** 1963 (4) SA 147 (A) at 159B-D.

⁸ With reference to ***AA Onderlinge Assuransie-Assosiasie Bpk v De Beer*** 1982 (2) SA 603 (A). ***Cooper and Another v Merchant Trade Finance Ltd*** (474/97) [1999] ZASCA 97 (1 December 1999) para 7; ***Govan v Skidmore*** 1952 (1) SA 732 (N) at 734C-E.

⁹ ***S v Essack & another*** 1974 (1) SA 1 (A) at 16C-E, quoting ***Caswell v Powell Duffryn Associates Collieries Ltd*** [1939] 3 All ER 722 at 733.

The position of the Second Defendant:

[63] This Court finds it apposite to note the position of the Second Defendant specifically, as the testimony of the witnesses addressed mostly the actions of the First Defendant.

[64] The Plaintiff could not positively testify that a representative of the Second Defendant assumed control of her person. She could not confirm if the vehicles of the First or the Second Defendant were utilised. There was no testimony to the effect that the alleged arrest was at the behest of the Second Defendant – mention was merely made that the ‘permits’ were not in order. It was also the Plaintiff’s testimony that she was ‘detained’ by the First Defendant.

[65] As such, no case has been made out against the Second Defendant specifically and the Plaintiff’s case against it stands to be dismissed as well.

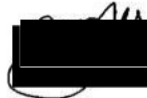
Conclusion:

[66] The Plaintiff failed to prove, on a balance of probabilities, that she was arrested and detained by the First and Second Defendant. As such, the Plaintiff’s claim cannot succeed and stands to be dismissed. There is no reason why the cost order should not follow the outcome of the proceedings. Having regard to the nature of the matter and the importance thereof to the parties, costs are awarded on a party and party scale including costs to counsel on Scale B.

Order:

[67] In the result the following order is made:

67.1 The Plaintiff's claim is dismissed with costs on party and party scale including costs to counsel on Scale B.



M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE PLAINTIFF
INSTRUCTED BY

: Adv. AM Schnehage
: Kirk Twine Attorneys
Polokwane

ktwine@ktpsa.co.za

FOR THE DEFENDANTS
INSTRUCTED BY

: Mr TA Masete
: Office of the State Attorney

Polokwane

TMasete@justice.gov.za

DATE JUDGEMENT RESERVED : 11 October 2024

DATE OF JUDGMENT : 20 February 2025

POLOKWANE HIGH COURT