



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

CASE NO.: 1086/2019

In the matter between:

THEMBELANI MBALELA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

ZONO AJ:

Introduction

- [1] The plaintiff instituted these proceedings for damages arising out of plaintiff's assault, unlawful arrest and detention, all of which took place on 15th June 2018, although the detention took longer. The plaintiff alleges that he was assaulted, unlawfully arrested and detained by members of South African Police Service who were acting within the course and scope of their employment with the defendant. As a result of his assault, unlawful arrest and detention the plaintiff alleges that he sustained serious injuries and suffered damages.

[2] The defendant in his plea denies that there was an assault or that the plaintiff was assaulted. The defendant pleads that if there were injuries sustained by the plaintiff, those injuries were not caused by the defendant or his Port St Johns Police employees. With regard to the arrest and detention, the defendant admits that there was an arrest and detention at the instance of the members of South African Police Service. However, the defendant denies that arrest and detention was unlawful.

[3] The defendant relies on the provisions of section 40(1) and 40(1)(h) of the Criminal Procedure Act 51 of 1977 as amended. Section 40(1) of Criminal Procedure Act provides:

“(1) A peace officer may without warrant arrest any person-

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition.”

[4] The defendant, in conclusion, pleads that the plaintiff was searched with his permission and a drug of boss Mandrax was found in his body and as result of that he was arrested and detained at Port St Johns Police cells.

[5] During trial of this matter parties applied for separation of issues with the issue of liability to be determined first and issue of quantum to stand over. This application was made in respect of all the claims.¹ The application was duly granted² and the issue of liability was separated from that of quantum.

[6] The parties were “*ad idem*” about the issue of onus. Plaintiff bore the onus of proof in respect of the claim arising from the alleged assault. The defendant bore onus of proof in respect of the claim arising from the alleged unlawful

¹ Assault, arrest and detention.

² Rule33(4) of Uniform Rules of Court (URC).

arrest and detention. Consequently, provisions of Rule 39(13) of Uniform Rules of Court became applicable.

[7] Rule 39(13) of the Uniform Rules of Court provides as follows:

“(13) Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.”

[8] The plaintiff called his evidence first in respect of the claim arising from the assault and for the sake of convenience also in respect of the claim arising from the alleged unlawful arrest and detention without him losing his right to call rebutting evidence³ in respect of the claim arising out of the alleged arrest and detention.

[9] It is apposite at this stage to remark that, Rules of court are designed to ensure a fair hearing and should be interpreted in such a way as to advance and not reduce the scope of the right to a fair trial entrenched in section 34 of the Constitution.⁴ They are also designed to enhance smooth running of the proceedings.

[10] In Eke⁵ the Constitutional Court observed as follows:

“39.Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by

³ Rule 39(14) of URC.

⁴ **DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket** 2002 (6) SA 297 (SCA) at 301 G-H.

⁵ **Eke v Parsons** 2016 (3) SA 37 (CC).

the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that the rules exist for the courts, and not the courts for the rules”.

[40] *Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to “secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice”. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts’ judicial functions.”*

[11] It was accordingly in the interests of justice and convenient to allow the plaintiff to call his evidence in respect of all the claims first without him losing his right of calling his rebutting evidence on any issue in respect of which the onus was on the defendant.

Assault

[12] The plaintiff testified that after he alighted from the taxi from Mthatha at Mampube Stop, Port St Johns, walking on the gravel road towards Sijungqwini Location, someone in the motor vehicle (ranger) with tinted windows called him by his nickname, *Sipikipiki*. As he was coming closer, he heard a sound of a firearm being cocked and he then ran away. Motor vehicle

occupants became his chasers; they fired some shots and he fell on the ground and three men caught him in the garden of a certain homestead.

- [13] One of the three men was in the Civilian Clothes and two were in the Police Uniform. They were all in possession of fire arms. They got the plaintiff up and handcuffed him and began to assault him with clenched fists, open hands, kicking him with booted feet and tripping him down. As they were assaulting him they were asking him about the firearm and that took place for about an hour. The plaintiff testified that he was hysterically crying as a result of which the members of the community came to watch. They would strangle the plaintiff while they were telling him to tap out if he has an answer.

- [14] The plaintiff was severely bleeding. After they realised that they could not find the firearm on plaintiff's body and the kind of answer they were looking for, they took plaintiff to his homestead where they found plaintiff's brother, Solomzi. Plaintiff and Solomzi's room were searched in vain. No firearm was found. The plaintiff was thereafter taken to Port St Johns Police Station where he was eventually detained.

- [15] As the plaintiff was being processed for detention, he requested to be excused to relieve himself, and he was accompanied by another Police Officer who later realized that the plaintiff's testicles were swollen. He reported what he saw to other police officers and advised that plaintiff be taken to the clinic. The same police officers who assaulted the plaintiff took him to the clinic at about 16:55, where he was medically treated and released with medication and a review date. He was then taken to the police station for detention.

- [16] The defendant discovered "*all documents opened and case docket*" in terms of discovery affidavit deposed to by Colonel Mbeki on 04th June 2020. Contents of the docket were subsequently filed on 31st October 2024 under cover of notice of filing. Part of the defendant's discovered documents is what the plaintiff referred to as "*clinic records.*" This appears to be a copy of the

clinic card page. The notes in the clinic record or card appear to have been made on the 15th June 2018.

- [17] The relevant crucial information recorded in the clinical notes or clinic records is as follows:

*“ 15th June 2018.....
Tembelani Mbalela M 29yrs
Caguba Loc
BP ¹³⁰/₈₅ MMHg P96 bpm T⁰C
16H55
Brought by Police
With Swollen Scrotum/testicles
After he was assaulted/kicked
On his private part today....
Review hospital PRN
Review-m/o (when needed) hospital”*

- [18] The plaintiff testified that he was released was from custody on 27th June 2018. An OPD sheet, part of Isilimela Hospital records discovered by the plaintiff in terms of plaintiff's discovery affidavit deposed to on 03rd June 2020, recorded this crucial information.

*“Patient's name : Tembelani Mbalela Age:29 Sex:M
Bp:¹⁰⁷/₆₁ Pulse 89” Resp 18 Temp: 39.7°C
.....
28/06/2018 Assaulted on Private parts by police
c/o of pains on private parts
Painful when passing urine
.....
Testis swollen ++ hard in areas...
..... Review PRN.”*

This information was recorded by Isilimela Hospital on the day following the release of the plaintiff from police custody.

[19] The plaintiff further testified that Isilimela Hospital referred him to Nelson Mandela Academic Hospital where he was advised that he would have to undergo surgical operation of the testicles. After the scan results, the plaintiff was advised that the testicles would have to be removed. He refused to undergo that operation as he was afraid.

[20] The defendant denies that the members of SAPS assaulted the plaintiff. Paragraph 3 of the plea states:

“3.2 The defendant denies the assault on the person of the plaintiff at all. In amplification the defendant avers that:

.....

3.3 The defendant admits that the plaintiff was detained at Port St Johns Police Station holding cell, free of injuries.”

[21] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial.⁶ During plaintiff's cross examination the defendant sought to introduce a version that the plaintiff might have been caused by other inmates. This is not defendant's pleaded case. This version presupposes that assault occurred in the police cells but not perpetrated by the police. Surprisingly defendant's witnesses did not come anywhere closer to the version that plaintiff's injuries might have been caused by the inmates. That which was put to the plaintiff was not supported by the defendant's witnesses.

[22] The situation was exacerbated by the fact that a version was placed again by the defendant's Counsel to the plaintiff that the police would come and testify

⁶ *Minister of Safety and Security v Slabbert* 2010 (2) LL SA 474 (SCA) Para 11.

that they do not detain injured people. When defendant's witnesses came to testify, none gave that version. No defendant's witness testified that plaintiff's injuries might have been caused by the other inmates, and the police do not detain injured people.

[23] Put differently, it was never clearly repudiated that the plaintiff was assaulted. Mandisi Xhaphile, who is one of the Police Officers who was present when the incidents of 15th June 2018 were taking place, gave evidence. He gave a general answer in relation to the alleged assault of the plaintiff. When a version of plaintiff's assault was put he would say "*I do not know that or say i don't know that he was assaulted*"⁷. A party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him.⁸ I am inclined to infer adverse inference against the defendant. Where a litigant wishes to dispute a fact, he is under a duty to deny it.

[24] I am fortified in my inclination to infer an adverse inference against the defendant by the provisions of Rule 22(2) of Uniform Rules of Court (URC) which provides:

"(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."

There is thus a serious duty imposed upon a legal practitioner who settles a plea or answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the plea⁹. Legal Practitioners should be discouraged to be slack with this well-grounded practice.

⁷ In a specific manner in the cross examination.

⁸ **Mc Milliams v First Consolidated Holdings (Pty) Ltd** 1982 (2) SA (1) (A) at 10E.

⁹ **Wightman t/a JW Construction v Headfour (Pty) Ltd** 2008 (3) SA 371 (SCA) at 375F- 376B.

[25] To round up, the plea only shows a bare denial of the allegations relating to the assault. The oral testimony of the defendant's witnesses only offers equally bare denial of the evidence relating to the assault of the plaintiff. The weighed of the evidential material favours not only the rejection of the defendant's version but also the admission of the plaintiff's case or a version relating to the assault.

[26] I have alluded above to the fact that the clinic card or clinic records discovered by the defendant demonstrate that the plaintiff was brought to the clinic on the same date of his arrest at about 16:55 by the police officer. No police officer, who gave evidence, attempted to deal with or negate this evidence. This evidence accords with plaintiff's evidence that he was brought to the clinic by the same police officers who assaulted him. Indeed, the weight of evidential material seems to be heavier in favour of the plaintiff.

[27] The plaintiff states that he was brought back to the police cells from the clinic by the same police officers who assaulted him. Whilst there is evidence that the plaintiff was at the clinic on 15th June 2018 at 16:55 and also that he was released from police custody only on 27th June 2018; there is absolutely no account by the defendant as to how:

- (a) the plaintiff was brought to clinic;
- (b) and how he was brought back to the police cells for detention. This avails plaintiff's evidence for admission as credible, reliable and probable evidence of the two.

[28] The plaintiff was released from custody on 27th June 2018. On 28th June 2018 the plaintiff was at Isilimela Hospital for the same injuries he complained of and suffered on or sustained on 15th June 2018. This medical record too, is not sought to be impugned by the defendant. The same injury for which the plaintiff was medically treated on 15th June 2018 by the clinic is the one that was medically considered on 28th June 2018 when he was released on

custody. Both plaintiff and defendant's version do not show that plaintiff was ever not in the police custody at least from 14:00 on 15th June 2018. The time when the plaintiff was brought to clinic (at 16:55), he was still or already in police custody. It is reiterated that this kind of evidence is not accounted for by or on behalf of the defendant.

[29] Where, as in this case, the onus rest on the plaintiff, he can only succeed if he satisfied the court on a preponderance of probabilities that his version is true and correct¹⁰. I accordingly find that plaintiff's version on the claim arising from the plaintiff's assault on 15th June 2018 is possibly true and correct.

[30] Nienaber JA in Stellenbosch Farmers Winey Group Ltd¹¹ observed as follows:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised 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 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 extracurial 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

¹⁰ **National Employers General Insurance v Jagers** 1984 (4) SA 437 at 440E.

¹¹ **Stellenbosch Farmers Winery Group Ltd and Another v Martell et al and others** 2003 (1) SA 11 (SCA) at 12D-H.

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..."

[31] The main hurdle the defendant could not pass is the contradiction between their discovered document *to wit*, clinic card or records of 15th June 2018, which demonstrates that the plaintiff was brought by the members of SAPS to the clinic with injuries on the scrotum or testicles on the one hand, on the other hand, that the plaintiff was detained free of injuries. Another difficulty with the defendant's version is that what was put to the plaintiff at times was not supported by the defendant's witnesses. Defendant's evidence, even when it stands alone leaves much to be desired. It is not reliable, it is full of improbabilities and it is not credible.

31.1 It worth noting that Constable Kapok testified that he handcuffed the plaintiff who appeared to him to be cooperative. That conduct was not explained. The probability is that their conduct of inflicting pain to the plaintiff was unprovoked. It is not clear why was it necessary to fasten the plaintiff with handcuffs if he was cooperative. Secondly, Constable Kapok was assisted by the two police officers *to wit*, Xhapike and Mlungu to put the plaintiff into the motor vehicle they were driving in. The nature of the assistance is not explained. The probability is that they interfered with plaintiff's body when they were assaulting him. It is again not clear why an assistance was necessary if the plaintiff was cooperative. Lastly, Constable Kapok testified that he did not notice any injuries on the plaintiff before he was locked up in the cells; none were reported by the plaintiff. The net effect of defendant's evidence is

that it is in direct contradiction with itself, and does not sit comfortably with the whole body of the evidential material before this court. Defendant's evidence is clearly not reliable.

31.2 Plaintiff's constitutional right to bodily integrity was violated by the members of defendant aforesaid.¹² Section 12 (1) of the Constitution provides:

“(1) Everyone has the right to freedom and security of the person, which includes the right-

(a)

(b)

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

The plaintiff was assaulted by the members aforesaid in the full view members of community. The circumstances under which the assault took place amounted to torture and it was very much degrading.

31.3 Cameron J in *Kirland Investments*¹³ aptly remarked as follows:

“82.....On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread

¹² Section 12(2) of the Constitution.

¹³ *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 Para 82.

respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

- [32] In the final analysis I find defendant liable for plaintiff's damages arising from plaintiff's assault on 15th June 2018.

Unlawful Arrest and Detention

- [33] Contrary to plaintiff's version that he was arrested pursuant to an assault and questions relating to his alleged possession of a firearm, the defendant's witnesses testified that the plaintiff was arrested for possession of drugs, *to wit*, Boss Mandrax. Constable Kapok testified that on 15th June 2018 he received an information that a young man from Caguba Administration Area, Port St Johns, went to Mthatha to purchase drugs and the informer undertook to update him about the youngman's whereabouts. He then requested Warrant Officer Xhaphile and Sergeant Mlungu to stand by for back up services/duties.
- [34] Warrant Officer Xhaphile and Sergeant Mlungu went to pick up Constable Kapok and then went to wait at Caguba Administrative Area for informer's update. At about 13:00 on 15th June 2018 the informer advised Constable Kapok that the suspect had alighted from Mthatha. The informer gave description of the suspect and how he dressed himself. Indeed, as they were driving on the road they saw a person matching the description given by the informer. That person was the plaintiff herein.
- [35] Constable Kapok alighted and went to the plaintiff. As he was introducing himself to the plaintiff, Warrant Officer Xhaphile and Sergeant Mlungu stood outside the motor vehicle they were driving in. Constable Kapok requested permission to search the plaintiff, which permission was granted by the

plaintiff. He found in the front pocket of plaintiff's pair of trousers a money bag containing some tablets.

[36] Constable Kapok suspected that those tablets were the drugs. He was not sure of the number of those tablets, but he testified that they were many. Constable Kapok asked to the plaintiff what was contained in the money bag and the plaintiff stated that those were drugs. Upon establishing that the plaintiff did not have licence or permit to possess drugs, he advised the plaintiff that he was arresting him. He then handcuffed the plaintiff. The two police officers assisted Constable Kapok in putting the plaintiff into the car. The tablets were with Constable Kapok.

[37] A case was opened at the scene and statements were taken as the two police officers had the necessary material to do so. The plaintiff was thereafter taken to the police station for detention. Constable Kapok testified that upon arrival at the police station he took the plaintiff into the cells while Warrant Officer Xhaphile and Sergeant Mlungu went to the charge office. Tablets were given to Warrant Officer Xhaphile to enter them in the relevant records. Constable Kapok registered the plaintiff in the cell records or registers and ultimately detained him in the cells. Constable Kapok then left the plaintiff in the cells, left the police station and police officers he was working with. He did not come to contact with the case and plaintiff again. This evidence was given together with the one relating to assault. Findings made about defendant's witnesses and evidence above are still relevant herein.

[38] Section 12(1) of the Constitution provides that:

“(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;”

- [39] An arrest constitutes an interference with the liberty of the individual concerned and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.¹⁴ Interference with individual's right to freedom must be justified in law. Every interference is *prima facie* unlawful¹⁵.
- [40] Individual's rights to freedom can be limited¹⁶. It can be limited if the limitation is strictly in terms of law of general application. An arrest of an individual constitutes an interference with the individual's right to freedom. The purpose of the arrest is to bring the suspect to trial or justice¹⁷. The defendant relies on section 40(1) (h) of CPA in that the plaintiff was found to be in possession of a Boss Mandrax.
- [41] I am mindful of plaintiff's version that he was arrested pursuant to police probe about firearm. Nothing was said about drugs. However, I wish in the interim to deal with the version of the defendant and establish if it passes muster.
- [42] Constable Kapok, the arresting officer, relied on the information obtained from his informer, who did not come to give evidence. It is not stated if the informer was present when the so called drugs were being bought. It is unknown how the informer got to know about the purchase of drugs. What we know is that the plaintiff was going alone when he was coming from Mthatha. It is not clear how the informer became aware of the drugs. I may allude to the fact that the informer did not even make a statement to the police. Informer's knowledge about drugs leaves more questions than answers. It could not have raised any reasonable suspicion that an offence referred to section 40(1)(h) of CPA has been committed. It is not unimaginable that a person coming from a doctor or pharmacy may be in possession of tablets relating to the condition he or she

¹⁴ **Minister of Safety and Security v Sekhoto and another** 2011 (5) SA 367 (SCA) Para 7; **Minister of Law and Order v Hurley** 1986(3) 568 (A) 589 E-F.

¹⁵ **Zealand v Minister of Justice and Constitutional Development** 2008 (2) SACR (1) (CC) Para 25.

¹⁶ Section 36 of the Constitution.

¹⁷ **Minister of Safety and Security v Sekhoto** 2011 (3) SA 367 (SCA) Para 42 and 44.

was consulting in connection with. It was not reasonable to suspect on a mere look to those tablets, without more, that they are Boss Mandrax.

- [43] Constable Kapok, having been led by the information received from the informer, confronted the plaintiff. According to him he found a money bag containing tablets. He knew that those were drugs by only using his naked eye and what he calls "*his experience*" to establish that those were drugs. He did not only know that those tablets were drugs, he also knew that they were a type of a drug that is called Boss Mandrax. This court was never apprised of Constable Kapok's experience and qualifications relating to his knowledge of different types of drugs, and where and how that knowledge, experience or qualifications were obtained. All we know is that Constable Kapok was an ordinary police officer. I say this because no evidence was led as to his knowledge of different types of drugs.
- [44] Lastly, at no stage were tablets sent for examination, even after the arrest and detention of the plaintiff. It is therefore difficult to arrive under these circumstances to a conclusion that arresting officer's suspicion was reasonable. Reasonable suspicion must be based on reasonable grounds. Three interrelated questions need to be asked and answered. Is the information received or heard from the informer reasonable? or Does it provide sufficient grounds for a reasonable suspicion? Does the possession of tablets by any person, on its own, provide a reasonable ground for suspicion that such a tablet is drug?
- [45] Informer's information about the drugs, without knowledge of how or where it was obtained is not reasonable. Possession of tablets, without more, cannot give rise to a reasonable suspicion that such a tablet is a drug, let alone that it is a Boss Mandrax. Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion¹⁸. The fact that the peace officer acted in good faith is no answer to a claim of unlawful arrest and detention.

¹⁸ **Duncan v Minister of law and Order** 1986 (2) SA 805 (A) at 814 D.

[46] In Mabona¹⁹ Jones J had this to say:

“.....It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[47] Arresting officer's reliance on the information from unidentified informer was insufficient. An informer who was not with the plaintiff when the alleged drug purchase was taking place. It is not clear how he became aware of the alleged purchase. The relationship between the informer and the plaintiff was not explained. Suspicion was not based on reasonable grounds.

[48] About the alleged drugs found in possession of the plaintiff, the arresting officer depended on his undisclosed experience without further investigating the kind of tablets he allegedly found in possession of the plaintiff.²⁰ Naming of the tablets as Boss Mandrax²¹ is insufficient.

¹⁹ **Mabona and another v Minister of law and order and others** 1988 (2) SA 654 (SE) at 659 E-H.

²⁰ **De Klerk v Minister of Police** 2018 (2) ALL SA 597 (SCA) Para 11.

²¹ Boss Mandrax.

[49] O'Regan in Coetzee²² deal with two aspects of freedom, namely the substance and the procedural component in this fashion:

"[159] These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in Bernstein and Others v Bester and Others NNO [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paragraphs 145-7, our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the state wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair. With respect, therefore, I cannot agree with Kentridge AJ when he states at paragraph 93 of his judgment:

*"In brief, if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial of such an offence. Where the severity of such a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial."*²³

[50] Both aspects of plaintiff's freedom have been negatively affected and violated by the conduct of Constable Kapok and two police officers. The procedural aspect is affected on the basis that the unwarranted application of force and assault of the plaintiff by the police officers concerned does not sit comfortably

²² **S v Coetzee and others** 1997 (3) SA 527 (CC) Para 159.

²³ **De Lange v Smuts NO and Others** 1998 (3) SA 785 (cc); 1998 (7) BCLR 779 (CC) Para 18.

with the version that the plaintiff, when he was being arrested, was dealt with politely. It is highly improbable that the plaintiff was properly advised of his rights in circumstances where he was being assaulted by the same members of SAPS. The manner in which the plaintiff was arrested was procedurally unfair. I accept plaintiff's version that demonstrates that the police officers did not introduce themselves to the plaintiff and that he was not advised of his rights. Police officer's failure when arresting and detaining the plaintiff to introduce themselves to the plaintiff, coupled with the fact that they failed to inform the plaintiff of his constitutional rights, is procedurally unfair. Consequently, plaintiff's freedom or liberty was arbitrary deprived.

- [51] Plaintiff's rights were violated by the police officers at two levels: Firstly, when he was arrested, and Secondly, when he was detained. When he was arrested, the police officers failed to advise him of his right to remain silent. Section 35(1) of the Constitution provides that:

“(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;”

- [52] When the plaintiff was detained the plaintiff was not advised of his rights set out in section 35(2)(a)-(f) of the Constitution which provides as follows:

“(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained;

- (b) *to choose, and to consult with, a legal practitioner, and to be informed of this, right promptly;*
- (c) *to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (d) *to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;*
- (e) *to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and*
- (f) *to communicate with, and be visited by, that person's-*
 - (i) *spouse or partner;*
 - (ii) *next of kin;*
 - (iii) *chosen religious counsellor; and*
 - (iv) *chosen medical practitioner."*

[53] Constable Kapok in his testimony stated that he is the one who took the plaintiff to the police cells. He testified about what he did when he was detaining the plaintiff. He testified that he registered the plaintiff into the cell records. Nothing else was said by Constable Kapok. A maxim of interpretation "*expressio unius est exclusio alterius*" is applicable. It simply means that

express mention of one thing is an exclusion of the other.²⁴ Express mention of the things done excludes all things not specifically mentioned. Had Constable Kapok advised the plaintiff of his rights he would have said so in his evidence. This attests to the fact that not only the arrest was unlawful but also the accompanying detention. In fact the power to detain is inherent in the power to arrest²⁵. If a police officer does not have power to arrest, as a corollary he does not have a right to detain.

[54] Section 195(1)(a) of the Constitution provides that:

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained....”

The manner in which the plaintiff was arrested and detained does not reflect the conduct expected by these provisions. Police Officer’s (Kapok) conduct when arresting and detaining the plaintiff did not mirror the conduct that is required of police officers. This section requires not just professional ethics, but also “*A high standard of professional ethics*” to be demonstrated. The bar is very high. Any conduct falling short of high professional standard is invalid²⁶and unacceptable in a country founded on Constitutional values and principles.

[55] When looking at this matter holistically one cannot divorce the conduct exhibited by the police officers when the assault was meted out to the plaintiff, and when the arrest was effected. Police officer’s conduct of 15th June 2018 was a single and continuous enterprise purpose of which was to subdue the plaintiff for him to submit to the arrest and consequent detention.

²⁴ **Ndaba v Ndaba** 2017 (1) SA 342 (SCA) Para 51 (footnote included).

²⁵ **Minister of Safety and Security v Sekhoto and another** 2011 (5) SA 567 (SCA) Para 42; **Minister of Police and another v Du Plessis** 2014 (1) SACR 217 (SCA) Para 28.

²⁶ Section 2 of the Constitution

[56] I have stated above that also the substantive component of plaintiff's freedom was violated. No tangible reasons and reasonable explanation was given for the arrest and detention of the plaintiff. On the authority of Coetzee²⁷ and De Lange²⁸ the state cannot deprive its citizen of liberty for reasons that are not acceptable. It does not appear that the tablets, which were allegedly the reason for the arrest and detention of the plaintiff, were ever sent for examination.

[57] In the amalgam of the facts of this case and the evidence tendered I find the defendant liable to the plaintiff for damages arising from his unlawful arrest and detention.

Conclusion

[58] In the preceding paragraphs I have found the defendant liable to the plaintiff for damages arising from plaintiff's assault, arrest and detention. I see no reason why costs cannot follow the result. I accordingly find the defendant liable to pay costs of suit.

[59] Although the plea shows that on 18th June 2019 the matter was postponed to afford the plaintiff an opportunity to obtain a legal aid legal representative, the evidence from both parties is silent about the postponement and the reason for such a postponement. The onus of proof on the issue of arrest and detention is on the defendant, who has failed to discharge such onus. Accordingly, the defendant has not made out a case to justify plaintiff's detention from 18th June 2018 to 27th June 2018.

Order

[60] In the result I make the following order:

²⁷ *S v Coetzee and others* 1997 (3) SA 527 (CC) Para 159.

²⁸ *De Lange v Smuts NO and others* 1998 (3) SA 785 Para 18.

1. The defendant is found liable to pay plaintiff's agreed or proven damages arising from plaintiff's assault on 15th June 2018.
2. The defendant is found liable to pay plaintiff's agreed or proven damages arising from plaintiff's arrest on 15th June 2018 and for his resultant detention up to and including 27th June 2018.
3. The defendant is liable to pay costs of suit.

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

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Matter heard on : **30, 31 October 2024 and**

Delivered on : **05 November 2024**
18 February 2025