



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

CASE NO: 128/18

In the matter between

ZONNAPELE NGQOKWENI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

KRÜGER AJ:

Introduction

[1] The plaintiff instituted a claim for damages against the Minister of Police as the employer of the police officials who arrested him in Stutterheim on 13 April 2017 and who caused him to be detained until 18 April 2017. It is the plaintiff's case that his arrest and detention were unlawful.

[2] The defendant admitted that the plaintiff was arrested and detained but asserted that the arrest and detention of the plaintiff were lawful.

The evidence

[3] Sgt Ulana was the first witness on behalf of the defendant. She testified that she, together with Sgts Metshitinga and Sandile attended to an area on the N2 where employees of the Amahlali Municipality were striking. She testified that:

- a. The striking employees placed stones, rubbish bins and burning tyres on the road to block traffic.
- b. She and Sgt Metshitinga removed items to clear the road. While doing so, a stone hit her on the leg, and she asked her colleague who threw the stone. Her colleague pointed to someone known to her, one Xolelwa.
- c. The witness went up to Xolelwa to confront her. As she did so, a group of the striking workers came towards her and started shouting at her, pushing her, and urging her to let them continue with their strike action.
- d. One man in this group, whom she knew by sight, pushed his finger against her forehead and told her that she did not owe them anything and that her kids were eating while his were starving. That man turned out to be the plaintiff.
- e. Sgt Metshitinga saw that Sgt Ulana was under threat, and she called for backup.
- f. Two of the striking workers stepped forward to protect Sgt Ulana, blocking the mob. When the police vehicle arrived, the two workers escorted her to the vehicle, and those who had threatened her ran away.
- g. Sgt Ulana and her colleagues then drove around looking for Xolelwa and the man who pushed her on the forehead, as they were people she could identify as part of the mob.
- h. Sgt Ulana explained that she was able to identify the man who pushed on her forehead as he walked past the detective's offices on a daily basis, wearing a blue jacket and a yellow and orange cap. He also wore that on the day of the protest.
- i. The officers found the man with the cap close by the site of the protest. Sgt Ulana identified him as the man who assaulted her, and they arrested him and took him to the police station.
- j. Sgt Ulana testified that the arrest of the plaintiff was lawful as he committed offences against her and that he was arrested on that same day when she saw him.

- k. She was later informed of his name but did not include his name in her statement of complaint.¹ At the request of Mr Kholiwe, a second statement was made setting out the details of the plaintiff's name, but for reasons not known to her, this statement was not included in the docket. Sgt Ulana stated that she only realised that it was not included in the docket after the civil claim was instituted.
- l. Sgt Ulana testified that she did not have any interaction with the prosecutor in the matter.
- m. The witness pertinently denied that plaintiff's version that he was one of the two men who protected her from the mob. She testified that he ran away as the police arrived, as did others who were part of the mob that threatened her.

[4] The second witness for the defence was Detective Commander Mazaleni. At the time of the incident, she was a police detective in Stutterheim. Her evidence can be summarised as follows:

- a. She was on stand-by duty over the Easter weekend in 2017. On Friday morning, 14 April 2017, she proceeded to the cells with a number of dockets, including that of the plaintiff.
- b. According to the witness, there was a problem with the cells in Stutterheim, and the arrested persons were held elsewhere. The plaintiff and others were held in Bhisho.
- c. Detective Mazaleni identified the SAPS14A Notice of Rights completed in respect of the plaintiff, completed by Captain Yateni on 13 April 2017.² Captain Yateni passed away in 2024. It seems to have been signed by the plaintiff. She explained that the SAPS14A is given to a person on arrest to notify him of his rights.
- d. The witness testified that she charged the plaintiff with assault, intimidation and public violence³ arising from the complaint of Sgt Ulana, and that an entry to that effect was made in the investigation diary.⁴

¹ Sgt Ulana's statement was admitted into evidence as exhibit A.

² The SAPS14A was admitted into evidence and marked exhibit B.

³ The warning statement of the plaintiff was admitted into evidence as exhibit C.

⁴ The investigation diary was admitted not evidence as exhibit D.

- e. She testified that she did not release the plaintiff because of the situation in Stutterheim as a result of the strike action in which a mall, a clinic, and other objects were burned. The plaintiff's place of work was furthermore close to Sgt Ulana's office.
- f. The witness explained in cross-examination that she had no concerns about the identity of the alleged perpetrator (the plaintiff) as he was in custody and there was a SAPS14A in the docket. The statement of Sgt Ulana also indicated that she knew the person by sight and that he was arrested.
- g. She added that she spoke to Sgt Ulana and asked for further information to be added to the statement and that she believed that that was done.

[5] The plaintiff testified in support of his claim. The essence of his evidence was that:

- a. He was at work and participated in the strike with his fellow employees on 13 April 2017, singing and dancing.
- b. The police arrived at the scene and asked the workers to stop their strike action, but the workers refused to do so and continued singing and dancing.
- c. Some of the striking workers threw stones at the police, but the plaintiff tried to stop the workers from throwing stones at the police, and he stood between them and the police.
- d. The plaintiff admitted that he knew of Sgt Ulana before the day of the strike.
- e. He stated that he did not assault her on the day and specifically denied pointing at her or touching her on the forehead.
- f. He explained that other striking workers pushed Sgt Ulana from behind the plaintiff. In cross-examination, the plaintiff testified that he told her not to go to the crowd. He admitted that it was not his role to tell the police how to do their work. He explained that he did not want her to get hurt, so he stood between her and the workers. The plaintiff could not explain why she would falsely state that he assaulted her.

- g. When confronted in cross-examination with Sgt Ulana's version regarding the two men who protected her from the crowd, the plaintiff explained that he was one of the people who protected her.
- h. The plaintiff testified that he was arrested by Sgt Tokwayo after he had left the area where the strike action took place. He was not told why he was arrested.
- i. In cross-examination, the plaintiff stated that he had left by the time the police back-up arrived as the crowd became violent. He could not explain how this statement aligned with his earlier statement that he protected Sgt Ulana from the crowd.
- j. The plaintiff acknowledged that he signed the SAPS14A on the date of his arrest.
- k. The plaintiff testified that the conditions in the cells were terrible, as the cells were dirty. There was an open toilet, meaning that one had no privacy. The blankets were lice-infested.
- l. On Good Friday the plaintiff could not attend church. He was supposed to preach on that day. The people at church now look down on him and call him a prisoner.
- m. On 18 April 2017, the plaintiff and other detainees walked across the street from the police cells to the court in handcuffs and leg-irons in full sight of the public.
- n. At the court, the plaintiff was released.
- o. The plaintiff testified that he felt humiliated and degraded as a result of his arrest and detention.

Arguments

[6] Ms *Pango*, for the defendant, contended that the two contradictory versions before the court required a consideration of the credibility of the witnesses, their reliability, and the probabilities, as set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et cie*.⁵ She argued that, on the evidence of the defendant's witnesses, the arrest of the plaintiff was lawful as it met the requirements of section 40(1)(a) and (j) of the CPA, as the required jurisdictional facts were met.

⁵ 2003 (1) SA 11 (SCA) para 5.

[7] Sgt Ulana, in Ms *Pango*'s view, was a credible witness. There was no reason for her to mistakenly identify the plaintiff. She identified the plaintiff by his cap and clothing as the one who assaulted her on the day. She only learnt his name later. Her version is more probable than that of the plaintiff, who claimed to be one of the people who assisted Sgt Ulana, yet he admitted that he told her how to do her job. Thus, the probabilities favour the version of the defendant that the arrest without a warrant was lawful. If that is found to be the case, it must be accepted that the plaintiff's detention was lawful. He was charged on 14 April 2017 and appeared in court on 18 April 2017, the first reasonable opportunity given the public holidays on Friday and Monday over Easter. He was informed of his rights and did not apply for bail at any stage. The evidence of Detective Mazaleni was that the situation in Stutterheim was volatile and that the nature of the offence militated against his release once charged.

[8] Ms *Pango* submitted that the case of the plaintiff should be restricted to that pleaded in the particulars of claim. Thus, the evidence of the plaintiff and the conditions of the cell should not be considered.

[9] For the plaintiff, Mr *Xozwa* contended, the evidence of the plaintiff and the defendant only contradicted each other on identity, and the version of the plaintiff should not be rejected as improbable. In his view, Sgt Ulana failed to record the name of the suspect in her initial statement, and it cannot be discounted that she misidentified the plaintiff, who was steadfast in his evidence that he tried to assist her. In addition to this, it must be considered that no evidence was provided on the exercise of discretion to the arrest of the plaintiff, and that the test for wilful obstruction is objective and requires the defendant to prove that the plaintiff knew he was interfering with police duties. The plaintiff was removed from the comfort of his family, his dignity was impaired, and he was unable to fulfil his duties as a preacher. It was conceded plaintiff's case did not extend to conditions in the cell, but I was asked to take judicial notice of that. With reference to precedent,⁶ Mr *Xozwa*

⁶ Mr *Xozwa* referred to *Zenzile v Minister of Police* [2024] 1 All SA 593 (ECM); *WSL v Minister of Police* 2024 (1) SACR 546 (GJ), among others.

submitted that an award of R 450 000 as set out in the particulars of claim would be appropriate.

The pleadings

[10] It is trite that the pleadings in a matter determine the parameters within which the dispute must be determined, and that the parties and the court are bound by the issues defined therein.⁷

[11] The particulars of claim outlined the plaintiff's claim as one based on unlawful arrest on 13 April 2017, when he was arrested by members of SAPS without justification or explanation, and detained over Easter weekend. He was released on Tuesday, 18 April 2017, when the prosecutor informed him that the case was withdrawn. The plaintiff alleged that he was the sole breadwinner in his family at the time and that he was unable to provide food for his family over Easter. He furthermore maintained that, as a devout Christian and church leader, he was deprived of his right to attend a church service at his church on Good Friday. As a result of the conduct of the defendant, the plaintiff asserted that he suffered pain, suffering and emotional shock, contumelia, loss of liberty and humiliation. He sought an award of general damages in the amount of R 450 000 for his unlawful arrest and detention.

[12] In response to these particulars, the defendant pleaded that the plaintiff was arrested without a warrant by Sgt Ulana on the date on the basis of section 40(1)(a) and (j) of the Criminal Procedure Act 51 of 1977 (CPA). At the time of the plaintiff's arrest, Sgt Ulana was a peace officer and the plaintiff wilfully interfered with Sgt Ulana carrying out her duties. The defendant particularly pleaded that Sgt Ulana and her colleagues were tasked with crime prevention duties at the scene where employees of the Amahlati Municipality were embarking on a strike. The employees barricaded the N2 and placed rubbish bins, tires, and other items in the road. Sgt Ulana and her colleague proceeded to remove some of the items from the road

⁷ *Molusi v Voges N.O.* 2016 (3) SA 370 (CC) para 28 and the authorities cited there.

when a stone was thrown at her, hitting her on her leg. She confronted the person who threw the stone and a mob of the workers then turned on her, pushing her around and telling her not to interfere with the protest. Sgt Ulana was able to identify one of the members of the mob by sight. SAPS members came to Sgt Ulana's rescue and the mob dispersed. The person who Sgt Ulana was able to identify, who turned out to be the plaintiff, was then arrested. As such, the defendant maintained that the arrest of the plaintiff was lawful, as was his subsequent detention. The defendant denied knowledge of the impact of the arrest and detention on the plaintiff and of his family responsibilities and put him to the proof thereof.

[13] The plaintiff did not include any averments regarding the conditions in the cell and being marched to the court from the cells in handcuffs and leg irons. Accordingly, the defendant was not called upon to respond to these allegations. The defendant was not afforded an opportunity to respond to these allegations and had closed its case by the time this evidence was presented. This evidence thus cannot be considered.

An outline of the legal requirements for lawful arrest and detention

[14] Section 40 of the CPA reads as follows in the relevant parts:

'40 Arrest by peace officer without warrant

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

(a) who commits or attempts to commit any offence in his presence;

.....

(j) who wilfully obstructs him in the execution of his duty.'

For an arrest to be lawful in terms of section 40(1)(a) the following jurisdictional factors must be proven: (1) the arrestor must be a peace officer; (2) an offence must have been committed or there must have been an attempt to commit an offence and (3) the offence or attempted offence must be committed in his or her presence.⁸

⁸ See Du Toit *Commentary on the Criminal Procedure Act* (RS 72, 2024) Ch 5 p13-14D

For an arrest to be lawful in terms of section 40(1)(j), in addition to (1) above, it must be proven that the plaintiff obstructed the police officer in the performance of her duties through some physical means.⁹

Once the jurisdictional factors have been established, the focus turns to the exercise of a discretion by the officer to arrest the plaintiff.¹⁰

[15] The lawfulness of detention must be determined separately from the lawfulness of the arrest, given the different statutory bases for each of these actions.¹¹

[16] Section 50 of the CPA regulates the procedure after arrest. An arrested person must be brought to a police station as soon as possible after his arrest and must be informed as soon as is reasonably possible of his right to apply for bail. The arrested person must be charged and ordinarily brought before a court for a first appearance within 48 hours after arrest. But the 48-hour limit only applies in respect of ordinary court days, i.e., weekdays that are not public holidays. Where a person is arrested at a time when the 48 hours will expire over a weekend or on a public holiday, he must be brought before the court on the first court day thereafter.

The evidence considered

[17] It is common cause that the plaintiff participated in the strike action in Stutterheim on 13 April 2017 and that he was arrested on the same day. While the plaintiff testified that he was arrested by Sgt Tokwayo, this was not set out in his particulars of claim, and his case for unlawful arrest did not rest on the fact that he was not arrested by Sgt Ulana. His case was based on mistaken identity, i.e. that he was not the person who assaulted Sgt Ulana. Because his version regarding the identity of the arrestor was not pleaded or put to Sgt Ulana in cross-examination or pursued in argument, I restrict the judgment to the case as pleaded and presented.

⁹ Du Toit *Commentary* Ch 5 p14Y.

¹⁰ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) para 28.

¹¹ *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) paras 37-38.

[18] The plaintiff did not dispute that he signed a SAPS14A notice of rights presented to him on 13 April 2017, and I accept that he was informed of his rights as set out in the notice. The first entrance in the investigation diary after the arrest of the plaintiff, completed by Sgt Ulana, recorded the outline of the complaint, the notification of rights, and the detention of the plaintiff, in a similar vein.

[19] It is common cause that the plaintiff was charged on 14 April 2017 by Detective Mazaleni with assault, intimidation and public violence. At that time, the plaintiff made a statement to the effect that he did not assault Sgt Ulana, that he told her not to approach the crowd.

[20] It was further not in dispute that the plaintiff was detained over the Easter weekend, and that he appeared in court on Tuesday, 18 April 2017, when the case against him was withdrawn.

[21] In order to determine whether the arrest of the plaintiff was justified, the contradictory versions must be considered in the light of the principles set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et cie*. The court has to consider the credibility of the witnesses, their reliability, and the overall probabilities before, as a final step, determining whether the defendant has discharged the onus to justify the arrest of the plaintiff on a balance of probabilities.

[22] The defendant's version was that the plaintiff, as part of a group of disgruntled workers, obstructed Sgt Ulana in the performance of her police duties. The plaintiff testified that he was one of the men who protected Sgt Ulana from the mob. But he contradicted himself on this point later. Sgt Ulana's version was that the men who assisted her escorted her to the police vehicle, whereas the plaintiff testified that he had left by the time the police arrived. Had he been one of the men who assisted her, he would have been on the scene as the police arrived. Further, on his own version, the plaintiff told Sgt Ulana not to approach the crowd. While he testified that he told her not to approach the crowd alone, his warning statement does not record the important qualifier 'alone'. The contradictions in the evidence in support of the

plaintiff's case, and the overall probabilities, lead me to find that, on a balance of probabilities, the plaintiff was not one of the men who assisted Sgt Ulana.

[23] Sgt Ulana was clear in her evidence that she knew the plaintiff by sight as he walked past her place of work often, always dressed in the same way. She observed the group of workers who turned on her as she confronted Xolelwa, close-up, and recognised the man she often saw walking past her place of work as one of them. I accept her evidence on this point, but that is not the end of the inquiry. Can it be said that the evidence supports the defendant's assertion that the plaintiff committed an offence against Sgt Ulana or obstructed her in carrying out her police duties?

[24] There is no reason why Sgt Ulana would lie about the plaintiff's involvement. I am satisfied that the evidence supports the conclusion that the plaintiff, as part of the group of striking workers, attempted to stop Sgt Ulana from continuing their strike action by pushing her and shouting at her. Further, I am also satisfied that the plaintiff pushed his finger against Sgt Ulana's forehead to emphasise his message that her presence there was not welcome. The question thus is whether this finding satisfies the remaining requirements of section 40(1)(a) or (j).

[25] In *Korkie v Minister of Police*,¹² Bloem J explained that the consideration in relation whether the arrestee committed an offence in the presence of the peace officer under section 40(1)(a) as follows:

'The test is whether the arresting officer had personal knowledge of facts upon which it can be concluded that the arrested person had *prima facie* committed an offence in his presence. By way of example, if the arresting officer walks into a room and sees A hitting B across his face with an open hand, he would be entitled in terms of section 40(1)(a) to arrest A because the facts observed by him disclosed the offence of assault. That it later turned out that A acted in self-defence and accordingly acquitted, is irrelevant for purposes of the arrest. One has to look at the facts, as they existed at the time of the arrest, to determine whether it could be concluded that, on the face of it, A committed the offence of assault on B in the arresting officer's presence.'

[26] The plaintiff and others' action of pushing Sgt Ulana *prima facie* constitutes assault, and coupled with their shouting at her, intimidation. The fact that the prosecutor declined to prosecute because he raised questions about the identity of the plaintiff in view of a crowd being involved, does not detract from the fact that, on

¹² (2129/2020) [2022] ZAECGHC 2 (1 February 2022) para 18.

a balance of probabilities, Sgt Ulana identified the plaintiff by sight in the group. She noted in her initial statement that the person she identified in the group (i.e. the plaintiff) was the one who was arrested. The fact that she did not mention his name in that statement does not mean that she did not recognise him.

[27] The group's actions were calculated to stop Sgt Ulana from interfering with their strike action by physically attempting to surround her, by pushing her, and shouting at her. It cannot but be concluded that, on a balance of probabilities, the actions of the plaintiff, as part of the group, amounted to wilful obstruction of justice.

[28] In light of the findings made above, I am satisfied that the defendant overcame the hurdle of establishing the jurisdictional facts required by section 40(1)(a) and (j). It must thus be determined whether the exercise of the discretion to arrest the plaintiff was rational.

[29] Mr Xoswa submitted that no evidence was adduced on the exercise of the discretion to arrest the plaintiff. Sgt Ulana testified that she drove around with her colleagues looking for Xolelwa and the person who was part of the group of workers who threatened her, that she was able to identify, i.e., the plaintiff. When she saw him, he was arrested for the offences he committed in her presence and taken to the police station.

[30] In *Zweni v Minister of Police*,¹³ the court explained that knowledge or awareness of 'discretion' as a concept is not required on the part of the arresting officer, but that what is required is for the arresting officer to have applied her mind to the relevant facts. What is required of the police officer is not perfection, judged with the benefit of hindsight.¹⁴ Pertinently, in *Minister of Safety and Security v Sekhoto*,¹⁵ the Supreme Court of Appeal explained that the arresting officer must act 'in good faith, rationally, and not arbitrarily'.

'This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of

¹³ (2629/2013) [2016] ZAECPHC 65 (4 October 2016) paras 29-31.

¹⁴ Du Toit *Commentary* Ch5 p14-R3

¹⁵ 2011 (1) SACR 315 (SCA) paras 38-39.

choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.'

[31] At the time of the plaintiff's arrest, Sgt Ulana did not know his name, but she knew him by sight. Given this and the prevailing circumstances in the aftermath of the protest action, her decision to arrest the plaintiff fell within the range of what was rational. I am satisfied that Sgt Ulana applied her mind in the circumstances and acted rationally. In light of these findings, the claim in relation to unlawful arrest must be dismissed.

[32] Detective Mazaleni testified that the plaintiff was detained in Bhisho as there was an issue with the cells in Stutterheim, whereas the plaintiff testified that he was detained in Stutterheim. Neither of these witnesses was confronted with the contrary version in cross-examination. The warning statement of the plaintiff, however, recorded that it was signed at Stutterheim. In my view, the evidence, on a balance of probabilities, supports a finding that the plaintiff was detained at Stutterheim. Not much turns on the location of the plaintiff's detention.

[33] In *Sandi v Minister of Safety and Security*,¹⁶ Eksteen J held that the grounds upon which it is contended that the detention of the plaintiff was unlawful must be pleaded in order for the defendant to respond thereto. In this instance, the plaintiff relied on the unlawfulness of his arrest, resulting in subsequent unlawful detention. He did not plead, in the alternative, that his detention became unlawful at some later stage.

[34] Section 39(3) of the CPA stipulates that '[t]he effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody'. Lawful discharge would follow when the detained person is released from custody on 'police bail' or by virtue of a court order, whether that is one granting bail, release on warning, or withdrawing the charges.

¹⁶ CA272/2012) [2017] ZAECHC 104 (13 September 2017) para 6.

[35] Detective Mazaleni testified that she did not release the plaintiff after charging him because of the tense situation in Stutterheim as a result of the strike action and because his place of work was close to that of the complainant. The plaintiff also did not request bail before his court appearance, and was informed of his right to do so. The evidence thus supports the conclusion that the plaintiff was lawfully discharged by court order at the first possible appearance after the Easter weekend. The claim on this score must thus also be dismissed.

[36] There is no reason why costs should not follow suit. No submissions were made regarding the appropriate scale on which a costs order should be made, but I am of the view that an award of costs on scale B is appropriate.

The order

[37] The plaintiff's claim is dismissed with costs on scale B.

R KRÜGER AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 18-20 August 2025

Date of judgment: 23 September 2025

APPEARANCES:

For the applicant :

Adv M Xozwa

Instructed by:

Sokutu Attorneys, Nahoon c/o Yokwana
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For the respondent:

Adv M Pango3

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