

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

REPORTABLE

CASE NO: 3213/2010

Date Heard: 08/06/2012

Date Delivered: 19/09/2013

In the matter of:

THABISO KENNEDY MAKAWU

Plaintiff

versus

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

SANDI J:

[1] The plaintiff sues the defendant, the Minister of Safety and Security, for damages for wrongful and unlawful arrest and detention.

[2] It is common cause that on 15 January 2010 the plaintiff was arrested and detained by Warrant Officer Gxagxisa ("Gxagxisa") and that he was released from such detention on Monday, 18 January 2010.

[3] At about 9h00 on 15 January 2010 the plaintiff was at his home at 12 Hutton Street in Bedford when two policemen, namely, Marangula and Gxagxisa arrived there. He had just woken up from sleep when he heard the sound of a police vehicle which was already in his premises.

[4] The plaintiff knew Marangula well, whereas he had met Gxagxisa for the first time a few days before the day in question. On that occasion Gxagxisa had visited him at his tavern about a case of theft of his cement which the plaintiff had reported at the police station. Gxagxisa invited the plaintiff to visit him at the police station so that he could take a statement from him about the case.

[5] The evidence of the plaintiff is that when the two policemen visited him on 15 January 2010, Marangula advised the plaintiff that Gxagxisa wanted to speak to him. Thereafter Marangula left. The plaintiff remained there speaking to Gxagxisa. Gxagxisa told the plaintiff that he wanted to see him at the police station. When the plaintiff told him he would follow him to the police station in his own vehicle, Gxagxisa refused this request. Instead, he transported the plaintiff to his tavern where the plaintiff dropped off his 5-year-old child with a domestic helper. However, the plaintiff took his house keys with him to the police station.

[6] The plaintiff testified that initially he entertained the belief that he would be at the police station for a short while and that he would be soon home thereafter.

[7] The plaintiff testified that Gxagxisa never informed him that he was being arrested. On the way to the police station, Gxagxisa informed the plaintiff that one Joey Sampson had made a statement to the effect that the plaintiff had hit Joey

Sampson with a firearm. According to the plaintiff his reaction to this was by telling Gxagxisa that what Gxagxisa had been told was untrue. The plaintiff asked Gxagxisa as to what he would do if he (the plaintiff) gave him his sworn statement, which of the two statements would he believe. The plaintiff testified that Gxagxisa became angry, and thereafter the plaintiff kept quiet until they reached the Bedford police station. According to the plaintiff they reached the police station at about 10h00 am. There Gxagxisa took his fingerprints and wanted him to sign certain documents which the plaintiff refused to do. When the plaintiff refused to sign those documents Gxagxisa told him that whether the plaintiff liked it or not it was "going to happen". The plaintiff testified that he did not understand what Gxagxisa meant by this.

[8] The plaintiff was thereafter taken to the charge office where he was placed behind a counter where arrested persons are normally kept at the charge office before detention. His shoe laces and money were taken from him.

[9] The plaintiff suspected that he was going to be locked up and asked that he be taken to the station commissioner, Captain Shumane, who was well-known to plaintiff. The plaintiff intended to arrange that he be allowed to attend court at some later stage without the necessity of detaining him in police cells.

[10] According to plaintiff's evidence Captain Shumane was surprised that he was being arrested in respect of an incident that occurred as far back as 2008, in respect of which Gxagxisa took the investigation about two years after it was reported to the police station.

[11] Later Gxagxisa came into the office of Captain Shumane and when the latter enquired as to whether it was possible for the Magistrate to release the plaintiff until his first appearance in Court, Gxagxisa objected to this suggestion and accused Captain Shumane of treating the plaintiff in a favourable condition.

[12] The plaintiff testified that at no stage on 15 January 2010 was he asked by any police officer to produce his firearm and he was not questioned about it at all. The plaintiff was then detained by Gxagxisa.

[13] The plaintiff testified that on the instruction of Gxagxisa he was refused to make telephonic contact with his wife.

[14] Later he was put in a police cell. Describing this he said he felt like a "caged animal" and that the experience was indeed humiliating, in the police cell he was provided with a thin mattress and dirty blankets, the cell was small and had an open toilet, he was stripped of his privacy, he did not eat inside the police cell which was stinking of faecal smell. The plaintiff felt a lot of discomfort during this time. From his evidence I gain the impression that he was kept in a conditions that are not humane in terms of his constitutional rights.

[15] The following day he was visited by his wife who had brought him some food. His wife informed him that she battled with the police to see him.

[16] On Friday and Saturday no police officer took a statement from him neither was he asked to produce a firearm. On 18 January 2010 Gxagxisa told him that he had to appear in court at Adelaide. For that purpose the plaintiff was transported by

Gxagxisa to the Adelaide police station while the plaintiff was in the back of the police van thereof with his hands cuffed behind his back in an awkward position.

[17] When they reached the Adelaide Magistrate's court, the plaintiff was again placed in a police cell. Thereafter Gxagxisa informed him that he had to produce his firearm. Again, Gxagxisa cuffed the plaintiff and transported him to his home at Bedford where he went to show Gxagxisa his licensed personal firearm. The plaintiff testified that when he and Gxagxisa reached plaintiff's bottle store he was still handcuffed and members of the public gathered around there to watch him. He said that he felt like a criminal.

[18] After he had shown the firearm to Gxagxisa which was kept in a safe. Gxagxisa took possession of it and drove the plaintiff back to Adelaide Magistrate's Court where he, again placed him in a holding cell. The plaintiff testified that in Court he saw one attorney whom he knew well and who was surprised to see him handcuffed. Gxagxisa set the bail as high as R1000-00 because he alleged that the plaintiff was unco-operative and resisted arrest. However the state prosecutor reduced the bail to R800-00.

[19] The plaintiff stated that had bail been granted to him at the Bedford police station he would have paid it on the same day.

[20] He said that the arrest and detention tarnished his image and reputation in the eyes of the public. He said he was degraded and humiliated by the conduct of Gxagxisa.

[21] On 15 January 2010 he was not questioned about a firearm and no police officer asked him anything about a firearm.

[22] Drunk people were brought into his cell. There was no privacy in the cell the size of which was 2m x 3m. The plaintiff testified that he did not sleep well that night. Among other things he was longing for his son.

[23] No police officer took a statement from him during that weekend. On Monday 18 January 2010 Gxagxisa told the plaintiff that he had to go to Court. It was only the regarding the charge preferred against him. He sat there in the cell not knowing what was going to happen to him.

[24] The plaintiff testified that when they reached the Adelaide police station the handcuffs were biting his wrists and he requested another police officer by the name of Mbuyiselo Magenge to request Gxagxisa to loosen them Gxagxisa did not do so. He testified that at Adelaide he was placed in a holding cell where he stayed for about an hour. Whilst in the cell Gxagxisa told him to produce the firearm. He hand cuffed him and went back with him to Bedford.

[25] When he reached Bedford he was still in handcuffs and was taken by Gxagxisa to his bottle store where a number of people had gathered. He testified that Gxagxisa paraded him like a criminal inside the bottle store. In a safe, a firearm was found. Because the plaintiff had a license to possess a firearm, his firearm was returned to him at some later stage. According to the plaintiff the firearm was returned to him at some later stage by one Colonel Nel of Cradock. The plaintiff had a licence to possess the firearm.

[26] After the firearm was found he was taken back to the Adelaide Magistrate's Court, still handcuffed. There he was seen by Attorney Mbanjwa whilst he was being taken to the holding cell. It appears that Attorney Mbanjwa was asked to see him in that condition.

[27] He denied that in 2008 he interfered with Joey Sampson. He testified that he had obtained an interdict which prevented Joey Sampson from attending his tavern.

[28] The plaintiff testified that on one occasion he had laid a charge against Joey Sampson for theft of his cement.

[29] Under cross-examination by Mr *Boswell* for the defendant, it was put to the plaintiff that Warrant Officer Gxagxisa had phoned him on 15 January 2010 to advise that he had been tasked to deal with old dockets and that he wanted to speak to the plaintiff. It was further put to the plaintiff that Gxagxisa had told him that he had a complaint of assault emanating from one Joey Sampson and that he wanted the plaintiff to visit him at the police station. Mr *Boswell* put to the plaintiff that the reason that Gxagxisa arrested him was that the plaintiff had made certain threats and that he was not prepared to co-operate with him. Furthermore, Mr *Boswell* put to the plaintiff that but for the threats, it was indeed not necessary for Gxagxisa to arrest the plaintiff. According to Mr *Boswell* it was on Monday, 18 January 2010 after the detention that the plaintiff started to co-operate with Gxagxisa.

[30] On the facts of this case it was common cause or not in dispute that the South African Police at Bedford experienced a backlog of cases which resulted in criminal

dockets not being investigated and finalised. In the latter part of 2009 Gxagxisa who was, at the time, stationed at SAPS in Cradock was instructed by his cluster commander to attend to the investigation and finalisation of those dockets. It is also common cause that among the dockets that Gxagxisa had to attend to involved the plaintiff in this case. In one docket the plaintiff was the complainant in respect of the theft of his property. In the other docket the plaintiff was a suspect, it having been alleged that he had assaulted one Joey Sampson with the butt of a firearm and caused him serious bodily injury. The incident alleged in the second docket (74/08/2008) occurred on or about 23 August 2008.

[31] What also seems to be common cause is that the plaintiff who was the suspect in the second docket was never charged or arrested for this offence by the Bedford police. The plaintiff's arrest and detention in respect of the August 2008 incident was triggered by Gxagxisa on 15 January 2010. During all this time the plaintiff was living in Bedford where he carried out his business without any threat of arrest or detention from the Bedford police. It is clear that the plaintiff was well - known, at least to the Bedford police. He was a member of the Community Police Forum who interacted with the police, particularly the station commander, Shumane and attended meetings of the Community Police Forum.

[32] The evidence tendered by Gxagxisa was that when he consulted with the plaintiff regarding the theft of his property, the latter displayed no interest in the continuation of the investigation in the theft case. It appears that the matter was then closed.

[33] Regarding the assault charge against the plaintiff, Gxagxisa testified that over the investigation of the theft and assault case, he met the plaintiff on two occasions. According to Gxagxisa he thereafter made a number of telephonic discussions with the plaintiff inviting him to consult with him at the Bedford police station. Gxagxisa testified that in the telephonic discussions he informed the plaintiff that an allegation had been made against him that he had assaulted someone with a firearm and requested the plaintiff to consult him. According to Gxagxisa promises made by the plaintiff to see him came to naught. Hence, according to him, on 15 January 2010 he went to the plaintiff's place.

[34] Gxagxisa testified that before 15 January 2010 he made a number of telephone calls to the plaintiff requiring that he visited him with regard to the assault charge lodged by Joey Sampson. Gxagxisa testified that the plaintiff made many promises to visit him at the police station, which he never did.

[35] Gxagxisa testified that when he reached plaintiff's home, the latter set the dog upon him and he had to request assistance from other police officers. He said that even though police back up arrived, they still could not access the plaintiff's house because of the dog that wanted to attack them. He stated that they (the police) were helped by garbage cleaners who chased the dog away from them. The garbage cleaner told the plaintiff that the police were looking for him.

[36] Gxagxisa testified that he asked the plaintiff why he was always delaying and wanted to know what the plaintiff's problem was. The plaintiff told him that he was a busy person and was looking after a 5 - year – old child.

[37] Gxagxisa testified that when he and the plaintiff reached the police station, instead of going to his office, the plaintiff went to the office of the Station Commissioner. Gxagxisa followed him and found him seated in a chair in the Station Commissioner's office. The Station Commissioner asked of Gxagxisa as to what was happening because the plaintiff said that he wanted to arrest him. Gxagxisa stated that he told the Station Commissioner that he had no intention of arresting the plaintiff and that all he wanted from him was an explanation regarding the complaint which was laid against him.

[38] Gxagxisa testified that he arrested the plaintiff without a warrant of arrest because, according to Gxagxisa, the plaintiff made a threat that he would kill Joey Sampson.

[39] It is common cause that on 15 January 2010 Gxagxisa went to the home of the plaintiff and took him to the Bedford police station. Gxagxisa admitted that the plaintiff was with his 5- year - old child at the time. According to Gxagxisa's evidence he was not prepared to wait for the mother of the child to arrive, before taking the child to the police station as requested by the plaintiff, and he took the plaintiff to the police station. The child was left at the plaintiff's tavern. Gxagxisa would not allow the plaintiff to travel to the police station in his own vehicle.

[40] Mr *Cole*, for the plaintiff, put to Gxagxisa that Joey Sampson did not say in his statement that the plaintiff discharged his firearm. Gxagxisa confirmed that Joey Sampson did not say in his statement that the plaintiff discharged shots from his firearm. However, Gxagxisa testified that a statement in the docket was to the effect

that plaintiff was shooting at Joey Sampson while the latter was running away. Counsel also pointed out to him that there was no statement in the docket which says that Joey Sampson was shot.

[41] Gxagxisa was asked whether he consulted with any of the witnesses before he arrested the plaintiff. It transpired from his statement that he consulted two witnesses on 20 January 2010. By that time the plaintiff had already been arrested and released from detention.

[42] Under cross - examination Gxagxisa persisted that on 15 January 2010 he had gone to the house of the plaintiff in respect of the assault and not the theft of his cement.

[43] Gxagxisa could not recall whether or not the plaintiff preferred to travel to the police station in his own vehicle; he was unable to explain why the plaintiff did not use his own vehicle; he could not explain why the plaintiff was not allowed to collect his child's clothes before leaving his home. His evidence was that the plaintiff did not make such a request from him.

[44] He confirmed under cross - examination that the reason for the arrest was the threat to kill Joey Sampson.

[45] It is common cause that the plaintiff was arrested on 15 January 2010 and that Joey Sampson withdrew the charge against him on 23/03/2003.

[46] In his statement dated 15 January 2010 Gxagxisa stated the following:

“On 2010/01/15 I visited the suspect, Thabiso Makawu to warn him to report at my office about this case and also his home case of theft of cement . . . Firstly he resisted arrest stating that the case was old. And he have (*sic*) a protection order to (*sic*) assault the complainant.”

[47] Questioned by counsel about “resisting arrest” he sought to change his statement to say that he “delayed” and not that he resisted arrest.

[48] Gxagxisa testified that when they reached the police station the plaintiff told him he had lost his firearm when Gxagxisa wanted him to produce it. He said the plaintiff refused to produce it. Asked why he did not apply for a warrant of search, he stated that he was intending to discuss this matter with his commander, Greyling of Cradock.

[49] Later in cross - examination Gxagxisa said that the plaintiff told him that he would get him.

[50] Confronted with his statement, exhibit “B”, made on 15 January 2010 as to why he did not mention in his statement that but for the threats, he would not have arrested the plaintiff. His answer to that question was that he had omitted to record his statement that fast. He also stated that he omitted to record in this statement the reason for the arrest of the plaintiff. However, he stated that the reason for the arrest of the plaintiff was recorded in his pocket book.

[51] He stated that the purpose of arrest was to afford him an opportunity for further investigation. He said the reason for arrest before the investigation was the threats made by the plaintiff.

[52] Gxagxisa conceded that there were inconsistencies in the contradictory evidence of the state witnesses. For instance Joey Sampson's evidence differs from the other witnesses. He did not say that the shots were fired at him.

[53] When questioned about the inconsistencies or in the evidence of the state witnesses, his reply was it was not his duty to decide the questions of the witnesses and that, in any event, the plaintiff was not going to be arrested but warned to appear in Court.

[54] What is clear from his evidence is that he did not evaluate the information contained in the statements of the witnesses.

[55] Gxagxisa decided that the first task he had once at the police station was to take the fingerprints of the plaintiff.

[56] According to Mr *Cole* the plaintiff was not asked to produce the gun on Friday.

[57] Constable Mike Luni testified that on 15 January 2010 he went to plaintiff's place together with Sergeant Oxley Marangula. They could not get into plaintiff's house because of a vicious dog that wanted to attack them. He knew the plaintiff well. He owned a tavern. There were occasions when he would be present at the

police station when the plaintiff went to report a case. He said the plaintiff was not avoiding the police and it was easy to make contact with him telephonically. He stated that the meetings of Community Police Forum would be held at the police station.

[58] According to the pleadings the plaintiff was arrested without a warrant by Gxagxisa at about 9h00 am on 15 January 2010. Thereafter he was detained in police cells at Bedford until 16h00 on Monday 18 January 2010, i.e. 3 days and 7 hours.

[59] The plaintiff's evidence is that Gxagxisa did not inform him that he was under arrest. According to the plaintiff on the morning of 15 January 2010 Gxagxisa instructed the plaintiff to go to the police station. Gxagxisa would not allow the plaintiff to go there in his vehicle. At that time the plaintiff was at home with his child. Gxagxisa would not allow the plaintiff to go with the child to the police station. As a result Gxagxisa transported the plaintiff in a police vehicle to where the plaintiff left the child.

[60] The defendant denies that Gxagxisa unlawfully arrested and detained the plaintiff in that he reasonably suspected the plaintiff of having committed a schedule 1 offence as set out in the Criminal Procedure Act 51 of 1977, namely assault with the intent to do grievous bodily harm.

[61] The defendant pleaded further that the plaintiff:

- Persistently avoided the police and refused to co-operate in the investigation of the case.
- Was alleged to have discharged a firearm.
- Threatened to do further harm to the complainant.
- Threatened the arresting officer.

[62] The evidence of the defendant's witness, Gxagxisa, who was the arresting officer is at variance to the defendant's plea. Gxagxisa's evidence is not that he arrested the plaintiff for a schedule 1 offence but for making threats that he would kill the plaintiff.

[63] The plaintiff alleged in his particulars of claim that Gxagxisa never informed him that he was arresting him. In fact that the evidence taken as a whole does not show that there was indeed an arrest.

[64] In his evidence Gxagxisa continued that when he went to the plaintiff's home on the morning of 15 January 2010, it was not his intention to arrest and detain him. All he wanted from him was his version regarding the events alleged by the complainant. Gxagxisa's evidence supports the plaintiff's version that he (the plaintiff) was not arrested and neither was he informed.

[65] Gxagxisa testified further and said that he informed the Station Commissioner that he was not going to arrest the plaintiff.

[66] Accordingly, in these circumstances the plaintiff was not and could not have been arrested for assault with the intent to do grievous bodily harm. Gxagxisa did not attempt to justify the arrest and detention on the basis of the offence of that offence.

[67] The provisions of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 do not apply in this case because Gxagxisa did not arrest the plaintiff for the commission of a schedule 1 offence.

[68] When Gxagxisa took over the investigation of this case no mention was made in the docket of the plaintiff having discharged a firearm. This was said to Gxagxisa for the first time on 20 January 2010 after the plaintiff had been released on bail. Firstly the plaintiff has not been discharged with the offence involving the discharge of his firearm and, secondly Gxagxisa did not arrest him for such an offence.

[69] The question that arises is what did Gxagxisa arrest the plaintiff for. In this matter it is common cause that Gxagxisa arrested the plaintiff without a warrant. An arrest or detention is prima facie wrongful. In matters such as this the onus rests on the defendants and an objective test applied in the assessment of lawfulness of the arrest. It is for the defendant to allege and prove the lawfulness of the arrest and detention.

[70] Gxagxisa had no reasonable belief that the plaintiff had committed a schedule 1 offence. As the evidence shows he never intended to arrest him for the offence of assault with intent to do grievous bodily harm (a schedule 1 offence). However, later, according to his evidence, he arrested the plaintiff because the plaintiff had made

some threats. See *Mhaga v Minister of Safety and Security* 2001 (2) All SA 534 (TK) and *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE)

[71] It is also not correct that the plaintiff persistently avoided the police. That much is clear from the evidence of Lumi.

[72] What is also interesting is the fact that in the arrest statement filed in the docket Gxagxisa does not say that the reason for arrest of the plaintiff was the threats that he had made.

[73] I was impressed by the plaintiff as a witness and I am satisfied that he made a mistake when he did not acknowledge that he signed the statement in which his constitutional rights are set out. In my view this is a genuine mistake on the part of the plaintiff and I do not think that it impacts negatively on his credibility as a witness. His evidence was coherent, straight forward, honest and reliable. Support for this is to be found from the evidence of Gxagxisa himself. According to him the plaintiff was not arrested. He never intended to arrest the plaintiff. The station commissioner was informed by him that the plaintiff was not going to be arrested.

[74] However, the difficulty I have with his evidence is that he was not able to justify the plaintiff's arrest and detention. This means that the defendant failed to discharge the onus resting on it.

[75] The plaintiff was arrested in broad daylight. He is a well respected member of a community. He is a member of the Community Police Forum and has on one

occasion stood for election. He runs his business in the township. When Gxagxisa took him to his tavern to fetch the firearm some of his patrons were present as well as the people who worked in the tavern. He was handcuffed and such handcuffing was done in an awkward way which caused the plaintiff some pain. Though plaintiff requested him to loosen the handcuffs, Gxagxisa ignored him.

[76] The plaintiff is a married man and has a 5-year-old child.

[77] It makes sense that Gxagxisa would not arrest the plaintiff on 15 January 2010 in respect of an offence which allegedly took place in 2008. Throughout this period the plaintiff was available in Bedford, he was running his business, he was living at his home with his family and interacted with the police who never before arrested him.

[78] In the circumstances I accept the evidence of the plaintiff and reject that of Gxagxisa where it is in conflict with the plaintiff's evidence. Clearly Gxagxisa acted unlawfully in carrying out the arrest and detention of the plaintiff. He arrested the plaintiff on Friday, 15 January 2010 and released him on Friday at about 16h00pm. In all the plaintiff was in detention for a period of three (3) days and seven (7) hours.

[79] The next issue for decision is that relating to the quantum of damages sustained by the plaintiff. In this regard I have been referred to judgments which serve as a useful guide for the determination of plaintiff's damages in this matter. In *Sebe Nzondelelo Mfafa and The Minister of Safety and Security* (case no. 647/2007 ECD) the plaintiff was detained from 01 November 2006 to 06 November 2006 and

was awarded damages in the sum of R120 000-00. The plaintiff was 46 years old at the time.

[80] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 the plaintiff was arrested and detained for a period of five days and was awarded damages in the sum of R90 000-00.

[81] In *Van der Merwe v The Minister of Safety and Security* 2011 JDR 0029 (ECG), the plaintiff was arrested and detained on 21 July 2006 at about 16h00 and was released from such detention on the morning of Monday, 24 July 2006. He was awarded damages in the sum of R120 000-00 in respect of the unlawful arrest and detention.

[82] The plaintiff is a 37-year-old married man. He has a 5-year-old child. He is a member of the Community Police Forum. He is a business man who owns a bottle store and a tavern at Bedford. He obtained his diploma in Human Resources Management at the Cape Technikon in 1998. He is involved in community work and is the chairperson of the School Governing Body of Templeton High School. A well-known person in the Bedford community. On one occasion he stood for elections as councillor in the local government elections. He was detained for three days and seven hours. He was arrested and detained under humiliating circumstances and I consider that contumelia is an aspect of the matter that this Court should take into account in the award of damages to the plaintiff.

[83] I have considered all the circumstances of this case and I have decided that an amount of R160 000-00 would be appropriate in the circumstances of this case.

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

a) Judgment is entered in favour of the plaintiff as follows:

- (i) Payment by the defendant of the sum of R160 000-00 together with interest thereon at the prevailing legal rate of interest from a date 14 days after judgment to date of payment;
- (ii) Costs of suit together with interest thereon calculated at the prevailing legal rate of interest from a date 14 days after *allocatur* to date of payment.

B. SANDI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff : Adv Cole
Instructed by : Wheeldon Rushmere and Cole Attorneys

Counsel for the defendant : Adv Boswell
Instructed by : Whitesides Attorneys