REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: **Case No: 1400/2011**

VERNON DANIEL MARTINS **Plaintiff**

and

MINISTER OF POLICE **Defendant**

Coram: **Chetty, J**

Heard: **23 & 24 May 2013**

Delivered: **4 June 2013**

Summary: **Criminal Procedure** – Arrest – Without warrant – Legality – Arrest effected for ulterior purpose – Justification not established

Assault – Evidence establishing assault perpetrated on plaintiff

Damages – Plaintiff awarded composite amount of R65 000.00

JUDGMENT

Chetty J

[1] This is an action for damages premised upon an assault perpetrated upon the plaintiff and his subsequent unlawful arrest and detention by a member of the South African Police Services on 23 December 2010. In his particulars of claim the plaintiff alleged that he was kicked on his lower leg, felled by the blow, smacked, forcibly pushed towards a police van, violently kneed on his back to facilitate his entry therein and thereafter hit on the right eye and surrounds in the police van. It is common cause that he was arrested without a warrant by Constable *Ryno Te Brugge*, (Te Brugge) in Missionvale, Port Elizabeth on the aforesaid date, transported to the Algoa Park police station and thence to the New Brighton police station where he was detained and only released on bail during the course of the following afternoon. Although the versions presented on behalf of the parties are irreconcilable, the truth as to what actually occurred is not difficult to discern. A useful starting point in that exercise is the evidence of Warrant Officer *Errol Kleinhans (Kleinhans)*.

[2] It is not in dispute that during the early afternoon of 24 December 2010, *Kleinhans*, to whom the case docket had been assigned for investigation, conducted an interview with the plaintiff at the New Brighton police station. During his testimony the latter acknowledged being questioned by *Kleinhans* but his account of what transpired stands in direct contradistinction to that of Kleinhans. On the plaintiff's version, *Kleinhans* conducted a superficial interview with him, repaired to the other side of the room where he sat down and started writing, whereafter he returned and asked him to append his signature to two blank pages which he was told were documents relating to his release on bail. During cross-examination, the plaintiff was referred to a statement, styled ***"interview statement***", ostensibly emanating from him

and bearing his signature and confirmed that the signatures appearing on the nethermost left corner of the statement, exhibit “A10” and “11” were his, but intimated that the two pages to which he had appended his signatures, were blank. The statement itself establishes the falsity of the plaintiff’s evidence. It is a *pro forma* document, set in type, with blank spaces reserved for the completion of the interviewee’s personal particulars and whatever statement he/she wishes to make. It is obvious from the content of the statement that the plaintiff was the author thereof and *Kleinhans*, merely his amanuensis. What emerges from *Kleinhans’* evidence is that he accepted that the plaintiff’s intervention in the incident the previous day was purely altruistic, and this understanding for the plaintiff’s plight, influenced him in hastening the plaintiff’s release on bail later that afternoon.

[3] It was put to *Kleinhans* by Mr *Beyleveld* that the plaintiff’s injuries, in particular the swollen bruised eye and surrounds, were clearly visible during the interview and the suggestion was made that his refusal to acknowledge this clearly established his collusion in the police’s attempt to suppress such evidence. *Kleinhans* was an impressive witness. His evidence was clear and consistent. He made concessions where necessary and at no stage did I discern the faintest hint that he was being untruthful. It is clear that he is an honest man and an officer with a sound work ethic, in essence, the quintessential policeman. I unreservedly accept his evidence that during the interview, the plaintiff was free of injury. The corollary of this finding is that I reject as false the plaintiff’s evidence that he was assaulted in the region of the eye as alleged. The rejection of the plaintiff’s testimony on this score, does not however, warrant the rejection of the entire body of his evidence, for it is evident, from *Te Brugge’s* own testimony, to which I shall in due course advert to, that the catalyst for

the events which then unfolded was the autocratic approach adopted by him on arrival at the scene. I shall deal with this more fully in due course but consider first the testimony relating to the assault.

[4] As corroborative evidence for the assault allegedly perpetrated on him by *Te Brugge*, the plaintiff called a number of witnesses to support his account. On his version the assault was two phased, the first, in the vicinity of his home where he was kicked on the shin, violently manhandled towards the police van and forcibly deposited therein and, the second, approximately two kilometres from his home where the two police vehicles stopped, the injured person transferred from the one vehicle to the other, whereafter *Te Brugge* landed a fist blow in the area of his right eye. Certain aspects of the initial assault were recounted by the plaintiff's wife, Mrs *Lauren Martins* and Mrs *Dominique Williams* and Ms *Marelise Groep*. It is unnecessary to traverse the latter two witnesses' evidence in any detail. Suffice it to say that I can place no reliance whatsoever on their testimony. They contradicted themselves, gave a garbled account of what occurred and their evidence is clearly the product of reconstruction.

[5] As regards the blow to the eye, the plaintiff's testimony finds no direct corroboration. As secondary evidence, he tendered a series of photographs of himself sporting an eye injury, allegedly taken by his wife on the day of his release. Those photographs however merely vouchsafe his evidence that his right eye and surrounding skin tissue was swollen and bruised. However, to prove that the injury was sustained subsequent to his arrest by *Te Brugge*, the plaintiff and his wife both

testified that on his release, Mrs *Martins* photographed the plaintiff using her cell phone. As corroborative evidence, he called Mr *Dean du Plessis* (*du Plessis*) who testified that he printed the photographs at his place of employment on 27 December 2010. I have no doubt that the latter in fact printed these photographs but the difficulty in accepting that this was done on the date alleged arises from the plaintiff's own testimony. By his own admission, upon his release, the ignominy associated with the public assault perpetrated on him, and his subsequent incarceration, though ever present, appears not to have perturbed him unduly – he had resigned himself to what had occurred. It was only on 6 January 2011 when he returned to work that, at the behest of his employer, he visited a doctor and was thereafter advised by his employer to lay a charge of assault against *Te Brugge*. Although the plaintiff was called to testify on two occasions, he made no mention whatsoever of having visited his place of employment on 27 December 2010 and having requested that the photographs be printed. Although *du Plessis* maintained that he printed the photographs on 27 December 2010, I am not persuaded, given the passage of time which has since elapsed, almost two and a half years, that his recollection is accurate. The probabilities are that they were printed only after the plaintiff’s return from the doctor.

[6] In my judgment the plaintiff's evidence concerning the time and manner in which he received this injury is contrived and falls for rejection. And, so too, his testimony concerning the series of events which preceded his arrest, but, with one notable exception. The juxtaposition of his oral testimony against the content of the statement minuted by *Kleinhans* on the 24th of December 2010 and the statement

made by him when laying a charge of assault against *Te Brugge* on 6 January 2011 ineluctably compels the conclusion that the former is partly contrived.

[7] In the course of this judgment I alluded to the statement minuted from the plaintiff by *Kleinhans*, and found that notwithstanding his disavowal, not only of being the author thereof, but moreover, that he was not appraised of his rights thereanent by *Kleinhans*, was false. The statement places the plaintiff in the midst of the incident, colloquially referred to in the evidence as, the "***mob justice***". It reads as follows: -

> "On 23/112/10 at just after 19:00 I was in Missionvale. There was a mob justice where a group of people was assaulting another person. I intervened and attempted to stop the fight. The police came also to stop the fight. While the police was on the scene attempting to stop the mob continued to assault the person. I intervened and attempted to stop the fight. The police ordered us to disperse. I did not because I wanted to help the person being injured. After I refused the police arrested me. I did have something to drink (beer) but I was not drunk. I only wanted to help the person being assaulted. I now know that it was impossible for the police to determine who wants to assault the person and who wants to help. I did not mean to offend or hinder the police."

[8] Under cross-examination the plaintiff was specifically asked to explain the apparent incongruity between his oral testimony and the content of the aforesaid statement. His response was that it was possible that what was recorded therein was correct but that he could no longer clearly remember. The answer is rather

perplexing. In his evidence in chief, he steadfastly maintained that prior to his arrest, he stood in the yard of his house, and, at no stage ventured near the incident, which he described as being approximately fifteen (15) to twenty (20) paces away from him. Under cross-examination he resolutely stuck to this version and decried any suggestion that he was in the throng gathered around the injured person. The aforementioned answer is incompatible with his earlier testimony that he could have been in the immediate vicinity of the injured person and gives the lie to his evidence that he merely witnessed the incident from his home.

[9] The plaintiff's untruthfulness hereanent however, does not inure to the benefit of the defendant. Having admitted the arrest, it bears the onus of establishing, on a balance of probabilities, that the arrest was justified. The testimony of *Te Brugge*, tendered to acquit the defendant of the onus resting upon it, however, contained the seed of its own destruction. During his testimony in chief, *Te Brugge* volunteered the information that shortly after his arrival on the scene the plaintiff remonstrated with him saying, "***wat julle doen is nie reg nie***". On *Te Brugge's* version, the admonishment is inexplicable - his conduct in maintaining order, he held forth, was beyond reproach and did not warrant censure. The plaintiff's version, coupled to the admitted admonition however, establishes the falsity of *Te Brugge's* evidence *vis-a-vis* the arrest. I reject *Te Brugge's* denial of having sworn at and brandishing his firearm at the crowd and accept that the plaintiff's admonition was actuated by *Te Brugge's* conduct. His indignation, at what he perceived to be the plaintiff's effrontery, appears to have clouded his reason and provided the catalyst for the arrest. His testimony relating to the plaintiff's interference with his official duties is, having regard to the testimony adduced and the probabilities, clearly contrived. Upon an

holistic appraisal of the testimony adduced, the arrest was actuated by an improper motive and effected for the sole purpose of assuaging *Te Brugge's* feeling of resentment at being admonished by the plaintiff. The defendant has consequently failed to discharge the onus to justify the arrest.

Quantum

[10] It will be gleaned from the aforegoing that although the extent of the violence perpetrated on the plaintiff may properly be regarded as a common assault, it nonetheless constitutes an infringement of the plaintiff's right to bodily integrity, and requires censure. On the facts found proved, there was no justification for either the assault or the subsequent arrest and detention. As adumbrated, *Te Brugge* took umbrage at being admonished by the plaintiff in public and in a fit of pique lashed out at him. There can be no excuse for such conduct from officialdom whose task it is to maintain law and order. Furthermore, the arrest and subsequent detention was effected for no purpose other than to assuage *Te Brugge's* wounded vanity. Although past awards provide a useful guide in determining an appropriate award, the facts peculiar to each case remain the overriding consideration and inform the award. In my judgment, a fair award for the assault would be R25 000.00 and R40 000.00 in respect of the unlawful arrest and detention.

[11] This brings me to the question of costs. Although the composite award falls within the jurisdiction of the Magistrates' Court, it is not axiomatic that costs on the Magistrates' Court scale must follow. The awarding of costs in any given case is in

the discretion of the trial court, to be exercised judicially upon a consideration of the relevant facts. In this case, as a mark of disapproval at the conduct of *Te Brugge*, for not only the assault, the arrest and incarceration of the plaintiff without justification, but moreover, for being deliberately untruthful, an award of costs on the High Court scale is entirely appropriate.

[12] In the result the following orders will issue: -

1. The defendant is ordered to pay the plaintiff the sum of R65 000.00 as and for damages.
2. Interest on the aforesaid amount at the legal rate of 15.5% per annum from date of judgment to date of payment.
3. The defendant is ordered to pay the plaintiff's costs of suit.

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D. CHETTY

JUDGE OF THE HIGH COURT

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