REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 27252/2015

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

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SIGNATURE

31.03.2017
DATE

In the matter between:

KAIZER LUCKY SELEBOGO **PLAINTIFF**

And

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an action for damages against the Minister of Police for the alleged assault and unlawful arrest and detention of the plaintiff. Merits and quantum are in dispute.

[2] It is common cause that the plaintiff was arrested on 17 March 2011 by police officials on a charge of "drunkness". He was detained at the Krugersdorp police station holding cells for approximately 4 hours, until he was released on 18 March 2011, in the early hours of the morning. It is further common cause that the plaintiff was arrested without a warrant of arrest by police officials acting within the course and scope of their employment with the South African Police Service.

[3] The defendant pleads that the plaintiff was arrested in terms of section 40(1)(*a*) and (*b*) of the Criminal Procedure Act 51 of 1977 ("the CPA"), and denies any assault on the plaintiff. The issues that therefore have to be determined are if the arrest and subsequent detention of the plaintiff were unlawful and whether the plaintiff was assaulted by the police officials.

THE EVIDENCE

[4] Plaintiff testified. He is a 34 year old male and employed at Woolworths. He is in a relationship and has two kids. He was also a soccer coach for an U/12 boys team in Kagiso. On 17 March 2011 he was in the company of his friends Tshepo, Amos and Rantsi. They went to visit a sick friend in Munziville. They were travelling by car and Amos was the driver. When they arrived at their friend's house at around 6 pm, they all had a couple of drinks. He had two 440ml cans of Hunter's Dry. At approximately 8:30 pm they left for home. On their way home they stopped on the side of the road to urinate. Three ladies approached the car and were speaking to Amos, when two police officers arrived in a marked police van. The policemen accused them of engaging in prostitution. The plaintiff protested and one of the two policemen, a tall male, said that he was talking too much. Two other police vehicles

also arrived on the scene. The police officers tried to solicit money from him (they wanted R200), but the plaintiff did not have any money. Amos also did not have enough money and it was suggested that they drive to an ATM to draw money. Amos was allowed to drive his vehicle and the plaintiff was in the passenger seat.

[5] On their way to the ATM, the police apparently had a change of heart, and ordered them to proceed to the police station. When they arrived at the police station the plaintiff was speaking on his cell phone with his mother. When he alighted from the vehicle, the tall police man slapped him against his ear, and his phone fell to the ground. The policeman continued to beat him with an open hand until they reached the inside of the police station. They were locked up in the police cells. The conditions in the police cells were poor. It stank and the toilets were not flushing. Amos was later taken from the cell and he disappeared for about 4 hours. At around 1am they were all released. He was handed a document that read: Fine R 150 = Drunkness. He visited Doctor Maharaj the next day and he was informed that his eardrum was ruptured. The content of the J88 report by Dr M C Maharaj, dated 19 March 2011, was admitted as evidence. The plaintiff opened a criminal case against the police officers for assault and bribery, but he later withdrew the case against the police officers because Amos was being harassed by the police.

[6] Constable Thobela testified on behalf of the defendant. He arrested the plaintiff on 17 March 2011 whilst doing crime prevention duties. On the day he noticed the plaintiff and three other males standing outside a car. They all had drinks in their hands. They stopped and approached the men. He told the males that they were parked at a "hotspot". An argument broke out and the plaintiff and his friends were

arrested for drinking in public because the liquid inside the glasses smelled of liquor. Constable Thobela testified that the plaintiff and his friends were also drunk. He instructed them to get inside the van, but they refused. The plaintiff especially was arrogant and did not want to obey any orders. He arrested the plaintiff to protect him. He wanted to protect the plaintiff from the criminal activities that occur at the "hotspot". When they arrived at the police station the plaintiff still refused to get inside the cells. He grabbed the plaintiff by the arms and his partner grabbed the plaintiff's legs. He had to physically force the plaintiff to go into the cells. He denied any assault on the plaintiff or that he tried to solicit a bribe from him. Constable Thobela testified that he did not know in terms of which section of the CPA he effected the arrest nor did he know the section of the offence the plaintiff committed in his presence.

EVALUATION

Did the plaintiff commit an offence?

[7] It is trite that an arrest or detention is deemed to be *prima facie* unlawful. It is for the defendant to allege and prove the lawfulness of the arrest. In essence the defendant has to plead justification for its actions.[1] As Rabie CJ explained in *Minister of Law and Order and Others v Hurley and Another*[2]

> "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

[1] See *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) *at 38B-C and Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC).
[2] 1986(3) SA 568(A) at page 589 E-F.

arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[8] The defendant pleads that the plaintiff was arrested in terms of section 40(1)(*a*) and (*b*) of the CPA. Section 40(1)(b) of the CPA, permits a peace officer to arrest a person "*whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody*". It is trite that "drunkness" is not a schedule 1 offence. The arrest could therefore only have been effected in terms of section 40(1)(a) of the CPA.

[9] As stated, it is trite that the onus to justify the arrest lies with the defendant. Section 40 (1)(a) of the CPA allows for an arrest without a warrant where a person commits or attempts to commit an offence in the peace officer's presence. The jurisdictional facts that should be proven by the defendant for a section 40(1)(*a*) defence are as follows:

9.1 The arrestor must be a peace officer;

9.2 An offence must be committed or attempted;

9.3 The offence must be committed or attempted by the arrestee;

9.4 The offence must be committed or attempted in the presence of the arrestor.

[10] It is common cause that plaintiff was arrested on a charge of "drunkness". Constable Thobela testified that "drunkness" does not bear its ordinary meaning of being intoxicated. According to him, "drunkness" is a generic term used by police

officials for what he referred to as "B crimes". He explained that "B crimes" are less serious offences, including drunkenness, drinking in public and domestic violence.

[11] Constable Thobela testified that he also arrested the plaintiff for "drinking in public". Drunkenness and drinking in public are two separate offences. The defendant did not give notice to the plaintiff prior to the trial that, although the plaintiff was arrested on a charge of "drunkness", the plaintiff was actually arrested for consuming alcohol in a public place. The plaintiff was clearly taken by surprise at the trial and did not have an opportunity of calling witnesses to contradict Constable Thobela's evidence in this regard. I will nevertheless deal with both the charge of drunkenness and drinking in public in establishing whether the defendant has proven the second jurisdictional fact, namely that an offence must be committed or attempted by the arrestee.

[12] As far as the charge of drunkenness is concerned, the defendant must prove that the plaintiff, at the time of his arrest, was in a condition where his or her capabilities were so impaired by liquor that he was likely to cause injury to himself or be a danger or nuisance or disturbance to others. For the offence of consuming liquor in or near a public place the defendant must prove the plaintiff was consuming liquor at the time of his arrest.[3]

[13] The *onus* is on the defendant to prove the lawfulness of the arrest. The defendant seeks to discharge this *onus* by relying upon the protection afforded by s 40(1) of the Act in respect of the arrest. I am satisfied that the defendant did not prove any of the elements constituting an offence of drunkenness or an offence of consuming liquor in a public place. What makes matters even worse for defendant is

[3] Section 127 (c) read with section 1 of the Gauteng Liquor Act 59 of 2003

that Constable Thobela also stated during his testimony that he arrested the plaintiff to keep him safe from the hotspot and that he arrested and detained him to sober up.

[14] On evaluation of Thobela's evidence the following possibilities for the arrest of the plaintiff had been established:

14. 1. Plaintiff was arrested for drunkenness.

14. 2. Plaintiff was arrested for drinking in public.

14. 3. Plaintiff was arrested for his own protection.

14. 4. Plaintiff was arrested and detained to sober up.

14. 5. Plaintiff was arrested because he was arrogant

[15] Constable Thobela was an extremely poor witness. He changed his version several times, gave vague answers in cross examination and was unable to give clear answers on basic principles relating to the arrest of a suspect. His testimony is rejected in its totality. I am satisfied that the defendant failed to prove the jurisdictional facts justifying the arrest of the plaintiff. The arrest and the subsequent detention were therefore unlawful.

Was the plaintiff assaulted?

[16] The plaintiff alleges in his particulars of claim that he was assaulted by one of the police officers that effected the arrest. It is not disputed that plaintiff consulted with Doctor Maharaj the day after he was released. The J88 was admitted as evidence. According to the J88 he suffered a ruptured eardrum

[17] Constable Thobela denied that he assaulted the plaintiff or that the plaintiff was assaulted by anyone else in his presence.

[18] The plaintiff provided the court with a detailed description of the assault he suffered. His version was clear and is supported by the common cause clinical findings and conclusions contained in the J88 report by Dr Maharaj. Constable Thobela's defence is a bare denial. In his testimony he made mention of the fact that he had to use force to get the plaintiff to go into the police cells. The defendant however did not allege that the plaintiff might have sustained the injury when he was forced into the holding cell.

[19] The *onus* is on the plaintiff to prove that he was assaulted. The plaintiff's evidence was corroborated by the medical evidence. There is no evidence that the plaintiff sustained this injury after he was released or before his arrest. The only reasonable conclusion under these circumstances on a balance of probabilities is that the plaintiff sustained these injuries during his arrest and detention. As previously noted Constable Thobela was an extremely poor witness and his evidence was rejected in totality. I am satisfied that the plaintiff had discharged the *onus* of proving he was assaulted by one of the arresting police officers by hitting him on his ear.

QUANTUM

[20] The plaintiff claims an amount of R150 000. The authors Visser & Potgieter, [4] set out the factors relevant in assessing damages as being the following:

> 'The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or malice on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement) of the deprivation of liberty; the status, standing, age

[4] *The Law of Damages* 2 ed at 475

and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the *actio injuriarum* also has a punitive function.'

[21] In *Minister of Safety and Security v Tyulu*[5], the plaintiff was a 48 year old Magistrate, incarcerated for 15 minutes. In assessing the damages the court considered the following: the age of the respondent; the circumstances of his arrest; its nature and short duration; the plaintiff's social and professional standing and the fact that he was arrested for an improper motive. An amount of R 15 000 was awarded on appeal. Bosielo JA reiterated that "*courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.*[6]

[22] In *Masisi v Minister of Safety and Security,*[7] an amount of R65 000 was awarded for a very short period of detention, namely 4 hours. The court noted that "*the right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos*"[8].The court further noted that the purpose of an award such as the present is to compensate a

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[5] 2009(2) SACR 282 (SCA),
[6] Minister of Safety and Security v Tyulu *supra* at par [26]
[7] 2011((2) SACR 262 (GNP)
[8] Masisi v Minister of Safety and Security *supra* at par [18]

claimant for deprivation of personal liberty and freedom and for the mental anguish and distress.

[23] The plaintiff testified that his standing in the community was impaired as a result of the incident and his relationship with his soccer team is no longer the same. In *Minister of Safety and Security v Seymour* [9], Nugent JA noted that the degree of humiliation to which the plaintiff is subjected is a factor to be taken into account when assessing *quantum.*

[24] Although the determination of an appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards, but it should not interfere upon the court's general discretion. One should be careful not to adopt a strictly mathematical approach in assessing the *solatium* commensurate with the injury inflicted. The period of detention is but one of the factors the court has to take into consideration in determining the amount.

[25] In *Mothoa v Minister of Police* [10], plaintiff was detained for 22 hours without any reason under unhygienic circumstances. He was awarded R150 000. The court took into consideration that the plaintiff was arrested for no apparent reason without a warrant whilst walking on his way home after work. The court held that the totality of the circumstances indicated that the police officials acted with an improper motive and malice toward the plaintiff.

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[9] 2006(6) SA 320 (SCA)
[10] (5056/11) [2013] ZAGPJHC 38 (8 March 2013)

[26] In *Ntwagae and Others v Minister of Safety and Security and Another* [11], elderly plaintiffs were unlawfully incarcerated for 2 and a half days and were awarded R 170 000. In *Mosweu v Minister of Police,* [12] a 36 year old male was awarded R120 000. In *Van der Westhuizen v Minister of Police and Minister of Education,*[13] a female travel agent was detained for one day. Her arrest stemmed from a contractual dispute which was clearly a *"civil issue and not a criminal offence".* She was awarded an amount of R150 000.00. In *Mokoena v Minister of Police,*[14] plaintiff was detained for 15 hours and an award of R120 000.00 followed.

[27] In assessing the damages I have taken into consideration that the plaintiff was assaulted during his arrest and that he felt humiliated by the incident. I also take into account that the plaintiff was injured as a result of the assault. There is, however, no evidence that the injuries or the incident had a lasting effect on the plaintiff.

COSTS

[28] Counsel for the plaintiff submitted that although it might be less expensive for plaintiffs in matters of this nature to institute actions in the Magistrates' Court, there are sound underlying principles and objectively good reasons for these matters to come before the High Court. It is submitted that a court should not merely consider the quantum awarded, but the nature of the cause of action.

[29] Counsel for plaintiff submitted that the defendant's conduct in this action speaks of contempt for people and process that does not befit an organ of government

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[11] (878/08) [2013] ZANCHC 7 (27 March 2013)
[12] Unreported judgment of Mphahlele AJ South Gauteng High Court Case number 26501/2011)
[13] [2015] ZAGPPHC 524 (20/5/2015)
[14] [2015] ZAGPPHC 401 (11/6/2015)

under our constitutional dispensation, and has fallen short of what is expected of public administrators by section 195 of the Constitution.

[30] Counsel for plaintiff relied on the matter of *R A and Others v The Minister of Police*,[15] wherein the full court awarded attorney client costs on the High Court scale. The court held that the matter dealt with the violation of important constitutional rights and rights of privacy and personal integrity of the appellants, and that the case also bears a public interest element. The facts *in casu* and the facts in *RA* matter are clearly distinguishable. In the *RA* matter the plaintiffs' house was surrounded by approximately 30 armed police officers who unlawfully broke into the house of the plaintiff. One of the plaintiffs was a boy aged 16. He was pushed to the floor and pointed at with a rifle. The actions of the policemen were of such a nature that plaintiffs' thought it was a house robbery. It later surfaced that the police were looking for a suspect in a murder case and went to the wrong address. The court found that the case was one "of more than the ordinary difficulty" and that the plaintiffs were severely traumatized by the incident.

[31] The Supreme Court of Appeal has more than once laid down the principle that the court's discretion must be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides. In *Cronje v Pelser*[16], Van Blerk JA stated:

> *"Dit kan nie sterk genoeg beklemtoon word nie dat dogmatiese toepassing van ander gewysdes, as sou dit geykte beginseld vir kostebevele voorskryf , die ongewenste uitwerking het dat dit die diskresie waarmee die hof a quo beklee is aan bande gele word"*

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[15] *R A and Others v The Minister of Police*. Unreported full bench appeal judgment, dated 21 April 2016, under Gauteng Division case number A315/2015.
[16] 1967 (2) SA589 (A)

[32] In *Sondlo v Minister of Police*[17], the plaintiff claimed general damages for an unlawful arrest and detention. The plaintiff was detained for approximately one day. In awarding the plaintiff R50 000.00 general damages and costs on the High Court scale, the court held that *"some restraint is called for when awarding damages where the fiscus is source thereof."*

[33] This action did not involve complex issues of fact or law and the amount claimed falls within the jurisdiction of the magistrate's court. Matters dealing with unlawful arrest and detention will always be in the public interest and will always involve violation of important constitutional rights and rights of privacy and personal integrity of plaintiffs. If this was the criteria in deciding whether matters should be instituted in the magistrate court or in the high court, all matters dealing with unlawful arrest would then, as a matter of course, be heard in the high court. I agree that plaintiffs in unlawful arrest matters should not be deterred from proceeding in the high court, but there are no specific circumstances in this matter that justified the plaintiff instituting a claim in a more expensive forum. I am accordingly of the view, exercising my judicial discretion, that costs should be awarded on the appropriate magistrate's court scale.

[34] In the circumstances, the defendant is ordered to pay:

1) The amount of R90 000 to the plaintiff as damages for his unlawful arrest and detention and assault;

2) Interest on the aforesaid amount at the rate of 9 % per annum from date of judgment to date of payment;

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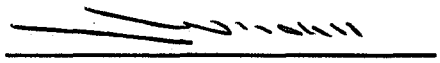
[17] *Sondlo v Minister of Police.* Unreported judgment by Wepener J, dated 21 August 2012, under South Gauteng High Court case number 14842/2011.

3) The plaintiff's costs of suit on the appropriate magistrate's court scale, including the qualification preparation and appearance fees of Doctor Maharaj.



L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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COUNSEL FOR PLAINTIFF:	Advocate Louis du Bruyn
ATTORNEY FOR DEFENDANT:	The State Attorney
COUNSEL FOR DEFENDANT:	Advocate Petre Marx
DATE MATTER HEARD:	8 March 2017
JUDGMENT DATE:	31 March 2017