**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**

Case Number: 19234/2015

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

**10 November 2023** _____

DATE SIGNATURE

In the matter between:

**SIMPHIWE MTETWA** Plaintiff

and

**MINISTER OF POLICE** Defendant

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**JUDGMENT**

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**NTULI, AJ**

*Background*

[1] Mr Simphiwe Mtetwa (the plaintiff) was arrested in the morning of 24 January 2015 and was charged with possession of drugs, colloquially known as “nyaope”. He was subsequently detained at Moroka Police Station cells. He states that the cell in which he was detained:

[a] Was overcrowded which made sleeping difficult;

[b] It had a toilet in the open which did not flush, and therefore emitted an unbearable stench; and

[c] He was given dirty and dusty blankets which made breathing difficult and as such aggravated his sinuses.

[2] On 19 January 2015, prior to his arrest, he visited Chiawela Hospital where he was diagnosed with severe pains and was put on medication for the pains and was also given a mouth wash for bleeding gums. On the Saturday of his arrest, he only took the morning dose of the medication and was denied access to his medication by the arresting officers and thereafter by the officers who detained him. It was only on Monday morning, 26 January 2015, that he took the medication. Consequential to the conduct of the police officers whereby they refused him access to the medication, he had to endure unbearable physical pains from the Saturday of his arrest to Monday morning when he took the medication. He equates the refusal to access his medication by the police officers to physical assault as such refusal caused him the same physical pains consequential to physical assault.

[3] The plaintiff is now suing the Minister of Police (the defendant) and the Minister is defending the suit. The defendant is contending that the arrest was lawful as it satisfied all the jurisdictional facts set out in section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA"). As the arrest and detention were not disputed, the defendant had a duty to show that the arrest was lawful and within the prescripts of section 40(1)(b) of the CPA.

[4] The arresting police officers, namely Captain Pillay ("Pillay") and Sergeant Nkuna ("Nkuna") narrated the chain of events leading to the arrest and the subsequent detention of the plaintiff. Save for a minor difference, their evidence is very similar in many respects, and they allege that:

[a] They were, and still are, members of the flying squad;

[b] On the day of the arrest, they were drafted to assist the unit of the Moroka Police Station in an operation of stopping and searching people in the Moroka jurisdiction;

[c] This operation was occasioned by the high crime rate in the area, especially drug peddling;

[d] Pillay and Nkuna were driving on Mgeni Road in a clearly marked police car;

[e] The area where the operation was being conducted is a very busy area with lots of people walking and sitting around;

[f] Whilst driving, they spotted the plaintiff walking opposite to their direction;

[g] They observed the plaintiff, who after seeing the police car, started making hand gestures, putting his right hand in his pocket, and taking it out as if he wanted to throw something away. Whilst doing that, he was looking around as if he wanted to run away;

[h] They allege that that behaviour of the plaintiff appeared strange to them, and they suspected that the plaintiff had committed an offence referred to in Schedule 1 of the CPA;

[i] Pillay, who was driving, stopped the car, alighted from the car, and ordered the plaintiff to stop. Pillay identified himself as a police officer and requested to search the plaintiff and the plaintiff obliged;

[j] Pillay conducted the search and found a “brownish” plastic in which there was also a “brownish” powder-like substance which he presumed to be drugs – nyaope;

[k] After explaining to the plaintiff his constitutional rights, he then arrested him for possession of drugs;

[l] He then took him to Moroka Police Station;

[m] At the Moroka Police Station, Pillay stated that he deposited the drugs in a forensic bag which he then sealed and recorded it in SAP 13;

[n] The plaintiff was then handed over to the police officials responsible for detention;

[o] They, Pillay and Nkuna, went back to the operation and never had any interaction with the plaintiff;

[5] The plaintiff narrated his own version of how the events of his arrest unravelled, and he states that:

[a] He woke up quite early on that day and started working (fixing) on a car – a VW Combi. He claims to be known in his neighbourhood as a car mechanic, having learned the skills from his uncle;

[b] In the process, he realised that he needed a No. 17 spanner and consequently went to a nearby “Dunlop Spares” to buy the spanner;

[c] On his way, he was stopped by a man he only knows by sight as he is a person that frequents the shopping area. The man asked him for a R2.00 coin which he did not have at the time but hoped to have one as change after paying for the spanner. He then asked the man to accompany him to the spares shop;

[d] Shortly thereafter, he saw a police car stopping just behind them. Pillay alighted from the car and asked to search them to which he agreed as he had nothing to hide;

[e] Pillay then searched him but could not find anything on him;

[f] And to his surprise, Pillay picked up something from the ground about a metre away from where he was standing. Pillay then said that the item belonged to him because it was picked up right behind him;

[g] He denied ownership and knowledge of that item which Pillay said were drugs and belonged to him;

[h] He was then handcuffed and pushed into the police car. Despite protesting his innocence, the police did not listen to his cries and claims of innocence. He alleges that he informed the police that he had a medical condition for which he was taking medication and requested them to take him home to get that medication. The police agreed to take him to his home but such did not happen. He states that the police asked him whether he had money on him to which he answered in the affirmative referring to the R140.00 he was going to buy the spanner with. He further told the police that he had more money at home;

[i] He relates that the police did not take him to his house to get his medication as they promised. Instead, they drove around the area with him and eventually took him to Moroka Police Station where he was eventually detained. He asked for access to a phone to call his family to inform them of the arrest and to ask them to bring his medication at Moroka Police Station where he was being detained. The police initially

did not entertain his request but after some time he was allowed to call his family. After being fingerprinted, he was put in a cell which was not humanly habitable because it was overcrowded, filthy and had one toilet in the open which did not flush. He was given dirty and dusty blankets which made it difficult for him to breath and that aggravated his sinus medical condition. He pleaded that he be given access to his medication which plea was ignored. The pains were so severe that he couldn't sleep nor eat.

[6] On Monday, 26 January 2015, he was given his medication and a jacket which his family brought at the Moroka Police Station on Sunday 25 January 2015. This he was told by one of the police officers. It was only then that he took his medication which he last took on Saturday morning before his arrest. He, together with other arrestees, were taken to the Protea Magistrate Court. There, they were put in a cell and their names would be called to appear before a Magistrate. When his turn came, the policeman who called up his name looked at the paper that he (the plaintiff) was given at Moroka Police Station and thereafter the police officer told him that he could go home because there was no case against him. That police officer directed him to another police officer who was seated at the desk and that police officer stamped a "welcome to Soweto" mark on his forehead and told him that he could go home.

*The law*

[7] The arresting officers sought to rely on section 40(1)(b) of the CPA to justify the warrantless arrest and detention of the plaintiff. Section 40(1)(b) sets out the following jurisdictional facts that must be present for such an arrest to be lawful:

[a] The arrestor must be a peace officer;

[b] The arrestor must entertain a suspicion;

[c] The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1 of the CPA; and

[d] The suspicion must rest on reasonable grounds.

[8] The Constitutional Court in *Mahlangu and Another v Minister of Police*[1] teaches that:

> "The police, like any other state functionary in the country for that matter, are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law. That is a basic component of the rule of law and one of the founding values of our Constitution".

[9] The unlawful deprivation of liberty, with the accompanying infringement of the right to human dignity, has always been regarded as a particularly grave wrong and a serious inroad into the freedom and rights of a person. In *Thandani v Minister of Law and Order*, the court said that:

> "… [S]ight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a [person] in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and the rights of an individual".[2]

[10] This Court has previously pronounced that "the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations".[3] In *S v Coetzee*,[4] the Constitutional Court pronounced on these two aspects as follows:

> "They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. … [O]ur Constitution recognises that both aspects are important in a democracy:

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[1] *Mahlangu and Another v Minister of Police* ("*Mahlangu*") [2021] ZACC 10; 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC) at para 26.
[2] 1991 (1) SA 702 (E) at 707 A-C.
[3] *Zealand v Minister for Justice and Constitutional Development and Another* ("*Zealand*") [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at para 33.
[4] [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 159.

the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."

[11] This approach was affirmed in *Zealand*[5] in which – as in the instant matter - the focus was on detention. There the court held that:

> "It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. *In Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.''

[12] Once all the jurisdictional facts prescribed in section 40(1)(b) are present, the discretion whether or not to arrest arises and that discretion is objectively justiciable. In *Duncan v Minister of Law and Order*[6] the court held that:

> "If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power".

[13] In *Mvu v Minister of Safety & Security*,[7] the court found that the fourth requirement, i.e. that the suspicion must rest on reasonable grounds is

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[5] *Zealand* above n 3 at para 25.
[6] *Duncan v Minister of Law and Order* [1986] ZASCA 24; [1986] 2 A11 SA 241 at para 24.
[7] *Mvu v Minister of Safety & Security & Another* 2009 (6) SA 82 (GSJ) at para 10.

objectively justiciable. Willis J, relying on *Hofmeyr v Minister of Justice and Another*,[8] drew a distinction between a claim for unlawful arrest and unlawful detention and found –

> "It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all".

[14] In ***Hofmeyer,*** King J as he was then, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto and that the failure by a police officer to properly do so is unlawful.

[15] In this case, no objective facts were given by the arresting officers, namely Pillay and Nkuna, to show that they did indeed apply their minds to the circumstances relating to both the arrest and detention of the plaintiff. Counsel for the defendant contended that the arrest of the plaintiff after Pillay allegedly found the drugs on him, amounts to the exercise of the discretion contemplated by law after being satisfied of the presence of the jurisdictional facts.

[16] I disagree.

[17] It is clear from the authorities cited above that the exercise of the discretion must be preceded by the application of minds to objective facts relevant to the circumstances of the person to be arrested, in this instance, the plaintiff. The typical objective facts that could have been canvased by Pillay from the plaintiff prior to arresting him would be to enquire about: (1) the plaintiff's residential address, which would have assisted in determining whether or not the plaintiff is a flight risk; (2) the residential address would have assisted in further investigating whether or not the plaintiff had some more drugs at his residence; and (3) it would have assisted to confirm or disprove the plaintiff's claim that he was fixing a motor vehicle hence the need to go to the spares shop to buy the spanner that he allegedly needed. Better still, Pillay's evidence, corroborated by Nkuna, is that the plaintiff willingly obliged when Pillay asked to search him. Why would they then not enquire further about

[8] *Hofmeyr v Minister of Justice & Another* 1992 (3) SA 108 (C).

him so that they could objectively exercise the discretion the law imposes upon them to do? Surely by asking questions about the plaintiff, the answers elicited would have helped them to comply with what is contemplated in the matter of *Olivier v Minister of Safety and Security and Another*[9], which case counsel for defendant cited in his heads of argument. Therein the court instructively teaches thus:

> "I say this by reason thereof that I am of the view that in circumstances such as these [deciding if an arrestor's decision to arrest was reasonable] each case must be decided on its own facts. This entails that the adjudicator of fact should look at the prevailing circumstances at the time when the arrest was made and ask himself the question - was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employment and residence, cooperation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or weakness of the case, and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation? The interests of justice may also be a factor. Once the court has considered these and such other factors which in the court's view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort".

[18] The plaintiff's evidence suggests that he was not far from his house when he was arrested. Pillay could have enquired what the plaintiff's occupation is. The plaintiff told the Court that at the time of his arrest, he was on his way to the shop to buy a spanner which he needed to fix a car he had been working on since about 06:30 that morning. By going to the plaintiff's house, Pillay could have confirmed whether or not the plaintiff/suspect was indeed working on the car as he claimed thus corroborating or disproving the plaintiff's claim that he was going to buy a spanner at the spare shop. Had Pillay asked that objective question in relation to the plaintiff's residential address, this could

[9] *Olivier v Minister of Police* 2009 (3) SA 434 (W) at 445 C-F.

have helped him exercise his discretion whether or not to arrest and detain the plaintiff.

[19] This information could have been verified by the arresting officers to objectively exercise the discretion contemplated in the authorities cited above. The arrest is the end result of the envisaged discretion the law imposes on the arresting officers to exercise.

*Analysis of the evidence*

[20] As stated above, Pillay and Nkuna's evidence for the defendant is very much similar in many aspects, save for one aspect in Nkuna's evidence, and that is with regard to the position where the plaintiff was when they (Pillay and Nkuna), allegedly observed the plaintiff behaving strangely, which behaviour constituted the basis upon which they reasonably suspected the plaintiff to have committed an offence. They both allege that the plaintiff was walking opposite to their direction when they spotted him. Nkuna's evidence, however, went further to say that the plaintiff was on the other side (the opposite lane) of the Mgeni Road, walking opposite to their direction. This appears to corroborate the plaintiff's version that he only noticed the police when they stopped behind them – them being him and the man who had asked him for a R2 coin. I come to this conclusion using the circumstances of the area of the arrest, as articulated by the arresting officers, and that is, that it is a very busy area and crime is rife, hence the reinforcement of the Moroka Police Station with the flying squad to which Pillay and Nkuna belong.

[21] In such a busy scenario, as articulated by Pillay and Nkuna, the probabilities are that there were lots of cars travelling up and down Mgeni Road as well. In such busy traffic, it is unthinkable that the police would have easily stopped next to the plaintiff as he was on the opposite lane walking in the opposite direction of the police car. The police car would have seriously disturbed the busy traffic flow if they would have simply stopped next to the plaintiff the way

they put it. The logical probability is that they (Pillay and Nkuna), must have executed a U-turn to be on the same lane with the plaintiff to be able to safely stop and also order the plaintiff to stop. This lends credence to the plaintiff's version that he only saw the police when they stopped behind him and never saw them coming from in front of him as they claim.

[22] This I accept to be probable and therefore must conclude that the "hand gestures", if any, the police claimed were performed by the plaintiff which consequently led them to form the "requisite suspicion" that the plaintiff had committed a Schedule 1 offence, might have related to something else and not suggestive of a person who is guilty of having committed an offence of any nature. I consequently reject the officers' version as improbable and therefore find that their suspicion was unreasonable, which then renders the stop, search, and arrest of the plaintiff unlawful.

*On the detention*

[23] Pillay and Nkuna told the court that at the Moroka Police Station they handed the plaintiff over to the police officers responsible for the processing of suspects to be detained and they could not tell what happened to him thereafter. The detaining officers were never called to testify on what transpired after the plaintiff was detained to challenge his claims of being refused access to his medication which police conduct the plaintiff equates to being assaulted.

[24] The plaintiff told the court that the cell in which he was detained was overcrowded and that made sleeping very difficult. The blankets were filthy and dusty which aggravated his medical condition of sinusitis; the communal toilet was in the open, and could not flush and therefore emitted a very unhealthy and unbearable stench; and he was denied access to his medication the Chiawela Hospital (Clinic) prescribed for him for the severe pains and the bleeding gums. The plaintiff asserts further that the police told

him that people in cells were not allowed to take tablets. The medication was brought by his grandmother on Sunday 25 January 2015. The pains, he says, were so severe that he couldn't eat, and sleeping was very difficult. He pleads that the refusal by the police to access his medication amounts to an assault, and as such, caused him unbearable pains. It is on this basis that he claims an amount of R550 000.00.

[25] As stated earlier, there is no evidence adduced on behalf of the defendant to rebut the plaintiff's claims, consequently I must accept the plaintiff's version to be true. Counsel, for the defendant, argued that because the plaintiff's version was not corroborated, it cannot and should not be believed.

[26] I disagree.

[27] There is no contrary evidence attacking its integrity. It is the only best evidence available to assist the court to discharge its duty to adjudicate on the dispute placed before it. The defendant had at its disposal the police officers who detained the plaintiff. No explanation was offered why they were not called to challenge the plaintiff's claims.

[28] In the premises, I conclude that the plaintiff suffered pains equivalent to pains that would be consequential to physical assault, so the plaintiff was assaulted as he pleaded in his particulars of claim.

[29] On whether or not the alleged "powderish, brownish" substance the arresting officers allegedly found on the plaintiff, and which Pillay presumed to be drugs, were indeed drugs, no one knows, as no shred of evidence was led on this aspect. Pillay told the court that at the Moroka Police Station, he recorded that substance in SAP 13, sealed it to be sent to the forensic laboratory for analysis. However, no evidence was led to confirm that that substance was indeed drugs as contemplated by the Drug and Drug Trafficking Act 140 of 1992.

[30] In argument, Counsel for the defendant, sought to refer me to a section 212 affidavit which formed part of the bundle of documents made available to the court. He invited me to have sight of that affidavit and thereafter admit it into

evidence to complete the transaction Pillay commenced when he allegedly sealed the substance to be sent to a laboratory for analysis.

[31] I declined that invitation as I disagree with him that the mere production of a document automatically qualifies it as evidence to be considered in the adjudication of the matter before me. Firstly, I pointed out to him the limitations and dangers associated with that proposition because the author of that document was never called to personally testify on the integrity of the contents thereof. As such, that testimony could not be subjected to scrutiny by the counsel for the plaintiff. Secondly, the pre-trial minutes by both parties clearly state that the documents in the bundle are what they purport to be and their contents are not admitted. This means then that it cannot be true that the plaintiff was found in possession of drugs and therefore his arrest was unlawful.

[32] In the circumstances, I find that the arresting officers, Pillay and Nkuna failed to exercise the discretion required by section 40(1) of the CPA and therefore the subsequent arrest and detention of the plaintiff was unlawful.

*The quantum of damages*

[33] Having found that the arrest and subsequent detention of the plaintiff was unlawful, now arises the issue of the amount payable to the plaintiff by the defendant as a *solatium* for the pain and suffering the plaintiff endured consequent to the unlawful arrest and detention.

[34] The plaintiff has pleaded that I award an amount of R550 000.00 to compensate for the unlawful arrest and for the two days he spent detained in a cell in the inhumane conditions articulated above.

[35] Our jurisprudence is rich with authorities on the issue of the amount to be awarded for damages occasioned by unlawful arrest and detention. However, in the final analysis, they all point to the discretion of the trial court for determination.

[36] I have in the main, sought guidance from the Constitutional Court decision of *Mahlangu*[10] and the other authorities cited therein. Delivering the unanimous decision of the court, Tshiqi J, directs that:

> "It is trite that damages are awarded to deter and prevent future infringement of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place".

Quoting from the Supreme Court of Appeal judgment in *Seymour*[11] she points out that:

> "Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss".

She then deferred to *Tyulu*[12] where the court re-affirmed the following:

> "In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our 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. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all facts of the particular case and to determine the quantum of damages on such facts."

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[10] *Mahlangu* above n 1 at para

[11] *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006 (6) SA 320 (SCA) at para 20.

[12] *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA) at para 26.

[37] In determining the amount payable as damages to the plaintiff, I have taken into account that:

[a] The arrest was capriciously effected in that it was consequent to a lack of exercise of the discretion required of the arresting officers by section 40(1) of the CPA;

[b] The plaintiff was detained in the cell that was overcrowded, with a toilet in the open which toilet could not flush and consequently emitted an unbearable stench;

[c] The police officers' conduct in refusing the plaintiff access to his medication amounts to a dereliction of their duty and as a consequence of that, the plaintiff endured unbearable pains for two days.

**THEREFORE, I HEREBY MAKE THE FOLLOWING ORDER:**

1. That the defendant pays an amount of R150 000.00 to the plaintiff together with interest at the prevailing legal rate from the date of judgment to date of payment thereof.
2. The defendant pays the costs of suit at the High Court scale of party and party together with interest thereon from a date 14 after allocatur to date of payment thereof.

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**NTULI AJ**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, JOHANNESBURG**

**APPEARANCES:**

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| Counsel for the Plaintiff: | Mr Malema |
| Instructed By: | Madelaine Gowrie Attorneys |
| | |
| Counsel for the Defendant: | Mr Mlambo |
| Instructed By: | State Attorney |
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| Date of hearing: | 14 & 21 August 2023 |
| Date of Judgment: | 10 November 2023 |