



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

CASE NUMBER: 13837/2017

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

DATE: 01 June 2023 _____

In the matter between: -

Billyboy Alpheus Kanaomang

Plaintiff

and

Minister of Police

Defendant

Neutral citation: Billyboy Alpheus Kanaomang v Minister of Police (Case No. 13837/2017) [2023] ZAGPJHC 607 (01 June 2023)

J U D G M E N T

MAHOMED AJ

INTRODUCTION

1. The plaintiff claims damages for his unlawful arrest and detention by the South African Police Services, acting within the course and scope of their duties. He claims damages in the amount of R150 000. He was detained for approximately 12 hours.
2. Advocate Lethuka appeared for the plaintiff and argued that his client's arrest and subsequent detention were both unlawful.
3. He submitted that the defendant's employees had no reason to arrest his client and that when they arrested the plaintiff, they had no intention of ever taking him to court.
4. Advocate Mabelane appeared for the defendant and submitted that both the arrest and the detention were lawful.
5. She proffered that the plaintiff was arrested and detained for being drunk and disorderly in the middle of a public road. He was obstructing traffic and endangering the safety of other road users, including endangering his life.
6. The plaintiff testified and the arresting officer testified for the defendant.

COMMON CAUSE

7. The plaintiff's arrest and detention.
8. The period of detention. The plaintiff was arrested and detained from 18h45 on 27 November 2016 until he was released the next morning at 06h00.
9. No warrant as authorised for this arrest.
10. The plaintiff was under the influence of alcohol.

THE EVIDENCE

The Defendant's Case

11. The defendant called constable Mayise, who was on crime prevention duties on the day. She informed the court that on 27 November 2016 she had commenced duties at about 17h30, together with her colleague whose name she could no longer recall as the arrest and detention happened a long time ago.
12. She has been a police officer for over 7 years and knows the area, which she knew was a "hotspot" for crime and car accidents.

13. She was in a patrol vehicle with her colleague, a male police officer, when she heard hooting and noticed the plaintiff in the middle of a busy main road in the area. He was unstable on his feet, and he appeared to be drunk.
14. She alighted from her vehicle and approached the plaintiff, when she confirmed he was drunk, as his eyes were red, he was unstable on his feet and his breath smelt of alcohol.
15. She tried to direct him off the middle of the road, but he resisted her, whereupon she had to call upon her colleague for help to get him off the street and away from the traffic.
16. She testified that she informed him that she was going to arrest him because of his behaviour and that he was disrupting traffic. Her evidence is that when she managed to get him to their vehicle, the plaintiff no longer resisted her, and she then informed him of his constitutional rights upon his arrest.
17. The plaintiff got into the police vehicle without any further trouble.
18. Thereafter they drove off to their charge office, which is a short distance off the main road where she booked him. She testified that it may have taken them two minutes to reach the police station.
19. Her evidence is that she reached the charge office around 18h45 and recorded his arrest by 18h48.

20. She recalled reading him his rights as per the notice of rights document and informed him again of the reasons for his arrest and detention.
21. The plaintiff signed the document, and she was satisfied that the plaintiff understood its contents. She testified that she spoke to him in Setswana, as he indicated it was his home language. She too signed off on the notice of rights document.
22. Whilst processing his arrest she noted that the plaintiff had a few previous convictions and charges pending, she informed him that he would appear in court and that the court will determine his right to be released.
23. Her evidence is that she thereafter handed the plaintiff over to the officer on duty for cells and she continued with her patrol duties.

The Plaintiff's Case

24. The plaintiff testified that he was standing at the petrol station together with four of his friends after they had spent some time drinking at the tavern in Khutsong.
25. He testified that at the time he was drunk, but not as inebriated as the rest of his friends.
26. He testified that he suggested to his friends to finish and prepare to return home. He was going to return home to his children.

27. Whilst he and his friends waited for a taxi, he noticed the police vehicle passing by. He testified that the vehicle then returned to where they were standing and one of his friends approached the police and chatted to them.
28. It appeared to him that his friend knew the officer and he was told that the police had offered to give them all a lift. They therefore all jumped into the back of the vehicle expecting to be given a lift to the bridge nearby in the direction of his home.
29. He testified that instead, they were all taken to the police station where he was detained together with his friends.
30. His testified that he was arrested because he was carrying a bag with beers which they had not finished at the tavern.
31. His evidence is that the police officers in the vehicle had tricked him into getting into their vehicle on the pretext of giving him a lift toward the direction of his home.
32. He testified that had he known, he would not have joined the others or taken a lift and that he no longer trusts the police.
33. He denied that he was causing a commotion on the street at the time of his arrest.

34. The plaintiff initially denied that his rights were explained to him, however upon noting his signature on the document he conceded that his rights may have been explained to him but denied that he understood his rights.
35. He testified that he was put into a cell with several other people. The cell was smelly with an open toilet and no privacy.
36. The plaintiff testified that although he was drinking with four male friends and 2 female friends, however he could not remember their names.
37. They were in the cell together. He was told that if he paid an admission of guilt fine of R150,00 he would be released. He did not have the money and therefor spent the entire night in the dirty cells.
38. One of his friends paid the R150 and had left the night of his arrest.
39. At approximately 06h00, the next morning, he was released. He testified that he was not taken to court.

ARGUMENT

40. Mr Letuka proffered that the arresting officer's version cannot be true.
41. He submitted that his client was never fully informed of his rights.

42. Upon analysis of the records of persons arrested and the times recorded, it was too short a time between an arrest and his clients booking in at the police station, for his rights to have been fully conveyed to him and for him to have understood them.
43. He submitted further that upon his arrest the police had never intended to take him to court.
44. Upon arrest of persons, the police must have intent to take the suspect to court. Counsel submitted that there is no evidence of such intention before the court, the arrest was arbitrary and unlawful. No warrant was authorised for the plaintiff's arrest.
45. Mr Lethuka raised a point in limine, when he argued that the defendant argued a different case from the one pleaded and that on this point alone, the plaintiff must succeed.
46. He submitted that the arrest as pleaded was in terms of s 40 (1) (a) of the Criminal Procedures Act 51 of 1977, however no offence of drunken and disorderly conduct is provided for in the Act.
47. He submitted, that the defendant cannot be allowed to argue now in terms of the Gauteng Liquor Act 2 of 2003, for authority to arrest and detain his client.

48. The defendant failed to plead this even in an amended plea and consequently the plaintiff did not know from the pleadings, the case he was to meet.
49. Counsel submitted, the pleadings define the issues between parties and that the court can only entertain what is on the pleadings.
50. He submitted that the defence cannot be sustained and that it be dismissed, on this ground alone.
51. Furthermore, Mr Letuka proffered that the evidence of the conditions in the cells, were inhumane and that his client was subjected to a night of fear as other inmates fought with one another and he risked being drawn into the brawl that night.
52. Counsel submitted that his previous convictions are irrelevant, in that the arresting officer did not know of the convictions at the time of his arrest. Counsel submitted that the unlawfulness arises upon arrest.
53. The constable had no basis to arrest the plaintiff, who did not cause any commotion, he was simply standing with his beers in his bag, together with his friends who were drunk, whilst they awaited transport to return home.

THE LAW

54. Section 40 provides:

*“(1) A peace officer may without warrant arrest any person-
who commits or attempts to commit any offence in his presence ...
....”*

JUDGMENT

55. In **MINISTER OF LAW AND ORDER v HURLEY**¹, Rabie CJ explained,

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

56. The onus rests on the Minister of Police in casu to prove the arrest was lawful.

57. The plaintiff in casu proffered that the arresting officer had no lawful authority or grounds to arrest him.

58. As set out earlier, this court is confronted with conflicting versions as to the circumstances of the arrest and detention.

59. In **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS**,² the court must then consider the credibility of the witnesses, their reliability, and the probabilities.

¹ 1986 (3) 568 (A) at 598 E-F

² 2003 (1) SA 11 (SCA)

60. The approach includes a consideration of the witnesses' candour and demeanour, a bias, and whether there were contradictions in the evidence.
61. I noted that the cause of action arose in 2016 and both witnesses could not readily recall the events of the day.
62. The plaintiff, contradicted himself, on whether he had signed the usual notice of rights document, his version that he was arrested because he was carrying a packet with his alcohol is farfetched, there was no evidence as to the type of packet he was holding and how the police could have identified what he had in it, it is improbable that he was offered a lift by the police with the assistance of his very inebriated friend.
63. The court has also had to note that Constable Mayise failed to lead any witness to corroborate her version, notwithstanding her evidence that she was on patrol on the day with a colleague.
64. The defendant admitted the arrest and the period of arrest.

LAWFULNESS OF ARREST

65. Mr Letuka in his closing argument, raised the point and correctly, that the defendant pleaded only in terms of s40 of the Criminal Procedure Act, which provides only for the jurisdictional requirements for a lawful arrest without a warrant. It does not provide for the offense for which the arrest was made.

66. It was submitted that the defendant's counsel, cannot at the hearing of the matter argue based on s127 (c) of the Gauteng Liquor Act, which provides:

"It is an offence for any person to...

(a)

(b)

(c) be intoxicated in or near any public place, including but not limited to any road, street, lane, thoroughfares, square, park, market, shop, warehouse, or public garage,"

67. Mr Letuka submitted that the defendant failed to plead the section of the Act that her client relied on when she arrested the plaintiff.

68. In **MOLUSI AND OTHERS v VOGES NO³**, the court referred to its decision in Sunker, wherein was stated:

"...it is a fundamental rule of fair civil proceedings that parties... should be apprised to the case which they are required to meet, one of the manifestations of the rule is that he who [asserts]... must ... formulate his case sufficiently clearly so as to indicate what he is relying on."

69. The court continued ⁴,

"The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone."

70. In referring to the case of **SLABBERT**, wherein the Supreme Court of Appeals, held:

³ 2016 ZACC 6 2016 (3) SA 370 CC par 27-28

⁴ Par 28

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally impermissible for a for a trial court to have recourse to issues falling outside the pleadings when deciding a case.”

71. I agree with Mr Letuka, that the defendant cannot now at the hearing argue a case which it failed to plead. The plaintiff is entitled to know the case he was to meet so that he could effectively prepare for and argue his defence.

72. The defendant’s case fails on this ground.

72.1. The arrest cannot be found to have been lawful. Axiomatically, his detention too must be unlawful.

72.2. It is noteworthy that neither of the parties called further witnesses to corroborate their versions.

72.3. What remains is for this court to consider what is fair compensation for the arrest and detention of this plaintiff.

72.4. In assessing the number of damages, one must consider all the evidence and in **MINISTER OF SAFETY AND SECURITY v TYULU**⁵the SCA stated *“bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him some much needed solatium for his injured feelings.*

⁵ 2009 (5) SA 85 SCA

- 72.5. However, in our constitutional democracy, the importance of the right to personal liberty is a critical right that must be jealously guarded and weighed against the arbitrary deprivation of personal liberty.
- 72.6. Furthermore, a court must look at the facts of the case, the plaintiff did not complain of any assault, he was taken to the station, and taken through procedures.
- 72.7. It was early evening when he was incarcerated. He was given blankets although they were dirty and the conditions in the cells certainly were not acceptable. The toilet was smelly and an open one, he had to share a cell with others and was at risk of being drawn into a scuffle with others who were fighting.
- 72.8. He was on his way home to join his family for the night when he was arrested. He could not be with his children that night.
- 72.9. He was arrested for just under 24 hours. He was unemployed at the time.
- 72.10. Although during his stay he was told that if he were able to pay a fine of R150.00, he could go home. He did not have that amount and watched his friend pay it and leave the cell.
- 72.11. It is important to strike a balance between the injury inflicted and the award as compensation must be fair to both parties.

72.12. In **ACCOM and OTHERS v MINISTER OF POLICE**,⁶ an amount of R40 000 was awarded for a stay under twenty four hours. I am of the view that this is fair compensation.

COSTS

73. Adv Mabelane proffered that costs ought to be awarded on a magistrate's court scale, this was not a prolonged period of detention.

74. Furthermore, she informed the court that she approached the plaintiff's legal team regarding hearing the matter in the Magistrate's Court and they declined.

75. When Mr Letuka raised the point in limine as he commenced argument, the court inquired if he had considered that the pleading was excipiable. He did not think it was for him to consider and of course no exceptions were taken.

76. A party which fails to raise an exception, could be visited with an adverse order for costs, where the matter could have been disposed of at the exception stage. This is a case in point.

77. It is trite that the award of costs is at the discretion of a court, and I am of the view that the costs be limited to costs up to the first day of trial.

Accordingly, I make the following order:

⁶ [CA 89/2021] 2 Dec 2021

1. The Defendant, the Minister of Police, is to pay the plaintiff the sum of R40 000.
2. Interest thereon, at the prescribed rate of interest from date of judgment to date of payment.
3. The defendant shall pay the plaintiff's party party costs on a Magistrate's court scale, up to the first day of trial only.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 01 June 2023.

DATE OF HEARING: 18 April 2023

DATE OF JUDGMENT: 01 June 2023.

Appearances:

For Plaintiff: Advocate Letuka
083 570 0886

Instructed by: Bessinger Attorneys
011 615 7089

For Defendant: Advocate JD Mabelane

Instructed by: The State Attorney.