

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

31/1/18

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
31/1/2018	
DATE	SIGNATURE

CASE NO: 55151/15, 55152/15

In the matter between:

Mdluli Calvin  
Moyo Liberty

1<sup>st</sup> Plaintiff  
2<sup>nd</sup> Plaintiff

and

Minister of Police

Defendant

Coram: Munzhelele AJ  
Heard: 30 November 2017

Delivered:

## JUDGMENT

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MUNZHELELE AJ:

### Introduction

[1] The plaintiffs instituted an action against the defendant for damages regarding their unlawful arrest, detention and violation of right to privacy. This incident is alleged to have occurred on 29 March 2015 at Motetema Police Station. The defendant entered a notice of intention to defend and also filed a plea to the claims. The defendant denies that the plaintiffs were arrested, detained; and that their rights to privacy was violated. Therefore the plaintiffs have a duty to begin with adducing evidence to prove their claim for damages.

[2] Summonses were issued separately by the plaintiffs under two different case numbers. It was thereafter agreed during trial that the two cases will be heard simultaneously, in order to shorten the proceedings. Quantum and merits were dealt with simultaneously as per agreement.

### Evidence

[3] Liberty Moyo was the first plaintiff to testify. He testified that they were seated at a party at Motetema village together with Calvin Mdluli and Wilbie Ntswane also known as '*source*'. While still seated, a group of people came and started to accuse Calvin Mdluli of having an affair with their girlfriends. Some people came out from their cars and started to hit Calvin with bottles. As Liberty and '*source*' stood up to defend their friend, they realised that Calvin had already been injured. They advised Calvin to report the matter to the police. The three went to the police station.

[4] They arrived at the police station at 23:00 pm, '*source*' remained in the car, and Liberty accompanied Calvin inside to report the matter. Calvin requested the

police to assist him open a case of assault. The police refused to assist him, saying that he arrived at a wrong time as they were busy with their duties.

[5] Liberty out of concern asked the police to give him reasons for saying that they are busy because they were fast asleep, putting their feet on top of the desk or table. The police told him to shut up but he kept on talking. He told them that he was taking a *video* and a photo of them sleeping. The video was taken in order to show the police seniors the following day. The photo was produced in court on bundle 'B' as evidence.

[6] While the two were still taking a *video*, three police officers stood up and came running towards Liberty and the other three went to Calvin. They grabbed Liberty by the collar and the other police pushing him to the wall while taking Liberty's belt and shoe lace. All the police were on uniform and wearing bullet proof vests. Liberty could not recognise the faces of these police officers.

[7] During cross examination Liberty was confronted with the photo evidence which shows a different version from the one given during examination in chief. The photo exhibited police wearing jackets, shirt and jeans instead of bullet proof vests as he said.

[8] Furthermore, Liberty was confronted with the fact that people on the photo did not seem like they were running as he said; but were just standing. His response was that *"the one standing was the police officer who was answering Calvin when he wanted to be assisted"*.

[9] Liberty was modifying his evidence as the trial progress. He even changed his version, saying that only two police officers came to him instead of three which he mentioned during examination in chief.

[10] He further stated that the police grabbed them by their trousers, took their phones and put the two friends in the holding cells at around 12:00 midnight; whereas his pleadings reflect that they were arrested at 01:00 am instead of 12:00 am.



[11] Liberty added that the phones were brought back while they were in the holding cell. Upon bringing the phones back, the police officers demanded cell phone passwords, which were given to them. Cell phones were unlocked, and all the photos were deleted except for one, which was stored on the messages. Liberty alleged that his phone is able to store photographs and *videos* on messages. However, he could not very well explain why the video was not found in the messages, whereas his phone can store such in messages. The police took a piece of paper and requested the two to write their details on it. Police threatened the two, telling them that if they do not write their details they will remain in the cell and never be released. They acceded to the threats because of fear.

[12] According to this plaintiff, the two were kept in the cell until morning 5:00 am. Liberty described the condition of the cells as filthy, smelly and full of water. They were given blankets to sleep. The particles or furs of the blankets were on his clothes such that he had to set his clothes on fire. There were no other inmates at the cell.

[13] Calvin Mdluli was second to testify. His evidence confirmed the date and place of the same incident mentioned by Liberty. However, Calvin testified that he was confronted by one gentleman and there was an exchange of unpleasant words between them. The gentleman's friends supported him against Calvin. The friends attacked Calvin with a bottle, which cut him on the head. Liberty and 'source' came and separated them. The three went to the police station to report the matter.

[14] Calvin confirms that when they arrived at the police station, they found the police officers asleep at 23:10. Police officers were wearing uniform, dry mack, shirt and some with bullet proof vest. Calvin requested police officers for assistance to open a case of assault. He even volunteered to take police officers to the place where the incident occurred, but the police officers refused to assist him, stating that they were busy. When Calvin insisted with his request, the police officers said that he was daring. Liberty interfered disputing the police's reason for not assisting Calvin. At that time Liberty indicated that he was taking a video of police officers sleeping, which he will show to the police supervisor as proof that the police were asleep on duty. When the police officers realised that they were being *video*

*recorded* by Calvin and Liberty, they approached Calvin. One police officer grabbed Calvin by the collar of the shirt. The other three police officers went to Liberty. One of them took Calvin's belt and shoe laces. They told them that they were under arrest at 23:55.

[15] According to Calvin, 'Source' came in and found Calvin and Liberty with the police officers. When he inquired what was going on, the police told him to get out. The police officers pushed Liberty and Calvin to the cell. Calvin testified that they could not sleep that night, because there was neither a bed nor blankets in that cell. The cell had a filthy smell and some little water at the door only. The plaintiffs were released at 5:00 am and went home. Calvin said that he took care of the injury by bandaging it himself.

[16] Wilbie Ntsane ('source') testified that he was in the company of the two plaintiffs at Motetema when Calvin was assaulted by people who kicked him and slapped him with open hands. He further testified that Calvin bled through the nose because he was slapped with an open hand. He confirmed that the three went to Motetema police station to report the matter. However, he did not see what happened inside the police station as he remained in the car. He testified that he only came inside the police station when he realised that the two were taking too long to come out. He confirmed that the shoe laces and belts of the two were taken by the police. He asked the police officers as to whether the two were getting arrested. He was told to get out.

[17] Plaintiff's case was closed. Defendant closed the case without calling any witness.

[18] The counsel on behalf of the plaintiffs argued that the plaintiffs proved the arrest and detention by the police. They further argued that they had proved their claim for damages. Counsel submitted that a fair and reasonable award should be R80 000 for each plaintiff.

[19] Counsel for the defendant argued that the plaintiffs failed to prove on a balance of probabilities that they were arrested and detained. Their case was full of contradictions. On the issue of the assault, Calvin testified that he was assaulted



using a bottle by one person. Liberty testified that Calvin was assaulted with bottles by a lot of people. 'Source' said no bottle was used to assault Calvin, but he was only slapped with open hands and kicked by the people.

[20] 'Source' testified that Calvin was not injured on the head but was just bleeding through the nose because he was slapped with an open hand. Calvin testified that he was injured on the head. Liberty's evidence did not mention where Calvin was injured.

[21] Counsel submitted that these contradictions by the plaintiff and his witness kept the court wondering what happened. The counsel for the defendant further submitted that Calvin and Liberty contradicted each other during their testimony. Liberty said that there were blankets inside the cell in which they slept. The blankets had furs which covered his clothes. He said that he had to burn his clothes because of the furs from the blankets. But Calvin said that there were no blankets in the cell. They did not even sleep inside the cell. Liberty said that the cell which he was in was full of water but Calvin said that there was no water except at the door. Calvin never said that they were pushed so as to be banged against the wall when they were arrested but liberty said they were. The counsel submitted that the plaintiffs failed to prove that they have been arrested and detained. They also failed to prove the damages claimed. He submitted that if the court finds that they have proved their claim then the award should be R30 000 each all inclusive.

#### Issue to be determined

[22] The court has to find whether there was an arrest and detention of the plaintiffs on the 29 March 2015.

The court has to also find as to whether the plaintiff has proved damages and to also determine the damages to be awarded.

#### Legal principles applicable

[23] It is trite that the deprivation of a person's liberty by means of arrest and detention at the hands of the police is prima facie unlawful. *In Minister of Justice v Hofmeyer*[1993] ZASCA 40 Hoexter JA held at 153D-E that:

*'The plain and fundamental rule is that every individual's person is violable. In actions for damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are prima facie illegal'.*

[24] In an action for wrongful arrest and detention a plaintiff only bears the onus of proving the arrest and detention. *In the case of Relyant Trading (pty) Ltd v Shongwe and another [2007] 1 ALL SA (SCA) Malan AJA held on para 6 that:*

*'To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself or someone acting as his agent or employee deprived him of his liberty.'*

### Discussion

[25] The defendant denied the arrest and detention of the plaintiffs and did not call any witness. A claim of these plaintiffs for wrongful arrest can only succeed if it can be said that the defendant effected the arrest and detention. If the plaintiffs, on whom lies the burden of proof, produce evidence and that evidence calls for an answer then in such circumstances the plaintiffs has produced a prima facie proof and in the absence of an answer from the defendant, it becomes conclusive proof (*Goosen v Stevenson 1932 TPD 223 at 226*). The question is whether the evidence given in this case amounts to prima facie evidence, and whether in the absence of the evidence by the defence it amounts to sufficient proof.

[26] Upon assessment, the evidence of the plaintiffs and their witness seems to be a fabrication on allegations of assault. There are a lot of contradictions in their *viva voce* evidence. 'Source' contradicted Calvin and Liberty about how this assault case occurred. Calvin said he was attacked with a bottle on the head and suffered an injury. Source said that there was no bottle used but Calvin was kicked and slapped with an open hand, which lead him to bleed through the nose.

[27] They further contradicted themselves regarding the issue of the bottle used as a weapon. Calvin testified that he was assaulted with a bottle by one person. Liberty testified that Calvin was assaulted with bottles by several people. 'Source' said that there were no bottles used. The plaintiffs established three versions on the same facts.



[28] Liberty's own evidence contained two different versions. He said that he was grabbed by the collar of his shirt by the police who were wearing uniform with bullet proof vest. Yet he produced a photograph which shows three men with no bullet proof vest, whom he implicated for his arrest. One of the police officer on the photograph was not wearing uniform. The credibility and reliability of this evidence is questionable.

[29] The plaintiffs again contradicted themselves regarding the number of police officers who apprehended them. Calvin said that only two police officers came to him and grabbed his collar, whereas Liberty said that three police officers came and grabbed him and the other three went for Calvin. Between these two versions, the court is unable to identify the correct one. It therefore becomes difficult for the court to comprehend what really happened in the case in question.

[30] The particulars of claim have the arresting time as 01:00am but Calvin testified that he was arrested at 23:55. Liberty testified that he was detained at 12:00pm these are three different versions about the arrest. Which version should the court believe amongst the three? It is trite law that a person stands or falls by his pleadings.

[31] The plaintiffs have contradictory evidence about the cell in which they were detained in. Liberty said that the cell in which he was detained was full of water whereas Calvin said there was no water at all except at the door.

They further contradicted themselves regarding the presence or absence of blankets in the cell. Liberty said that there were blankets inside the cell. They used the blankets to sleep inside the cell. Calvin said that there were no blankets inside the cell. They never slept inside the cell. They were all the time standing until the police released them. The story the plaintiffs concocted went bad. One would even think that they were not in the same cell.

[32] Counsel for the plaintiffs argued that these contradictions by the plaintiffs and their witness are immaterial. He submitted that the court should only look at whether the plaintiffs were arrested and detained or not. It is trite law that when assessing the evidence the court should also look at the reliability of the evidence



presented. When assessing such, the credibility of the witness should be the central focal point in establishing the reliability of such evidence. Contradictions by the plaintiffs in this case are material; and the court cannot overlook such, especially when the defendants denied the arrest and detention of the plaintiffs. The contradictions in this case arouse suspicions of fabrication. *In the case of Hodgkinson v Fourie 1930 TPD 740 at 743 the court stated as follows:*

*'At the close of the case of the one side upon which the onus rest, the question which the judicial officer has to put to himself is: "is there evidence on which a reasonable man might find for that side"*

[33] Thus, the contradictory evidence presented before the court by the plaintiffs in this case cannot be deemed prima facie nor sufficient proof. In this case there is no evidence upon which a reasonable court might find in favour of the plaintiffs.

[34] In the light of the above evidence the court found that the plaintiffs failed on a balance of probabilities to prove that there was any arrest or detention by the police.

#### Costs

[35] The defendant counsel submitted that punitive costs should be ordered against the plaintiffs if their case is not successful. There was no substantiation for such request. Therefore the court will not order punitive costs.

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

1. Plaintiffs claim 1 and 2 are dismissed
2. No order as to costs



**M.M. MUNZHELELE**

**ACTING JUDGE OF THE HIGH COURT**

Counsel for plaintiffs:

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Instructed by:

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