IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO: 20788/20

In the matter between:-

LUDWICK MATUDZI MULEYA Plaintiff

VS

MINISTER OF POLICE First Defendant

DIRECTOR OF NATIONAL PUBLIC PROSECUTION Second Defendant

Coram: Kooverjie J

Heard on: 11-13 October 2023

Delivered: 26 October 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 26 October 2023.

SUMMARY: Police officials in arresting and detaining persons should exercise their discretion within the bounds of rationality.

ORDER

It is ordered:-

1. The claim for unlawful arrest is dismissed.
2. The claim for unlawful detention is upheld.
3. The claim for assault is dismissed.
4. The respondents are ordered to pay the costs on a party-and-party scale, which includes the costs of one counsel.

JUDGMENT

KOOVERJIE J

[1] In these action proceedings the plaintiff has instituted a claim for damages claiming that his arrest and detention was unlawful. He further claimed that he was assaulted by members of the South African Police Services ("SAPS"). He

holds the defendants liable on the basis that the SAPS officials committed unlawful acts in the execution of their duties in the course of their employment.

[2] The parties have agreed to separate merits and quantum. This court is therefore only required to adjudicate on the merits. The issue of quantum is postponed *sine die*.

ISSUES FOR DETERMINATION

[3] This court is required to determine:

3.1 whether the plaintiff's arrest was lawful;

3.2 whether the plaintiff's detention was lawful; and

3.2 whether the plaintiff was assaulted by members of the SAPS.

THE PLEADINGS

[4] The plaintiff pleads in his particulars of claim the following:

"5.1 On the 8th day of April 2017 at approximately 21h00 and at Soshanguve Police Station the plaintiff was arrested, detained and assaulted by unknown members of the Soshanguve Police Station in official clothing. The plaintiff was detained at Soshanguve SAPS and was

then taken by the unknown officers to the Soshanguve clinic … on the 9th of April 2017 to treat his injuries. The plaintiff was brought before the court on the 10th of April 2017 whereafter the prosecutor released him on a fixed bail.

5.2 The plaintiff was arrested without a warrant.

5.3 The arrest was made without any reasonable suspicion and was mala fide in that the arresting officers abused their powers.

5.4 The plaintiff was assaulted by the abovementioned officers as they used their hands/fists on the plaintiff in such a manner that he lost his consciousness and obtained critical injuries to his one eye and bodily damages.

5.5 The plaintiff was subsequently arrested and detained at Soshanguve Police Station SAPS"

[5] In their amended plea, the defendants' defence is premised on Section 40(1)(a) of the Criminal Procedure Act. The following was pleaded:

"10.1 The Plaintiff was arrested for crimen injuria, reckless and negligent driving, resisting arrest and assault. The Plaintiff's arrest and detention were lawful in terms of Section 40(1)(a) of the Criminal Procedure Act 51 of 1997 on the following grounds:

10.1.1 The arresting officer was a peace officer as defined in Act 51 of 1977.

10.1.2 The Plaintiff committed the offences he was arrested for in the presence of the peace officer.

10.1.3 The member of the first Defendant had a reasonable suspicion of having committed offences of crimen injuria, reckless and negligent driving, resisting arrest and assault based on the factors that were before him at the time of the arrest.

10.1.4 The member of the first Defendant exercised its discretion properly under the circumstances.

10.1.5 On the basis of the reasonable suspicion and factors before the member of the first Defendant at the time of the arrest and in accordance with section 40(1)(a) of the Criminal Procedure Act, the Defendant's member was entitled to effect an arrest of the Plaintiff, without a warrant of arrest.

10.1.6 The Plaintiff resisted arrest and the assault of the members of the first Defendant in the process. The Plaintiff could not be arrested without the use of reasonable necessary force, the Plaintiff was restrained. The Plaintiff tried to run but he fell. The members of the first Defendant used reasonably necessary force to effect the arrest but did not assault the plaintiff.

10.1.7 The Defendant's members in acting as aforesaid followed proper arrest procedure and acted within the confines of the Constitution of the Republic of South Africa, Act 108 of 1996.

10.1.7 The first Defendant pleads further that the plaintiff was lawfully detained on the 6th of April until his release …"

THE PLAINTIFF'S TESTIMONY

[6] The plaintiff, Mr Muleya, testified that on 8 April 2017 and around 21h00, he was travelling from Mabopane Station going to his house in Soshanguve. Whilst driving, he stopped at the robot and after passing the robot he saw police officers on the left side of the road, busy with the driver of the vehicle they had stopped.

[7] After passing them he noticed that the police officers switched on their blue lights and started following him in their motor vehicle. He noted that their motor vehicle was marked as a SAPS vehicle. He explained he did not stop as he feared for his safety as he believed that the individuals following him pretended to be SAPS officials. According to him, it is a well-known fact that perpetrators, pretending to be law enforcement officers, commit various crimes, particularly after dark. It is for this reason that he drove straight to the police station and stopped.

[8] He testified that whilst still in his car, one of the police officers, a white male, dragged him out of the vehicle and punched him on the right eye., which caused him to pass out. He only regained consciousness whilst in the police cells. He spent two days in the cell and was only released on Monday.

[9] Under cross-examination, he persisted with his testimony that he did not stop for the police that night as he feared for his safety. Reference was made to his statement (which he deposed to shortly after his arrest). He was questioned as to why he did not set out his reasons for not stopping when the police were chasing him. It was put to him that his version was a fabrication and thus untrue.

[10] He further denied the following under cross examination, namely: skipping a red traffic light, and driving recklessly and/or negligently, insulting, assaulting the police officials and resisting arrest, trying to escape when the SAPS officials were in the process of handcuffing him and that he was not pulled out of his motor vehicle.

THE DEFENDANTS' TESTIMONY

[11] On behalf of the defendants, the two police officials, "Kilian" and "Sithole", who were involved in the incident, testified. At the time both of them were constables. They have since been promoted as sergeants.

Kilian's testimony

[12] Sergeant Kilian explained that he was assigned to do vehicle checks with Constable Sithole on 8 April 2017. Around 21h00 he saw a white Quantum taxi skipping a red traffic light and almost knocking a pedestrian. They cautioned the plaintiff to stop. Since the plaintiff refused to stop, they followed him in their vehicle with the blue lights switched on.

[13] He explained that thereafter the plaintiff was driving recklessly and did not proceed directly to the police station. Instead he went in another direction, skipping stop signs thus endangering other road users. Kilian was driving whilst Sithole was calling for backup from other police officers performing crime prevention duties in the area. The plaintiff was eventually cornered near the police station by another SAPS vehicle.

[14] When he could go no further, Kilian testified that Sithole approached the plaintiff at the driver's side and that Kilian was behind him. The plaintiff got out of the vehicle and was aggressive towards Sithole. Sithole and the plaintiff got into a scuffle. Kilian then intervened. In this process, the plaintiff slapped him and scratched his arm. They eventually managed to hold the plaintiff with both hands, and attempted to cuff him. The plaintiff, however, freed himself from their grip and attempted to flee. It was at this point that Sithole tripped the plaintiff, causing him to fall with his face down. Kilian explained that this is a technique where they use

minimum force in order to arrest persons. The plaintiff was then handcuffed and arrested.

[15] Kilian further testified that after apprehending the plaintiff, he called the paramedics. They found the injuries to be superficial and did not treat him. Kilian further testified that the plaintiff was arrested on charges for reckless and negligent driving, *crimen injuria*, assault (on constable Kilian) and resisting arrest.

[16] Under cross examination, Kilian affirmed that the charges against the plaintiff were serious and the plaintiff was justifiably arrested. The reason for the arrest was to secure the plaintiff's attendance at court, and as an arresting officer he had carried out his duties lawfully.

[17] Further under cross examination it was posed to him that a less severe means could have been employed to ensure that the plaintiff was brought to court. Hence the arrest was not justified. He also testified that tripping the plaintiff did not constitute an assault, and particularly as no force was used. He further persisted with his version that Sithole had requested the plaintiff to get out of his motor vehicle.

Sergeant Sithole's testimony

[18] Sergeant Sithole's evidence was aligned to Kilian's testimony. He testified that, at the time, he was assigned with Constable Kilian on Aubrey Matlala Road, in Soshanguve to conduct crime and prevention duties at the vehicle checkpoint.

[19] He further corroborated Kilian's version that they followed the plaintiff with their police vehicle, that the plaintiff drove recklessly and they continued following the plaintiff until he was cornered at the police station. He also testified that the plaintiff did not stop at the premises but outside of the police station.

[20] He confirmed that both him and Kilian initially managed to hold the plaintiff's hands but before they could place the cuffs the plaintiff freed himself from their grip and attempted to run away. Sithole tripped the plaintiff. This caused him to fall on his face, thereby injuring himself. He confirmed that the paramedics had not treated the plaintiff. He also mentioned that the plaintiff was verbally abusive to both him and more specifically Kilian by making disparaging racist remarks. He however conceded that Kilian was slapped and slightly scratched on his forearm.

[21] Under cross examination Sithole was also questioned as to whether there were less severe methods that they could have taken to secure the plaintiffs presence in court. It was put to him that a charge for reckless and negligent driving did not warrant an arrest and detention. Sithole testified that the arrest was appropriate as the plaintiff's driving could have p[laced other peoples' lives in danger.

[22] Regarding his testimony that he was also assaulted by the plaintiff, he was questioned as to why he had not laid a charge for assault against the plaintiff like Kilian had. Sithole merely answered that he did not do so.

[23] Under cross examination, the plaintiff highlighted discrepancies that emanated from their testimonies, namely: that Kilian only testified that he was assaulted and not Sithole; and further why the visit from the paramedics was not recorded in any statement. In this regard, Sithole testified that although same was not recorded in the 'Occurrence Book', it could have been recorded in his pocket book. His response eventually was that he was unable to remember since it was an incident that occurred a long time ago.

[24] He further persisted with his version that the charges against the plaintiff were serious and that there was no other method that he was aware of securing the plaintiff's attendance at court. Sithole further explained that tripping the plaintiff in order to effect the arrest did not constitute assault. The plaintiff sustained injuries due to him falling on his face.

[25] Insofar as informing the plaintiff his constitutional rights, he testified that this was complied with. However the plaintiff refused to sign the said form. When the plaintiff's version was put to him that such form was never given to him to sign, he

denied that this was the case. It was again put to him that the offences for which the plaintiff was charged, did not justify his arrest. In fact, an alternative method could have been imposed on him to secure his presence at court.

ANALYSIS

Legal principles: Arrest

[26] It is trite that the onus is on the defendant to prove on a balance of probabilities that the arrest was lawful. In ***Hurley*** the court said[1]:

"An arrest constitutes an interference with the liberty of an 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."

[27] Section 40(1)(a) of the Criminal Procedure Act provides that a peace officer may arrest without a warrant any person who commits or attempts to commit any offence in his presence. The jurisdictional facts necessary for the arrest under Section 40(1)(a) are the following:

27.1 The arrestor must be a peace officer;

27.2 an offence must have been committed or there must have been an attempt to commit an offence;

[1] Minister of Law and Order v Hurley1986 (3) SA 568A at 589E-F ("Hurley")

27.3 the offence or attempted offence must have been committed in his or her presence.

[28] In order to determine if the arrest was justified, it is settled law that the test is objective. In ***Scheepers***[2], our courts have stated that:

"A police officer may without a warrant arrest any person who commits or attempts to commit any offence in his presence. In the circumstances, the issue for determination under this provision requires that there must be existence of a particular factual situation before the peace officer's power to arrest without a warrant can come into existence. If the circumstances exist, the arrest can be made. If they do not exist the peace officer has no right to embark upon arrest. Therefore good faith or reasonable mistake does not help. For peace officers to arrest in terms of the aforesaid section, they must first be clear that the action precipitating the arrest is indeed an offence. The arresting officer therefore needs to have personal knowledge of the conduct of the arrested person and the facts on which the arrest is based."

[29] In this instance, the plaintiff was arrested for the offences of *crimen injuria*, reckless and negligent driving, resisting arrest and assault. All of the above acts were committed in their presence. He was, however, not prosecuted on the said

[2] Scheepers v Minister of Safety and Security 2015 (1) SACR 284 ECG at paragraph [17] and [18]

charges. The fact that the arrested person was thereafter not prosecuted or later acquitted does not make the arrest unlawful.

[30] It cannot be disputed that the jurisdictional requirements in terms of Section 40(1)(a) of the Criminal Procedure Act were met. Both testified that they were peace officers, secondly that the offence was committed in their presence.

[31] Once the jurisdictional requirements are satisfied, the peace officer has a discretion whether to exercise his powers of arrest, whether the person should be released and under what conditions, arises at a later stage. The party who alleges that the discretion was not properly exercised, even though the jurisdictional facts are present, bears the onus of showing that such discretion was unlawful.

[32] In my assessment, I am required to make findings on the credibility, the reliability of the witnesses and the probability of their versions.[3]

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3 The Supreme Court of Appeal in the seminal judgment in **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others** 2003 (1) SA 11 (SCA) at 14J - 15E, set out on how to approach such a situation. It was stated:

"*To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance*

[33] It is evident that the versions of both parties are conflicting. The court in **National Employers General Insurance Co Ltd v Jagers** 1984 (4) SA 437 (E) at 440E - 441A said:

"*… where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false*." (My emphasis)

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compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it… But when all factors are equiposed probabilities prevail". (My emphasis)

[34] Having considered the evidence of both parties, I am of the view that the plaintiff's version of the events that night is probably not true. In respect of the events that transpired on that particular night, Kilian's version was corroborated by Sithole. They testified due to the plaintiff's failure to stop at the robot, he was charged for reckless and negligent driving.

[35] I find it prudent to highlight the approach endorsed by our courts pertaining to the officials' discretion. The court in ***Sekhoto***[4] reaffirmed the approach in ***Duncan v Minister of Law and Order***, namely that the discretion of the peace officer must be properly exercised. ***Sekhoto*** is further authority for the following propositions:

35.1 if the officer exercises the discretion to arrest knowingly for purposes not contemplated by the Legislator, the arrest will be unlawful. The decision to arrest must be made to bring the arrested person to justice. Hence arrest for an ulterior purpose, particularly to threaten or harass the suspect or in instances where the arrestor knows that the State would not prosecute are examples of such ulterior motive;

35.2 further the arrest must be exercised in an objective, and rational manner. The court pointed out that the standard of rationality is not breached because an officer exercises the discretion in a manner that a court does not deem it to be optimal;[5]

[4] Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) paragraph [29]
[5] Paragraphs [32] to [39] of Sekhoto

35.3 the discretion to arrest must be exercised with regard for the limits of the particular statute read together with the prescripts of our Constitution. Therefore upon an arrest has been effected, an officer must bring the arrestee before a court. Once this is done, the authority to detain that is inherent in the power to arrest has been exhausted. Ultimately the purpose of the arrest is to bring the suspect to trial. The arrestor is not required to determine whether the suspect ought to be detained pending a trial;

35.4 the court further remarked that where serious crimes were committed, an arrest would be justified and in a matter where the offence is trivial, it would be irrational to arrest.[6]

[36] In ***Sekhoto***, the court held that the rationality test should not be applied strictly. The court remarked that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged for the vantage of hindsight. As long as the discretion is exercised within this range, the standard is not breached.[7]

[6] Paragraphs [4.2] to [4.4]
[7] Paragraph [39] of Sekhoto

[37] The plaintiff contended that his arrest was unlawful, more particularly as the offences for which he was charged were not of a serious nature. On the contrary, the defence testified that they were serious and the arrest was justified.

[38] In being guided by the principles enunciated in ***Sekhoto***, I am of the view that the arrest was lawful. The evidence reflects the particular circumstances under which the arrest took place. In summary, the plaintiff was aggressive. He was not only physically but verbally abusive as well. He refused to stop when cautioned to do so, he drove away from the police officials and even attempted to flee when he was to be arrested. The officials were left with little option but to arrest him. Even though the offences that he was charged for may not have been serious, I take cognisance of the circumstances the police officials found themselves in. From the time the plaintiff spotted the police, he not only failed to stop but resisted his apprehension. It may not have been the optimal choice at the time, but I find that their decision to arrest was rational.

DETENTION

[39] The defendant pleaded that the plaintiff was lawfully detained until his release. The enquiry into whether the detention was lawful or not, constitutes a separate

enquiry from that of the arrest. In ***Mvu v Minister of Safety and Security and Another***[8] the court emphasized:

"A claim is based, not only on alleged unlawful assault, but also upon alleged unlawful detention. That there is an important distinction between the two is, in my respectful opinion, not properly understood by many – and it is not only police officers who have erred in this regard. Both the power to arrest and the power to detain an arrestee at the police station after an arrest are statutory authorities expressly granted. A police officer, insofar as detention is concerned, is required again to apply his or her mind to the circumstances relating to the person's detention and to consider whether the detention is necessary or not."

[40] It is settled law that police officers have the power to detain an arrestee at the police station after an arrest. The issue for determination is whether such detention was justified. It was argued that the police officials failed to apply their minds in detaining the plaintiff in the police cells. Police officials hold a legal duty not to unduly and unlawfully inhibit a person's right of freedom. It is common cause that the plaintiff was detained from 8 to 10 April 2017.

[41] It is further common cause that Kilian and Sithole were not stationed at the Soshanguve Police Station. I am in agreement with the plaintiff that it remained the duty of the SAPS officials stationed at the SAPS station to apply their minds

[8] Mvu v Minister of Safety and Security and Another 2009 (6) SA 82 (GSJ) paragraph [9]

as to whether the detention was justified. It was argued that the officials who took over from Kilian and Sithole were required to consider the circumstances that led to the plaintiff's arrest, namely that he refused to stop as he feared for his safety.

[42] Again the general principle approved by our authorities is that a police officer is required to apply his or her mind to the circumstances relating to a person's detention. An enquiry has to be made whether the detention was necessary at all.[9]

[43] I have noted from the "Statement Regarding The Interview With The Suspect", recorded the day after the arrest, that is 9 April 2017 at 15h00, that the plaintiff was not willing to divulge anything to the officer assigned to take his statement. Therein the plaintiff agreed to make a statement. He opted to do so for the court. As a result the officer was not privy to circumstances that led to the arrest at the time.

[44] Even though the officer was not made aware of the said circumstances, I find that it was still necessary for him to apply his mind independently from the officials who arrested the plaintiff. He should have had regard to the offences that he was charged for, and found that detention was not justified. Such offences did not warrant imprisonment. A lesser invasive manner could have been imposed in

[9] Mvu v Minister of Safety and Security supra

order to secure the plaintiff's attendance at court. The plaintiff could have been released and reprimanded to appear in court. In the premises, the detention was unlawful.

ASSAULT

[45] The police officials persisted with their versions that they had not assaulted the plaintiff and neither was it their intention to do so.

[46] Counsel for the defendants argued that in terms of Section 49(2) of the Criminal Procedure Act, reasonable force can be used in order to effect the arrest. Section 49(2) of the Criminal Procedure Act provides:

"(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing …"

[47] In ***Matlou***[10] the court recognized as one of the grounds for a successful defence is when the person resists an arrest or has taken flight.

[10] Matlou v Makhubedu 1978 (1) SA 946A

[48] I find the version of the defendants on the balance of probabilities as being probably true, namely the explanation that the police officials were required to use minimum force to apprehend the plaintiff. The injury was caused due to the plaintiff falling after being tripped. The force therefore used in the circumstances was necessary and reasonable.

[49] Having regard to the evidence before me, I find that there was no intention to assault the plaintiff at the time. The version of the defendants, particularly Kilian's version is corroborated by Sithole, namely that the plaintiff had resisted the arrest and attempted to run away. I find the version that Sithole tripped him in order to stop him to be probable. The plaintiff's allegation that he was physically assaulted and as recorded in the J88 should be considered in context. The information set out in the J88 was obtained from the plaintiff.

CONCLUSION

[50] In summary, I find the following:

50.1 the arrest was not unlawful;

50.2 the detention was unlawful;

50.3 the claim for assault cannot succeed. In my view the elements for assault, namely the intention proviso has not been proved.

COSTS OF TWO COUNSEL

[51] On the issue of costs, I am required to exercise my judicial discretion. The plaintiff has succeeded in the claim for unlawful detention. The plaintiff seeks costs of two counsel. I am of the view that the evidence and pleadings were not voluminous, the issues for determination was relatively straight forward and the legal principles involved have been entrenched by our courts over time.

[52] In the premises, I do not deem it justified to award costs of two counsel. Costs should therefore be awarded for costs of one counsel.

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Plaintiff:	*Adv. H Mpe*
	Adv. J Makhene
Instructed by:	*Gildenhuys Malatji Inc.*
Counsel for the Defendant:	*Adv. ST Pilusa*
Instructed by:	*The Office of the State Attorney*
Date heard:	*11-13 October 2023*
Date of Judgment:	*26 October 2023*