IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Case number: **92316/2016**

In the matter between:

MOKULUNGA JOMBILE Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

T P KRÜGER AJ:

1. The plaintiff instituted action against the defendant for unlawful arrest and detention, assault and malicious prosecution. The plaintiff did not persist with the claim for malicious prosecution.

2. The defendant on the pleadings admitted the arrest and detention. The first question then to decide is whether the arrest and detention was lawful.

3. On 21 February 2016 the plaintiff transported three persons from Rustenburg to a mine near Northam at the request of one Siya, who is of the same “clan” as the plaintiff’s mother. In addition, he knew Siya because he had previously taken the then unemployed plaintiff for employment assessment at a mine near or at Rustenburg. The plaintiff did not know the other two passengers.

4. The plaintiff dropped Siya and the two other persons off next to the road near the mine between 21h00 and 22h00. He testified that he assumed that they had gone to work at that time of the night. He however did not know at which mine Siya and the other passengers were employed. He then drove to a nearby floodlight next to the same road and went to sleep, while waiting for Siya and the other passengers to return. He was woken up by mine security officials on 22 February 2016 between 01h00 and 02h00 who had with them one Anthini Ginyani.

5. Ginyani was one of the persons transported and earlier dropped off by the plaintiff near the mine. Ginyani did not testify at the trial, but it appears from the docket that he subsequently paid an admission of guilt fine for theft of precious metals and malicious damage to mine property.

6. The whereabouts of Siya and the third transported person when the plaintiff was confronted by the mine security officials have not been disclosed to the court.

7. There is a dispute as to who had shackled the plaintiff and Ginyani: whether it was the mine security officials or the police, who came to the place where the plaintiff's car was parked. According to the plaintiff, the policemen handcuffed them with their hands in front of them. According to the policeman who testified on behalf of the defendant, Constable Langa, the plaintiff and Ginyani had already been handcuffed when he arrived at the scene. Nothing turns on this. It makes sense that the mine security officials would have cuffed the suspects, while waiting for the police to arrive.

8. The police were called to the scene by the mine security officials who had informed them that they had apprehended two persons who had broken in and stolen goods from the mine. According to Langa, a Mr Solomon, a security official, informed the police that the two persons had been apprehended, after

some people had cut the fence, gained entry to the property and stolen a quantity of an unknown mineral.

9. The mine security officials showed the stolen mineral, packed into a plastic bag, and other items taken to the police. The policemen investigated the area and found the track used by the perpetrators to enter the mine premises. Near the track the policemen found two helmets worn by the perpetrators.

10. The policemen also questioned the plaintiff and Ginyani. During the questioning the plaintiff informed the police that he was the driver. Ginyani confirmed that he had come with the plaintiff in his car and had intended to return with him.

11. The policemen arrested the plaintiff and Ginyani at the place where the plaintiff's car was parked.

12. Langa testified that he had requested the plaintiff and Ginyani to assist the police to look for their accomplices. The police drove around with the arrested persons to search for the accomplices but were unable to find them.

13. Langa testified that when he arrested the plaintiff and Ginyani, he took into account what the mine security officials had told him underpinned by his own observations at the scene, including the track used by the perpetrators and the

fact that Ginyani had been found with a plastic bag containing a mineral. Langa testified that he was convinced that the plaintiff and Ginyani had participated in the execution of a crime. Therefore, there existed in his mind no reason why he could not arrest them. In addition, the plaintiff and Ginyani were not known to the policeman.

14. The policemen took the plaintiff and Ginyani to the police station at Northam and handed them over to the officers at the charge office, to be further processed. Langa had no further contact with the plaintiff.

15. The plaintiff was taken to court on the day after his arrest on 23 February 2016. The matter was postponed to 11 March 2016 when the plaintiff was released on bail.

16. An arrest without a warrant is lawful in terms of sec 40 of the Criminal Procedure Act, 51 of 1977, if, inter alia, at the time of the arrest the arresting officer had a reasonable belief that the plaintiff had committed an offence referred to in schedule 1 of the Act. Theft is listed in schedule 1 of the Act.

17. Now although the plaintiff might not have entered the premises of the mine to actively participate in the break in and theft, he was on his own testimony the driver who had brought the perpetrators to the mine. Although he might have known only one of the perpetrators, he had agreed to drop the perpetrators off

next to the mine in the middle of the night nowhere near any gate. He then drove to a spot where he waited for them to return whereafter he would have taken them to Rustenburg.

18. Suspicion is a state of conjecture or surmise where proof is lacking and arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. The policemen's suspicion in the circumstances was reasonable. Ginyani was the only person who could have taken the mine security officials to the plaintiff. They phoned the police who found everybody at the plaintiff's parked vehicle.

19. I cannot fault the discretion exercised by Langa as the arresting officer to arrest both the plaintiff and Ginyani. Constable Langa clearly stated the facts upon which he decided to arrest both the plaintiff and Ginyani. Objectively viewed the facts justifies a reasonable belief that an offence referred to in Schedule 1 had been committed and that the plaintiff should be arrested. It was the middle of the night, the plaintiff admitted to them that he was the driver, stolen property was found in the possession of his accomplice, Ginyani, and the plaintiff and Ginyani drove around with the police to try and locate their other accomplices.

20. In the light of all the circumstances, I was not persuaded that they had improperly exercised their discretion to decide whether an arrest was necessary.

21. It is justifiable that the police would have thought that the plaintiff had made common purpose with his passengers to steal mine property. The definition of common purpose is set out in ***S v Thebus and Another 2003 (6) SA 505 (CC) at para 18***:

'The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime.'

22. Irrespective of whether the doctrine of common purpose would have found application in these circumstances, the plaintiff was, on the facts that the police official had made his decision to arrest him, an accomplice to housebreaking and theft which are offences referred to in Schedule 1.

23. Counsel for the plaintiff put it to the policeman that they had an alternative to either summon or warn the plaintiff to appear in court instead of arresting him. Such a position however loses sight of the fact that the plaintiff, who comes from Rustenburg, was apprehended a hundred kilometers away near Northam and that he was unknown to the policemen. In addition, on the plaintiff's testimony there was a communication gap in the form of a language barrier

between him and the policemen – it seems that he comes from the Eastern Cape and did not understand the local vernacular and the police did not understand him. The plaintiff was therefore not a local person who could have explained his purpose on the scene to the police.

24. In the premises I find that the arrest of the plaintiff was lawful.

25. The plaintiff was remanded in custody on 23 February 2016 and the matter was postponed until 11 March 2016 for profiling, i.e. confirming the identity and address of the plaintiff. During his evidence in chief, the plaintiff testified that somewhere in between the above dates there was a second appearance, when the matter was again postponed, because the police had not yet been able to confirm his identity and address. He did not know the date of this second appearance. There is no indication on the docket handed up in evidence of such a second appearance.

26. Although much was made of the fact that the police took a long time to profile the plaintiff, it was virtually impossible to be done before the first appearance. The plaintiff did not provide any verifiable proof to the police of his identity or address. The profiling was thus done sometime after the first appearance and before the second appearance.

27. I find that the detention of the plaintiff was not unlawful. The plaintiff's claim for unlawful arrest and detention must therefore fail.

28. The plaintiff's second claim pertains to his assault allegedly by the policemen at or near his motor vehicle at the scene of his arrest.

29. According to the plaintiff, the policeman caused him and Ginyani to sit on the ground, with drawn-up knees and their arms next to the sides of their knees and their hands in front of their legs. The policemen then pushed a rod of iron between their arms and the underside of their knees, whereafter they lifted them up with the rod and dropped them on the ground. This was done several times. The policeman also kicked them and hit them with closed fists.

30. There are several discrepancies between the plaintiff's evidence described above and his pleaded case. In the particulars of claim he alleged that he was struck in the face with an open hand, that the policemen stomped on his hands with their booted feet whilst he was handcuffed, that the handcuffing was excessively tight and that the policemen picked up the plaintiff by his feet and arms and threw him into the air.

31. When he testified, Constable Langa denied the allegations of assault, despite earnest cross-examination by counsel of the plaintiff. It was put to Langa that the J88 that formed part of the evidence before court recorded bruises on the

abdomen and on both the legs of the plaintiff, as well as bruising and swelling on the right ankle. It was put to him that the injuries coincided with the testimony of the plaintiff and that it was improbable for the plaintiff to have sustained the assault otherwise than by assault by the officers that arrested him. Langa decried any knowledge of the assault.

32. Counsel for the defendant asked only three questions during his cross-examination of the plaintiff – none of which addressed the manner of assault or the discrepancies between the particulars of claim and the viva voce testimony or the seriousness of the injuries or the failure of the defendant to lodge a complaint at the time of giving his warning statement. Counsel for the defendant interrogated the plaintiff about the reason for his psychological treatment that commenced a year or two before the trial and why it had taken such a long time before he started with such treatment and why he had gone to a clinic only after his release from detention. He however did not ask a single question to test the plaintiff's version in respect of the assault.

33. In closing argument, counsel for the defendant argued that the plaintiff could have sustained the injuries in the overcrowded cell where he was detained and where there were constant fights and acts of violence. Counsel for the defendant also argued that the plainitff testified that for some inexplicable reason he was spared from the acts of violence because the other persons in the cell probably felt sorry for him as he had already suffered injuries. He

argued that this explanation is simply improbable and far-fetched as it is common knowledge that prison life is characterised by violence and he could not have been spared for the entire period of his incarceration. Therefore, he said that a conclusion could safely be drawn that the injuries sustained by the plaintiff could not have been sustained at the time of his arrest.

34. The problem that the defendant has is that this version (as presented in closing argument) was never put to the plaintiff in cross-examination.

35. A party has a duty to cross-examine on aspects which he disputes. The rationale of the duty to cross-examine is that the witness should be cross-examined so as to afford him or her an opportunity of answering points supposedly unfavourable to him.

36. The failure to cross-examine a witness about an aspect of his or her evidence may have the result that the evidence may not be called into question later. The cross-examiner who disputes what the witness says has a duty to give the witness an opportunity to explain his or her evidence, to qualify it or to reveal its basis. Failure to do so has been dubbed extremely unfair and improper. Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence. From this point of view, such evidence will carry more weight than evidence disputed by means of

cross-examination and the failure to cross-examine, will be a factor increasing evidential value.

37. A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity to cross-examine, did not wish to dispute the version or aspects of the version of the particular witness who was available for cross-examination. A cross-examiner is duty bound to put his or her defence or version on each and every aspect he or she wishes to place in issue, to the witness.

38. In ***Small v Smith*** Claassen J said at 438:

It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

39. In the circumstances I am reluctantly compelled to hold that the plaintiff has acquitted himself of the burden of proof in respect of the assault.

40. The plaintiff did not present any evidence that the physical injuries sustained were of a permanent nature. Indeed, the only evidence presented was that set out in the J 88 form which testified to the soft tissue injuries suffered by the plaintiff. He did testify that he was now attending sessions with a psychiatrist, since he was not functioning well. He did not know that it would take so long for him to work through the trauma of his arrest and detention. He however failed to present any evidence from the psychiatrist as to the prognosis, the duration of the treatment or whether medicine has been prescribed.

41. There is no hard and fast rule for the determination of the quantum of damages to be awarded for assault. Like in the assessment of damages for unlawful arrest and detention, a court will take all the circumstances into consideration to determine the quantum. It was put like this in ***Minister of Safety and Security v Tyulu 2009 (5) SA 85 SCA at paragraph 26***:

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 or her 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 9 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 the facts of the particular case and to determine the quantum of damages on such.

42. A court is allowed to have regard to the quantum awarded in similar cases. I could not find any on similar facts and neither counsel referred me to any. In ***Hlungwani v Minister of Police (HCA05/2018) [2019] ZALMPPHC 41 (23 August 2019)*** the court award R100 000.00 for assault. In determining the quantum the court had regard to the following aspects:

(i) The severity of the assault and injuries sustained;

(ii) The manner or mode of assault on the Appellant;

(iii) The torturous manner of the assault on the Appellant;

(iv) The assault endured for a long period of some hours;

(v) The Appellant had committed no offence;

(vi) The aim of arrest was not to bring the Appellant to justice but a mere torture;

(vii) The Appellant deprived of his liberty for about five hours;

(viii) The assault was humiliating to a point where the Appellant defecated, with his clothing on him.

43. Having regard to all the factors in the case before me, I am of the opinion that an amount of R50 000.00 would be fair and equitable compensation for the assault.

44. Counsel for the plaintiff tried to persuade me to order that interest should run on the amount awarded a tempore mora to date of payment. In this regard he relied on the judgment of ***GFE Blything v Minister of Safety and Security and Another (8281/2013) [2016] ZAGPPHC 770 (31 August 2016)*** which in turn relied on the Full Bench decision in ***Nel v Minister of Safety and Security A1009/2010 ZAGPPHC 188 (22 August 2012)*** wherein it was held that:

The default position of the Act is that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate a tempore morae, unless a court of law orders otherwise. Where a court deviates from this position, an order that it any make, must appear just in the circumstances of that case.

45. Before me there was no evidence why it had taken almost eight years to bring this matter to trial. To grant interest to run for such an extended period without some explanation for the delay appears to me to be unjust.

46. There is no reason why the plaintiff should not be entitled to his costs. The parties agreed to the jurisdiction of the high court.

In the premises I make the following order:

1. The plaintiff's claim for unlawful arrest and detention is dismissed;
2. In respect of the claim for assault the defendant is ordered to pay the defendant the sum of R50 000.00 within 30 days of this order;
3. Interest on the sum in paragraph 2 shall run at the prescribed rate of interest from 30 days of the order to date of payment;
4. The defendant shall pay the plaintiff's cost of suit.

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T P KRÜGER AJ

Acting Judge of the High Court

Appearances:

Counsel for the plaintiff:	*Adv J Schoeman*
Instructed by:	*Spruyt Lamprecht du Preez Attorneys*
	c/o Schoeman Esterhuizen Gamberini Attorneys
Counsel for the defendant:	*Adv MC Mavunda*
Instructed by:	*The Office of the State Attorney*
Date heard:	*6 & 14 February 2024*
Date of Judgment:	*11 March 2024*