IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 8716/2010

In the matter between:

TEBOHO CHRISTOPHER TLHATSI **PLAINTIFF**

and

THE MINISTER OF POLICE **DEFENDANT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 11 November 2022, at 11h15.

ORDER

The following order is made:

1. The defendant is ordered to pay 100% of the plaintiff's proved or agreed damages for the unlawful arrest on 2 July 2010 and his detention until 6 July 2010.
2. The defendant is ordered to pay 100% of the plaintiff's damages for the assault on 2 July 2010.
3. The issue of quantum is separated in terms of rule 33(4) and postponed sine die.
4. The defendant is to pay the wasted costs of the pre-trial conferences and the judicial case flow conferences that the defendant failed to attend on an attorney and client scale.
5. The defendant to pay the costs of suit.

JUDGMENT

Sipunzi AJ

Introduction

[1] Teboho Christopher Tlhatsi (the plaintiff) instituted an action claiming damages against the Minister of Police (the defendant) in which the plaintiff alleges that on 2 July 2010 he was:

(a) unlawfully arrested and detained; and

(b) assaulted without provocation and just cause by two members of the defendant without a warrant of arrest and/or proper grounds for the arrest.

[2] The issue of merits was separated from quantum in terms of Uniform rule 33 as also agreed to by the parties. The matter proceeded on merits only.

[3] The defendant admitted that the arrest of the plaintiff was without a warrant and contends that the offence involved was a Schedule 1 offence and that the arrest was based on a reasonable suspicion that the plaintiff had committed the offence. It further contended that the arrest was lawful and denied the allegations of assault.

[4] At the commencement of the trial, the parties agreed that, although the defendant bore the onus in respect of the arrest and detention, the plaintiff bore the onus as regard the assault and therefore the plaintiff would bear the duty to begin.

Evidence

[5] The plaintiff testified that at approximately 13h00 on 2 July 2010 he was walking down the road to the store when a white sedan approached him from behind. When it reached him, it stopped and blocked his path.

[6] Warrant Officer Mthiyane (Mthiyane), who was unknown to the plaintiff and in civilian clothing, jumped off from the front passenger seat of the sedan. He held and forced the plaintiff into the motor vehicle and a scuffle ensued as the plaintiff was resisting being placed in the vehicle. Mthiyane was telling him to get into their vehicle. The driver of the motor vehicle, Warrant Officer Ngcobo (Ngcobo) also joined in. As the scuffle continued Ngcobo hit him with the butt of a firearm on the back of his head. He also fired a shot, which struck the plaintiff on the left ankle. The plaintiff denied that he was in possession of a steel rod. He denied that he used the steel rod to hit Mthiyane during the scuffle.

[7] The plaintiff testified that he managed to flee from Mthiyane and Ngcobo. As he was running down the road, they were shouting to others to catch the criminal, referring to the plaintiff as the criminal. About three to four gunshots were also fired at him. He was running, hoping that his colleagues with whom he was working at the nearby train station would rescue him. He tripped and fell into a ditch which resulted in an injury to his right ankle. He crawled and hid in a nearby toilet building. He was pulled out of the toilet building. The officers had been joined by about 25 to 30 people from the community. These people hit him with sticks and sjamboks for about ten minutes until his colleagues arrived and stopped the attack on him.

[8] At about 14h00, the plaintiff was transported to KwaNdengezi Police Station where he was detained in a police cell for approximately five hours before he was taken in an ambulance to RK Khan Hospital. He was not informed of the reason for his arrest. He remained in hospital until 6 July 2010 when he was transported in a police motor vehicle back to the KwaNdengezi police cells. During his consultation with the doctor, he did not mention the injuries (swelling and/or tenderness) on his head and hands because he was no longer feeling pain and he did not consider them important. He believed that the doctor observed that he was injured on his back from the assault by the community members.

[9] On the morning of 7 July 2010, the plaintiff was transported to the Pinetown Magistrate’s Court. In that afternoon, he was transported back to the police cells at KwaNdengezi without having entered a courtroom or appearing before a magistrate. Later that day he was released and he went home with his siblings. Subsequently,

the plaintiff went to the Hammersdale Police Station to enquire whether there was any case that may have been registered against him, but to no avail. He had not been informed that there was a case of attempted rape that was registered against him. Instead, after some time he laid a charge of attempted murder against Mthiyane and Ngcobo.

[10] During cross-examination, the plaintiff admitted that at some stage before his arrest he had been informed by one Ngidi from the Hammersdale police that there was a charge of attempted rape that was opened against him by Nonhle Mkhize, who was also his neighbour. When he went to Hammersdale Police Station to meet Ngidi, he was informed that such a person was unknown at that establishment. When the said Ngidi contacted him again he advised him to speak to Mkhize.

[11] The sister of the plaintiff, Sethati Princess Tlhatsi (Sethati) testified that when she learned that her brother was injured, arrangements were made to visit him at hospital. Their plans were hindered by Ngcobo when he found them near the residence of the plaintiff on 3 July 2010. Ngcobo believed that they were in the vicinity of the plaintiff's residence to attack the complainant in the case against the plaintiff. For this, they were detained in Ngcobo' s office. At a later stage, statements were obtained from them, after which they were sent home.

[12] Sethati learned that the plaintiff was scheduled to appear in court on 6 July 2010. Together with other family members, they went to the Pinetown Magistrate's Court but did not see the plaintiff. Later that day, they found him at KwaNdengezi Police Station and requested that he be released. When she saw the plaintiff, he was in the police cells; unable to walk and was crawling. He was eventually released and they had not paid bail for his release. As the family of the plaintiff, they resolved to investigate the case that was registered against the plaintiff. Their investigations revealed that there was no case registered against the plaintiff. The CAS number that was given to them by Ngcobo had no stamp and it was found not to exist in the records and the database of the South African Police Service. This was the end of the plaintiff's case.

[13] Mthiyane and Ngcobo testified that they encountered the plaintiff on 2 July 2010 when they arrested him. They were not in police uniform. They were not using a marked police vehicle. They confirmed that during the arrest there was a scuffle from which the plaintiff sustained injuries, including a gunshot wound. They admitted that they did not have a warrant of arrest but believed that their conduct was justified as the plaintiff was a suspect in a case of attempted rape. They believed that their conduct towards the plaintiff was permissible in terms of s 40 of the Criminal Procedure Act 51 of 1977 (the Act). They both did not dispute that the plaintiff was taken to Pinetown Magistrate's Court on 6 July 2010 but returned to the police station without having appeared in court.

[14] Ngcobo added that earlier on 2 July 2010, he received a call from the complainant in the alleged offence of attempted rape. She advised him that she was about to meet the suspect, being the plaintiff. Ngcobo requested Mthiyane to assist him in arresting the said suspect. At that time, he was not the investigating officer of the case but he quickly perused the docket and they first went to pick up the complainant. As they were driving down the road, the complainant spotted the plaintiff and pointed him to them. He pulled over and Mthiyane jumped out the vehicle to arrest the plaintiff. He remained in their vehicle with the complainant.

[15] When Mthiyane was arresting the plaintiff, he saw that they were talking. The plaintiff was resisting and had hit Mthiyane with a steel rod. Armed with his firearm, Ngcobo testified that he joined the scuffle to assist Mthiyane. The plaintiff grabbed his firearm and they both wrestled for the possession of the firearm until a gunshot went off. The plaintiff then fled and disappeared as he remained attending to Mthiyane who was injured. Later they were assisted by onlookers who pointed to the plaintiff that was hiding in a nearby toilet. The plaintiff was assaulted by community members. He intervened and the plaintiff was taken to the clinic. He was later taken to hospital. Mthiyane added that he did not report a case against the plaintiff. He also had no record to show that he was assaulted and/or injured by the plaintiff.

Issues

[16] The crucial questions for determination as raised during the evidence are:

(a) whether the police were justified in the arrest and detention of the plaintiff, and without a warrant; and

(b) whether the police assaulted the plaintiff at the time of his arrest, if the answer is in the affirmative, the next enquiry should be whether they were justified in their conduct as police officers.

Unlawful arrest and detention

The legal position

[17] There is a wealth of jurisprudence on the principles of unlawful arrest and detention. Among others, it is settled that an arrest or detention deprives one of their liberty and dignity and therefore must be constitutionally and statutorily justified.[1]

[18] In order to justify an arrest without a warrant, there are jurisdictional facts that must be met in any given situation. In terms of s 40(1)(*b*) of the Act:

'(1) A peace officer may without warrant arrest any person-

(*a*) who commits or attempts to commit any offence in his presence;

(*b*) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

…'

[19] Once the jurisdictional facts in section 40(1)(*b*) of the Act are satisfied, then the peace officer has the power to exercise his discretion on whether or not it is necessary to arrest the person or the suspect, and such discretion must be properly exercised.[2]

[20] The onus of proving that the arrest and detention was and remained lawful and justified in a case of arrest and detention without a warrant, rests on those who effected the arrest and held the person in detention. In a case where the arrestor is a peace officer, then such officer must justify the arrest or the detention. They must also show that they were guided by the constitutional obligation to consider whether

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[1] *De Klerk v Minister of Police* [2019 ZACC 32] (2021 (4) SA 585 (CC); 2020 (1) SACR 1; 2019 (12) BCLR 1425) para 62.

[2] *Duncan v Minister of Law and Order for the Republic of South Africa* (38/1985) [1986] ZASCA 24; [1986] 2 ALL SA 241 (A) at 248.

there were no less invasive options to bring the arrestee to court than the drastic measure of arrest.[3]

Evaluation

[21] It is common cause that the plaintiff was arrested by officers Mthiyane and Ngcobo on 2 July 2010 and that he was detained until 6 July 2010. There is no challenge to the evidence that the plaintiff was a suspect in an alleged offence of attempted rape, which also falls under schedule 1 and therefore covered by the provisions of s 40(1)(*b*) of the Act.

[22] The aspect that remains to be determined is whether these officers had a reasonable suspicion that the plaintiff committed the offence complained of and whether they properly exercised their discretion.

[23] Factors that find relevance in determining the extent of their suspicion include their role, if any, in the investigation of the complaint by Mkhize who was the complainant. Such include whether they had sufficient information upon which they would have formed a 'reasonable suspicion' that the plaintiff may have committed the offence alleged; and to an extent the make of the vehicle they were using, if they knew that they were going to arrest.

[24] Ngcobo did not disclose the content of his telephonic discussion with Mkhize although this seemed to have laid the basis for him to resolve that it was necessary to arrest the plaintiff. Both officers also did not disclose the information that may have been shared by Mkhize from the time they picked her up until they met up with the plaintiff.

[25] Instead the sequence of events from the time they met the complainant suggests that the meeting of the plaintiff was incidental, they were all not expecting to see him until he was pointed out by Mkhize. There is also no evidence to suggest that Mthiyane was acting on the instruction of Ngcobo, who may have some idea or background, when he jumped out of the vehicle and pounced on the plaintiff. It appears that Mthiyane only reacted to the pointing out of the plaintiff and absolutely, nothing else.

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[3] *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at 187C-D.

[26] If indeed as testified by Ngcobo, that they left their offices in order to arrest the plaintiff, who he said the complainant was afraid of, the make of the vehicle they were using brings about some questions. They were pursuing a person that was suspected of a violent offence, and a sexual misconduct. It is somewhat strange that they were using a sedan and the complainant was a passenger in the same vehicle. When he was questioned about this in cross-examination, Ngcobo responded by saying that they were going to improvise. Again, this is another strong indication against Ngcobo' s veracity that the plan was to arrest the plaintiff even before he approached Mthiyane for assistance.

[27] Both officers were not seized with the investigation of Mkhize' s complaint until there was a phone call from Mkhize. It does not appear that Ngcobo had any substantial knowledge or background upon which he would have made the decision that the arrest of the plaintiff was warranted. As for Mthiyane, as he put it, he was providing back up to Ngcobo. It however remains unclear what exactly would have been his role when they left their offices. He had not seen the docket and none of the involved parties were known to him. There appears to have been no basis upon which he may have resolved to arrest the plaintiff. Simply put, both officers have failed to show any basis that may have justified their conduct.

[28] Their assertion that they acted in good faith and under the belief that their conduct was justified under s 40 of the Act is not supported by the proven facts. For instance, the plaintiff was arrested on 2July 2010, which fell on a Friday. In terms of s 50(1) of the Act, the plaintiff was supposed to have appeared before a court soon after his arrest or within 48 hours after his arrest; or if 48 hours lapsed during the weekend, as it was the case in this matter, the plaintiff was due to appear in court on Monday, 5 July 2010. This did not happen and even when he was transported to the court premises. The defendant failed to offer any explanation for this omission which was a violation of s 50 of the Act.

[29] The above outline analysis shows, that when the conduct of these officers is objectively assessed, it was short of satisfying the jurisdictional factor that was

pointed out in *Mabona v Minister of Law and Order and Others*,[4] namely that the peace officer involved must have entertained a reasonable suspicion that the plaintiff committed an offence under schedule 1 of the Act, and that it is not permissible for the officer to act merely on a subjective suspicion as it appears to have been the case herein. Therefore, it is safe to conclude that their actions towards the plaintiff were not based on solid grounds.

[30] On the question of the proper exercise of the discretion, once more, there is no evidence to show that either Ngcobo or Mthiyane questioned the plaintiff about the allegations of attempted rape that they were investigating or acting upon before he was arrested. This goes against the principle stated in *Louw v Minister of Safety and Security*[5] where the court held that, if an officer purports to act in terms of s 40(1)(*b*) of the Act, he should investigate the exculpatory explanation offered by the arrestee before he could form a reasonable suspicion for the purpose of a justified arrest.

[31] In the exercise of the discretion, the officer would have had regard to the prevailing circumstances which he must weigh in order to decide if an arrest was necessary.[6] The sequence of events from the time these officers left their offices until the plaintiff was taken to the police station should inform this determination. For instance, if they had any background information of what may have been happening between the parties before the phone call by Mkhize. Another important factor would be if there were any specific instructions from the allocated investigating officer or whoever may have dealt with the matter previously; what Mkhize may have disclosed to them before they came across the plaintiff; and if there was any complaint of imminent danger that the plaintiff posed to the complainant or what occasioned Mkhize' s call to Ngcobo.

[32] In the absence of any information or evidence from either the officers and the plaintiff to answer these questions, it is logical to conclude that the decision to arrest

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[4] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE). Also see *Duncan v Minister of Law and Order* above fn2.
[5] *Louw v Minister of Safety and Security* above fn3 at 184.
[6] *MR v Minister of Safety and Security* [2016] ZACC 24; 2016 (2) SACR 540 (CC) and *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141 (2011 (5) SA 367 (SCA); 2011 (1) SACR 315; [2011] 2 ALL SA 157).

the plaintiff was not informed by any enquiry by both officers. It would also seem that the decision to arrest was made even before they met or spoke to the plaintiff. It was not based on any considerations and/or the weighing of prevailing circumstances. Again, it seems that it was incidental and not a consequence of a consideration of any factors that needed to be taken into account. Therefore, the arrest and the subsequent detention of the plaintiff failed to meet the jurisdictional factors contemplated in s 40(1)(*b*) of the Act, upon which the two officers claimed to have been the empowering provision for their conduct.

Alleged assault

Legal position

[33] Section 49 of the Act, reads:

'49 Use of force in effecting arrest

1. For the purposes of this section-

(*a*) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;

(*b*) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

(*c*) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

2. If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and 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, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

(*a*) the suspect poses a threat of serious violence to the arrestor or any other person; or

(*b*) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

[34] In *Sebogodi v Minister of Police*,[7] the court reaffirmed that

'…although the arrest and the use of force are two concepts, they are so interwoven in the circumstances of this matter that it will justify the proposition that where the balance of probability proves that the arrest was unlawful, the use of force will automatically also be unlawful in that the grounds for the use of such force (to arrest) are non-existent. The defendant's use of force will thus automatically constitute assault on the person of the plaintiff in the event of defendant's failure to prove the lawfulness of such assault.'

Evaluation

[35] The evidence has established that the plaintiff was injured during his physical altercation with Ngcobo and Mthiyane and that he sustained injuries that occasioned his detention at the RK Khan Hospital. It is not in dispute that he also sustained a gunshot wound on the left ankle and a fracture on his right ankle. However, there is a dispute on whether he was hit with the butt of Ngcobo' s firearm on the back of his head.

[36] Ngcobo and Mthiyane did not explicitly deny that Ngcobo hit the plaintiff with the butt of his firearm on the head and hands. Such can be gathered from their version of the sequence of events from the time Ngcobo joined the scuffle until the firearm was discharged. It should also be noted that the plaintiff did not provide this information to the doctor during his examination. His explanation for this omission was that he did not deem it important since his focus was on the gunshot injury and fractured ankle.

[37] Even if it could be argued that there is a discrepancy in his evidence on this aspect, the bottom line is that the plaintiff suffered serious bodily injuries during the arrest by the two officers. For the purpose of the enquiry at hand it suffices to make a determination whether the infliction of the injuries sustained by the plaintiff could be justified in terms of s 49 of the Act or his injuries will automatically constitute assault in the event that the defendant failed to prove the lawfulness of the assault, as the court re affirmed in *Sebogodi v Minister of Police*.[8]

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[7] *Sebogodi v Minister of Police* (1201/2016) [2017] ZANWHC 68 (27 October 2017) para 23.
[8] Ibid.

[38] In this case, it has already been found that the officers of the defendant failed to demonstrate that the arrest and detention that deprived the plaintiff of his liberty and dignity were constitutionally and statutorily justified. It follows that the assault on the plaintiff was unlawful and unjust.

Conclusion

[39] It therefore follows that the arrest of the plaintiff on 2 July 2010 and his detention until 6 July 2010 are declared unlawful and unjust; and that the assault of the plaintiff was unjustified and therefore unlawful.

Costs

[40] One finds no reason to deviate from the general norm that costs should follow the result. However, it has been argued on behalf of the plaintiff, and as his draft order claimed, that the court should further order that: (a) the defendant pay the wasted costs of the pre-trial Conferences that the defendant failed to attend on 29 March 2019; 4 July 2019 and 30 July 2019 on an attorney and client scale; and (b) the defendant pay the plaintiff's wasted costs that flow from the judicial case flow conferences held on 5 December 2019, 12 November 2020 and 9 January 2020 on an attorney and client scale.

[41] There was no challenge to this on behalf of the defendant. It was instead submitted by counsel for the defendant that, she too, has had difficulty in getting instructions from the defendant in preparation for the trial. She submitted that all attempts to get instructions were in vain even on the prayer that the costs, if granted, should be on a punitive scale.

[42] As stated in *Erasmus: Superior Court Practice*:

'The purpose of rule 37 of the uniform rules is "to promote the effective disposal of the litigation". The main objective of the rule is "investigating ways of avoiding costs at a stage when it can still be avoided" and, like its predecessor, it is "intended to expedite the trial and to limit the issues before the court".'[9] (Footnotes omitted.)

[9] DE van Loggerenberg *Erasmus: Superior Court Practice* RS 19, 2022 at D1-497.

At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or such party's attorney, because such party or the party's attorney:

(a) did not attend the pre- trial conference; or

(b) failed to a material degree to promote the effective disposal of the litigation.

In this instance, it seems that the defendant failed to respond to rule 37(4) and 37A notices on at least six occasions, and without any explanation to their opponents.

[43] There is no doubt that the conduct of the defendant must have caused frustration to the plaintiff. They showed disregard to the professional courtesy they owed to their opponents. To a great extent they displayed no appreciation of the primary object and purpose of rule 37 and the judicial case management system (rule 37A). From this background, this is classical example of a case where a special costs order is justified. These circumstances warrant a punitive costs order.

Order

[44] The following order is therefore made:

1. The defendant is ordered to pay 100% of the plaintiff's proved or agreed damages for the unlawful arrest on 2 July 2010 and his detention until 6 July 2010.
2. The defendant is ordered to pay 100% of the plaintiff's damages for the assault on 2 July 2010.
3. The issue of quantum is separated in terms of rule 33(4) and postponed sine die.
4. The defendant is to pay the wasted costs of the pre-trial conferences and the judicial case flow conferences that the defendant failed to attend on an attorney and client scale;
5. The defendant to pay the costs of suit.

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Sipunzi AJ

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