

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

CASE NO.: 204/2010

In the matter between:

VAALTYN JACOBS

PLAINTIFF

And

THE MINISTER OF SAFETY & SECURITY

DEFENDANT

JUDGMENT

BESHE, J:

[1] In this matter the plaintiff brought an action against the defendant claiming damages for wrongful arrest and detention as well as for the impairment of his reputation and good name. The claims are for the sums of R120 000.00 and R20 000.00 respectively.

[2] It is common cause that the plaintiff was arrested without a warrant at his home in Bedford on Friday the 31st of July 2009 by members of the South African Police Services (SAPS) acting in the cause and within the scope of their duties.

[3] It is also common cause that he was released from custody on Monday the

3rd of August 2009.

[4] Plaintiff testified that when he appeared in court on that Monday he was told that documents relating to his case had gone missing, he was then released without being called upon to answer to any charge.

[5] Two witnesses testified on behalf of the plaintiff, the plaintiff and his wife Annie Mentoor. Police officers Peter Charles Buys, William Justus, Henry Plaatjies and Lawrence Alexander van Zuydam testified on behalf of the defendant.

[6] Plaintiff testified that two police officers, Plaatjies and van Zuydam arrived at his house at about 10hh00 on the 31st of July 2009. They were looking for Romeo a young man who was staying in his premises and related to him, in connection with a break-in at a local shop. He asked the officers whether they had a search warrant to which van Zuydam responded they did not work with search warrants. An altercation ensued between the plaintiff and van Zuydam.

[7] The police officer also asked where his sons Fernando and Paulos were. When Fernando objected to the way the police were talking to his father, van Zuydam cocked his firearm and pointed it at him. Plaintiff intervened saying the police should rather arrest Fernando and not shoot at him. At that stage his wife Ms Mentoor jumped in front of Fernando in a bid to stop van Zuydam from shooting him. van Zuydam remarked that plaintiff and his children were talkative and a waste/filth "... .. jy en jou kinders is gemorste". They then

left taking Romeo with them.

[8] At about 15h00 van Zuydam returned to plaintiff's house, on this occasion they were about 30 officers travelling in 15 motor vehicles, some in uniform, others in civilian clothing, armed with an array of weapons in the form of rifles, handguns and pepper sprays. The officers once again asked where Romeo was. Plaintiff reminded them that they took Romeo with them earlier that day.

[9] van Zuydam threatened to spray him with the pepper spray when he once again asked if he had a search warrant and instructed his colleagues to take him to one of the police vehicles at the scene after poking him with a finger in his face without any provocation. At that stage his wife was standing next to the door of their house with Fernando not far from her and Paulos at the gate.

[10] His two small dogs were shot by van Zuydam with what appeared to be a rubber bullet rifle, killing one dog and injuring the other. The surviving dog Teeffy was exhibited in court, having been brought in by Paulos who was \pm 5 foot tall and of slender built. Teeffy was + 40cm tall and had an unhealed wound on the left shoulder.

[11] According to the plaintiff when Fernando walked into the house, van Zuydam kicked the door, causing a hole through which he pushed his rifle saying he was going to shoot Fernando he then took him to the police van and remarked once again that they were talkative and that he and his children were a waste or filth "gemorse" which was echoed by Plaatjies.

[12] During cross-examination it transpired that Fernando and Paulos were 16 and 18 years old respectively. Plaintiff also denied he prevented the police from arresting Fernando and Paulos when they visited his home in the morning of the 31st of July 2009. He denied that the two young men moved to the other side of the house, armed themselves with spades saying no-one was going to arrest them. Or that he told the police they will arrest his sons over his dead body. He denied that police left to avoid confrontation taking only Romeo with them.

[13] Plaintiff's wife Ms Mentoor confirmed plaintiff's account of what happened on the two occasions when the police visited their home on the 31st of July 2009. It also transpired from her evidence that the dog that was killed by van Zuydam was smaller than Teeffy. She denied that the dogs were biting Plaatjies or any of the police men.

[14] Peter Charles Buys testified that he saw the plaintiff at the Bedford police station after his arrest for having refused that his sons be arrested. He testified that he advised the plaintiff of his constitutional rights but he refused to listen, shouted and swore at him.

[15] It also transpired that he was also one of the officers who visited the home of the plaintiff that afternoon at the behest of the station commissioner and Plaatjies. He told the court that he kept a watch from a neighbour's house. According to Buys plaintiff was arrested by van Zuydam and Plaatjies.

He opened the door of the police van in order for van Zuydam and Plaatjies to place the plaintiff inside the van.

[16] He testified that he heard two shots being fired at the time when he was still at the neighbour's house behind the plaintiff's house before he moved to open the door of the police van. He did not see anybody being threatened with a spade at plaintiff's house or being attacked by dogs.

[17] William Justus Henry Plaatjies testified that he received a report regarding a break-in in which plaintiff's sons Fernando and Paulos were implicated as well as one Romeo who also stayed at plaintiff's premises. He then together with van Zuydam, one Johnson and Moultrie proceeded to plaintiff's house in two motor vehicles where they informed plaintiff and his wife that they were looking for the three men in connection with a break-in at a local shop. They could see all three in the premises standing behind the plaintiff.

[18] The latter and his two sons became aggressive. Paulos and Fernando were carrying spades, Fernando threatened to chop van Zuydam with the spade. Plaintiff told them they were not going to arrest anyone. Ms Mentoor took Paulos and Fernando towards the back of the house. They arrested Romeo and decided to leave or withdraw in his words with the intention of coming back later once they got re-enforcements.

[19] Later that afternoon they once again proceeded to the home of the plaintiff being a team of about 14 policemen travelling in \pm 7 vehicles. They

spoke to the plaintiff and his wife who were standing in front of their house and explained that they wanted to search the house for stolen goods. At the time Fernando and Paulos were also present.

[20] Plaatjies testified that he approached Fernando so as to arrest him but plaintiff repeatedly told him he would only arrest his sons over his dead body. Paulos was at that stage standing next to the house carrying a spade in a threatening manner. Fernando ran inside the house and closed the door behind him. Plaintiff prevented him from entering the house in order to arrest Fernando, protesting that his sons did not do anything wrong. He informed the plaintiff that by obstructing him from arresting Fernando he was committing an offence and if he did not stop obstructing him he was going to arrest him.

[21] He testified that he then held plaintiff and informed him that he was arresting him for hindering a police officer from executing his duties.

[22] He saw ± six dogs coming towards him and van Zuydam who was carrying a shot-gun fired a shot towards the dogs but the dogs charged at them whereupon van Zuydam fired a second shot when one of the dogs was attacking him (Plaatjies) on his leg at the time when he was taking the plaintiff to the police van.

[23] After placing the plaintiff inside the van he together with van Zuydam went back to the house where van Zuydam kicked the door open because Fernando was holding the handle of the door from inside and refusing to open

it.

[24] They arrested Fernando, Paulos was also apprehended by some of their colleagues. Plaintiff remained in custody from that Friday until he was taken to court on the following Monday. According to Plaatjies, plaintiff's case was postponed several times but eventually charges were withdrawn against him.

[25] Plaatjies testified that he could not release plaintiff on police bail because he did not give his co-operation and feared that he would decamp if released on bail. He conceded that plaintiff had a fixed address and there was no possibility that he would interfere with witnesses who were policemen.

[26] During cross-examination, *Mr Cole* pointed out to Plaatjies that his evidence was at variance with the pleadings in that in defendant's reply to a request for further particulars, it was stated that plaintiff was standing in the door carrying a spade in his hand hindering and obstructing Inspector Plaatjies from entering the house. And that van Zuydam was the member of SAPS who was attacked by dogs.

[27] It also transpired that in the cell register plaintiff's charge was stated to be that of assault common and not that of obstructing the police in the execution of their duties.

[28] Next to testify on behalf of the defendant was Inspector Lawrence Alexander van Zuydam. He told court that he together with colleagues Plaatjies, Johnson and Moultrie visited plaintiff's home at about 09h20 on the

31st of July 2009 with a view of arresting Romeo who was staying at the plaintiff's premises as well as plaintiff's two sons Paulos and Fernando. Plaintiff told them they were not going to take anybody with them and that Paulos and Fernando picked up spades which they held in a threatening manner; as if they were going to attack him and his colleagues. When he cocked his firearm plaintiff's wife pushed Paulos and Fernando towards the back of the house and they only were able to arrest Romeo who gave them his co-operation.

[29] Later that afternoon they once again visited the home of the plaintiff after arranging for reinforcements and were now about 15 in number and travelling in about 8 vehicles. They found Fernando, Paulos, plaintiff and his wife at home. When Plaatjies tried to get hold of Fernando plaintiff intervened by getting between them. Fernando managed to enter the house and slammed the door behind him. van Zuydam testified that he kicked the door open and arrested Fernando. He confirmed what Plaatjies said about plaintiff and Paulos also having been arrested at that stage and placed inside the police vehicles.

[30] During cross-examination van Zuydam confirmed that he was armed with 12 bore shot gun. He told the court that he did not see any of the two young men carrying a spade in the afternoon. It also transpired during cross examination that he fired 2 shots on the ground when one of the dogs held his trousers and another wanted to bite Plaatjies and there were 8 to 10 dogs, some big and others smaller. He however could not confirm that the shots

were fired when Plaatjies was taking the plaintiff to the police van. Also that he did not see plaintiff push Plaatjies or assault any of his colleagues.

[31] I will consider evidence in this matter mindful of the fact that defendant bears the onus of proving that it was justified in depriving the plaintiff of his liberty – or that the arrest was lawful. In respect of the claim for *injuria*, plaintiff bears the onus of proving the use of the *injurius* words. It is noteworthy that plaintiff's evidence in the latter regard was not challenged at all.

[32] The version of the plaintiff and that of the defendant as to how events unfolded at plaintiff's home leading to his arrest on the 31st of July 2009 are divergent. The approach to be adopted by a court when confronted with divergent versions was determined in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 SCA paragraph 5*** to be the following:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a 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 about 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 extracurial statements or

actions, (v) the probability or improbability of particular aspect of his version, (vi) the calibre and cogency of his performance 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 and 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[33] Plaintiff and his wife gave evidence in a clear and coherent manner. They did not contradict themselves or contradict each other. Their evidence relating to plaintiff's second claim was not challenged at all. No criticism was levelled at the manner in which they gave evidence regarding any significant aspect of the two claims. The only criticism that was levelled at plaintiff's evidence is in regard to his evidence about what happened after he was arrested.

[34] The evidence on behalf of the defendant on the other hand is by no means consistent. In response to a request for further particulars for trial, defendant answered that plaintiff was standing in the door carrying a spade in his hand hindering and obstructing Inspector Plaatjies from entering the

house. Responding to a question: What are the names of the policemen who were allegedly attacked by plaintiff's dogs? The answer was "Inspector van Zuydam". Clearly this is at variance with the evidence of defendant's witnesses in court.

[35] According to van Zuydam one dog was biting him and the other wanted to bite Plaatjies. He also denies that this happened at the time when Plaatjies was taking the plaintiff to the police van as suggested by Plaatjies who also suggested that one of the dogs was biting him in his leg. It is also noteworthy that Buys did not see any of his colleagues being attacked by dogs and yet he moved to go and open the door of the police van in order for Plaatjies to place the plaintiff inside the van.

[36] None of the witnesses on behalf of the defendant testified about plaintiff having attacked or wielded a spade, yet, as indicated earlier this was suggested to have been the case in the defendant's reply to a request for further particulars.

[37] Only Plaatjies testified that on the second occasion when they visited the home of the plaintiff Paulos wielded a spade in a threatening manner. Buys did not see anyone being threatened with a spade, probably because he was at a neighbour's premises. But Zuydam who was working closely with Plaatjies, also did not see any of the young men carrying a spade in the afternoon.

[38] There is also no clarity as to the offence for which the plaintiff was arrested, whether it was hindering the police in the execution of their duties or common assault. This begs the question whether the reason for this uncertainty is not because there was an attempt to justify plaintiff's detention which was otherwise arbitrary and meant to spite him for asking if the police had a warrant of arrest and or a search warrant.

[39] In terms of section 40 (1)(b) of the Criminal Procedure Act 51 of 1977, it is permissible for a peace officer to arrest a person without a warrant, when the person is suspected of having committed an offence referred to in schedule 1. Assault common and hindering police in the performance of their duties are not listed in schedule 1. In addition to the offences listed in schedule 1 one is "any offence, except the offence of escaping from lawful custody, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine. (my underlining)

[40] Section 67 of the South African Police Services Act 68 of 1995 provides that a person who resists or wilfully hinders or obstructs a member in the exercise of his/her powers or the performance of his/her duties or functions shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months imprisonment. (my underlining) Surely this offence does not fall under schedule 1 because the offence envisaged in schedule 1 in addition to those listed, provides for punishment without the option of a fine.

[41] There is also no evidence that Plaatjies applied his mind as to whether or not the offences that plaintiff was suspected of committing was a schedule 1 offence. The only reason why a decision was taken to arrest the plaintiff as suggested by Plaatjies was that he was uncooperative and would not go to court. He however conceded that there was no possibility that he would interfere with witnesses who were policemen and that he had fixed address.

[42] In my view plaintiff's version when weighed against that of defendant is the more probable and believable one. I am unable to conclude on the evidence before me that the defendant has succeeded in justifying the arrest and detention of the plaintiff. Accordingly it is my finding that such arrest and detention was unlawful.

[43] As far as plaintiff's second claim is concerned, namely that of *injuria*, as indicated earlier this was not denied. This took place at plaintiff's home who was about 50 years old at the time, in the presence of his wife, his sons and one Romeo and the words were uttered repeatedly. In determining the quantum of damages to be awarded I will take into account the circumstances of this case as well as awards that were given in previous comparable cases to which I have been referred by counsel.

[44] In ***Olgar v Minister of Safety and Security ECD 18 December 2008 (Case Number 608/07)*** Jones J stated "*In modern South Africa, a just award for damages for wrongful arrest and detention should express the importance of the Constitutional right to individual freedom and it should properly take into account the facts of the case, the personal circumstances of the victim, the nature and degree of*

the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of extravagant distribution of wealth from what Holmes J called “the horn of plenty” at the expense of the defendant.”

[45] In my view these remarks equally apply to damages for the *injuria* suffered by the plaintiff.

[46] Plaintiff's claim is for R120 000.00 for wrongful arrest and detention and R20 000.00 for *injuria* totalling R140 000.00. *Mr Sandi* for the defendant submitted that an amount of between R80 000.00 and R85 000.00 would be appropriate in the circumstances of this case, especially in view of the fact that no evidence was led as to the conditions under which the plaintiff was detained, and there being no indication that his health was adversely affected by the detention.

[47] Plaintiff spent 3 nights in the custody of the police. There is also no doubt that the words uttered by van Zuydam and confirmed by his colleague that plaintiff and his children, were degrading, humiliating and injured his dignity.

[48] Of the cases I was referred to by counsel, as regards previous awards for damages arising out of unlawful arrest and detention the matters of ***Fubesi v The Minister of Safety and Security (Case Number 680/2009)*** and ***Juan van der Merwe v The Minister of Safety and Security (Case Number 2565/2009)***, both unreported decisions of this division, were considered to be closely comparable to this case. In ***Fubesi's*** case, the plaintiff who was

detained for almost 4 days was awarded R80 000.00 in respect of the arrest and detention. In *van der Merwe's* case, the plaintiff in that case who was arrested and detained for ± 3 days was awarded R120 000.00 in respect of such arrest and detention. In the latter case there was evidence regarding the conditions of plaintiff's detention which were described as appalling as well as the effect the arrest and detention had on him.

[49] Taking into account all the circumstances of this case, as well as awards in comparable cases, my view is that R80 000.00 would be a reasonable award for unlawful arrest and detention and R10 000.00 for the impairment of plaintiff's dignity and good name (*injuria*).

[50] Judgment is granted in favour of the plaintiff against the defendant for:

- (a) Payment of the sum of R80 000.00 in respect of unlawful arrest and detention.**
- (b) Payment of the sum of R10 000.00 in respect of *injuria*.**
- (c) Interest on the damages set out in paragraphs (a) and (b) at the legal rate of 15,5% per annum from a date 14 days after judgment to date of payment.**
- (d) Costs of suit.**

Date Reserved 4 February 2011

Date Delivered 27 October 2011