

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

CASE NO.: 3222/2010

In the matter between:

SIYABUYA MHLAMBELI

Plaintiff

And

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

BESHE, J:

[1] The plaintiff has brought three damages claims against the defendant in respect of:

1. Unlawful arrest and detention.
2. Assault.
3. Malicious prosecution.

[2] The plaintiff who is a male person aged 29 years testified that on the 22 March 2008 he was taking part in a Easter soccer tournament in Cradock. In-between matches he drove to town in his motor vehicle, a Ford Laser. On his way to town he was stopped by a police woman who was sitting in a police van together with a child. He stopped next to the police van whereupon the lady officer who, it transpired is constable Matsotso, hereinafter referred to as Matsotso, asked why he was driving recklessly and alleged that he was driving at 120km per hour in the township. Plaintiff denied that he had been driving at 120km per hour. According to him he was driving at 60km per hour. Matsotso told him to follow her to the police station which he refused to do. He

was allowed to leave but Matsotso told him that she will get him.

[3] Later as he was driving back to the township where the soccer tournament was held, he realised that he was being followed by a police van sounding its siren and flashing its lights. He was instructed via a public address system to pull over, which he did. The driver of the police van at that stage was a male officer – who, it is common cause, was Sergeant Blouw (Blouw), with Matsotso as his passenger. Matsotso asked plaintiff whether she had not told him that she will get him and asked for his licence. Plaintiff told her he will not give her his licence because he did not know who she was. Blouw produced what plaintiff referred to as a licence card. He then handed his licence to Blouw who in turn handed it to Matsotso. Having received his licence back from Matsotso, he asked if he could leave. Matsotso asked what his name was as well as his identity number and insisted that he produces his identity document and not just tell her what they are. This irked him a bit and he asked if he had not given them his driver's licence earlier and why she wanted it again.

[4] Blouw joined the fray and asked whether he was prepared to produce his licence or not, grabbed him by means of his clothes in his chest and slapped him with an open hand across his face. He also struck him with a clenched fist on his face. When he tried to free himself from him, he drew out a firearm. At that stage, one Nokwezi who owns a tavern in the township came to the scene and intervened on his behalf. She also lifted plaintiff's pants which had fallen to his feet as a result of the scuffle between him and Blouw. Nokwezi advised him not to flee because Blouw will shoot him. He fled nonetheless. As he was fleeing he heard a gunshot ringing. He then dived into his motor vehicle in a bid to escape the shooting. He heard a second shot ringing. He was eventually taken to the police station at about 15H00. At no stage was he told that he was under arrest or what charge/s he was facing. He was then locked up with approximately twelve other men. He described the experience as being a scary one because he had never been locked up before.

[5] Having been arrested on Friday 22 March 2008, he remained in police custody until Tuesday the 25 March 2008 when he was ultimately released on warning by the magistrate at about 11H00. After making about five court appearances the charge/s against him were withdrawn. He had secured the services of an attorney to represent him at the trial and expended some R8 949.00 in this regard. He denied that he was chased by the police in town because he had failed to stop at several stop streets. He also denied that he threw his licence at Matsotso's face.

[6] Next to testify in support of plaintiff's case was Nokwezi whose full names are Xoliswa Nomjikelo Mbali. Her evidence was briefly to the effect that she was driving to town at about 15h00 on the day in question when she observed a police van as well as a maroon motor vehicle on the side of the road. She saw two police officers who were in uniform, a male and a female. The former was holding a young man who had his back against one of the vehicles at the scene and who was trying to cover his face. She observed the male officer striking the young man who she later identified as the plaintiff with an open hand as well as with a clenched fist on his face.

[7] Having stopped her motor vehicle she pleaded with the police officer to forgive the plaintiff. She was told by the officer that plaintiff did not want to get into the van. Seeing that the officer had a firearm in his hip, she offered to talk to the plaintiff to get into the police van. The officer moved backwards, drew his firearm out and fired two shots in the air. After the first shot was fired, plaintiff tried to flee. When the second shot was fired he dived into his motor vehicle. Plaintiff was later taken out of his motor vehicle, placed in the police van and taken to the police station. She testified that she did not see plaintiff grab the officer's firearm or struggling with the officer for its possession nor did she see the firearm fall to the ground. Had this happened, she would have been able to witness that happening. With Ms Mbali's evidence, the plaintiff's case was closed.

[8] Both Matsotso and Blouw testified on behalf of the defendant. According to Matsotso whilst patrolling in Lingelihle Township in Cradock in a marked police van with Sergeant Blouw, and at the time when they had stopped at a

stop street they observed plaintiff's motor vehicle approaching at a high speed. She observed that plaintiff's motor vehicle did not appear to be stable on the road. She estimated that he was driving at a speed of 80, 100 or 120km per hour. As plaintiff's motor vehicle got closer to theirs she could hear from the sound of the engine that plaintiff was pressing hard on his accelerator. When the vehicle turned around a corner its tyres screeched. She decided to stop the plaintiff and ask him why he was driving fast in a built up area. Plaintiff apologised saying he had not seen any speed limit signs. She told him that she was warning him and asked that he signs her pocket book where she had made the entry about warning him. Plaintiff refused to sign saying he will not drive in that manner again. Matsotso did not insist on him signing the entry. Plaintiff drove off.

[9] On that same day, about thirty minutes to an hour later they once again saw plaintiff's motor vehicle exiting the Spar Shopping Centre parking lot in town. He then drove through a number of stop streets without stopping. Upon observing this they flashed their police lights and sounded a siren and chased plaintiff's motor vehicle. During the course of the chasing they drove in excess of 100km an hour. Plaintiff ultimately stopped along Sikulu Street after his motor vehicle appeared to be jerking. She asked plaintiff to produce his drivers licence. At first plaintiff refused to do so but later took it out and threw it at her face and it landed on the ground. She asked him to pick it up and give it to her properly. Plaintiff asked who she was, in a disrespectful manner. Blouw intervened and asked the plaintiff to pick up the licence. He picked it up and pushed it to her chest. When Blouw asked what plaintiff's problem was he moved away from her and held Blouw on his chest. The two then struggled. She then proceeded to their patrol van in order to radio for back-up. When she looked at the two again she observed that they had fallen to the ground. As Blouw was getting up he fired a shot. When she returned to where plaintiff's motor vehicle was parked she observed that plaintiff was held by Ms Mbali. Plaintiff was later taken to the charge office where he was charged with reckless driving, assault on police official, robbery was also mentioned because she saw plaintiff grabbing Blouw's firearm although she did not know what his intentions were.

[10] Next to testify on behalf of the defendant was Blouw. He confirmed what Matsotso said regarding their first encounter with the plaintiff and about Matsotso questioning the plaintiff about the manner he was driving. He also confirmed that they later saw plaintiff in town and observed him driving through a number of intersections without obeying stop signs at those intersections. He instructed Matsotso to switch on the flashing lights, siren and chase plaintiff's motor vehicle. Having managed to stop the plaintiff Matsotso asked for his driver's licence, at that stage he proceeded to inspect plaintiff's motor vehicle. Returning to the spot where plaintiff and Matsotso were, he heard the latter telling the plaintiff to pick up his licence from the ground. Plaintiff picked the licence up and pushed it into Matsotso's chest. He then got in between the two and asked plaintiff what his problem was. Plaintiff responded by asking what he intended doing and charged at Matsotso. He told Matsotso to go and call for back up. Plaintiff turned towards him and grabbed him on the chest. He also got hold of the plaintiff. As they were grappling with each other they lost balance and both fell with plaintiff landing on top of him. When he tried to get up plaintiff placed his foot on his neck. He felt somebody pulling his firearm from its holster, he also reached for the firearm but realised it was no longer in the holster. He looked around and could no longer see the plaintiff and saw his firearm lying a distance away from him. He reached for it and fired a warning shot.

[11] He observed the plaintiff talking to two ladies who were trying to persuade him to get into the police van. He also told plaintiff he was under arrest for reckless driving, assaulting him and for taking his firearm. Plaintiff was thereafter taken to the police station where he was ultimately handed over to the Relief Commander – presumably to be locked up.

[12] It transpired that in his statement Blouw made no mention of plaintiff having driven through several stop streets without stopping. Blouw conceded to have left out a number of aspects that he testified about from his statement or gave a different account in court and attributed this to either a mistake on his part or to fact that he did not remember to include those aspects in his statement. He also admitted that he did not see his firearm in plaintiff's

possession only saw it lying a distance away from him. He denied that he assaulted the plaintiff. It is also apparent from Blouw's additional statement that the intention to arrest the plaintiff was formulated on the second occasion they spotted him in town and formed the opinion that he was driving recklessly.

[13] It being common cause that the plaintiff was arrested and thereafter detained from the time of arrest on Friday the 22 March 2008. What needs to be determined is whether such arrest and detention was unlawful.

[14] It also behoves this court to determine whether or not the plaintiff was assaulted by an employee of the defendant as well as whether or not the plaintiff has proved his claim for damages for malicious prosecution.

[15] Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause (Section 12(1)(a) of the Constitution). It is trite that an arrest constitutes an invasion of the liberty of a person and it is *prima facie* wrongful and unlawful and the onus is on the defendant to allege and prove its lawfulness.

[16] At page 47 of *Amler's Precedents on Pleadings*, 7th edition by LTC Harms the following is stated:

“An arrest without a warrant is lawful if, *inter alia*, at the time of the arrest the arresting officer had a reasonable belief that the plaintiff had committed a Schedule 1 offence. The defendant has to show not only that arresting officer suspected the plaintiff of having committed an offence but that the officer reasonably suspected the plaintiff of having committed a Schedule 1 offence specifically.”

[17] The basis for defendant's contention that the arrest was unlawful is not very clear. At paragraph 6.2 of its plea defendant states that “Defendant pleads that the said members arrested the plaintiff lawfully on a charge of reckless and negligence driving, assault on a police official, resisting arrest and robbery”.

[18] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that: “A peace officer may without a warrant arrest any person whom he reasonably suspects of having committed a Schedule 1 offence, other than the offence of escaping from lawful custody”.

[19] Robbery is listed under Schedule 1. So is assault where a dangerous wound is inflicted, as well as any offence except the offence of escaping from lawful custody, the punishment of which may be a period of imprisonment exceeding six months without the option of a fine.

[20] Whereas robbery is a Schedule 1 offence, evidence reveals that the intention to arrest the plaintiff was formed at the time when the two officers allege they observed plaintiff failing to stop at several stop streets. Blouw did not categorically state that reckless driving for which he sought to arrest the plaintiff was a Schedule 1 offence. I am unable to conclude that he had formed a reasonable suspicion that the plaintiff by failing to stop at several stop streets amounted to a commission of a Schedule 1 offence.

[21] It is noteworthy that nowhere in the statements of both officers is mention of plaintiff having driven through several stop streets without stopping made. Both alluded to having observed plaintiff driving at a high speed earlier that day and seeing him later “doing the same thing”. *Mr Cole* for the plaintiff argued that this was indicative of the fact that witnesses for the defendant were fabricating a story about plaintiff failing to stop at several stop streets, so as to justify his arrest.

[22] In my view even that explanation would not justify the arrest at the plaintiff because failure to stop at a stop street or reckless driving is not a Schedule 1 offence. I am inclined to agree with *Mr Cole* that witnesses for the defendant are making up the story of plaintiff having driven at a high speed on both occasions when they allege he did. It does not sound probable that plaintiff would have succeeded in making a turn at the intersection where he was initially stopped by Matsotso. That he was also able to bring his motor vehicle to a stop a short distance from where he was stopped. Although the officers had referred to tyres of motor vehicle screeching and the motor vehicle

spinning it later turned out that this did not happen. It stands to reason that their version must be rejected in this regard. I am satisfied that the plaintiff has succeeded in showing on a balance of probabilities that his arrest by the employees of the defendant was unlawful. It stands to reason that the detention that followed the arrest was unlawful.

[23] In regard to the assault, save to admit that Blouw fired two warning shots, defendant denies that the plaintiff was assaulted in any way. *Mr Pillay* for the defendant argued that it has not been shown on a balance of probabilities that plaintiff was assaulted by Blouw but what is clear is that plaintiff was arrogant on the day.

[24] The proper approach to be taken by a court when confronted with divergent versions was determined in ***Stellenbosch Farmer's Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 SCA at 14 paragraph 5*** to be the following:

“The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows: To come to a conclusion on disputed issues a court must make findings on (a) credibility of the various factual witnesses; (b) their reliability and (c) the probabilities”

[25] Blouw denies that he assaulted the plaintiff. Matsotso testified that she did not witness any assault on the plaintiff by Blouw because at some stage she left the spot where they were to go and call for back up. Plaintiff on the other hand gave a detailed coherent account of how he was assaulted by Blouw. His version of how the assault took place was corroborated by Ms Mbali, who was not part of what was happening at the scene but observed what was happening at a time when she was driving towards the scene. She can therefore be regarded as an independent and objective witness. Her version of what happened concerning the assault was not challenged at all save to show that she is not in a position to say what happened before she arrived at the scene. The plaintiff and Ms Mbali did not contradict themselves or each other. I am of the view that both were credible and reliable witnesses. I can find no reason why their version should not be accepted. It stands to reason that defendant's version falls to be rejected in this regard as well.

[26] Accordingly I am satisfied that the plaintiff has discharged the onus resting on him, of proving on a balance of probabilities, that he was assaulted by Blouw and that such assault was unlawful.

[27] In order for the plaintiff to succeed in respect of his claim for damages for malicious prosecution he has to prove:

- (a) that the defendant set the process in motion by instituting or instigating the proceedings.
- (b) that the defendant acted with malice or *animus iniuriandi*.
- (c) that defendant acted without reasonable or probable cause.
- (d) that the proceedings terminated in plaintiff's favour and
- (e) that the plaintiff suffered damages.

[28] As regards (a), (b) and (c) it was contended on behalf of the plaintiff that defendant's employees wrongfully and maliciously set the law into motion by laying false charges of reckless or negligence driving, assault on police and robbery against the plaintiff.

[29] In its plea defendant admitted that the arrest of the plaintiff took place without a warrant on the 22 March 2008 on charges of reckless and negligence driving, resisting arrest, assault on a police official and robbery. Defendant denied that any false charges were laid against the plaintiff by its members.

[30] I have already made a finding rejecting the evidence of the defendant's witness where it is at odds with that of the plaintiff. I have also found that the intention to arrest the plaintiff was formulated at the time that he was allegedly observed driving through stop streets without stopping. That such an offence is not a Schedule 1 offence. As indicated Blouw does not seem to have applied his mind as to whether that was a Schedule 1 offence or not. It is doubtful whether plaintiff did drive in the manner described by the defendant's witnesses seeing that both did not mention in their statements that plaintiff

drove through several intersections without stopping at stop signs. I am satisfied therefore that the two officers set the process in motion by instituting the proceedings against the plaintiff by laying false charges against him.

[31] In regard to (d), it is common cause that charges against the plaintiff were withdrawn after he had made several appearances in court. No evidence was placed before court as to why the charges were withdrawn against the plaintiff. In my view however, the fact that the charges were withdrawn against the plaintiff is an indication that the prosecution failed. That being the case I am satisfied that the plaintiff has proved the requirements of malicious prosecution and that his claim in this regard should succeed.

[32] As regards the quantum of damages plaintiff claims:

(a) Payment of a sum of R120 000.00 as and for damages in respect of wrongful arrest and detention.

(b) Payment of a sum of R60 000.00 as and for damages in respect of assault.

(c) Payment of the sum of R28 949.00 as and for damages in respect of malicious prosecution.

The amount claimed under (c) above is made up of:

- i) reasonable and necessary legal fees incurred by plaintiff in
respect of legal representation R 8 949.00
- ii) general damages in respect of *contumelia* R20 000.00

Counsel for the defendant did not contend that the damages claimed by the plaintiff were excessive. As was pointed out in ***Minister of Safety and Security v Seymour 2006 (6) SA 320 at 326 paragraph 20:***

“Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss.”

Earlier at paragraph 17 in ***Seymour's*** case *supra Nugent JA* stated as follows:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular need to be looked at as a whole and few cases are directly comparable.”

[33] Plaintiff, a young single male person, was arrested on a Saturday afternoon which fell during the Easter weekend. Evidence reveals that this was in the glare of quite a number of people. Mention is made of a bus in the vicinity and a bus driver who, with Ms Mbali followed the plaintiff to the charge office. As a result of the arrest plaintiff's further participation in the soccer tournament was cut short. He was then detained with twelve or so other persons in a smelly cell with an open toilet. He could not eat because food was pushed through the door and some of it would fall next to an open toilet. He remained in that cell until Tuesday morning. Altogether he spent approximately three and a half days in custody. There is no doubt that this was a serious infringement of his right to freedom. Bearing all these circumstances in mind, as well as awards in similar cases, in my view an appropriate award is the sum of R60 000.00.

[34] The assault on the plaintiff comprised of two blows to his face, one with an open hand and another with a clenched fist. Two shots were fired which instilled fear that he will be shot at causing him to run and take refuge in his motor vehicle. In this regard, in my view an award of R10 000.00 will be an appropriate compensation for the assault that plaintiff endured at the hands of defendant's employees.

[35] In respect of malicious prosecution, there is evidence before me that plaintiff expended R8 949.00 towards legal representation for purposes of the case that was instituted by defendant's employees. There can be no doubt that plaintiff also suffered general damages of being caused to appear in court on several occasions as an accused person. In this regard, I am of the view that an award of R10 000.00 will be appropriate.

[36] In the result, judgment is granted in favour of the plaintiff against the defendant for:

1. (i) payment of damages in the sum of R60 000.00 in respect of claim 1.

(ii) payment of damages in the sum of R10 000.00 in respect of claim 2.

iii) payment of damages in the sum of R18 949.00 in respect of claim 3.
2. The defendant is ordered to pay interest on the damages awarded in paragraph 1 above at the legal rate from a date 14 days after the date of this judgment to date of payment.
3. Costs of suit.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff:	ADV: S H Cole
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