IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION - GRAHAMSTOWN)

Case No: 155/2016

In the matter between:

VUYISANA FUDUSWA **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT

MALUSI J:

[1] This is an application for damages for wrongful and unlawful arrest and detention arising out of the arrest and detention of the

plaintiff by the police officers on 15 September 2015. The action is defended.

[2] At the start of the trial as per agreement of both parties footage recorded on closed circuit television *(CCTV)* of an incident on 28 August 2015 involving the plaintiff and Gugile Sizwe Namba *(Namba)* was shown. The agreement further provided that the court be furnished with a document under the rubric *'transcript of video'* essentially to present an explanation for the mute video footage.

[3] The defendant called Namba as the first witness. Namba testified that on 28 August 2015 at Stone Towers shopping mall in King William's Town, he parked his motor vehicle adjacent to the exit door of a gymnasium. The plaintiff emerged from the gymnasium whilst Namba was still in his motor vehicle. Namba greeted the plaintiff who in response showed him the middle finger. He regarded this gesture by the plaintiff as an insult. The plaintiff went to his motor vehicle and immediately re-entered the gymnasium. Namba testified that when plaintiff exited the gymnasium on the second occasion they locked eyes. The plaintiff dismissively waved Namba away.

[4] Namba gave evidence that at that stage he approached the plaintiff to seek an explanation for his behaviour. The plaintiff said he can kill him on the spot when responding to Namba's request that the plaintiff identify himself. Namba asked the plaintiff what had he done. The plaintiff responded that he ought to know him. A female employee of the gymnasium, Babalwa intervened in the altercation and requested the plaintiff to leave. As plaintiff left the parking lot he directed further invective against Namba.

[5] Namba testified that he went to the police station to lay a charge against the plaintiff. He was not able to do so as he did not know the personal particulars of the plaintiff. He returned the following day having obtained some particulars and the case was registered. He attended at Stone Towers mall with the investigating officer, Constable Madikane *(Madikane)* to view footage of the incident recorded on CCTV. Namba answered questions asked by Madikane as they viewed the footage. Namba further clarified other aspects as they left the office in the mall where they had watched the footage.

[6] Namba stated that in the fortnight following the incident there was a lack of progress in the police investigation of the charge. Namba assisted the police by identifying the plaintiff to Madikane. He later heard the plaintiff had been arrested by the police.

[7] Under cross-examination Namba testified that on 14 September 2015 he attended at the police station to complain to the Station Commander about lack of progress in the investigation. He overheard the Station Commander instruct Madikane to detain the plaintiff. He admitted he knew the decision to arrest the plaintiff was taken before plaintiff had given his version to the police. He stated that the police had all the information to trace the plaintiff before he was arrested.

[8] Namba conceded that showing the middle finger to a person is no more than a rude gesture. The gesture says one is angry or wants a fight according to his culture. He admitted he confronted the plaintiff as the latter was leaving the parking lot. He conceded he did not feel intimidated but said he only wanted revenge to being called a cheat which is a very sensitive issue to him. He stated that his sole

purpose in laying the charge was for the police to compel the plaintiff to have a discussion with him. He had told Madikane about this purpose before the arrest of the plaintiff.

[9] The defendant's next witness was Constable Madikane, the investigating officer of the criminal case. He gave evidence that the case docket was allocated to him on 29 August 2015. The complainant's initial statement was the only statement in the docket at that stage. After reading the statement he gained the impression that the plaintiff had threatened to kill the complainant. He also read the investigation diary where another police officer had noted that two witnesses were available and plaintiff had been very rude during the incident.

[10] Madikane testified that thereafter he interviewed Namba who confirmed the contents of the statement. He was told the plaintiff had shown Namba the middle finger. The plaintiff had threatened to kill Namba if he ever greeted the plaintiff again. Madikane was informed of further insults directed at Namba by the plaintiff. He watched the video footage at the mall together with Namba. Madikane later

interviewed the security officer who stated he had neither heard any threat nor saw the incident. The other witness Babalwa refused to make a statement.

[11] Madikane gave evidence that on 11 September 2015 he telephonically requested the plaintiff to come to his office. The plaintiff failed to do so despite his undertaking. On 13 September 2015 he visited the plaintiff who denied knowledge of the incident and Namba. Madikane arranged for Namba to accompany him to point out the plaintiff. On 14 September 2015 they met the plaintiff driving a motor vehicle when he promised to attend at the police station later that afternoon. He again failed to arrive.

[12] On 15 September 2015 Madikane visited the plaintiff with two other police officers. They prevailed on the plaintiff to accompany them to the police station. Madikane stated that at the police station the plaintiff refused to co-operate with him by failing to provide personal details. It was due to this failure to co-operate that he decided to arrest the plaintiff.

[13] Under cross-examination Madikane conceded that if Namba's purpose was to discuss the altercation with the plaintiff it ought to have influenced his decision to arrest the plaintiff. He stated that at the time he brought the plaintiff to the police station he had not yet taken the decision to arrest the plaintiff. He still wanted to interview him. Due to the plaintiff's non-cooperation he decided to arrest him so he may answer the allegation in court.

[14] Madikane testified that the video footage proved that the plaintiff committed intimidation when he viewed the footage. He saw *'a fight'* and a raised middle finger. Thereafter the defendant closed his case.

[15] The plaintiff testified that he was initially informed by his secretary that Madikane had attended at his office while he was temporarily absent. Upon return he contacted Madikane when the latter informed him of the charge of intimidation laid against him by Namba. The plaintiff undertook to attend at the police station.

[16] The plaintiff stated that on 14 September 2015 he met Madikane while their motor vehicles were stationery at an intersection controlled by traffic lights. The plaintiff again undertook to attend at the police station after fetching his child from school but failed to do so.

[17] The plaintiff gave evidence that on 15 September 2015 Madikane with three other males attended at his office. He was instructed to go with them to the police station. He drove his own motor vehicle to the police station where Madikane instructed him to park at the back. He was directed to the cellblock building by Madikane. Upon entry the steel gates were closed behind him and he was told he was under arrest. He was informed the reason for his arrest was non co-operation with Madikane. Consequent to him having been placed in a cell another policeman allowed him to call his attorney. The attorney tried to arrange his release on bail but Madikane opposed it. He was detained overnight.

[18] The plaintiff testified that on 16 September 2015 he was taken to the magistrate court in King William's Town in a police van with

other detainees. At the magistrate's court he was detained in a holding cell until a policeman released him without appearing before court.

[19] Under cross-examination the plaintiff denied intimidating the complainant. He testified that he greeted Namba as he exited the gymnasium. When he got to his motor vehicle he realized he forgot some clothing item in the gymnasium. He fetched it and upon exiting the gymnasium he again greeted Namba who was still seated in his motor vehicle. When he was in his own motor vehicle he was pursued and confronted by Namba. He ignored Namba. As he was reversing out of the parking bay he noticed Babalwa. He answered Babalwa's question by explaining what had transpired. He then left the parking lot and went home. That was the evidence for the plaintiff.

[20] Mr Cole, who appeared for the plaintiff, submitted that Madikane had no reasonable grounds to arrest the plaintiff as he had not committed any offence. He argued that Madikane had not exercised any discretion whether or not to arrest and detain the

plaintiff. He criticized Madikane for not checking the information in the docket with two potential state witnesses. He emphasized the fact that the complainant only wanted a discussion with the plaintiff. He was scathing in criticizing the reason provided by Madikane for arresting and detaining the plaintiff.

[21] Mr Sandi, who appeared for the defendant, submitted that the only issue for decision on the pleadings was whether or not an offence had been committed. He argued that the plaintiff had not made any allegation in the pleadings that there had been an improper exercise of the discretion to arrest by Madikane and the issue had not been fully canvassed during the trial. He argued further that on the facts of this matter the act of showing Namba a middle finger amounts to a threat to kill. The plaintiff further uttered the threat to kill which gave Madikane a reasonable suspicion that plaintiff had possibly committed an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (*the Act)*.

[22] It is necessary to consider the pleadings for a proper determination of the issues that arise. In the particulars of claim the plaintiff pivoted his claim on the allegations that:

"4. On or about 15th September 2015 and in King Williams's Town the plaintiff was unlawfully arrested and detained by...Detective Madikane.

5. He was detained unlawfully for twenty four (24) hours without any lawful cause and released without appearing in any court of law.

6. The arrest and detention were wrongful, unlawful and without justifiable cause. . .

8. At the time the plaintiff was arrested he had not committed any offence under Schedule 1 of the Criminal Procedure Act 51 of 1977."

[23] The defendant in his plea justified the arrest and detention by stating that:

"5.2.2 in this case the plaintiff had threatened to kill the complainant, Dinilesizwe Namba;

5.2.3 the arrest and detention took place in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 in that Madikane, after investigating the complaint, reasonably suspected that the

plaintiff had committed the offence of intimidation, a Schedule 1 offence, and was further of the view that there was a prima facie case for the plaintiff to answer in a court of law; and

5.2.4 *the crime that was committed was serious and constituted an ongoing threat to the complainant who feared for his life due to the plaintiff's actions of an intimidatory nature."*

[24] Mr Sandi has correctly submitted that more clarity was given to the issue in the particulars for trial provided by the parties. When requested to provide the basis for his allegation of unlawful arrest and detention, the plaintiff stated that:

"The plaintiff's arrest and detention were both wrongful and unlawful as he had committed no crime and there was no reason for his detention."

The plaintiff further elaborated that there was no reason for him to be arrested or detained.

[25] The defendant in his request for trial particulars for the first time raised the issue whether the plaintiff contends that Madikane did not exercise the discretion properly in arresting and detaining him. The answer by the plaintiff was in the affirmative in both instances.

Despite an invitation by the defendant, the plaintiff failed to provide specific facts for the contention that Madikane did not exercise his discretion properly.

[26] I find merit in the argument by Mr Sandi that the only issue for determination is whether or not the jurisdictional facts existed for Madikane to have effected the arrest. The plaintiff has failed to plead specific facts as the basis for the contention that the discretion was not properly exercised by Madikane. As such the exercise of discretion was never an issue between the parties due to bad pleading by the plaintiff.[1] I am satisfied that the issue was not fully canvassed during the trial as an issue for determination by the court.[2]

[27] It is trite that an arrest and detention are *prima facie* unlawful. The defendant bears the onus to establish lawfulness once the fact of the arrest is common cause.[3] The defendant justifies the arrest of the plaintiff by relying on section 40(1)(b) of the Act.

[28] Section 40(1)(b) of the Act provides that:

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[1] *Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA) at para 50.
[2] *Minister of Safety & Security v Slabbert* [2010] 2 All SA 474 (SCA) at paras 11 and 12.
[3] *Minister of Law & Order v Hurley & Another* 1986 (3) SA 568 (A) at 589E-F.

"(1) A peace officer may without a warrant arrest any person –

(a) . . .

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

[29] It is trite that to succeed with the defence based on section 40(1)(b) of the Act the defendant is required to establish that:

"(i) the arrestor is a peace officer;

(ii) the arrestor in fact entertained a suspicion;

(iii) the suspicion which he held was that the suspect (arrestee) had committed an offence referred to in Schedule 1;

(iv) the suspicion rests on reasonable grounds."[4]

[30] On the evidence led during the trial, the only jurisdictional fact which is common cause is that Madikane is a peace officer. The other jurisdictional facts were in dispute.

[4] *Duncan v The Minister of Law & Order* 1986 (2) SA 805 (A) at 818G-H.

[31] The Appellate Division *(as it then was)* has held on a number of occasions that the concept of a suspicion is correctly encapsulated in the following passage:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect, but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."[5]

[32] The test to be applied is an objective one. The enquiry is whether a reasonable person in Madikane's position who had the information at his disposal would have considered that there were good and sufficient grounds for suspecting that the plaintiff intimidated Namba.[6]

[33] Madikane was questioned at length on the information he held before arresting the plaintiff and whether this engendered a suspicion in him that the plaintiff had committed a Schedule 1 offence. He repeatedly stated that he arrested the plaintiff for not co-operating with the police. He wanted the plaintiff to answer the allegations

[5] *Duncan supra* at 819I-J, *Minister of Law & Order v Kader* 1991 (1) SA 41 (A) at 50H-I; *Isaacs v Minister van Wet & Orde* [1996] 1 All SA 343 (A) at 348.
[6] *Mabona & Another v Minister of Law & Order & Others* 1988 (2) SA 654 (SEC) at 658E-F.

against him in court. I did not get the impression that Madikane in his own mind had surmised that the plaintiff may possibly have committed the offence. He seemed to have been eager to obtain the plaintiff's version so that he may make up his mind.

[34] Madikane was pointedly asked under cross-examination the reasons he had arrested the plaintiff. He stated it was due to lack of co-operation and anger the plaintiff displayed at the cellblock. At no stage did he state that he suspected the plaintiff to have committed the offence of intimidation which caused him to arrest the plaintiff.

[35] It is clear from the video footage that Namba did not appear to be intimidated by the plaintiff as he kept advancing and remonstrating with him. This is probably the reason Namba and Madikane repeatedly stated that the display of the middle finger by the plaintiff was the intimidating act. Neither of them relied on the words *"I will kill you"* as the act of intimidation. Also the Rule 36(10) notice by the defendant placed reliance on the alleged display of the middle finger. Even if I were to accept that the plaintiff showed the middle finger, such behavior may at worst be considered unacceptable when

measured against conduct expected of members of polite society. Regardless, it is no basis for a suspicion that the plaintiff may have committed intimidation as provided in the Intimidation Act.[7]

[36] Even if I were wrong, it does not appear to me that the suspicion rested on reasonable grounds. Throughout his evidence Namba indicated that he only wanted to have a discussion with the plaintiff. This fact was conveyed by him to Madikane. The denial of knowledge of this fact by the latter is unconvincing and is rejected. Namba's attitude to discuss the matter detracts from reasonableness of the grounds of the suspicion.

[37] Madikane did not know at which stage he took the decision to arrest the plaintiff. This also points to the fact that he did not have reasonable grounds for the suspicion. If reasonable grounds existed he would know when he was ready to effect an arrest. Namba's evidence clearly indicates that the Station Commander gave Madikane an instruction to arrest the plaintiff. Madikane never addressed this evidence directly, content to state police procedures

[7] Section 1(1) of the Intimidation Act 72 of 1982.

and that the Station Commander was not his immediate supervisor. In my view, the probabilities overwhelmingly indicate that the plaintiff was arrested in compliance with this instruction rather than a suspicion by Madikane that the plaintiff had intimidated Namba. It is significant that the plaintiff was arrested the day after the instruction was issued. There is no other fact that adequately explains the timing of the arrest.

[38] In my view the evidence was inadequate for the suspicion to be formed by Madikane. He had only Namba's statement and the further particulars he may have provided. Regrettably, not much detail of the further particulars was provided during the trial as the defendant's case erroneously concentrated on the issue of the middle finger. I accept that Madikane need not be satisfied of the guilt of the plaintiff nor that a *prima facie* case against him exists at the initial stage of the investigation. But the veracity of the allegation that the plaintiff may have intimidated Namba was dispelled by the video footage which, in my view, shows Namba being the aggressor. He advances towards and remonstrates with the plaintiff which actions are inconsistent with a person who has been intimidated.

[39] Namba was not a good witness. He evaded answering simple and direct questions. His version of what transpired at the mall parking lot stands to be rejected in the light of the video footage and the plaintiff's version. His evidence did not provide much assistance to the defendant on the issue for determination.

[40] Madikane was also a poor witness. He gave long, irrelevant answers to direct questions. He was an evasive witness. He failed to provide clarity on the crucial issue of his suspicion or lack thereof.

[41] The plaintiff was a good witness who gave clear evidence. His demeanour on the witness stand was convincing. I accept his version of events at the mall parking lot.

[42] I am satisfied that the arrest of the plaintiff was unlawful. It must follow that the initial detention was also unlawful due to the arrest being unlawful.

[43] The amount of damages to be awarded to the plaintiff must be determined. The applicable guidelines were stated by the Supreme Court of Appeal as follows:

"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 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 facts." (Footnotes omitted).[8]

[8] *Minister of Safety & Security v Tyulu* 2009 (5) SA 85 (SCA) at para 26.

[44] The plaintiff had further claimed under two head of damages viz pain and suffering on the one hand and also under humiliation and *contumelia*. Mr Cole in reply to my query submitted that the pain relates to the emotional pain felt by plaintiff due to his ordeal. The humiliation relates to the publicity and knowledge by his colleagues that plaintiff had been arrested and detained, so it was submitted. There is no merit in these damages standing separately from the unlawful arrest and detention damages. These damages have always been subsumed in the unlawful arrest and detention damages. These aspects are considered when assessing damages for unlawful arrest and detention. I find no justification on the facts of this case to consider them as separate damages and will consider them as part of the damages for unlawful arrest and detention.

[45] At the time of the arrest the plaintiff was 36 years old. He was single with a minor son. His arrest and detention caused inconvenience to his son as he had to walk a long distance home from school. He was employed as a sales manager at Old Mutual which I consider to be a relatively high social standing in society. The members of staff at this office and other colleagues became

aware of his detention and attended at court which publicity embarrassed the plaintiff.

[46] The plaintiff was arrested at his workplace though fortunately he was outside and none of his colleagues witnessed the arrest. He was also allowed to drive his own motor vehicle when departing. The plaintiff was detained from 10h00 on 15 September 2015 to 10h30 on the following day, a period of 24 hours 30 minutes. There were 8 people detained with him in the cell whom he considered common criminals inducing fear in him. He could not sleep properly due to the unhygienic conditions he found in the police cells. The toilets in the cells in both the police station and the court building were inadequate. He stated that his arrest and detention was humiliating and embarrassing. It appeared the ordeal had a traumatic effect on the plaintiff as he was emotional in court wen recounting it despite the lapse of time.

[47] I have taken into consideration the quantum awarded in similar cases as a guideline.[9] At the same time I have kept in mind that each case must be decided on its own merits. I accept that the amount of an award is not capable of precise calculation and is determined in the exercise of a broad discretion. In my view an award of R70 000.00 is appropriate taking into account *'the facts of the case, personal circumstances of the plaintiff, the affront to his dignity and personal worth.'*

[48] Mr Sandi urged upon the court to award costs on a Magistrates Court scale due to the amount likely to be awarded for damages. In my view that would not be fair and just. A proper exercise of my discretion requires that I take into account the fact that this case involved a violation of the right to liberty enshrined in the Constitution. Some issues arising in the matter received proper consideration due to the matter being heard in the High Court. Mr Cole correctly submitted that the case was of some importance to the plaintiff vindicating his dignity and standing. Consequently in fairness to both parties costs will be awarded on the High Court scale.

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[9] *Mfini v Minister of Safety & Security* (3137/2010) [2015] ZAECPEHC 3 (29 January 2015); *Prince v Minister of Safety & Security* (CA 117/201) 2013 ZAECGHC 48 (23 May 2013); *Domingo v Minister of Safety & Security* (CA 429/2012) [2013] ZAECGHC 54 (5 July 2013).

[49] In the result the following order will issue:

49.1 The defendant shall pay the plaintiff an amount of R70 000.00 for damages consequent upon the plaintiff's unlawful arrest and detention on 15 September 2015;

49.2 The defendant shall pay interest on the aforesaid amount, calculated at the rate of 9% per annum, from the date of judgment to date of final payment;

49.3 The defendant shall pay the plaintiff costs of suit.

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T MALUSI

JUDGE OF THE HIGH COURT

***Appearances*:**

For the Plaintiff:	Adv Cole *instructed by*
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For the Defendant:	Adv Sandi *instructed* by
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Heard on:	23 & 24 October 2017
Judgment delivered:	17 July 2018