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

Case No: CA171/2020

In the matter between:

SITHILE MHLENGI — **Appellant**
Plaintiff *a quo*

And

THE MINISTER OF POLICE — **Respondent**
Defendant *a quo*

JUDGMENT

BESHE J:

Introduction

[1] This is an appeal against a judgment that was handed down in the New Brighton Magistrates' Court, Port Elizabeth wherein appellant's claims for unlawful arrest and detention as well as unlawful assault were dismissed.

[2] It is common cause that the appellant was arrested without a warrant on the 23 August 2015 and detained at KwaZakhele Police Station. On the following day, he was taken to the New Brighton Magistrates' Court cells from where he was released without him appearing in court. It was also common cause during the trial that in the process of being arrested appellant sustained an injury to his head from which he bled.

Pleadings

[3] Appellant pleaded that his arrest and subsequent detention was wrongful and unlawful in that:

he did not commit an offence in the presence of a peace officer;

there was no reasonable suspicion that he committed a *Schedule 1* offence;

there was no reasonable or probable cause for arresting him;

his constitutional rights were not explained to him.

It was also pleaded in the Particulars of Claim that the assault was unprovoked and therefore unlawful.

[4] Denying that the arrest was unlawful, respondent pleaded that the appellant committed an offence in the presence of the arresting officer, one **Sergeant Matyila** (**Matyila**), who as a result effected an arrest which arrest was resisted by the appellant. In light of the said resistance, the arresting officer used minimum force to effect the arrest. Further that any injuries appellant may have sustained were sustained as a result of his resistance of a lawful arrest. Furthermore, that the arrest of the appellant was justified in terms of *Section 40 (1) (a)* and *(40) (1) (q) of the Criminal Procedure Act 51 of 1977.*

Evidence

[5] The appellant as well as **Mr Ndumo** (**Ndumo**) testified in support of the appellant's case. **Matyila** testified on behalf of the respondent, so did **Warrant Officer Sparrow** (**Sparrow**).

[6] Appellant's evidence was briefly to the effect that the police arrived at his home where he stays with his nephew and two nieces. **Matyila**, who we now know is the officer who arrested him, confronted him about abusing the children with whom he was staying. It is common cause that this was subsequent to a complaint the police received from one of appellant's nieces – **Ntombikayise Magoda** (**Magoda**). When he tried to offer an explanation about their living arrangements, **Matyila** suggested he moves out of the house and get his own place to stay. He informed **Matyila** that he could not do so. It was at that stage that his cousin **Ndumo** arrived. Appellant invited **Matyila** to

confirm from **Ndumo** about how they lived in that house. It was at that stage that **Matyila** struck him with a fist on his chin, as a result of which he fell. He tried to get up with the assistance of **Ndumo**. **Matyila** prevented him from doing so by placing his knee on top of him and called for his colleague who had remained outside, to assist him handcuff the appellant. Having been handcuffed, **Matyila** held on to the handcuffs and dragged him towards the police van. In the process of doing so, he caused him to bump his head against the wall and his body to bump against some pillars at the premises. He was driven to the police station and then to Dora Nginza Hospital and back to the police station where he was locked up.

[7] It appeared to be common cause between the parties that appellant was bleeding from his head, that he did not receive treatment for his injury at Dora Nginza Hospital. However, the parties are not in agreement as to the reason why he was not treated. Appellant told the court he does not know why he was not treated. **Matyila** suggested that appellant refused treatment.

[8] Appellant denied that he refused to sign the form containing his constitutional rights. A notice of rights form was exhibited in court in which it is recorded that appellant refused to append his signature thereto. According to the said form, he was informed that he was being detained in connection with Domestic Violence (Intimidation).

[9] Regarding the conditions under which he was detained, appellant testified that the cell was dirty and had a foul smell with blood stains. He was locked up with six other people. He was scared that some of them might be criminals. During cross-examination, it was put to the appellant that the decision to arrest him was taken after he started swearing and shouting at **Magoda**. This led to his arrest for intimidation, *crimen injuria* and for attempting to assault the complainant. Further that he continued to resist being arrested even after being handcuffed. This was denied by the appellant. It was also put to the appellant in cross-examination that based on a

statement that was made by **Magoda** before his arrest, there was a reasonable suspicion that he had committed an act of domestic violence and act of intimidation.

[10] Appellant's version was to a large extent confirmed by **Ndumo** who had gone to appellant's place upon seeing a police van parked outside his place. On his arrival he heard the police official asking appellant why he does not move out of the house and find himself an alternative place to stay. Appellant tried to explain that the police did not know what they were talking about. It was in response to that that the police officer struck the appellant with a fist on his face, causing him to fall on top of a couch. The officer proceeded to press the appellant down with his knee placed against his chest. **Ndumo** testified that he tried to intervene. **Matyila** called on his colleague to come and handcuff the appellant, which he did. **Matyila** used the handcuffs to drag the appellant to the police van causing his body to bump against the walls, door frame, pillars and the gate in the process.

Respondent's Case

[11] According to **Matyila** this matter was sparked off by a complaint by the appellant's niece **Magoda** that plaintiff was kicking her out of the house she stayed in, intimidated her, swore at her and had assaulted her earlier that day by slapping her.[1] Together with his partner **Sergeant Gerber** (**Gerber**) they drove to appellant's place with a view to getting his side of the story. His attempt to engage with the appellant came to naught as the latter became aggressive. He did however inform appellant about his niece's complaint that he was chasing her out of the house. Appellant insisted that he did not want his niece there and started pushing them. **Matyila** testified that "... at the time he was pushing me he was trying to get to the niece that is when I entered between them to stop him and I said that you see what you are doing now you are intimidating this girl in front

[1] Pages 121 – 122 of the record.

of me".[2] He went on to state that appellant swore at them and chased both of them out. I assume he was referring to himself and plaintiff's niece because when all this was happening his partner remained outside according to him. It is worth to note that at no stage was it put to the appellant that he pushed **Matyila** and complainant out of the house. According to **Matyila**, it was at that stage that he informed appellant that he was intimidating his niece in his presence. Because he did not know what will happen if he were to leave, he was arresting him. He proceeded to read him his rights. Appellant continued to push him away. He resorted to using minimum force in order to arrest him. This he did by putting his arms around him in a bid to lock his arms. They both ended up falling to the ground. He adds . . . "there were chairs in that room". This in my view was in response to **Ndumo's** evidence that appellant fell against a couch. He sent appellant's niece to go and call **Gerber** outside. They handcuffed the appellant and ultimately placed him inside the police van with the aim of bringing him to court because "he was intimidating his niece in front of us".

[12] **Gerber** who was in the company of the arresting officer was not called as a witness even though at some stage after **Matyila's** testimony he was warned to appear in court on the next date.

[13] The next witness to testify in support of defendant's case was **Sparrow**. His evidence concerned a warning statement that was purportedly taken from the appellant in his presence. He disavowed this and explained that the officer who purportedly obtained the statement from the appellant, **Warrant Officer Magingxa**, who has since passed away, must have used a form bearing his name to obtain the statement. This aspect becomes of moment in light of the fact that appellant denies that he made a warning statement. Apart from that, I do not think this took the case any further regarding the *lis* between the parties. Except to cast doubt as to whether or not warning statement was obtained from the appellant and therefore whether he was warned of his

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[2] Page 126 of record lines 5 – 8.

constitutional rights. Appellant denied that he was apprised of his constitutional rights at any stage.

[14] It is in my view apposite to have regard to what is contained in the relevant part of the police statements that were submitted by **Magoda** and the arresting officer as to what led to the arrest. According to **Magoda**, the appellant chased her out of the house saying that the house does not belong to her. That she became scared because plaintiff charged towards her in an aggressive manner. Adding that nobody has the right to intimidate her in such a manner. And that she requests that the matter be investigated by the police.

[15] In his statement, **Matyila** stated that after introducing himself to the appellant and asking him what was happening in connection with his niece, he told him that the latter does not belong there. He also started shouting at his niece and when he tried to stop him he swore at both of them (**Matyila** and plaintiff's niece). He informed plaintiff he was going to arrest him for intimidation and proceeded to explain his constitutional rights to him. He used minimum force when appellant resisted being arrested.

[16] It was on the basis of the evidence summarized hereinabove that the court *a quo* in a one page judgment, dismissed plaintiff's claim.[3] Having found that the appellant's version was full of impossibilities and exaggerations. Whereas that of **Matyila** is understandable and can be followed. It is clear from the Magistrate's response to the request for reasons in terms of *Rule 51 (1) of the Magistrates' Courts Rules* that he found the following facts to have been proved:

The appellant shouted at the complainant telling her to leave when **Matyila** explained the purpose of their visit to him. This led to the decision to arrest him. This was due to the fact that he refused to co-operate during the arrest

[3] This is despite the fact that appellant lodged two claims against the respondent.

he had to be handcuffed and dragged towards the police van. The Magistrate concluding that appellant's arrest was therefore justified.

Discussion

[17] The court *a quo's* judgment is assailed on *inter alia* the following grounds:

The Magistrate erred by failing to deal with plaintiff's claims separately and by merely dismissing plaintiff's claim.

By failing to make credibility findings in respect of the witnesses.

By not considering that plaintiff's evidence was corroborated by **Ndumo**.

[18] It is trite that an appeal court will be slow to interfere with the findings made by the trial court in respect of both facts and the credibility of the witnesses. It is only in the event of there being a misdirection of fact on the part of the trial court, or probabilities having been overlooked that an appellate court is at liberty to disturb those findings.[4]

[19] The versions presented by the parties during the trial were mutually destructive of each other. Unfortunately, the Magistrate did not let us into what aid he used to assess the credibility of the witnesses' evidence. In light also of the fact that the *onus* rested on the respondent to justify the arrest. It is always useful to adopt the approach suggested in the ***National Employers' General Insurance v Jagers***[5] when confronted with divergent versions. In this matter the following approach was suggested:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a

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[4] See R v Dlumayo and Another 1948 (2) SA 677 (A), Santam Bpk v Biddup 2004 (5) 586 at 589 [5].
[5] 1984 (4) SA 437 ECD at 440. See also SFW Group Ltd & Ano v Martell et Cie & Ors 2003 (1) SA 11 SCA at 14 [5].

criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities."

Can it be said that the version that was presented by the respondent was credible and therefore true. **Matyila** testified that the visit to appellant's house was a result of a complaint that appellant was kicking **Magoda** out of the house, intimidating her, swearing at her and had slapped her earlier that day. Surprisingly though, nowhere in **Magoda's** statement is there mention of being sworn at and being slapped (with an open hand). There is also no mention in **Matyila's** statement of **Magoda** having complained of having told him that the appellant swore at her and slapped her with an open hand. All he mentions is that the complaint was about appellant intimidating her and chasing her out of the house. Hence the plaintiff was charged with intimidation (domestic violence). It was also not put to the appellant that he pushed both **Matyila** and **Magoda** out of the house. This is also not contained in his statement concerning the arrest. It is also a mystery why **Gerber** would remain outside seemingly unperturbed by the fracas inside the house, namely that of appellant pushing people out of the house and swearing at them culminating in appellant being held by **Matyila** and both landing on the floor according to **Matyila**. It was only upon being called to bring the handcuffs at the stage when appellant was already on the floor that he entered the house. What are the probabilities of this happening? It must be borne in mind that appellant's evidence was corroborated by **Ndumo** in all material respects. Contrary to the Magistrate's finding that appellant's evidence was full of impossibilities, I am of the view that the probabilities favour the version presented by the appellant during the trial. Clearly **Matyila** endeavoured to make respondent's case as he went along in a bid to justify the arrest of the appellant. His version cannot be true on a balance of probabilities. In my view

Matyila was clearly disingenuous. That therefore his version should have been rejected and that of the appellant, namely that he did not commit an offence in the presence of **Matyila**, accepted.

[20] *Section 40 (1) (q) of the Criminal Procedure Act* that is also relied upon by the respondent does not afford them a defence or justification for the arrest. This subsection provides for the arrest of a person without a warrant, who is reasonably suspected of having committed an act of domestic violence as contemplated in *Section 1 of the Domestic Violence Act, 1988*, which constitutes an offence in respect of which violence is an offence. This in view of the fact that there is no credible evidence that appellant used violence in respect of the **Magoda**. The arrest and detention of the appellant was in my view wrongful and unlawful.

[21] Regarding the assault, **Matyila** was very coy about the minimum force used to arrest the appellant. Whereas the evidence of the appellant which was corroborated by **Ndumo** painted a clear picture of how the assault took place. The assault was therefore wrongful and unlawful. I am of the view that the appellant succeeded in showing on a balance of probabilities that the assault on him was not justified.

[22] The appellant is entitled to a reasonable solatium for the damages he suffered as a result of the unlawful arrest and detention as well as for the assault.

Quantum

[23] In my view, we are in a position to assess the quantum of damages suffered by the appellant from his evidence. His claim was for an award of R100 000.00 in respect of each of his two claims. Appellant testified that he felt embarrassed when he was placed inside the police van in full view of his neighbours. As indicated earlier, he testified about the conditions under which he was detained. Regarding the assault, he testified that after his release from

custody he was examined by a doctor. Even though there was extensive reference to a medical report colloquially known as a J88 during the trial, it did not form part of the record placed before us. He testified that the doctor booked him off work for a week. That he experienced pain on diverse parts of his body as a result of the assault on him by **Matyila**. These are factors that should be taken into account when considering the quantum of damages. One can also not lose sight of the fact that the right to freedom and security of the person is enshrined in the *Bill of Rights*[6] which is a cornerstone of our democracy. We were referred to a number of previous awards for damages that were made in comparable cases. Having considered those and the circumstances of the present matter, I am of the view that the following award would be reasonable and fair: R40 000.00 in respect of each claim.

Order

[24] In the result, the following orders will issue:

1. The appeal succeeds with costs.

2. Judgment is granted in favour of the appellant against the respondent. In the sum of R40 000.00 in respect of each of appellant's two claims.

3. Interest is awarded at the prescribed rate from date of summons to date of payment.

4. Costs of suit, including costs of counsel not exceeding two (2) times the Magistrate's Court tariff subject to the discretion of the Taxing Master / Mistress.

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[6] Section 12 of the Constitution.

NG BESHE
JUDGE OF THE HIGH COURT

FLATELA AJ

I agree.

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JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES

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Date Heard	:	14 May 2021
Date Reserved	:	14 May 2021
Date Delivered	:	29 June 2021