**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

**Case No: 4132/17**

In the matter between:

**LANGALIVELILE MADYIBI** **Plaintiff**

and

**MINISTER OF POLICE** **Defendant**

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**JUDGMENT**

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**TOKOTA J:**

**Introduction**:

[1] The plaintiff has instituted an action claiming damages from the Minister of Police in respect of the following:

(a) Unlawful arrest R200 000 (claim 1);

(b) Assault R100 000 (claim 2);

(c) Unlawful detention R200 000 (claim 3);

(d) General damages R200 000 (claim 4).

At the commencement of the hearing Counsel for the plaintiff informed me that the claim in respect of assault has been abandoned. The defendant resisted all the remaining claims. Mr Mapoma, who appeared for the defendant, correctly conceded that as the defendant has admitted the arrest and detention the onus is therefore on him to justify such arrest and detention. The overall onus of proof of damages remains the burden of the plaintiff.

**Evidence of the defendant**

[2] The defendant called two witnesses. The first witness was the investigating officer. Warrant Officer Madliwa Mvumbi is a detective warrant officer who was stationed at Bityi police station at the time of the arrest. He stated that on 17 February 2017 one Chief Mtirara reported at the police station that certain people, including the plaintiff, were demarcating land in his area unlawfully. The docket was opened and handed over to him to investigate.

[3] On 26 February 2017, before he could embark on the investigation, late in the afternoon he was informed by his supervisor that the plaintiff had been arrested. He had never met the plaintiff and even at the police station he only saw him when he was being released on 27 February 2017. In his view the arrest was premature because the investigations were not yet complete. Although he was not present

during the arrest he maintained that the arrest was lawful in that the plaintiff was a “ring leader”. He initially said that he charged him with unlawful demarcation of land. When he was cross-examined he stated that he is not the one who charged him. He initially testified that he explained his constitutional rights but later said he is not the one who explained the rights of the plaintiff. He later denied that he said he charged him.

[4] The second witness was Sergeant Onke Mgudlwa. He is a police Sergeant in the SAPS. On 26 February 2017 he was doing patrol duties together with Constables Matikinca and Nyolukana. He received information that there were unlawful demarcations of land at Xhugxwala. They proceeded to the area. On their arrival they found people and a tractor driver demarcating land sites. There were about 50 people. They called the owner of the tractor. They told him that it was alleged that he was demarcating land unlawfully. They then told him to stop demarcating land. He told them that he was hired by the people and that he would not stop. Members of the community came to them and told them that they were not going to stop because it was their land. Sgt Mgudlwa then requested a back up from Public Order Police Service unit (PoPs) seeing that the situation was becoming tense.

[5] On the arrival of PoPs members of the community dispersed. The owner of the tractor did not run away. They decided to arrest him. They arrested him and took him to Bityi police station where he was detained. Sgt Mgudlwa disputed that the plaintiff was arrested on his way home. He testified that the plaintiff stopped the demarcation when he saw the community members leaving. His tractor was also

taken to the police station. The plaintiff alleged that his tool box was missing. Sgt. Mgudlwa denied any knowledge of the tool box and stated that if it was there it would have been entered in the SAP 13 register for exhibits. He stated that all the plaintiff's personal belongings were recorded there and handed back to him when he was released the following day.

[6] Although he was present when the plaintiff was released he did not know the reason for the release. He himself was not acquainted with laws relating to land matters and therefore did not know what offence exactly the plaintiff committed. He was adamant however that he was demarcating land unlawfully.

[7] Under cross-examination he said the reason for the arrest was because the plaintiff disobeyed them when they told him to stop the demarcation. He testified that the crowd was violent. When asked what the plaintiff did to indicate violence he said it is because he disobeyed them by not stopping the demarcation. When asked why he did not arrest members of the community he replied that it was the plaintiff who was breaking the law. He confirmed that the plaintiff told them that he was demarcating land because he had been hired to do so. He however stated that no one is allowed to just grab the land for himself.

[8] He testified that the purpose of arrest is to detain the person and take him to court. It was put to him that the plaintiff would testify that he was pepper sprayed. His response was that it was possible because he was violent. He testified that the plaintiff resisted arrest even though he was being arrested by seven police officers.

He confirmed that members of the community queried his arrest but they were a bit far away being scared of the PoPs.

[9] Sgt Mgudlwa could not deny that the police cell in which the plaintiff was detained was small and the conditions thereof were unpalatable. Although he faintly denied that the plaintiff had no blankets to sleep with he did not really enter the cell and check what was inside. He confirmed the presence of the toilet inside the cell and could not dispute that no one in the cell could relieve himself privately.

**Evidence of the plaintiff:**

[10] The plaintiff gave evidence in support of his claim. He testified that on 26 February 2017 he was hired by the community at Xhugxwala for the use of his tractor to demarcate residential sites. This was at Xhugxwala administrative area in Viedgesville in the Mthatha district. After he finished the demarcation he informed the community that his fee was R500 as they had bought 20 litres of diesel. He left and on his way home he observed a contingency of police vehicles going past him towards the direction of the demarcated plots.

[11] Although the tractor was noisy he heard vehicles coming and they blocked his way and came to him. At that stage there were shootings and it was smoky. They came to him and took him to the police van where he was locked up in the back. Whilst inside the van he heard people shouting at the police enquiring as to why he

was being arrested. He was conveyed to Bityi police station and someone drove his tractor to the police station as well.

[12] According to him he was arrested by the PoPs. There was an argument amongst the Bityi police and PoPs as to the reason for his arrest. He was searched and his personal effects were entered into the exhibit register which he signed. His wife arrived at the police station and explained to them that he, the plaintiff, had been hired to do the demarcation. The police swore at her and there was an exchange of insults between his wife and the police. He was given a paper containing his constitutional rights after which he was locked up in a cell.

[13] He described the cell as small and congested. It did not have blankets or beds. There were iron bunkers but he did not have one. He slept on the floor and with no blankets. No food was served to him. Although this was never put to Sgt. Mgudlwa during cross examination he denied that he was arrested by him. He was released on the following day at about 11h00. He claimed that the tool box which was in his tractor was missing. His tractor could not start. He had to buy a new battery.

[14] When he left he was given a date to appear in the magistrate's court. He could not remember the date. On that day he indeed attended court. He was told by the investigating officer to sit in the gallery. He saw the investigating officer talking to the prosecutor. He was informed by the police that he could go home because there

was no case against him. He was hurt by the arrest and detention. This version too was never put to the defendant's witnesses.

**Discussion:**

[15] The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or detention our courts have adopted the rule that such infractions are *prima facie* unlawful. Once the arrest has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.

[16] As can be gleaned from the above summary of evidence there are essentially contradicting versions and new versions that have never been put to witnesses. It remains my duty to find which version is more plausible bearing in mind that the defendant has the onus to justify the arrest and detention and that the plaintiff has an overall onus to prove that he suffered damages. It has been held that a party should endeavour to put so much of his own case to the opponent's witnesses as concerns that particular witness. It is grossly unfair and improper to let a witness' statement go unchallenged and thereafter argue that he be disbelieved.[1]

[17] On a balance of probabilities I make the following findings of fact: On 26 February 2017 the plaintiff was busy demarcating sites at Xhugxwala administrative area Mthatha with the community. Whilst they were still busy with the demarcation of

[1]Small v Smith, 1954 (3) SA 434 (SWA) at p.438F; Van Tonder v Kilian NO 1992 (1) SA 67 (T) (1991 (2) SACR 579) at 73A

sites, Sgt Mgudlwa and the two constables arrived. They arrested the plaintiff at the site and not on his way home, stating that he was demarcating land unlawfully. The plaintiff informed them that he was not doing this for himself but had been hired by the community to do so. They informed him that he was being arrested but he resisted saying that he had committed no offence.

[18] At the site members of the community informed the police that no one was going to be arrested because they were demarcating their land. There was an argument in this regard and members of the community became aggressive. They informed the police that the plaintiff was hired by them. Sgt. Mgudlwa assessed the situation and instead of just leaving them he decided to call for back up.

[19] Sgt Mgudlwa made a call for back up and members of PoPs were deployed. On the arrival of PoPs the plaintiff was arrested and members of the community must have dispersed. In view of what follows it is immaterial who effected the arrest. The plaintiff was put in the back of the police van and transported to the police station at Bityi. There was informed of the charge against him and was made to sign warning statement. He was searched and his personal belongings were kept under the custody of the police. He was then locked up in a small cell where there other inmates.

[20] Late that afternoon Warrant Officer Mvumbi arrived and was informed that the plaintiff had been arrested. He did nothing about it and the following day, in the morning, they discussed the matter and decided that there was no evidence to

support a criminal charge against the plaintiff, hence he was released without being charged.

[21] The arrest was without a warrant of arrest. The defence raised in the pleadings and the attempt to justify it in evidence was that the plaintiff was arrested because he committed an offence in the presence of the police. Therefore the question that must be answered is: -did the plaintiff commit any offence in the presence of the police? Mr Mapoma submitted that the arrest was lawful in that the plaintiff had committed an offence in the presence of the police in contravention of section 26(2) read with section 58 of the Spatial Planning and Land Use Management Act, No 16 of 2013 (Land Use Management Act). Accordingly, so the argument ran, the police were justified, in terms of section 40(1)(a) of the Criminal Procedure Act No. 51 of 1977(the CPA), in arresting the plaintiff.

[22] Sgt Mgudlwa, who claimed to have been the arresting officer, stated that he did not know of any offence that was committed as he is not *au fait* with laws relating to land issues.

[23] In order for the defendant to succeed in the defence raised he must justify the arrest and detention by establishing that an offence was committed in the presence of the police. A mere suspicion is not enough.

[24] In his plea the defendant pleaded that the arrest was effected in terms of sections 40(1)(a)[2] 40(1)(j)[3] and 40(1)(b)[4] of the CPA. In terms of section 40(1)(b) the defendant must show that there was a reasonable suspicion that an offence mentioned in schedule1 to the CPA had been committed; and in terms section 40(1)(j) the plaintiff must have wilfully obstructed the police in the execution of their duty. Reliance on these sections of the CPA was not pleaded in the alternative. The defendant therefore, in a fishing expedition searching for any possible defence, cast a wide net in the hope that one or other would be covered in evidence.

[25] Although the defendant pleaded that the officers were authorised to effect the arrest in terms of sections 40(1)(a), 40(1)(j) and 40(1)(b) the evidence led was confined to establishing that an offence was committed in the presence of the police. Mr Mapoma also in his argument confined himself to this defence. The reference to disobeying the order of the police related to stopping the demarcation of sites and not obstruction of the police in the execution of their duties.

[26] Ms Mncotsho-Boya, appearing for the plaintiff, submitted that the arrest and detention was unlawful. She simply referred the court to **Ralekwa v Minister of Safety & Security 2004 (1) SACR 131 (T) (2004 (2) SA 342) para. 14**. I must assume that she was contending that since Sgt Mgudlwa was instructed by his commander to proceed to the scene the arrest was based on the instructions of his commander not on the commission of the offence in his presence. The case of

[2]Para. 16 of the defendant's plea
[3] Para 17 of the defendant's plea
[4] Para.18 of the defendant's plea

**Ralekwa** is distinguishable from the present matter. There the instruction came from a private person whereas in the instant case if any such instruction were to be heeded to it came from a senior police officer. Furthermore the **Ralekwa** arrest was in terms of section 40(1)(b) which has a different test from section 40(1)(a). However, in this case it was not the evidence of Sgt Mgudlwa that he relied on the instructions of his superior. He testified that he arrested the plaintiff because he is the one who was demarcating the sites and that he disregarded them and continued to do so in their presence.

[27] It is trite that the onus, in a case of arrest and detention without a warrant, of proving that the arrest and detention was and remains lawful and justified is upon whoever arrested and holds the detainee in detention or whoever is responsible for his detention. If, therefore, an arrest or detention is by or at the instance of any public officer or authority, the responsible official must justify the arrest or detention by pointing to the statute or statutory regulation from which he claims to derived his power to arrest or detain the detainee and he must demonstrate that he has acted within the scope of the power conferred and that further that he has observed the provisions of the statute or regulation empowering him to do so.

[28] Section 26(2) of the Land Use Management Act provides:

> *"26 Legal effect of land use scheme*
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> *(1) An adopted and approved land use scheme-*
>
> *(a) has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme;...*

*(2) Land may be used only for the purposes permitted-*

*(a) by a land use scheme;*

*(b) by a town planning scheme, until such scheme is replaced by a land use scheme; or*

*(c) in terms of subsection (3).*

*(3) Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act.*

*58 Offences and penalties*

*(1) A person is guilty of an offence if that person-*

*(a) ...*

*(b) uses land contrary to a permitted land use as contemplated in section 26 (2);*

*Land* use is defined *as follows: 'land use' means the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land use purposes;*

I do not see the necessity to analyse the section relied upon by the defendant. Suffice it to say in my opinion on the facts proved in this case no evidence was led to prove that an offence in terms of the section relied upon has been committed by the plaintiff. The plaintiff never used any land. He was merely engaged in his business activities by doing what he was hired for by the community. No evidence was led as to who was the owner of the land in question.

[29] Accordingly the defendant has failed to establish that the statute relied upon authorised the arrest by the police. Furthermore, Warrant Officer Mvumbi stated the arrest was in any event premature as the case was still under investigation. Although

the docket was opened on the 17th of February 2017 no evidence was led that any investigation was ever conducted to date of the arrest. From Sgt Mgudlwa's own version the plaintiff was hired by the community to demarcate sites by means of his tractor. He never 'used' the land as envisaged in the section 26(2) of the Land Use Management Act.

[30] Sgt Mgudlwa testified that he is the one who detained the plaintiff. He explained under cross-examination that he detained him for unlawful demarcation of land. It is clear from the evidence that the question of resistance or disobedience was never an issue. The docket only records that he has been arrested for 'unlawful demarcation of land'. Consequently I hold that the justification of the arrest and detention fails and that the arrest was unlawful.

[31] As far as detention is concerned no evidence was forthcoming from the defendant as to why the plaintiff was detained.

The question is whether the arrest caused or materially contributed to the harm arising from the detention.[5] The "but-for" test (*conditio sine qua non*) is ordinarily applied to determine factual causation.[6] In this case if the plaintiff was not unlawfully arrested, the harm arising out of his detention would probably not have ensued.

[5] *Minister of Police v Skosana* 1977 (1) SA 31 (A); [1977] 1 All SA 219 (A) at 34F-G:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio* (the question falls). If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part." (Footnotes omitted.)

[6] In *Lee* above n 23 at paras 41 and 74, the majority of this Court held that in appropriate cases, the "but-for" test should be relaxed.

Consequently the conduct of the police in arresting the plaintiff factually caused the harm.[7] I therefore hold that the detention was unlawful as well.

[32] In the light of my findings that the plaintiff has proved that he was unlawfully arrested and detained and the defendant has failed to justify such arrest and detention what remains to be determined is the quantum of damages suffered by the plaintiff.

[33] The plaintiff was detained for approximately 24 hours. The conditions of the cell where he was detained were not conducive. However, this had no impact on his health. The plaintiff testified that nothing has changed his life by being arrested and detained. The community still has a high regard for him. His tractor business is still flourishing. He is not using any medication despite his heart being sore.

[34] Mr Mapoma submitted that in light of his evidence the plaintiff has not proved any damages suffered as a result of the arrest and detention. I do not agree. An arrest and detention is a serious violation of the right to freedom. Section 12 of the Constitution provides that '*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;'*

It follows in my view that once this right has been infringed and once it is found that there was no just cause for the arrest and detention the arrestee will suffer a measure of damages. The arrest itself coupled with detention has consequences of

[7]*Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 25.

non patrimonial damages. It remains the duty of court to assess the quantum of such damages.

[35] It has often been said that a comparable table of cases of similar nature serves as a useful guideline. However in **Seymour**[8] it was said

> *"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."*

The Learned Judge of Appeal went on and said:

> *"The dangers of relying excessively on earlier awards are well illustrated by comparing the award in **May**[9] to the award that was made in **Maphalala v Minister of Law and Order**.[10] In **Maphalala** the plaintiff was arrested on 23 June 1992 and released in consequence of an order of court on 16 September 1992. He was immediately arrested again and released only on 19 November 1992. During the period that he was detained the plaintiff was held in solitary confinement, mostly incommunicado, for 150 days. While in detention he was also tortured. In a comprehensive and closely reasoned judgment, and after referring to the decisions in **Ramakulukusha v Commander, Venda National Force,** and **Minister of Justice v Hofmeyr** (both of which the Court considered to be less serious), Coetzee J awarded the plaintiff R145 000 (R300 000) for his unlawful arrest and detention. (He was awarded an additional R35 000 for assault.) Needless to say, the circumstances in that case were gross compared to those in **May**. Whether the award in **May** was excessive, or the award in **Maphalala** was niggardly, is beside the point. I use them only to illustrate that the gross disparity of the*

[8]Minister of Safety & Security v Seymour 2006 (6) SA 320 (SCA) ([2007] 1 All SA 558) para.17
[9]May v Union Government 1954 (3) SA 120 (N):
[10]Maphalala v Minister of Law and Order (WLD, case No 29537/93, 10 February 1995):

*facts in each case is not reflected in the respective awards, and neither is in those circumstances a safe guide to what is appropriate."*

[36] Mbenenge JP also carefully analysed a comprehensive comparison of cases in an unreported judgment of **Candice J Nel v. Minister of Police CA62/2017** from paragraph 36 to 44. I do not deem it necessary to recite those cases referred to by the Learned Judge President. Suffice it to state that the case he was dealing with had certain features of the present case, though the two are not completely similar. In that case the plaintiff was born on 2 March 1985, a mother of three children. She was arrested just after midday on Sunday, 5 January 2014 and was released the following day 6 May 2014. She was, together with her two year old infant, detained in a police cell with other unknown females, until the morning of Monday, when she was released without appearing in court. She was detained for approximately 20 hours. The cell in which she was detained was dirty and bore an unbearable stench; she was experiencing incarceration for the first time. The appeal court awarded her R35 000.

[37] In this matter in assessing damages I take into account the following factors: (a) I do not know the age of the plaintiff; (b) he is a married man but I do not know if he has any children; (c) he is highly esteemed in his community as a business man; (d) he was arrested in the presence of a large group of people and bundled in the back of a van; (e) he was detained in a dirty cell which was congested with other inmates and he slept on the floor; (f) the arresting officer detained him without applying his mind as to whether he could be released on warning or bail or at all and did not really care whether or not he would be taken to court; (g) he was released

without being charged or appearing in court; (h) the detention lasted for approximately 24 hours; (i) he was readily accepted back in the community where he lived; (j) he only suffered humiliation and the arrest almost amounted to harassment.

[38] Our law has always regarded the deprivation of personal liberty as a serious injury, and where the deprivation carries with it the imputation of criminal conduct of which there was no substance the injury becomes very serious indeed.

(39] Taking into account all the above listed factors and the remarks in **Tyulu**[11] where it was said '*(i)n 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'* I consider R40 000as a reasonable award of damages.

[40] What remains is the determination of costs. The award of damages for R40 000 falls within the jurisdiction of a magistrate's court. The period of detention was only one day. The plaintiff could not have foreseen that he would not get any award beyond the magistrate's court jurisdiction. Counsel for the defendant in her heads recommended damages in the same amount. The parties are warned that in future serious consideration will be given, without warning, to the award costs on a lower scale of the magistrate's court. Having said that I see no reason why the general rule that costs should follow the results should not apply.

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

[41] In the result I make the following order:

(a) The defendant is liable to compensate the plaintiff for damages suffered as a result of the unlawful arrest and detention on 26 February 2017 in the amount of R40 000, such sum to be paid within 30 days from the date of this order;

(b) The defendant shall be liable for the payment of interest on the above amount calculated at the prescribed legal rate from the date of the expiry of 30 days within which the amount due should have been paid.

(c) The defendant is ordered to pay the costs of suit.

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**B R TOKOTA**

**JUDGE OF THE HIGH COURT**

Counsel for the plaintiff : Ms Mancotsho-Boya

Instructed by : M Zilani Attorneys

: **MTHATHA**

Attorneys for the Defendant : Mr Mapoma

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| Instructed by | : | State Attorney |

**MTHATHA**

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| Date of hearing: | 11, 12 and 13February 2020 |
| Date judgment delivered: | 17 March 2020. |