

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2008/37480

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

CHIRINDZA ERNESTO GUIDIONE

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

J U D G M E N T

VILAKAZI, AJ:

- [1] The plaintiff, Chirindza Ernesto Guidione, instituted action against the Minister of Safety and Security ,in which he claimed damages for unlawful arrest and detention and assault by members of the SAPS on 24 August 2008 at Ngema section, Katlehong.

- [2] The merits in respect of a claim for unlawful arrest and detention have been conceded by the defendant and thus the issues that remains for consideration relates to the quantum aspect of that claim and whether or not the plaintiff was assaulted during the arrest.
- [3] In the amended particulars of claim, the plaintiff's claim alleges the following:
- [3.1] On 24 August 2008 at approximately 19h00, at Ngema Section in Katlehong, he was unlawfully and without reasonable ground arrested by members of the SAPS whose full and further particulars are unknown to him.
- [3.2] Whilst so arrested and detained he was unlawfully assaulted. He was detained at the police station on suspicion of being an illegal immigrant.
- [3.3] On the subsequent day, he contacted his brother who then brought his identity document and its authenticity was verified by an officer of Home Affairs.
- [4] In the plea the defendant admits the arrest and detention of the plaintiff. It denies that the arrest and detention were unlawful. It sought to justify the lawfulness of the arrest and detention on the basis that the the plaintiff was suspected of being illegally in the country and that his

arrest and detention was effected in terms of s41 read with s34 of the Immigration Act 13 of 2002. In relation to assault allegations, the defendant's defence is a bare denial.

THE EVIDENCE

[5] The plaintiff did not call any witnesses in respect of quantum.

[5.1] The plaintiff, a Mozambiquan national arrived in South Africa in 1991 and at the time of his arrest he was and is still employed by Petrol Industrial. On 24 August 2008 at about 19h00 as he was about to leave the gate of his house, the police officer approached him and requested him to produce his identity document which he did not have on him. His request to be afforded an opportunity to fetch it from his house was turned down. He was thereupon arrested.

[5.2] He was bundled into the police van and when he tried to resist the police assaulted him with an open hand on the face and he co-operated. The police drove him to the Katlehong police station. During the journey to the police station his head banged against the body work of the vehicle because of the reckless manner in which the vehicle was being driven.

[5.3] Upon arrival at Katlehong police station, he was led into the charge office whereby he was requested to write down his

personal particulars. He refused to furnish his personal details. The policemen became agitated towards him. He was assaulted with clenched fists and booted feet. Though he was a suspected illegal immigrant he was kept at the police cells. In the meantime Pat, his brother brought the plaintiff's identity document at the police station. It would seem that the police took it to the Home Affairs offices for verification. Upon being satisfied that his identity document was a legitimate one, the police released the plaintiff on Monday, 25 August 2008.

[8.4] Upon his release from detention, the plaintiff took a taxi home. He changed his blood stained clothes and thereafter went to lay a charge of assault at the police station against the police. Having done so, he went to hospital for treatment of his injured ear. In this regard the plaintiff confirmed in the J88 which was completed by the treating doctor or hospital related to him. The J88 records an ear injury and that such injury is consistent with the alleged assault. He went to several police stations whereupon he was turned away and advised that he must submit a J88 medical report in support of his charge of assault against the police. He said he could not remember whether he attended to the doctor following his release. He explained to the doctor that treated him that he has an ear ache and difficulty in hearing.

[6] He sustained this injury when his head banged against the body work of the vehicle as he was being conveyed to the police station. Under cross-examination the plaintiff added that he was hit by the police on the ear while he was at the police station. He did not intimate to the doctor that he bled profusely because upon his visit to the doctor the bleeding had subsided.

[7] The defendant's version was not put to the plaintiff.

That concluded the plaintiff's case. The plaintiff closed its case without calling his brother or Pat who brought the identity document to the police station. Neither was the medical doctor called to testify as to the extent of injuries.

EVIDENCE FOR THE DEFENDANT

[8] The first witness for the defendant was Constable Tebele Mack Mashangoane, a policeman for the past 12 years, stationed at Katlehong. He confirmed that on the evening of 24 August 2008 he was working night shift. He was posted to do "*search and stop*" duties in Katlehong together with his colleague.

[9] He together with the other police approached the plaintiff and asked him about his national. On being asked to produce his documentation confirming whether he is legally in the country he was unable to do so.

[10] The plaintiff explained to them that his identity document was at his house, which was few streets away. He drove to the plaintiff's house,

however they were informed that the identity document could not be found.

[11] As a result of his reasonable suspicion that the plaintiff was an illegal immigrant he arrested him in Katlehong and placed him in the van.

[12] At Katlehong police station he detained the plaintiff in the cell. He denied that he assaulted the plaintiff. After writing down his statement at the police station, he left to continue his crime prevention duty. At the time when the plaintiff was detained in the cell, he was free of any injuries.

[13] Under cross-examination Constable Mashangoane denied that he refused to accompany the plaintiff to his house in order to collect his identity document.

[14] He was adamant that the plaintiff failed to produce his identity document on the same day he was arrested. Had the plaintiff produced his identity document, though after arrest, he would not have detained him in the cells. The plaintiff was the only arrestee on that day in question.

[15] He denied that he assaulted the plaintiff prior to arrest and at the police station.

- [16] That concluded the defendant's case. The defendant closed its case without calling any of the other police officers involved in the arrest or on the scene.

ANALYSIS OF EVIDENCE

- [17] It is clear from the evidence adduced by the parties that there are two mutually destructive versions on the issues in dispute.

Stellenbosch Farmers Winery Group Limited and Another v Martell et cie 2003 (1) SA 11 (SCA) provides guidelines as to how situation such as the present one should be approached. These are set out as follows in paragraph 14;

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (c) this necessitated an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

- [18] The issues to be determined are whether the plaintiff was assaulted during his arrest and detention in the police station by the police officers and secondly if so the amount of compensation to be awarded to him.

[19] Constable Mack Mashangoane, the only defendant's witness confirmed the plaintiff's version regarding the following issues:

- (a) That the plaintiff was arrested and taken in a police van and detained on 24 August 2008.
- (b) He was released the following day upon production of an identity document. The authenticity of the plaintiff's identity document was verified by an official of the Department of Home Affairs.

[20] The defendant disputed the following:

- (a) That defendant denied that the plaintiff was assaulted, whereas the plaintiff alleged that he had been assaulted and in this regard furnished a J88 medical report which confirmed that his ear injury was consistent with the assault. I would prefer the plaintiff's version to that of the police officer in relation to the assault.

[21] First, the defendant's version was not put to the plaintiff under cross-examination. It was expected of this arresting officer to have disclosed the names of all the police officers who were with him when the plaintiff was arrested and detained at the police station on 24 August 2008. In the absence of the explanation why this was not done an inference is inescapable that their evidence would not have supported the defendant's version.

- [22] Secondly, the defendant's version was not put to the plaintiff regarding who arrested him and the reason for his arrest and detention. The plaintiff's version on this aspect remains unchallenged.
- [23] The defendant did not produce records of the cell register which would support Constable Mashangoane's evidence that when the plaintiff was detained he sustained no injuries or no injuries were reported to him.
- [24] The probabilities in the case are in favour of the plaintiff's version regard being had to the following:
- (a) On his release from detention, he attempted to lay a charge of assault at Katlehong police station, although he was turned away and told to request the doctor to complete a J88 medical report
 - (b) That he went to the doctor on 28th August 2008 and received medical attention.
 - (c) The medical report confirms an ear injury. The discrepancies on the date when he attended to the doctor are not material contradictions and do not affect the credibility of the plaintiff.

(d) A police witness confirmed that he was arrested and detained in Katlehong police station overnight on suspicion of being an illegal immigrant.

(e) That he was released the following day upon production of his identity document and was not charged.

[25] No charges were proffered against the plaintiff.

[26] In the circumstances, I find that the plaintiff has established on a balance of probabilities that:

(a) he was wrongfully arrested and detained. His arrest and detention would have been avoided had he been given an opportunity to collect his identity document from his house which when it was subsequently produced confirmed that he was in the country legally. The police had discretion to arrest him. In this case they did not exercise their discretion at all. They proceeded on the basis that once someone was suspected of being an illegal immigrant he had to be arrested and be kept in detention. This was unlawful.

(b) that he was wrongfully assaulted.

[27] What thus remains to be done is the assessment of appropriate damages. In doing so, I will have regard to what was stated by the Supreme Court of Appeal in *Minister of Safety and Security v Seymour*

2006 (6) SA 320 SCA. 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 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. 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.

[28] There are a number of reported cases dealing with damages to be awarded for a relatively short period of unlawful arrest and detention. Such cases can only serve as guidelines because each case must be decided on its own merits.

[29] Counsel for the plaintiff submitted that although the detention was for a short duration, there were aggravating factors such as after his arrest he was manhandled and forced into the van, the police drove at an excessive speed over the humps causing him to hit his head against the bodywork of the police van, he was assaulted, the police refused him an opportunity to collect his identity document from his house and

as a result he was caused to spend a night at the police station which he would not have.

[30] Counsel for the defendant submitted that in awarding damages I must take account of the following factors:

[30.1] there were no malice on the part of the police in arresting the plaintiff. I disagree. There was no basis for a reasonable suspicion that the plaintiff was an illegal immigrant to justify his arrest. His arrest was done in bad faith.

[30.2] that the police were acting in terms of the provisions of the Immigration Act 13 of 2002, (section 41 read with section 34) in arresting and detaining the plaintiff.

[30.3] that the following day, the plaintiff contacted his brother who brought his identity document and its authenticity was verified by an official of Home Affairs whereupon he was released at 12h00 at Primrose police station.

[31] Counsel for the plaintiff relied on the case of *Weinberg v National Commissioner of Safety and Security* 2012 6K6 QOD 161 (GNP).

- [32] Counsel for the defendant submitted given the circumstances of this case, an award in the amount of R15 000 in respect of unlawful arrest and detention would be appropriate.
- [33] *The Weinberg's* case is distinguishable from the facts of this the case in that the plaintiff was an IT consultant and was arrested in full view of his wife, children and community. He was detained in a holding cell with two other men. The plaintiff was arrested in the evening and no one saw the police effecting his arrest. All that the court was told, is that he is a Mozambiquean national, labourer, in the employ of Petrol Industrial.
- [34] Having given careful consideration to all relevant facts, including the age of the plaintiff, the circumstances of his arrest, its nature and short duration, I am of the view that a fair and appropriate award of damages for the plaintiff's unlawful arrest and detention is an amount of R25 000,00.
- [35] In respect of a claim for unlawful assault, the plaintiff's injuries were fortunately not of a serious nature. No evidence was tendered to demonstrate any long-term emotional trauma or serious *sequelae* arising from the assaults. The injuries reflected in the J88 are tissue injury, ear and body pain (common assault). The doctor that treated the plaintiff did not testify as to the extent of injuries suffered.

[36] I am of the view that an amount of R50 000,00 is considered a just and equitable amount for damages sustained in respect of wrongful assault, mainly due to the fact that any form of invasion of person's physical integrity no matter how trivial is indefensible in any civilised society particularly by police officers who are enjoined to protect individuals against such invasions of their physical integrity.

[37] With regard to costs, it was argued by the defendant that in light of the amount of the plaintiff's claim, the action should have been instituted in the magistrate court and that the costs to be awarded should be awarded on the magistrate court tariff. I agree with the latter contention. Costs would be awarded on the magistrate court tariffs.

[38] I make the following order:

1. The defendant is ordered to pay plaintiff's damages in the sum of R75 000,00 (Seventy Five Thousand Rand)
2. The defendant must pay the plaintiff's costs of suit, taxed on the appropriate magistrate, including the costs of counsel.

T D VILAKAZI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR PLAINTIFF	ADV MTSWENI
INSTRUCTED BY	E TALANE ATTORNEYS
FOR DEFENDANT	ADV GUMBI
INSTRUCTED BY	STATE ATTORNEY
DATES OF HEARING	13 AND 14 APRIL 2015
DATE OF JUDGMENT	11 JUNE 2015