REPUBLIC OF SOUTH AFRICA

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

CASE NO.: 10692/15

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

16/03/2017 .....

In the matter between

THEMBA ALFRED SITHOLE **PLAINTIFF**

and

THE MINISTER OF POLICE **DEFENDANT**

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The plaintiff claims an award of damages against the defendant, such damages being suffered as a result of the alleged unlawful arrest and subsequent detention of the plaintiff.

[2] On 24 December 2014 at around 7 pm, the plaintiff, who lives at 1133 Ngobu Street, Zola North, Soweto went to a neighbouring house situate at 1141A, Ngubo Street, Zola North, Soweto. At that address,

members of the Crime Prevention Unit of the South African Police Services of Jabulani Police Station arrested the plaintiff. He was thereafter detained at Jabulani Police Station until 29 December 2014, a period of five days.

[3] The plaintiff alleges that his arrest and subsequent detention were unlawful. The defendant admits the arrest and subsequent detention. The period of detention is also admitted. However, the defendant denies that the arrest and subsequent detention of the plaintiff were unlawful. The arrest was made without a warrant.

[4] At the commencement of the trial, counsel for the defendant moved an application to amend the defendant's plea. The application for the amendment was not opposed and the amendment was granted. The amendment related to arrest and subsequent detention of the plaintiff on suspicion of possession of drugs, as opposed to dagga, that was originally pleaded.

[5] The defendant relies upon the provisions of s 40(1)(h) of the Criminal Procedure Act, 77 of 1978 (the Act) in respect of the lawfulness of the arrest and subsequent detention.

[6] The following is common cause between the parties:

(a) Plaintiff's arrest on 24 December 2017 was made without a warrant;

(b) After the arrest, the plaintiff was taken to Jabulani Police Station where the plaintiff was advised of his Constitutional Rights and in that regard he signed a document, with serial number Q9078957, indicating that his Constitutional Rights were explained to him and that he understood same;

(c) Thereafter, the plaintiff was detained in the cells of Jabulani Police Station;

(d) On 25 December 2014, the plaintiff was charged on a charge of possession of dagga. After the charge, the plaintiff was detained further at Jabulani Police Station;

(e) The plaintiff requested the police officer, delegated to charge him, to be released on bail (so-called police bail). His request was not adhered to and he remained in detention;

(f) On 29 December 2014, the docket was allocated to an investigating officer who cursorily went through it. Thereafter, the investigating officer sent the docket through to the prosecutor at Protea Magistrate's Court for processing. The plaintiff was also taken to the Protea Magistrate's Court on the same day;

(g) The prosecutor who received the docket endorsed the docket *nolle prosequi* and the plaintiff was subsequently released.

[7] The nub of this matter relates to whether the arresting officer had in terms of the provisions of s 40(1)(h) of the Act a reasonable suspicion that the plaintiff had committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs.

[8] It is common cause that the defendant, having admitted the arrest without a warrant, bears the onus of proving the lawfulness of the arrest and the subsequent detention of the plaintiff.[1]

---

[1] *Minister of Safety and Security v Sekhoto et al* 2011(1) SACR 315 (SCA) [7]

[9] The respective versions relating to what happened immediately prior to the arrest being made are divergent and have no common denominator, other than that the plaintiff was arrested at the relevant address on that day.

[10] Counsel appearing on behalf of the defendant submitted that in the event that the versions of the parties are diametrically opposed, the approach to be taken is stated in the judgment of *Stellenbosch Farmers' Winery Group Ltd et al v Martell et Cie et al.*[2] In that matter the following was said:

> *"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by 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 (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors*

[2] 2003(1) SA (SCA) at 15I – 16D

mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[11] In applying the aforesaid approach to the present matter, counsel on behalf of the defendant submitted that the evidence of the plaintiff is to be considered: not cogent; evasive; contradictory; loaded with many bare denials without cogent explanations. It is further submitted that for the foregoing, the plaintiff's version stands to be disregarded.

[12] Dagga is an undesirable dependence-producing substance possession of which is prohibited in terms of the provisions of Part III of Schedule 2 to the Drugs and Drug Trafficking Act, No. 140 of 1992.[3] It follows that the unauthorised possession thereof falls within the provisions of s 40(1)(h) of the Act.[4]

[13] The defendant led the evidence of four witnesses. That of the arresting officer, Constable Twala, and the evidence of Warrant Officer Seikaneng, who accompanied Constable Twala on the day of the arrest. The evidence of the officer who formally charged the plaintiff at

---

[3] See *Prince v President of the Law Society of the Cape of Good Hope* 2002(1) SACR 431 (CC) par. [22]

[4] s 4(b) of Act, 140 of 1992

the Jabulani Police Station, Sergeant Morotolo, and that of Detective Constable Mashabela, who was the investigating officer, was also led.

[14] The evidence of Sergeant Morotolo and Detective Constable Mashabela concerned events post the arrest. It is not relevant to the question whether a lawful arrest and detention occurred. At best, their evidence may have some bearing on the probabilities. The evidence of Constable Twala and that of W/O Seikaneng requires consideration, them being present at the time the plaintiff was arrested. W/O Seikaneng did not observe anything that occurred immediately prior to the arrest. His knowledge of what happened immediately prior to the arrest constitutes hearsay evidence on his part. In other crucial respects, the evidence of W/O Seikaneng contradicts that of Constable Twala. I shall deal with these issues later.

[15] The court is left to consider the versions put forward by the plaintiff and by Constable Twala relating to the incidence that led to the arrest of the plaintiff. Those versions, say counsel for the defendant, are diametrically opposed.

[16] Constable Twala's evidence can be summarised as follows:

(a) He and W/O Seikaneng, both from Jabulani Police Station, were on crime prevention patrol when a report of alleged criminal activity at 1141B Ngobu Street, Zola North, Soweto was received from radio control. The report was that people were smoking dagga and using drugs in the back room;

(b) They proceeded to the said address and approached the back room from which the smell of dagga smoke was clearly apparent;

(c) Constable Twala knocked on the door and entered. The room was heavy with dagga smoke;

(d) In the room were three male persons smoking dagga;

(e) He requested permission to search and was granted permission;

(f) On searching the suspect, Constable Twala found a small "green plastic" containing a drug-dependency substance, called nyope in the location.

(g) Counsel for the defendant asked Constable Twala what offence he suspected was committed, to which he answered "the using of drugs unlawfully";

(h) On being questioned by counsel for the defendant, Constable Twala testified that he took the "green plastic" to Jabulani Police Station where it was entered into the relevant register, SAPS 13. The officer responsible thereafter put it into a forensic bag for examination by the laboratory;

(i) Counsel for the defendant then took Constable Twala to a document appearing in Bundle B. Constable Twala identified it as his statement written after arresting the suspect;

(j) In paragraph 3 of that statement, Constable Twala recorded that he received the report from radio control referred to above and at the given address found three African males smocking dagga in the room that was "full of smoke". He further recorded that he introduced himself and sought permission to search the three African males. He did not deal with the remainder of that paragraph. I shall return to this aspect later;

(k) Constable Twala was then referred to paragraph 4 of his written statement. In that paragraph he recorded that he informed the suspect that he was under arrest for possession of drugs and

informed the suspect of his constitutional rights. He testified that those rights related to the right to remain silent, to obtain legal representation and should he be unable to obtain such, the State would provide legal representation.

(l) The suspect was then placed in the back of the police van and they proceeded to Jabulani Police Station where he detained the suspect. In the said paragraph he identified the suspect as one Alfred Themba Sithole, 51 years of age, of 1133B Ngobu Street. The remainder of the paragraph contains details relating to the SAPS 14 and details of the exhibit that was handed in as per SAPS 13.

[17] Under cross-examination Constable Twala conceded that:

(a) He was told what criminal activity was underway at the said address;

(b) He was told to search the people at the said address;

(c) When he went to the address, he was aware of the complaint referred to above, and sought permission to search;

(d) He knew that the "content of the 'green plastic' contained drugs that the people use", it was a problem in the location, and that was why he knew it was nyope;

(e) He did not know who the owner of the property was.

[18] Further under cross-examination he described the substance found in the "green plastic" as "creamy whitish very soft powder". Constable Twala denied that the powder looked like flour and said that he could not agree that it looked like the product that was used to make porridge.

[19] When asked whether he was an expert to the extent that he could identify the substance as nyope, he answered that he attended a workshop at the Police Station. He explained that it was a five-day workshop presented by an expert in drugs. He did not explain what type of workshop it was, what the content thereof was and how that had enabled him to identify the substance in the "green plastic" as being nyope. He conceded that no certificate was issued in respect of the attendance of the workshop. His evidence in respect of the workshop is vague and sketchy. It is not possible to discern whether Constable Twala had the necessary knowledge to reasonably identify a substance as constituting a drug.

[20] He further conceded that the best way to identify the substance was to have it analysed in a laboratory. Constable Twala's response thereto was that he was told and shown what it was. I am not persuaded that Constable Twala possessed sufficient knowledge or experience to identify the substance as nyope, or for that matter any other substance falling within the scope of s 40(1)(h).

[21] When pressed, Constable Twala consistently responded that they were told that dagga and drugs were being used and that they were to search the people present. Furthermore, he claimed that he was not alone as he apparently only searched one suspect. He further testified that he smelled dagga and that smoke from the dagga was thick in the air. His evidence in that regard is clearly exaggerated.

[22] It is curious that, as he testified, the persons in the room were found smoking dagga, but no dagga was found. He knew dagga and could identify it. Further in this regard, the charge brought against the plaintiff, when charged the following day, and as indicated on the docket, the plaintiff was accused of be in possession of dagga. However, Constable Twala and Detective Mashabela disavowed any

charge relating to a charge of being found in possession of dagga. The alleged mistake was not explained.

[23] When cross-examined on his written statement referred to above, and in particular that it is lacking that he found the "green plastic" in the suspect's trouser pocket, his response that one cannot say word for word what happened is unconvincing. He could testify to that fact a number of years later, yet could not record that fact in his statement shortly after the incident. That fact is important. It would explain a reasonable suspicion of the commission of an offence. The omission of that fact in Constable Twala's statement renders the evidence of Constable Twala suspect to say the least. It impacts upon his credibility.

[24] When the plaintiff's version was put to Constable Twala that the plaintiff was arrested outside the room and at the gate leading from the yard, he merely stated that it was not the truth. Nothing further was said.

[25] Constable Twala's response to the statement that the plaintiff was charged for possession of dagga and not the possession of drugs such as nyope was that it was a mistake. I have dealt with this aspect earlier. The delay in charging the plaintiff remains unexplained.

[26] Further in this regard, it is interesting to note that in Constable Twala's written statement he mentioned that the suspect on being asked what was in the "green plastic", the suspect admitted it to be nyope. Constable Twala did not repeat that in his evidence in chief, neither under cross-examination. He also did not refer thereto when taken to his written statement by counsel for the defendant. The latter's submission in argument that Constable Twala had "confirmed" his statement is without merit. It was not confirmed as a whole. In my view it is a glaring inconsistency. If true, it would have put the issue to bed. Furthermore, it was not put to the plaintiff in cross-examination

that he had admitted to being in possession of a drug, and in particular being in possession of nyope.

[27] Further inconsistencies in the evidence of Constable Twala's evidence are as follows:

(a) He testifies that although the three African men were found smoking dagga, no dagga was found in the room nor in the possession of any of them;

(b) No evidence is led that the other two men found in the room were searched;

(c) He did not testify that all three men in the room were arrested as apparently had happened;

(d) He repeatedly suggested that the other men in the room were searched, as he was not alone. W/O Seikaneng did not confirm that evidence. He testified that he accompanied Constable Twala to the back room, yet did not enter it. He was behind Constable Twala. Only Constable Twala entered the room as stated in his statement relating to the incident. He did not testify that he had searched anyone;

(e) It is curious that none of the other men in the back room was searched. It is clear that only the plaintiff was searched. That inconsistency is not explained. It has a direct impact upon the credibility of Constable Twala relating to the independent suspicion of the commission of an offence.

[28] W/O Seikaneng was referred to his written statement relating to the incident. That statement is inconsistent with the evidence of Constable Twala in the following respects:

(a) W/O Seikaneng stated that Constable Twala on entering the room asked to search "an African male known by the name of Themba Sithole aged 51 years of 1133B Ngubo Street, Zola North";

(b) He did not testify that they found three African males in the room;

(c) He did not see where Constable Twala found the "green plastic", and was told by Constable Twala where he had apparently found it. He did not witness the search of the plaintiff;

(f) He did not search any other person who may have been in the room. He was the only person who had accompanied Constable Twala and did not enter the back room;

(g) In his statement, W/O Seikaneng stated that when the plaintiff was asked about the "green plastic", the latter kept silent and went speechless. Clearly there was no admission made to being in possession of nyope;

[29] Counsel for the defendant submitted that all the witnesses who testified on behalf of the defendant were reliable and truthful witnesses whose evidence is to be accepted over that of the plaintiff. For the foregoing reasons that submission is without merit.

[30] W/O Seikaneng does not support Constable Twala on material issues. I have indicated these above. The versions of the two witnesses are contradictory. In particular the defendant relies on the evidence of both Constable Twala and W/O Seikaneng in discharging its onus.

[32] Furthermore, in my view, it cannot be found that Constable Twala had formed an independent view or suspicion in respect of the commission of an offence as provided in s 40(1)(h) of the Act.

(a) On the evidence presented, Constable Twala had not divested his mind of the report that was made to him by radio control. He repeatedly referred back to the report and the instruction to search;

(b) The clear instruction was that an offence was being committed, they were merely to search;

(c) W/O Seikaneng identified the plaintiff as the person who was to be searched;

(d) The circumstances at the property did not lean toward a suspicion of the commission of an offence, other than that was already known to Constable Twala prior to his arrival at the property.

[33] It can accordingly not be found that Constable Twala had formed a reasonable suspicion of the commission of the offence stipulated in s 40(1)(h) of the Act.

[34] Further in my view, the facts available prior to the attending at the said property clearly indicate that a warrant was required to search the property, or any portion thereof, and any person found on the said property. The clear purpose for their attending at the said premises was to search for the dagga and drugs being smoked there. That instruction militates against the forming of an independent reasonable suspicion of the commission of an offence within the scope of s 40(1)(h) of the Act.

[35] The inconsistencies between the versions of Constable Twala and W/O Seikaneng, as well as the deficiencies in the evidence of Constable Twala, as referred to above, affect the credibility of those witnesses and in particular that of Constable Twala.

[36] The version of the arrest proffered by the plaintiff, is clearly contrary to that presented on behalf of the defendant. In this regard, the plaintiff testified that he was on his way out of the yard when the police forced him back and made him wait. He adequately explained his presence at the said property. He had received a report that his helper was there and he went to advise the latter that the material for work to be done had arrived and that they would commence the work on 26 December 2014. He did not find his helper there and on his way out he was prevented from leaving. He was not searched and nothing was found on his person. He was merely taken to the Jabulani Police Station together with three other men, from the backroom, in the back of the police van. He was only charged with possession of dagga on the following day. However, no dagga was found on the property or any person on the said property.

[37] The criticisms levelled against the plaintiff's evidence are without merit. The plaintiff adequately explained the apparent contradiction in his evidence relating to whether he had found his helper and had spoken to him at the said property. His demeanour under cross-examination of that issue clearly indicated that he was misunderstood and that he had not contradicted himself. The criticism relating to whether the plaintiff was handed a copy of the signed "Notice of Rights" or not, is of no consequence. It does not take the matter any further and does, in my view, not impact negatively upon the plaintiff's evidence. Neither does the criticism levelled at the issue of an alleged contradictory instruction to his erstwhile attorneys have any impact. Legal representatives draft court process documents. It cannot be laid at the door of the client. The issue relating to whether the plaintiff was unemployed as opposed to being "self employed" does not add anything to the relevant issues.

[38] The issue relating to the criticism that the "whole" version of the plaintiff was not put to the witnesses is in my view of no consequence. The

relevant portion was put to Constable Twala who made the arrest. I have dealt with this issue earlier.

[39] On the probabilities, and for the foregoing reasons, the version of the arrest put forward on behalf of the defendant weigh against the defendant.[5]

[40] In my view, the defendant, for the foregoing reasons, did not discharge the onus in respect of the lawfulness of the arrest and detention of the plaintiff.[6]

[41] I find that the jurisdictional requirements for a finding of a lawful arrest without a warrant as provided in s 40(1)(h) of the Act have not been satisfied.

[42] There remains the issue of quantum. The plaintiff bears the onus of proving the amount of damages suffered. In his regard, the plaintiff claims in his particulars of claim an amount of R350 000.00. In support of that claim, the plaintiff relies upon the following:

(a) The plaintiff is 51 years of age;

(b) He was detained for a period of five days over the Christmas season;

(c) Conditions in the cell in which he was detained were atrocious. He shared the cell with many other detainees some of whom were drunk and others appeared dangerous. It was dirty and unhygienic. The blankets were dirty and unusable. The quality of the food given was poor. His complaints and request for better and safer accommodation were ignored;

---

[5] See in general *Minister of Safety and Security v Sekoto et al* 2011(5) SA 367

[6] See *Stellenbosch Farmers' Winery Group, supra*

(d) His partner in a customary union and his family were abhorred by his arrest and detention and he was obliged to work on those relationships to restore the pre-incident good relationships. His partner passed away subsequently;

(e) His grandchild, who adored him, withdrew and despised him;

(f) The plaintiff's good standing with his neighbours and customers deteriorated and he was no longer trusted;

(g) He lost the work that he was to have attended to after the Christmas season and was obliged to repay the monies that he had already received;

(h) Generally his reputation was damaged.

[43] Reliance was placed upon the judgment in *Ntshingana v Minister of Police*[7] where it was held that a court considering the issue of damages relating to unlawful arrest and detention was expected to make an estimate *ex aequo et bono.*

[44] Counsel for the plaintiff referred to and relied upon a number of cases in support of the plaintiff's quantum. I do not intend dealing with each of those cases. None of those matters have any direct relevance to the present matter. The duration of detention in each of those matters related to a couple of hours in detention.

[45] In this regard, reference to the judgment in *The Minister of Safety and Security v Seymour*[8] and in particular paragraph [20] thereof will suffice, where it was held

---

[7] Unreported judgment, 163/91, EDC, 14.10.2003
[8] Unreported judgment D T [2006] SCA 67 (RSA)

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

[46] In the matter of *Seymour, supra,* the Supreme Court of Appeal held that an amount of R90 000.00 for detention for a period of 5 days (in 2006) would be a reasonable and fair compensation. That case was decided 10 years ago. However it is closer to the present matter.

[47] In my view, a fair and reasonable amount for compensation for the unlawful arrest and detention in the present matter would be R100 000.00.

[48] It follows that plaintiff's arrest and subsequent detention was unlawful and the action is to succeed.

I grant the following order:

(a) The defendant is ordered to pay the plaintiff an amount of R100 000.00;

(b) Interest upon the amount of R100 000.00 *a tempore morae* at the rate of 15.5% from the date of this order to the date of final payment;

(c) Costs of suit on the appropriate Magistrate's Court scale, such costs to include the costs of counsel

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff: G Matlombe
Instructed by: Mekhoe Attorneys

On behalf of Defendant:	E Nwedo
Instructed by:	The State Attorney