

REPUBLIC OF SOUTH AFRICA

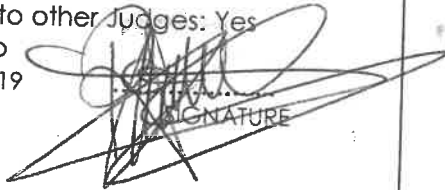


HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG.

CASE NO : 7968/2013

- (1) Reportable: No
(2) Of Interest to other Judges: Yes
(3) Revised: No
(4) 28 June 2019
DATE


SIGNATURE

In the matter between:

MICHAEL ONYENETO

PLAINTIFF

And

**MINISTER OF POLICE
CONSTABLE RAMCHARAN
LEBOHANG WELINGTON THOTSEJANE**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

JUDGMENT

CORAM: RE MONAMA, J

INTRODUCTION

[1] The plaintiff describe himself as a businessman of Beview East, Johannesburg. The first defendant is the national Minister of Police who is sued *ex officii* for the alleged unlawful actions of the second and third defendants. The latter defendants are the servants who are and were in the employ of the department of police during the occurrence of the alleged conduct.

[2] The plaintiff claims ¹ against the defendants are for:-

- unlawful arrest and the amount claimed was R400 000, 00;
- unlawful assault and the amount claimed was R350 000,00;
- unlawful search and confiscated goods the amount is R79 000,00;
- damage to property and the amount claimed is R120 000,00 ;and
- loss of income claim and compensation sought is R15 000,00.

The claims were substantially amended on three occasions. The current amount claimed in respect of the total heads of claims is an amount of R1 549 000,00.

[3] The action is defended. The defendants have raised the plea of justification, denial, lawfulness and consent².

[4] The parties held a pre-trial conference during 24 May 2017. During the said conference the parties agreed to the separation of the issues of liability and quantum. As a result certain facts have now become common cause for the purposes of this trial. The arrest and the detention of the accused, the search

¹ See the record Bundle 1 paginated pages 5 -11 dated 3 March 2013.

² See the record Bundle 1 Paginated pages 34-39.

of the premises at the China Shopping Complex in Sebokeng are common cause.

[5] As stated above the parties have agreed to and successfully applied for the separation of liability and quantum issues. The issue of quantum is postponed *sine die*.

THE ISSUES AND ONUS

[6] The issues for the determination are the alleged unlawful arrest, the assault, malicious damage, the loss of income. The defendants are the onus bearing parties in respect of the alleged unlawful arrest³. They must prove the lawfulness of the arrest. Finally, the plaintiff bears the onus of proof on the remaining issues.

EVIDENCE-THE PLAINTIFF'S CASE

[7] The plaintiff testified that he is a businessman. He is currently selling clothing. During 27 August 2011 he was operating a business of a tuck shop at the shopping complex situate in Zone 7B Sebokeng. He gave the description of the lay out. This shop was divided into three distinct sections. One section was used as the kitchen where the food was cooked, the next section was a restaurant where he sold the food and where the patron could eat. Finally, the third section was used to operate the business of games where people could play. At the time of his arrest he has been operating this business for some approximately four years. He estimated prior to his arrest

³ See Sections 40 and 50 of the Criminal Procedure Act (the "CPA.") and Sections 12 and 35 of the Constitution of the Republic of South Act ("the Constitution.").

and his income was approximately R45 000,00 per week. The income vacillated according to the demands of business.

[8] He testified that for some considerable time prior to his arrest he was also selling some very expensive watches to the locals. The watches included, inter alia, the *tag heuer carrera* and *tag heuer monaco*. These watches were supplied by his unnamed friend who was allegedly based in Europe. In the area of Sebokeng he engaged his friend, Johnie Patric phale ("Lephale") to sell the watches to his co-workers and friends. The latter also assisted him on part time basis and for a commission in his restaurant.

[9] During 2011 Lephale facilitated the sale of a *tag heuer monaco* watch to a co-worker, Derrick Rolf "Derrick". The sale price was an amount of R32 000,00 and the purchaser paid a deposit of R6 000,00. The balance of the purchase price was not forthcoming despite several promises. On 27 August 2011 Lephale phoned him and advised that Derrick wanted to effect payment of the balance of the purchase price and that they arranged to meet. After the call Lephale arrived. He amplified the arrangements made with Derrick. The destination was at or near the Nandos fast food outlet in Vanderbijlpark. The plaintiff locked the shop and they travelled in a taxi to meet Derrick. The plaintiff had an amount of R4 500, 00 in cash on him.

[10] They arrived at their destination at about 10:30. As they approached the fast food outlet they saw Derrick who was sitting on an object ahead. Lephale instructed him to remain behind while he approached Derrick. When Lephale met Derrick, he noticed the latter lit a cigarette and several police vehicles and police officers in civilian clothes approached

them . The police officers surrounded them. Suddenly, the officer came over to him and instructed him to lie down. They harassed him and enquired about the guns. He was searched and they took his cash money in the sum R4 500,00 and his cell phones. He was then thrown into the police van. Liphale was put into a different van. They were driven to the local police station.

[11] At the police station he was pushed into a room. He was asked about the guns. The officers repeatedly and continuously assaulted him all over his body. He was suffocated with a plastic and teargased. The assaults lasted or approximately three hours.

[12] Later he placed in a boot of a jeep motor vehicle by the second and third defendants. They drove to his shop in Sebokeng. Liphale was travelling in the car with the two uniformed police officers. He heard him given the two officers instructions. When they arrived the police opened the shop. He was taken out of the boot and dropped violently at the door of the shop. He lost consciousness but heard them ransacking the shop, pulling things down and damaging them

[13] There were many people around. The officers and the Derrick searched the shop. They did not ask him what they were looking for. The search lasted for approximately three hours. He did not witness the search because he was unconscious and could not see. At some point he shouted for assistance and Lephale came and assisted to the toilet. Later he was thrown into the van together with the goods consisting of the books, sales recording books, wrist chain, panado, grandpa tag heuer watch and transported to Evaton Police Station.

[14] At Evaton Police Station he was left in the motor vehicle and later driven to Sebokeng Police Station where he was dumped into a police cell and was almost dead. Later the cell inmates called the commander and he was transported to hospital where he was released after some days.

[15] Upon his release he approached the police station and demanded the return of his goods. He was unsuccessful. He did not continue with the business.

[16] **Johny Patrick Lephale**, testified that he is the friend of the plaintiff and that he has known the plaintiff for a long time. During August 2011 sold to Derrick a *tag heuer monaco* watch from him. He sold it on behalf of the plaintiff. The price was an amount of R32 000,00. Derrick paid a deposit of R6 000,00. The balance of R26 000, was to be paid at a future stipulated time. Derrick defaulted on numerous occasions. But on 27 August 2011 he received a call from Derrick who arrange with him to come and receive the payment of the balance. They arranged to meet in Vanderbijlpark. He accordingly informed the plaintiff. They agreed to meet at the shop that that should travel together. On his arrival at the plaintiff closed the shop. They travelled together from Sebokeng to Vanderbijlpark in a taxi. On arrival they observed Derrick sitting on a meter box ahead of them. He alone approached Derrick. When he arrived at him, he lit the cigarette. They were then immediately confronted by several police officers. He was instructed to lie down. The officers enquired what he and the plaintiff wanted from Derrick. They were taken to the Vanderbijlpark police station in a black X5 BMW SUV motor vehicle.

[17] At the station he was taken to and detained in a different room. He was separated from the plaintiff. He did not know where the plaintiff was detained but could hear his cries of the plaintiff. Later he was asked whether he knew where the plaintiff's shop was situated and whether he could direct them thereto. He agreed and they drove to Sebokeng. They travelled in a black SUV. Ramcharan was the driver. He was in the passenger seat next to the dog. He did not see the plaintiff. On their arrival, they found four police officers were already in the process of searching the premises. They were directed by the female officer. He does not know how they gained entry. The officers told them that they were looking for drug, guns and everything illegal. He testified that the officers ransacked the shop, they pulled everything down, turned the shop upside down and attempted to pull down the television set which was mounted on the wall. The search included the opening of the fridges and opening the sofas.

CROSS EXAMINATION

[18] The plaintiff and his witness cross examined. The denied that he threatened to shoot Derrick and that he sold drugs. He denied that the shop was dilapidated but that it had been renovated. He testified that he knew Lepale for a period of approximately 18 months prior to the arrest and did not know Derrick. He insisted that he was driven to the Vanderbijlpark police station in a van. Under cross examination he stated that he was driven in a jeep but also admitted that he does not recall the make of the vehicle.

THE DEFENDANTS' VERSIONS.

[19] **Ashok Ramchran ("Ramcharan")**, the sergeant in the South African Police services testified that on 27 August 2011 he received an intelligence report from Sergeant Christein Pieterse ("Pieterse") that a certain Derrick Rolf ("Derrick") was in danger because of the threats directed towards a drug addict by a Nigerian drug lord. Pieterse was the fellow member in the police service and stationed at Vanderbijlpark Police Station. She was attached to the crime intelligent unit. The information was that Derrick was to be killed by fire arms. Upon the receipt of the information he made arrangements to arrest the suspect. He and Constable Thotsejane made arrangements for Derrick to meet the plaintiff. They gave precise instructions to Derrick how to act once he meets with the plaintiff. Thereafter, they travelled to the scene were using a black unmarked BMW X3 SUV. They arrived at the scene. They then took up their place at the arrange scene. When the plaintiff met with Derrick an agreed signal was given. These officers then proceeded to confront the plaintiff. Ramcharan testified that he introduced himself to the plaintiff. He informed him of his business there and requested to search him. The plaintiff agreed. Immediately thereafter, they proceeded to the nearby police station. The purpose of the visit was to afford Pieterse to profile the plaintiff. When the profile work was concluded they left for Sebokeng.

[20] From the VanderbijlPark police station they drove to the plaintiff's shop in Sebokeng. He was the driver and his co-worker and the plaintiff were passengers. The plaintiff gave directions. They were followed by Pieterse and her husband

who were driving an unmarked police vehicle. On their arrival he requested permission to search the premises. The search was done in an orderly manner. He commented that the shop did not appear to be used regularly. The place was dirty. Because they received permission to search they proceeded to do so. During the search he noticed some white fine powderlike stuff. He also noticed two small plastic which contain white powder. They also noticed a safe. The plaintiff was unable to provide the key. They arranged for assistance from the technical unit. Once open they found CD and DVD without labels. The hot plate and the plastic containing the white powder and white solid stuff and certain items were removed from the property. These items were properly secured for analysis as some white powder was found amongst the items confiscated.

[21] After the search at the shop he decided to charge the plaintiff with the possession of illegal substance, possession of the counterfeit CD and DVD. He locked the shop and proceeded to Evaton Police Station to charge the plaintiff and later to Sebokeng Police Station to have the plaintiff detained. On the arrival at the detention centre he and Warrant officer Mofokeng ("Mofokeng") led the plaintiff to holding cells. When the plaintiff was detained he was uninjured with no visible injuries. The plaintiff was also provided with the notice of rights

[22] **Sergeant Lebohang Wellington Thotsejane** ("Thotsejane") testified that he is a constable in the South African Police Service. He confirmed and corroborated the evidence of Ramchran that on 27 August 2011 they received an intelligence from Pietersea a fellow member attached to the crime intelligence unit about the threats directed to a certain Derrick who requested the police assistance. He mentioned

that a team comprising constable Pieterse and Sergeant Pieterse, and Ramcharan participated. During the encounter at the fast food outlet Ramcharan asked for and was granted the requisite permission to search the plaintiff. From there they proceeded to the police station where it took few minutes before they drove to Sedbokeng. They used the same vehicle all the time and Ramcharan was the driver and this witness sat at the back with the plaintiff. On their arrival the plaintiff unlocked and opened the shop. Again the requisite permission to search the shop was granted. He testified that they found the shop untidy and in disarray. The substance and certain items were found and confiscated. He denied the version of the plaintiff about the necklace, gold bracelet and tag heuer watch. He denied that the plaintiff was present during the entire period. He denied the assault allegations.

[23] **Sergeant Christien Pieterse ("Pieterse")** testified that she is a sergeant in the crime intelligent unit of South African Police Service. She explained how this unit work. During 27 August 2011 she received an intelligence from her regular agent. The informer is Derrick. He informed her that a drug lord is threatening to shoot him because he owed him money for the drugs. This information was duly communicated the investigation team but Pieterse decided to attend. At the time she was pregnant and requested the company of her husband who is also an officer in the police service and stationed in Vanderbijlpark. They went to the destination where Derrick agreed to meet with the plaintiff but remained in the background. However, she testified that the plaintiff was alone. She denied that the plaintiff's witness was present.

[24] **Kenalemang Bassie Mothopeng** testified that she was a police officer stationed at Sebokeng Police Station. She stated

her rank and the ambit of her duties. On 27 August 2011 she was on duty and working in the holding cells area. She has been working in that unit for a considerable time and she was familiar with the standing orders. She was in the company of and under the supervision of Warrant officer Mofokeng who has since retired. She testified that she is familiar with the procedure regarding the detention. The procedure demand that that the suspect to be detained must be free of injuries. She also has to inspect the suspect for any visible injuries. Should she observe or be told of injuries she will not detain but will refer the suspect for medical attention. In addition she will make the necessary entry in their records. On the relevant day Ramcharan handed her a warrant and a book from Evaton Police Station. She inspected the plaintiff from her station. The plaintiff was free of injuries and he made no report to her about injuries or assault. Ramcharan and Mothopeng then escorted the plaintiff to the holding cells. She knocked off at 20:00 without any reports. The following day she notice an ambulance which transported the plaintiff to the hospital. She was not informed what the problem was.

[25] Warrant officer Thomas Hermanus Frederick Pieterse ("Pieterse1") , is the member of the South African Police Service and testified that on 27 August 2011 he was in the company of his wife who is also a member of the South African Police Services. They booked themselves on duty at their station because his wife had an information about the illegal and unlawful guns , threats to kill Derrick, and sale possession and use of illegal drugs. The informant was Derrick who is her regular agent. Derrick and the plaintiff had arranged a meeting about the unpaid purchase price of the drugs. They decided to attend the meeting. For their security they requested a back up from other officers. When they secured the back up they

then went to the agreed meeting place. When the plaintiff arrived on the scene the informer gave a signal. Ramcharan and Thotsejane arrested the plaintiff. He did not take any part in the arrest but attended the police station. They went to the police station to drop the informer. He and his wife also attended the search at the shop in sebokeng. He and his wife travelled together in a bakkie and on their arrival he saw the plaintiff alighting from the vehicle he was travelling with Ramcharan and Thotsejane. He and his wife maintained a low profile. The other officers searched his premises for drugs and guns. They were also looking for the documents. He testified that any item that was confiscated was recorded and placed in appropriate evidence bags. He testified about a locked safe and their wait for the expert to come either from Johannesburg or Pretoria to unlock it. After it was unlocked he and his wife left the plaintiff with the arresting officers.

THE CROSS EXAMINATION.

[26] The witnesses were extensively and brutally cross examined. The four first police officers who made the first encounter at the fast foods outlet with the plaintiff denied ever assaulting the plaintiff at the police station or at all. They denied that they stole an amount of R4 500,00 from the plaintiff when he was arrested and detained. They denied that they ransacked the shop and broke the goods of the plaintiff. Both Mothopeng and Ramcharan denied that when he was placed in the cells he had any visible injuries nor did he make any such report.

EVALUATION.

[27] Before I deal with the evaluation I must mention certain fundamentals. These fundamentals are quite often taken for granted. I am unable to find the reason except possibly that "familiarity breeds contempt. The functions of the pleadings

are often taken for granted. The pleadings must be drawn meticulously to properly place the case of the litigants. The plaintiff's attorneys has dismally failed. They adopted a supine attitude. These failures are manifested by the amount of amendments⁴ and the way the prayers are formulated.

THE AMENDMENTS

[28] The first amendment was made in terms of the notice dated 4 November 2013. The essence of the amendment was to correct the numbering of the particulars of claim. The second amendment was made in terms of the notice dated 24 March 2014. The essence of this amendment was first to increase the quantum in respect of unlawful arrest from R400 000,00 to R900 000,00 and to increase the quantum in respect of assault claim from R350 000,00 to R365 000,00. Lastly this amendment was to "amend paragraph 15 in respect of claim 2 by adding the following: 15.3 payment in the sum of R15 000,00 as loss of income over a period of three weeks(consequential damages)." The third amendment was introduced in terms of the notice dated 18 June 2014. The amendments were introduced some amplification to the so-called confiscation claim and to increase the amount from R79 500,00 to R157 889,95⁵ as well as the amplification of the items in Claim 4⁶. The consolidated amended pages relating to the particulars of claim are included in the bundle mentioned in foot note 5. However, the amendment styled "latest amendment" of 31 November 2015 now introduced "claim 5 for loss of income"

[29] The defendants' attorney did not object to these amendments. Even during the pre-trial conference of 24 May 2017 there is no attempts to interrogate the amendment which introduced even new cause of action. As stated above both

⁴ See paginated record pages

⁵ See Bundle " Index to Notices" paginated pages 18-25 and 26-33.

parties adopted the supine attitude. The level of pleading is exceedingly poor. Both attorneys parties approached this matter in a cavalier manner. They paid little or no proper attention to the functions of the pleadings. The pre-trial was nothing but a farce.

UNLAWFUL ARREST CLAIM

[30] I now turn to the claims. It is common cause that the plaintiff was arrested without a warrant. An arrest effected without a warrant of arrest infringes the fundamental rights. But an arrest without a warrant is permissible. The arrest in such circumstances must be justified. The arresting officers must explain why he resorted to such a drastic procedure. The defendants must justify the arrest. They bear the onus .

[31] The evidence the first four witnesses who appeared on the scene is crucial. The arrest was effected by warrant Ramchran. He and other witnesses testified. First on his own behalf and for the other defendants. But there is no evidence placed before me why he resorted to this kind arrest. In my view, the plaintiff was arrested or placed under arrest at the Nandos outlet. The arrest follows the alleged threats. Threats *per se* cannot displace the need for proper explanation for an explanation would also be judged to determine whether the explanation was reasonable. As stated the arresting officer did not mention anything about a warrant in his evidence. Therefore, the submission⁷ by the defendants' counsel that warrant officer Ramcharan had suspicion is misplaced

[32] A warrant is necessary because such an arrest affects the fundamental rights which are enshrined in the constitution of the land. The defendants have failed to discharge the onus on the balance of probabilities. The said

⁷ See paragraphs 181-183 on pages 59-60 of the defendants' heads of arguments.

failure is fatal to the alleged justification. The said defence must fail.

UNLAWFUL ASSAULT CLAIM.

[33] The plaintiff testified that he was manhandled during the arrest and that he was thrown violently into the van when taken to the police station immediately following his arrest. He also testified that at the police station he was put into a room and severely assaulted by the four police officers taking turns. The assault took the form of punching and teargas. He alleges that as a result of these assaults sustained injuries to the head, to the back, to the shoulders, to the arms and legs, to the stomach, buttock. He testified that he even thought he was dead. He also testified that when they drove to the shop he was placed in the boot of the police vehicle. By the way he described the injuries it is fair to infer that the injuries were serious. The police officers denied the allegations. Therefore the plaintiff must prove the assault.

[35] No medical evidence was produced. There is no explanation for the failure to lead such evidence. But such failure is fatal to his claim. I give my reasons below.

[36] In my view, If the alleged assault took place as it was testified, police officers at the detention facilities could observed same. Such injuries demanded the immediate medical attention. The arresting officers denied the assault and denied that they also transported him when he was placed in the boot. It is highly improbable that the assault took place.

[37] The plaintiff and his witness did not impress me. They exaggerated many things. The watch that he alleges is an expensive brand. You cannot obtain it in the streets. The defendants and their witnesses positively impressed me. The version of the plaintiff in respect of the claims that I dismissed was improbable.

UNLAWFUL DETENTION

[38] The detention is the by-product of unlawful arrest. Any detention subsequent thereto must *ipso facto* unless the suspect was brought to court within the time allowed by law. There was no explanation why the suspect was not brought to court at all. He was in detention for a period of seven days. I find that the plaintiff must succeed in respect of unlawful detention.

CONFISCATION OF PROPERTY.

[38] The plaintiff has stated that he had item confiscated during the search. These include a *tag heuer careira* watch, samsung J5 phone, passport chain and bracelet, vodacom device phone, apple-phone. He puts the value of these items at R164 889,90. The two items being the chain and the bracelet are value at R83 890,00. The plaintiff has not explained how he acquired these items save to testified that his friend in Europe occasionally sends him watches to sell for him. He did not produce any proof that he indeed had those items in his possession. It will be recalled that when he left to collect the promised balance of the alleged sale from Derrick he took with him an amount of R4 500, 00. He locked the shop. This indicative that this shop was nothing but a tuck shop. He exaggerated the profitability and the size of the shop. He embellished the assets. In my view, he failed to proof that claim.

MALICIOUS DAMAGE TO PROPERTY.

[40] The plaintiff testified that the search took place without care. Properties were broken. These allegation were denied. The plaintiff testified that when the search and the alleged destructions occurred he was unconscious. Therefore it improbable that he saw who the perpetrators are. He was unconscious when they dumbbed him at the door before the search. Under cross examination he changed his version and stated that he was *semi conscious*. The plaintiff , his witness

did not impress me. The changed the version to suit the situation. I find them unreliable and without any credibility.

LOSS OF INCOME.

[41] As I stated above, that the plaintiff has amended his particulars of claim on several occasions. Regarding been had to the history of the particulars of claim and the amendments thereto, the plaintiff has not amended his claim to include the claim for the claim of loss of income. Accordingly to the particulars of claim, there are four claims.⁸ But in the later part of the said record the claim is included in the prayers⁹. The claim was not properly introduced nor was evidence led to prove this claim. The plaintiff did not produce any evidence of whom employed him nor documents relating to his business. I find his alleged employment and income to be fabrication. Similarly, the alleged watches are also found to be fabrication.

CONCLUSION AND ORDER.

[42] I have considered the entire evidence on merits. First I am satisfied that the defendants have failed to justify the arrest. Nothing is place before me why they arrested the plaintiff. Their evidence did not give any reason. Therefore the claim for unlawful arrest must succeed. The plaintiff was detained in the police cells and hospital from 27 August 2011 until 3 September 2011. The said detention was as a result of unlawful arrest. Similarly, the claim for unlawful detention must succeed. The remainder of the claim must fail because the plaintiff failed to make out the proper case on the balance of probabilities.

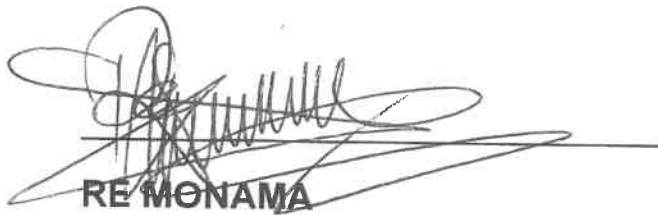
[43] I am accordingly making the order below. In my view, if the matter was given a proper attention, it could have been handled in the civil regional court. Therefore, I make the following order, namely:

⁸ See: The prayers in the Index to Pleading (Bundle 1) pages 10-11 of the paginated record

⁹ See: The prayers on pages 57-59 of the record.

44.1 The defendants are ordered to compensate the Plaintiff In respect of Claims 1 and 3 to the extend is able to prove his damages with costs;

4.2 The Plaintiff's Claims 2, 4 and 5 are dismissed with costs.



RE MONAMA

JUDGE OF HIGH COURT,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the plaintiff: Mr AC Grove
Mills and Groenewald Attorneys,
Vereeniging.

For the respondents: Adv. JT Ntunja
Instructed by: State Attorney,
Johannesburg

Date of first hearing: August 2017, January, March
2018(the trial lasted for several
different days, months and years)

Date of judgment: 28 June 2019