IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)

CASE NO: 905/2010
DATE HEARD: 20, 21/11/2012
DATE DELIVERED: 11/12/2012

In the matter between

THOBELA JULIUS FUNDE **PLAINTIFF**

and

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

ROBERSON J:-

[1] This is an action for damages for invasion of privacy and assault. The plaintiff alleged that during the night of 7/8 April 2007, members of the South African Police Service, acting in the course and scope of their employment with the defendant, unlawfully entered and searched his home, and assaulted him in his home. The defendant pleaded that police officers had received information that the plaintiff was in possession of, and was dealing in, dagga. They searched the plaintiff's house with his permission and dagga was found. The defendant

denied the assault and pleaded that the plaintiff had resisted arrest and minimum force had been used to bring him down on the ground in order to handcuff him.

[2] The plaintiff testified that at about midnight that night (which was the start of the Easter weekend) he was asleep in his bedroom with his wife and child[1]. He was awoken by a knock at the door. Because of the manner of the knocking, he did not have time to dress. Wearing only underpants, he opened the door and saw about eight police officers, among them a woman. They forced their way into the house. He asked them what they were looking for and they said they were looking for firearms. He told them he did not use a firearm and did not even have a knife. They then asked if he used dagga and he told them he did because of his religion (he is a Rastafarian) but that there was no dagga in the house at that time. He was then handcuffed behind his back and his wife and child were told to go to another room. When it was put to him in cross-examination that he was handcuffed because he was considered a flight risk, he said that he had not been aggressive.

[3] One of the police officers said that a person referred to as "Umthakathi Wezindaba" would be called, and this person entered. These words were interpreted as meaning "witch of stories". The plaintiff identified this person in court as Captain Matomane, who later testified on behalf of the defendant. Matomane and another officer forced him to lie on his back. Matomane produced a plastic glove and put it over the plaintiff's head, with the result that he

[1] His wife died two months later.

could not breathe. He lost consciousness and the glove was taken off and he was revived with water. The process was repeated, and endured for half an hour to an hour. He thought he was going to die. He was also pressed down on his shoulders, causing the handcuffs to tighten, and thereby causing pain to his wrists. He felt humiliated at being subjected to this treatment in the presence of his family.

[4] After a while the police officers brought in a parcel and said that they had found it in the yard. The plaintiff asked Matomane to remove the handcuffs and he did so. He was given clothing to put on and was taken away in a white Venture motor vehicle. On the way to Kwa Dwezi police station they came across a youth carrying gin. The police officers ordered the youth to drink the gin, then slapped him and accused him of drinking in front of the police. They also came across a couple in a car and ordered them to go home. They found people drinking beer and broke the beer bottles on the road.

[5] At Kwa Dwezi police station, the parcel they said they had found in his yard was opened, and he saw it contained a number of plastic bags of dagga, known as bompies. Police officers from Kwa Dwezi were then instructed to take him to Kwa Zakhele police station, where he was detained until the following Tuesday. He was taken to court and released on warning. The case was postponed a number of times until the charge was withdrawn on 18 January 2008, because of the failure of the police to appear at court.

[6] He reported the assault at Kwa Dwezi police station and thereafter requested his attorney to pursue a charge of assault on his behalf.

[7] He denied that he had given the police permission to enter and search his home. He denied that prior to the arrival of the police at his house he had sold dagga to an informer and that dagga was found in his house. It was specifically pleaded that the dagga was found in the wall next to a wardrobe and he said that he did not have a wardrobe in his bedroom.

[8] Captain Sakhele Matomane testified that he has been a police officer for twenty-one years. The incident involving the plaintiff took place during the course of a police operation known as Operation Tshisa. The operation had been ordered at provincial level as a result of the high crime rate in Port Elizabeth. Matomane's pocket book reflected that on 7 April 2007 he came off duty at 11h00 and came back on duty at 22h30. He described his activities before coming back on duty as "information gathering", but did not record these activities in his pocket book. Between 19h00 and 20h00 on the evening of 7 April 2007, he was approached by a youth of about eighteen or nineteen years, whom he did not know, who informed him that dagga was being sold at Rasta's house in Kwa Dwezi. Matomane already had an informer in that area, and this youth was recruited by him as an informer only on this occasion, and he regarded him as an informal informer. He gave this informer money to buy dagga from the

house and the informer returned with a packet of dagga. He paid the informer R10.00 from his own pocket because Operation Tshisa did not have a budget for informers. When questioned by the court with regard to the informer, he said that they were looking for information in that area and while stationary (presumably in a vehicle) he called the informer, from amongst people who were passing by. He first engaged the informer in a conversation about sport and then asked him if he knew where dagga was sold in the area. He sent him to buy dagga and waited for about fifteen to twenty minutes before the informer came back with a dagga cigarette.

[9] Matomane, Warrant Officer Sitinga, and other officers, then planned an operation to take place at the house. With regard to obtaining a search warrant, he said if they had delayed they may not have found dagga, and the Magistrate's offices, where they can apply for a search warrant, were already closed. He said that the general rule was that a search warrant should be obtained, but a search can be conducted without a warrant, provided permission is requested.

[10] He could not recall how many police officers went to the plaintiff's house, but in operations of this nature there are sometimes six or sometimes eight officers involved. They arrived there at about 01h00 and found the gate closed. They jumped over the fence and surrounded the house. Matomane knocked on the door, identified himself, and announced that they had come to search. The plaintiff opened the door and he and Sitinga entered. They did not force their

way in and the plaintiff invited them in. He did not tell the plaintiff that he was not obliged to let them in because it may have slipped his mind to do so. He did not explain the plaintiff's rights at this stage. He could not remember what the plaintiff was wearing and could not dispute that he was only wearing underpants. He smelled dagga, and told the plaintiff that they had come to search for dagga which he was selling. He asked the plaintiff's permission to search and the plaintiff gave permission. He also told the plaintiff that they had sent someone to buy dagga at the house and that he could not deny that there was dagga there. At this the plaintiff smiled and took out several bags of dagga from a place between the wall and ceiling board material, which covered the wall. Matomane suspected that there might be more dagga there. He handcuffed the plaintiff in order to secure his arrest and to prevent his escape. He did not remember that the plaintiff resisted arrest. The plaintiff was looking around as if he intended to escape. Matomane demonstrated the plaintiff's movements by turning his head from side to side. At this stage Sitinga's duties were to keep a lookout and cover him (Matomane) while he was searching, because he could not see what was going on behind him. He found further bags of dagga in the same place in the wall, making a total of sixty-four bags altogether. He then informed the plaintiff that he was arresting him for dealing in or possession of dagga. The whole operation in the house took about twenty minutes.

[11] He denied assaulting the plaintiff as alleged. He heard about the name Umthakathi Wezindaba for the first time at trial. To him these words mean

"someone who is bringing beautiful things to people" and not someone to be feared.

[12] The plaintiff was thereafter taken to Kwa Dwezi police station. On the way, Matomane threw away the dagga which had been bought by the informer. When it was pointed out to him that dagga is an illegal substance and someone might have picked the cigarette up and smoked it, he said he had opened the cigarette and scattered its contents. He threw this dagga away because by then they had the dagga from the plaintiff's house.

[13] He was shown extracts from the occurrence book and the cell register of Kwa Zakhele police station, which reflected that the plaintiff's time of arrest was 02h30 on 8 April 2007, and the time of detention was 03h30. He explained this discrepancy by saying he had merely estimated the times he had mentioned, and that time had also been spent opening a docket.

[14] He agreed that he omitted to mention the following facts in his statement in the police docket: the information received from the informer; that the plaintiff produced dagga; and that he found more dagga in the wall. He explained these omissions by saying that he had said the plaintiff voluntarily gave them dagga and that he would explain in court what happened thereafter.

[15] He was unable to explain why the charge against the plaintiff was withdrawn. He received a subpoena and went to court at New Brighton. The case was postponed in his presence and he was told he would be subpoenaed again.

[16] During cross-examination he agreed that there had been another action against the defendant involving an allegation of assault committed by him on 13 April 2007, using the same methods. The case was settled. He said that he had not been on duty at the time he was alleged to have committed the assault. His pocket book, however, did not reflect that he had gone off duty. His explanation for the omission was that perhaps he had forgotten to make the entry because he was tired.

[17] Warrant Officer Sitinga testified. He has been a police officer for twenty years and also participated in Operation Tshisa. On 7 April 2007 his shift began at 19h00 when parade was held at the base. Matomane also attended the parade. He met Matomane later at about 01h00 at their camp and Matomane told him about the information he had received concerning dagga at Kwa Dwezi. He and Matomane and other officers, he estimated there were less than eight of them altogether, proceeded to the house and found the gate closed. They climbed over the fence and he and Matomane, who comprised the “penetration team”, knocked on the door, while the others surrounded the house. Matomane announced that they were the police and the door was opened by the plaintiff.

The plaintiff did not deny entry and Sitinga and Matomane entered. They did so as police officers, because Matomane had introduced them as such. Sitinga could not remember how the plaintiff was dressed because he was following Matomane at the time and was looking around.

[18] Matomane asked the plaintiff for permission to search and the plaintiff agreed. Matomane did not ask the plaintiff about a firearm and told him he was looking for dagga. The plaintiff hesitated and Matomane told him that he had sent a youth to buy dagga there. The plaintiff smiled and was reluctant to go to the place where the dagga was. He then produced dagga from between the wall and the ceiling board. Matomane was not satisfied and thought there might be more dagga. He handcuffed the plaintiff because he was leaving him alone with Sitinga, and because he wanted to secure the arrest. The plaintiff did not resist arrest but was looking around as though he wanted to escape. He was not made to lie down, and was standing while handcuffed. Sitinga was guarding Matomane as well as ensuring that the plaintiff did not escape. It was necessary to guard Matomane because he was going to bend down, and the plaintiff might have kicked him. Matomane found more dagga in the wall.

[19] Matomane informed the plaintiff he was arresting him and explained his rights. Later Sitinga said that Matomane explained the plaintiff's rights when he was about to handcuff him. The plaintiff was not tortured. Sitinga denied that he

had said he was going to call Umthakathi Wezindaba. The meaning he ascribes to these words is an invisible witchdoctor who does wrong.

[20] According to Sitinga they were at the plaintiff's home for half to three quarters of an hour. When referred to the entries in the occurrence book and cell register, he said that it was possible that their time of arrival at the charge office was 02h30, but he also said that this time was wrong.

[21] The plaintiff was taken to Kwa Dwezi police station where a case was opened and the dagga was entered into the SAP 13 register. At this stage the plaintiff was fully dressed. Sitinga did not see Matomane throw a dagga cigarette away on the way to Kwa Dwezi, although Matomane told him that he had a dagga cigarette. Sitinga said that dagga could be thrown away if it was a small quantity.

[22] The plaintiff was charged with dealing in, or possession of dagga. Sitinga did not mention in his statement for the police docket that the plaintiff had produced dagga from the wall, that Matomane had found more dagga, and that the plaintiff had been handcuffed. He did not receive a subpoena to testify at the criminal trial.

[23] With regard to the allegation in the defendant's plea that the plaintiff had resisted arrest and was made to lie down in order to handcuff him, Sitinga said

that there was a mistake because the plaintiff had not resisted and was not made to lie down. He and Matomane had together consulted with the State Attorney.

[24] The plaintiff was a calm, dignified and steadfast witness. His version did not change during cross-examination. Matomane and Sitinga appeared unruffled during cross-examination, but both of them tended to adapt and change their evidence.

[25] It was common cause that a contingent of at least six police officers were part of the operation at the plaintiff's house, that Matomane and Sitinga entered the plaintiff's house, that he was handcuffed, and that he was arrested and detained. There were however mutually destructive versions concerning whether or not the plaintiff gave permission to enter and search, and whether or not he was assaulted.

[26] I am of the view that there was nothing inherently improbable in the plaintiff's evidence. It was submitted that it was improbable that he was tortured for such a long time, but it must be remembered that he estimated the time as half an hour to an hour, and that in view of what he had to endure, it would have been very difficult to be accurate about the length of time. Moreover, the time of his arrest which was recorded as 02h30, was more consistent with his version than with that of Matomane and Sitinga, who both testified that events in the plaintiff's house took a shorter time.

[27] I shall assume in favour of the defendant that Matomane and Sitinga had been given some information about the plaintiff and that they did not randomly choose his house. However, their version of how they came to be there and what went on in the plaintiff's house, was very suspect.

[26] Matomane's evidence about the informal informer varied. Initially he said the informer approached him with information but later he said that he had called him over, and after first talking about sport, asked him if dagga was sold in the area. According to Matomane's pocket book he was off duty at this stage. He threw away the dagga allegedly purchased from the plaintiff. This dagga was evidence. I find it highly improbable in any event that police would throw dagga away, even if it is a small quantity. It is an illegal substance and would need to be officially destroyed. Matomane did not mention the information he received from the informer in his statement for the police docket. This was crucial evidence of dealing in dagga. In my view the conclusion to draw from all these factors is that the evidence about the informer and the purchase of dagga, was a fabrication.

[29] It was put to the plaintiff in cross-examination that the police agreed that he was not aggressive, and that he had been handcuffed because he was considered a flight risk, and because there was only one police officer to guard him while Matomane searched for more dagga in the wall. Matomane and

Sitinga testified to this effect. I find it improbable that Matomane and Sitinga considered the plaintiff to be a flight risk and that this was a reason he was handcuffed. It was agreed that he was not aggressive. If he had tried to escape, Matomane could easily have assisted Sitinga. Sitinga's evidence that the plaintiff might have kicked Matomane while he was bending down was clearly made up on the spot. The demonstration of where the dagga was found showed that it was not necessary to bend down to retrieve it. Moreover, there were several police officers surrounding the house. Matomane's and Sitinga's evidence that the plaintiff was looking around was in itself a very flimsy ground for fearing that he would escape, and was a weak attempt to justify the use of handcuffs. According to them he did not resist arrest. I am therefore of the view that their professed reasons for handcuffing the plaintiff were highly improbable.

[30] In any event, the reasons given in evidence for handcuffing the plaintiff, differed materially from what was pleaded, namely that he had resisted arrest and the police used minimum force to bring the plaintiff to the ground in order to handcuff him. It is most probable that the State Attorney who consulted with Matomane and Sitinga at the same time, obtained this information from them. On the defence version, they were the police officers in the plaintiff's house. In spite of the evidence, including the evidence that the plaintiff was standing while handcuffed, no application was made to amend the plea. The plea supported the plaintiff's version that he was handcuffed and made to lie on the ground.

[31] Matomane's and Sitinga's evidence about permission to enter and search the plaintiff's house was in my view equivocal. In evidence-in-chief Matomane said that the plaintiff opened the door and they entered. In cross-examination this was repeated, and it was only after the plaintiff's evidence that they had forced their way in was put to him, that he said that the plaintiff invited them in. Sitinga's evidence that they went in as police officers suggested that he thought that they did not have to get permission to enter. He merely said that the plaintiff did not deny entry. In the light of this evidence I find it more probable that the plaintiff did not give permission to enter and search his house. This finding is supported by the size and manner of implementation of the operation. Six police officers climbing over a fence, and knocking at the door in the manner described by the plaintiff, is not, in my view, consistent with a request to enter and search.

[32] I find it highly improbable that Matomane and Sitinga, both experienced police officers, would have omitted to mention in their statements for the police docket, crucial events which occurred that night, if those events had actually taken place. They were the only witnesses to the alleged discovery of a considerable quantity of dagga in the plaintiff's house.

[33] For all the above reasons, I am satisfied that the evidence of Matomane and Sitinga concerning the issues in dispute, can safely be rejected as false. I have already mentioned that the plaintiff's evidence was not inherently improbable, and it was corroborated to some extent by the plea. Given that

Matomane's and Sitinga's reasons for handcuffing the plaintiff were false, it is probable that the plaintiff was indeed handcuffed so that he could be tortured in the manner he described.

[34] I therefore find that the plaintiff proved on a balance of probabilities that the police entered his house and searched it without his permission, and that he was assaulted in the manner he described.

[35] This was a serious invasion of privacy. The police illegally entered the plaintiff's home in the middle of the night, when he was asleep with his wife and child. The assault was particularly severe. It may not have left physical injuries, but the experience of not being able to breathe and fearing death, must have been terrifying. One cannot really find the words to describe what the plaintiff must have felt. He was at the mercy of two police officers. He was rendered helpless and impotent in his own home, while his wife and child were present, albeit it in another room. The ordeal endured for some time. Matomane and Sitinga were unrepentant. In my view the amount of R110 000.00 which was claimed was modest, as was submitted by Mr. Dyke, who appeared for the plaintiff. This amount was a globular sum for both the invasion of privacy and the assault. I consider it to be an appropriate award.

[36] There are many reported judgments where damages have been awarded to plaintiffs whose fundamental rights have been breached by police officers,

acting in the course of their employment. These officers have been rightly criticised in these judgments for their failure to comply with their Constitutional obligations. I echo such criticism. The importance of the need for those in authority or positions of power to comply with those obligations is particularly highlighted because of the abuse of fundamental rights which took place in this country's past. Matomane and Sitinga were police officers prior to the enactment of the interim Constitution, followed by the Constitution. One would think that they would have comprehended the enormous shift which took place in relation to the protection of fundamental rights. I commented that they were unruffled during cross-examination. The glib manner in which they stood their ground tells me that they do not have a problem with the notion of torture. They are senior police officers. What sort of message do they send to their juniors? What effect does their conduct and that of police officers who commit similar abuses, have on the morale of the police force? Given the seriousness of their conduct and its wider implications, I believe it necessary to direct that a copy of this judgment be forwarded to the Minister of Police and the National Commissioner of Police.

[37] The following order is made:

[37.1] The defendant is to pay to the plaintiff damages in the sum of R110 000.00, together with interest thereon at the legal rate from date of service of summons to date of payment.

[37.2] The defendant is to pay the plaintiff's costs of the action, together with interest thereon at the legal rate from a date 14 days after date of *allocatur* to date of payment.

[38.3] The Registrar is directed to forward a copy of this judgment to the Minister of Police and the National Commissioner of Police.

_____
J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv B Dyke, instructed by Howard Collen Attorney, Port Elizabeth

For the Defendant: Adv R Pillay, instructed by State Attorney, Port Elizabeth