IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE CASE NO: 32005/03

DATE: 31/3/2005

In the matter between:

PHUTI DANIEL CHAUKE DEFENDANT

AND

D M PATON 1ST DEFENDANT

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

2ND DEFENDANT

JUDGMENT

WEBSTER J

The plaintiff seeks judgment for general damages in the amount of R500 000 arising from his arrest and detention by the first defendant. It is common cause between the parties that the first defendant was, at all relevant times, acting within the course and scope of his employment as a superintendent of the City of Tshwane Metropolitan Police Service.

BACKGROUND

The action arises from an occurrence which was the proverbial storm in a tea-cup. The plaintiff was an acting

superintendent in the employ of the second defendant when he went on leave in December 2002. He was stationed in Central Pretoria, referred to in evidence as zone 6. On his return to his employment on 13 January 2003 he was handed a letter dated 3 January 2003. Its contents were drastic. The letter was from Commissioner M.A. Mmutle, the Chief of Police: Metropolitan Police Department. It reads as follows:

"Mr. P.D. Chauke
Tshwane Metropolitan Police

Sir

ACTING IN THE METROPOLITAN POLICE DEPARTMENT

Notice is hereby given that your previous acting position has been terminated

In view of the staff and organisational arrangements, you have been assigned to act as Constable: Region 3 maximum period of three months till 1 April 2003.

The aforementioned acting is subject to the following conditions:

- *This is a voluntary acting position;*
- *This position does not carry an acting allowance;*
- *You will **only** be remunerated for additional actual business kilometres travelled;*
- *This acting position **does not entitle** you or should not create legitimate expectancies to, in further, claim to be appointed in this position, as this position is currently an acting position in terms of the structure of the Metropolitan Police Department.*
- *Your acting may be terminated with a week's notice;*
- *If you do not accept the position offered to you during this interim phase, it will not influence your final placement in terms of the migration/placement policy;*

- *Accepting of this acting position is without prejudice of existing rights.*

Yours faithfully

COMMISSIONER M A MMUTLE
CHIEF OF POLICE: METROPOLITAN POLICE DEPARTMENT"

Aggrieved by the demotion and transfer contained in the above letter the plaintiff completed a "Grievance Procedure Form" citing the above letter as being a transfer to Region 3 without any consultation with him or his union (the union being the labour or trade union with which he is registered as a member). The grievance form was hand-delivered to the secretary of the plaintiff's then supervisor, K.S.B. Sekhudu on 13 January 2003. It was common cause that this form was agreed upon between plaintiff's union and the defendant as being the official form to be completed by a worker of the defendant and submitted to the defendant in the event of a worker having a grievance. The plaintiff was not on duty on the 14th and 15th of January 2003. He reported for duty at 22hOO on 16 January, 2003. The first defendant who had been on the same level as the plaintiff before the latter went on leave but had been "promoted" to senior superintendent on 3 January 2003 called the plaintiff to his office. The first defendant informed the plaintiff that he had been instructed by Sekhudu to hand a document to him (Exhibit "B") which reads:

"To: P.D. Chauke

Sir,

I have to inform you that I have received a direct order.

This order instructed me to prevent you from entering any operational offices of Region 6 and to also prevent you from entering, using or in any way, come into contact with any of the vehicles used by Region 6.

I therefore order you not to enter the premises of 125 Boom street - the premises currently being utilized by Region 6 and I further order you, not to come within 5 metres of any Metro Police Vehicle used by Region 6 officers.

This order will stay in effect until I have received orders to the contrary of which you will be duly notified

I trust that you will cooperate in this matter.

(Signed)
D.M. PATON - SENIOR SUPERINTENDENT: REGION 6

(Signed)
S.S. NKOMO - COMMANDER: REGION 6"

Paton advised the plaintiff to proceed to region 3 and report there for duty. After a discussion the plaintiff left the first defendant's office and proceeded to a vehicle in which he was to go out on patrol in the execution of his duties. He got into the rear of the vehicle. The driver of the vehicle was one Selepe with E.N. Chauke as the co-driver. Another Metro Police officer who was to the driven to his *home*, namely Patrick Moloba was seated on the back seat. The first defendant came up to the vehicle and placed the plaintiff under arrest. Another Officer Jansen handcuffed him. This took place on the parade ground.

It was common cause that the plaintiff was driven by the first defendant to the Pretoria Central Police Station where he was detained in a cell after his constitutional rights had been read to him. The plaintiff was incarcerated. He was released from custody at about 09h30 on 17 January 2003 on the instruction of the Station Commissioner. The plaintiff was never charged.

DEFENDANT'S PLEA

In their plea the defendants admitted that the plaintiff was arrested on a charge of trespass and for defying the direct instructions from his superior not to climb into the defendant's (sic) vehicle, for verbally threatening the first defendant with death and further for hindering the Metro Police officials in the execution of their duties. It was the defendants' case that the first defendant, as a peace officer had been present when a crime was committed and that he had lawfully arrested the plaintiff. I have my reservations as to whether there exists such an offence as " ... obstructing or hindering the Metro Police in the execution of their duties".

THE ARREST

Section 40 of the Criminal Procedure Act 51 of 1977 empowers a peace officer to arrest without a warrant a person who commits or attempts to commit an offence in his presence. The issue therefore is whether the first defendant was entitled to arrest the plaintiff as he did.

The plaintiff's evidence is clear that he did not accept the transfer to region 3 together with his demotion to the rank of constable. He testified that according to a 'collective agreement' entered into by his labour union and the second defendant the lodging of a grievance effectively placed the parties to the dispute in the same positions they were in prior to the grievance complained of. The effect of this was that he was entitled to remain in region 6 and to retain his rank as acting superintendent for a period of five (5) days. He testified that exhibit "A" and "B" were unprocedural and of no validity. He testified that after his release he did not go to region 3 and has remained at region 6 employed as a cashier.

The first defendant confirmed that he arrested the plaintiff as mentioned above. He made no mention of having been threatened with death by the plaintiff. He testified that when the plaintiff left his office after he had given him exhibit "B" the plaintiff went to a Metro Police vehicle driven by Selepe. At that stage Selepe had been standing outside the driver's door. His co-driver Chauke was seated inside the left front passenger seat. When the plaintiff got into the motor vehicle Chauke alighted and walked to the front of the vehicle whilst Selepe moved away from the vehicle. He believed that these two officials had behaved in this fashion as he, the 1st defendant, had publicly announced that the plaintiff was not to come within five metres of the vehicles used by region 6 officers.

The witness Johan Jansen effectively corroborated the version of the first defendant.

Sekhudu, the Deputy Chief of the Metro Police testified that he was aware of the plaintiff's transfer from region 6 to region 3. This transfer had been part of his plan to expose the Metro Police personnel to policing duties as many of them had been traffic officers before that department was disbanded and replaced with the Metropolitan Police Unit which had far wider powers. He testified that he had authorised the transfer of the plaintiff to region 3 but had not demoted the plaintiff. He testified that the plaintiff was to have been transferred as an acting superintendent and not demoted to a constable. The administrative aspect of the transfer was controlled by one Coetzer. He confirmed that he had interviewed the plaintiff after having seen the letter of the 3rd January 2003. The plaintiff had informed him that he would not move to region 3. He warned the plaintiff against defiance and that he (plaintiff) would be removed to region 6. He confirmed having received the grievance form but did not entertain it as it was supposed to have been given to the plaintiff's new supervisor in region 3. He was unable to state what the outcome of the plaintiff's grievance had been even though it would eventually have had to come to him. He confirmed that the first defendant had consulted him about the plaintiff. He testified that he instructed the first defendant not to allow the plaintiff to enter the premises of region 6 or to use the vehicle of region 6.

Under cross-examination he stated that a certain procedure had to be followed before a member of the Metro Police could be transferred. This procedure involved consultation with the union of which the officer to be transferred was a member. The member concerned had to be interviewed, preferably face to face. He disassociated himself with the second paragraph of the letter dated 3 January 2003, demoting the plaintiff. He confirmed that the condition that reads "*This is a voluntary acting position"* meant that the member concerned was not forced to accept the position to which the member was being transferred and was at liberty to decline it. He stated that the plaintiff could have remained where he was in region 6 and that this would have been acceptable to him.

The question to be decided is the legitimacy of the plaintiff's arrest. It is clear from a reading of section 40 of the Criminal Procedure Act 51 of 1977 that an arrest or detention without a warrant is unlawful unless it falls within the parameters of the section. In an action for damages arising from an arrest it is not necessary for the plaintiff to prove wrongfulness or unlawfulness (Minister van Wet en Orde v Matshaba 1990(1) SA 280 (AD) at 286 B - D). Once an arrest and detention are admitted the onus of proving that the lawfulness rests on the person effecting the arrest (Lombo v African National Congress 2002(5) SA 668 (SCA) at par 32).

There is one aspect that requires an explanation. The Tshwane Metropolitan Police unit was formed about four or so years ago. It comprises the former Traffic Department. The structure has not been formally constituted with the result that only the top echelons of the unit are staffed by personnel who have recognized and specified ranks. The ranks from constable up to senior superintendent have not been properly designated and the personnel have not been given any formal ranks. Consequently personnel are appointed in acting capacities in the various ranks. Hence the rank of acting superintendent held by the plaintiff at the time of the incident.

The evidence of the plaintiff was clear and precise. He refused to accept the transfer and the demotion. It was conceded by Sekhudu that he did not authorise the plaintiff's demotion. He confirmed that there was a consultative procedure that was to be followed before a member could be transferred. That process is a sensible one and is consistent with the concept of transparency, fairness and accords with one of the basic principles of natural justice, that is fairness.

Even though no agreement between the defendant and the plaintiff's union was produced it can be safely accepted that a formal agreement is in place. This is no as the plaintiff's evidence that he has always been a "shop-steward" of the South African Municipal Workers Union at his place of employment with the second defendant was unchallenged. The document at page 28 of

exhibit "A" lists the names of various individuals who were elected shop-stewards as at 23 May 2003, with the corresponding area in which the 2nd defendant has departments. The plaintiff's name appears against the number 89 at page 30 of the bundle of documents, as one of the 8 shop-stewards in the Metro Police. It was common cause that there is a grievance procedure. The plaintiff's evidence that the "Grievance Form" initiates a grievance dovetails with the existence of a formal agreement between the plaintiff's union and the second defendant.

The basic purpose to be served by a grievance procedure is generally the adjudication on a grievance in a controlled, mutually agreed speedy and inexpensive and least disruptive manner. That was the plaintiff's case. There is no doubt whatsoever that the plaintiff filed a grievance on the very day he received the letter advising him of his transfer and demotion. It is common cause between the plaintiff and Sekhudu that the transfer was not done procedurally. Sekhudu's evidence regarding the demotion was, by inferential reasoning, unauthorised and therefore invalid. Sekhudu testified that Coetzer was the official responsible for human resource management with the second defendant. The plaintiff disputed that the signature on the letter of 3 January 2003 was that of the Chief of Police: he referred to the document at page 26 of the bundle "A" and stressed that the signature on the latter document was that of the Chief of Police. Commissioner Mmutle, the Chief of Police was not called to testify. The plaintiff's grievance appears to have been ignored, Sekhudu being

completely unable to explain what became of the grievance. It appears unlikely that there could be no record of the fate of the grievance in the second defendant's records if it was ever entertained. All these facts considered cumulatively appear to have constituted a deliberate, wilful and flagrant disregard not only of existing procedures but a serious violation of the plaintiff's rights. It is my considered view that the plaintiff was within his rights to insist on the resolution of the grievance before he accepted his demotion and transfer.

The first defendant held the same rank as the plaintiff before 3 January 2003. The first defendant was aware when he was given instructions by Sekhudu that the plaintiff had been demoted and transferred from region 6. In the interview the plaintiff made it abundantly clear that he was not accepting his demotion and transfer as well as the ultimatum in exhibit "B". This set of facts clearly establishes that there was a serious dispute relating to the plaintiff's employment relationship more particularly between Sekhudu and the plaintiff. At best for the defendants all that the plaintiff did when the first defendant persisted in going on duty on 16 January 2003, was that he had been guilty of insubordination. Even if that were to be accepted that does not mean that the plaintiff was legitimately barred from the defendant's premises in region 6. Until his grievance had been addressed he was, in my view, legitimately entitled to report for duty at region 6 and he could never be said to be trespassing. This is confirmed by the fact that the plaintiff is still in region 6, albeit as a cashier.

It is clear from the evidence of the first defendant that he was present at his office at 22hOO on 16 January 2003 to prevent the plaintiff from going on duty. Jansen's presence there was no co-incidence. If Jansen was at the parade ground for legitimate reasons, the presence of handcuffs and Jansen's presence at the parade ground after the dismissal of the parade were all too coincidental. These coincidences have a direct bearing on the alleged obstruction and hindering of Selepe and Chauke.

It is significant that in the charge sheet drawn up on 15 July, 2003, no mention is made of the complaint of hindering or obstruction and is not included as one of the acts of misconduct by the plaintiff. Charge 1 and the alternative charge thereto read as follows:

"CHARGE 1

Contravention of:

Clause 3(1)(d) disobeys, disregards or wilfully fails to carry out a lawful standing order, or a lawful order, or a lawful instruction given to him by a person who has authority to give the order or instruction on account of your conduct on 16 *January 2003 by disobeying a direct order not to climb in any region* 6 *vehicle and/or not to enter any region* 6 *property.*

ALTERNATIVE Y

Clause 3(1)(u) conducts himself in a disgraceful improper or unbecoming manner or, is guilty of gross discourtesy towards any person due to your refusal to heed an instruction by disobeying a directs order not to climb in any region 6 *vehicle and/or not to enter any region* 6 *property."*

[Vide page 35 of Exhibit "A"].

This charge deal expressly with the occurrence of 16 January 2003.

Further, the defendants' plea before the amendment was moved and granted at the trial, likewise had no reference to acts of obstruction or hindering Metro Police officials. The mystery about this offence deepens when regard is had to the facts listed below:

(i) The plaintiff was about 10 metres away from the vehicle driven by Selepe when the plaintiff started walking towards it.

(ii) There is no explanation as to why Selepe did not get into the vehicle and drove off except the plaintiff's one and that is that he was supposed to go out on patrol in that vehicle and Selepe was waiting for the plaintiff.

(iii) There is no evidence that any of the other police officials who had been at the parade had left the parade ground for it to be said that Selepe and Chauke were hindered from executing their duties.

(iv) There was no evidence or any indication at the trial that Chauke and Selepe were not available to testify at the trial. They were the only persons who could have explained why they had not driven off before the plaintiff arrived there or at any stage. Equally, they are the only persons who could throw any light on

whether they had been hindered or obstructed, if at all, and in what respect.

The facts listed above are more consistent with the defendants' plea in its form and content before the amendment, and that is that the plaintiff was arrested for *"trespass ... on 2nd defendant's property notwithstanding written and verbal warnings for him not to do so, climbed 2nd defendant's vehicle in non-compliance with direct orders of his superiors at work ... ".*

The witness Sekhudu was clear and emphatic that he wanted to imprint a military style of management as the Deputy Chief of Police. He had expected the plaintiff to proceed to region 3 even without the plaintiff's grievance having been adjudicated upon. Hence his instruction to the first defendant that he should remove the plaintiff from region 6 offices should be come there. On the probabilities there was clearly no offence committed by the plaintiff. The first defendant knew this and must have been overly enthusiastic and eager to satisfy his master, Sekhudu.

To the extent that it may be necessary to comment on demeanour and the question of credibility, I found the plaintiff to be an honest and reliable witness. His evidence was consistent with the facts and the probabilities. I found the first plaintiff to be evasive, unsure of himself and unreliable insofar as it related to the plaintiff having committed any offence in his presence. Where there was a conflict in his evidence with that of the plaintiff I

accept that of the plaintiff as having been more reliable and probable. The evidence of Jansen appeared to be strained - he clearly had been invited to assist arrest the plaintiff had the plaintiff been of a mind to resist arrest. Sekhudu's trade mark was his inability to remember any date or to place any occurrence in any time frame. He clearly had no interest in resolving the plaintiff's dilemma and grievance and wished to treat plaintiff with the old fashioned hostility to trade unionist whose impertinence and insubordination was anathema to military-style discipline and intolerance of Sekhudu. Where his evidence contradicted that of the plaintiff I preferred to accept that of the plaintiff.

I am satisfied on a conspectus of all the evidence that the plaintiff has to succeed on the merits.

I turn now to the question of damages and the quantum thereof. The plaintiff was arrested on the parade ground in the presence of his fellow workers. He held a senior rank as acting superintendent. He had been a senior traffic officer with a service of fourteen (14) years before the advent of the Metro Police Unit. He was handcuffed like a criminal and driven to the charge office of the Pretoria Central Police Station. He was incarcerated for just over nine hours without just cause. His arrest was disseminated in the Beeld newspaper of 22 January 2003 and in the Pretoria News. He exhibited signs of stress and pain when he testified on his arrest and incarceration.

The plaintiff consulted a clinical psychologist, Dr. Visser. His curriculum vitae containing his academic qualifications, professional experience etc appear on exhibit "A" from page 1 thereof - his qualifications and experience are fairly extensive and impressive. He gave uncontested evidence.

Dr. Visser testified that he is a practising psychologist with twenty two (22) years' experience. He consulted the plaintiff and from the symptoms disclosed to him he concluded that the plaintiff suffered a major depression as a result of the traumatic effects of his arrest. He testified that the arrest had affected the plaintiff's life adversely in many ways. He found the plaintiff's condition to be sufficiently serious to arrange with his doctor to administer medication to the plaintiff and for the plaintiff to receive psycho-therapy. The symptoms giving rise to the plaintiff's conditions were:

1. loss of weight - lOkg in one month;
2. serious sleep disturbance;
3. constant thoughts of suicide;
4. problems in his relationship (his wife walked out on him for a certain period);
5. serious abuse of alcohol;
6. outspoken depressed mood;
7. financial worries resulting from salary reduction;
8. sporadic recollections to the night of his detention;
9. increased anxiety level.

As these symptoms had never manifested themselves in the past, Dr. Visser ascribed them to the experiences chronicled above. Of the symptoms listed above those set out in 2, 3, 5, 6, 7, 9 and frustration and aggression as a result of occupational uncertainty and the manner in which this had been handled were still present when the plaintiff consulted Dr. Visser on 5 August 2004. The plaintiff felt that "his name had not been cleaned".

Mr. Malan who appeared for the plaintiff submitted that the plaintiff had proved that the first defendant had maliciously prosecuted him. That the first defendant was guilty of malicious prosecution of the plaintiff cannot be doubted at all. The plaintiff did not, however, claim damages under this head. Mr. Malan submitted further that the incident had led to much mental anguish for the plaintiff and that the publicity of his arrest and detention had damaged his reputation. He submitted that a solatium of R75 000 would be just and fair damages in the circumstances.

Mr. Seima for the defendants, cited various decided cases including Todt v Ipser 1993(3) SA 577, where damages of R4 000 were awarded to the plaintiff who had been arrested and detained overnight; Thandani v Minister of Law and Order 1119(1) SA 702 (E), where the plaintiff, an organiser of a worker's union had been wrongfully arrested and detained for 59 days had been awarded general damages of R22 000; Mthimknulu and Another v Minister of Law and Order 1993(3) SA 432 (E) in which two plaintiffs who

had been arrested unlawfully and detained for 144 days were each awarded general damages totalling R44 000 and R4 000 for malicious prosecution; Tobani v Minister of Correctional Services NO (2000) 2 B All SA 318 (S.E.) in which the plaintiff had been detained for seven months after having failed to respond to his name on the day he was supposed to be taken to court was awarded damages of R50 000 and Manase v Minister of Safety and Security and Another 2003(1) SA 567 in which the plaintiff who had been unlawfully detained for 49 days was awarded damages in the amount of R90 000. He submitted that the damages to be awarded to the plaintiff in this case should be along the line of damages awarded in the above list of cases.

In Thandani v Minister of Law and Order (supra) VAN RENSBURG J commented as follows at 707(B):

"In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. In the words of Broome JP in May v Union Government 1954 (3) *SA 120 (N) at 130F:*

'Our law has always regarded the deprivation of personal liberty as a serious injury'".

The "fundamental rights" referred to by Van Rensburg J in the Thandani case (supra) are now enshrined in the Bill of Rights to The Constitution of the Republic of South Africa, Act 108 of 1996 which " ... *enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".* Section 12 of the Constitution provides:

"12. (1) *Everyone has the right to freedom and security of the person, which includes the right -*

(a) not to be deprived of freedom arbitrarily or without just cause;"

The plaintiff's fundamental rights to freedom, dignity and the security of his person were seriously violated and infringed. This occurred in the presence of his colleagues and those over whom he exercised authority and control. There was no need to subject him to the indignity and ignominy of being handcuffed - the evidence of the first defendant was that the plaintiff had been calm and collected. It can be inferred further from the facts that he neither resisted or behaved in a manner that would have required subduing him or preventing him from escape: No force was necessary to take him out of the vehicle that was being driven

by Selepe or to place him in the vehicle in which he was conveyed to the Police Station.

The approach suggested by Mr. Seima that regard be had to awards in previous cases is a useful guide. It remains nothing more than that. Each case is unique and has to be decided upon its own merits. Two decided cases demonstrate this clearly. In Stapelberg v Afdelingsraad van Kaap 1988(4) SA 875 CPD the plaintiff who had been wrongfully arrested and detained for 3 hours was awarded damages of R10 000. In Ochse v King Williamstown Municipality 1990(2) SA 855 (ECD) the plaintiff there was awarded general damages of R7 500 for his unlawful arrest and detention for one and a half to two and a half hours. The awards in these cases contrast starkly with those in the cases quoted to me by Mr. Seima.

The plaintiff was deeply affected by his experience. Dr. Visser attributed the symptoms complained of by the plaintiff to the humiliation, indignity, anxiety consequent upon extreme humiliation which deeply affected him. I observed the plaintiff as he testified and was being cross-examined. He conducted himself

as a dignified person, humble yet with a bearing of a person of stature. He withstood trying cross-examination that was intended to be provocative. His experience during his arrest and incarceration must have been traumatic and deeply humiliating hence the desire that his name be cleaned.

It was admitted by the defendants that at all material times, the first defendant was acting within the course and scope of his employment as a servant of the second defendant. The second defendant is accordingly vicariously liable for the acts of the first defendant. The order for damages will accordingly be against both defendants.

Mr. Malan submitted that a punitive costs order should be made against the defendants. I do not agree. Punitive costs are not awarded lightly. Generally such costs are awarded to mark the court's disapproval at the conduct of the party against whom such a costs award is made. They *" ... may be awarded on the grounds of an abuse of the process of court vexatious unscrupulous, dilatory or mendacious conduct on the part of the unsuccessful litigant; absence of bona fides in conducting*

litigation; unworthy reprehensible or blameworthy conduct; an attitude towards the court that is deplorable or highly contemptuous of the court; conduct that smacks of petulance; and that is vexatious and an abuse of the process of court". Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa; Fourth Edition, page 719.

None of the above find application in the conduct of the defendants. They were entitled to defend the action - they merely exercised their fundamental legal right. In the circumstances the plaintiff is entitled to ordinary costs.

The following order is made:

Judgment is granted for the plaintiff against the first and second defendants, jointly and severally, the one paying to absolve the other for wrongful and unlawful arrest and detention in the sum of R40 000.00 plus costs of suit.

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of hearing	15/03/2005
Counsel for the Plaintiff	Adv. Malan
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