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

CASE NO: 34537/07

DATE: 27/10/2008

In the matter between:

JERRY JAMES NDHLOVU PLAINTIFF

versus

MINISTER OF SAFETY AND SECURITY DEFENDENT

JUDGMENT

MAKHAFOLA, AJ:

INTRODUCTION:

[1] The Plaintiff has issued summons in this court against the Defendant based on two claims, namely: A and B. Claim A is based on unlawful arrest and detention whereof the Plaintiff has allegedly suffered damages in the amount of R150 000.00 as general damages. Claim B relates to the Plaintiff being wrongfully and unlawfully assaulted by other prison inmates with whom he was held in custody in the police cells of Thulamahashe Police Station.

[2] As embodied in Exhibit "C" paragraph 2 thereof, the parties had agreed that the question of liability should be separated from the ***quantum***. An application for the separation made by the parties was granted and the court proceeded to hear evidence on the question of liability.

ONUS TO BEGIN:

[3] The parties had agreed that the ***onus*** to begin in claim A was on the Defendant and on the Plaintiff in Claim B.

AD CLAIM A (UNLAWFUL ARREST):

CASE FOR THE DEFENDANT:

ALFRED WRIGHT MASHELE:

[4] He is an inspector in SAPS, stationed at Mhala Police Station. He has been in the Police Service for 23 years. He knows the Plaintiff who he had arrested for robbery. After the robbery the complainant had identified the people who had robbed him and identified the motor vehicle used during the robbery, he accompanied the complainant to where the said motor vehicle was, at a mechanic and arrested the mechanic. The mechanic was locked up at Mhala Police Station where he was later interviewed.

[5] The mechanic is Obed Maswanganyi. He reported that the vehicle belongs to Ndlhovu who they traced and found to be James Ndlhovu. At the time he could not find him but they were telephoned by Obed after some days telling them about Ndhlovu who they went to arrest at Accornhoek. He introduced himself to the Plaintiff as an inspector investigating a robbery case against him. He also explained his rights to him, thereafter arrested him and detained him at the Police Station.

[6] The Plaintiff went to court the following day after he had been charged. The Plaintiff was arrested on 30 August 2004.

CASE FOR THE PLAINTIFF:

[7] The Plaintiff closed his case without testifying.

AD CLAIM B (ASSAULT BY PRISON INMATES):

CASE FOR THE PLAINTIFF:

[8] Mr Jerry James Ndhlovu is the Plaintiff who testified that he had instituted two claims before the court namely: claim A for unlawful arrest and claim B for assault.

[9] When he entered the charge-office at Thulamahashe Police Station he was searched by the Police. The following items were taken by the Police: R70.00 cash, and a trousers-belt and was issued a receipt and told that on his release he would received the said items.

[10] After he had entered the police cells, he was again searched by the inmates. The boss of the inmates instructed one of the inmates to search him. The R70.00 receipt was found in his possession that he had deposited R70.00 at the charge-office.

[11] An argument ensued between him and the inmates. Their boss told him that he had handed money at the charge-office but did not want to give them anything. They were going to lift him up 10 times whilst he was facing the sky and 10 times facing down.

[12] At that time the boss would be seated at a corner and would then instruct the inmates to “surrender”. He would then be released from a lifted position to the floor. Whenever that was done to him he would lift up his head so that when falling to the floor his head could not come into contact with the floor. The result was that only his body came into contact with the floor upon falling. This was done to him about five times as far as he can recall.

[13] In the cells he can remember that there were 19 inmates with whom he was detained. Whilst they were lifting him up and letting him fall on to the floor he was crying very loud and they were singing. This ordeal began after he was locked up in the cell. And nobody after him was locked into the same cell.

[14] Although he cannot say precisely when the ordeal ended because he had waken up after fainting, he estimated that the assault could have ended between 01H00-02H00 the following morning of his detention.

[15] He sustained injuries to his chest as he was pointing out and also serious injuries on his spinal cord. The Plaintiff lifted up his lumber jacket to show the court a white coloured support of the spinal cord which has silver iron plates, he was wearing.

[16] The charge-office is about 15 meters away and it is right opposite there which is within the hearing distance of any singing taking place in the cells.

[17] No police officer came to the cells at the time of his ordeal whilst he was crying and the inmates singing. He lost his consciousness because each time he fell on to the floor from the first occasion they trampled on him until the fifth occasion as far as he can recall.

[18] He saw a police officer for the first time in the morning, after he had been critically injured, when they came to count them in the cells. He remembers four police officers who came to the cells at that time.

[19] The Plaintiff was in cell 1 and one Mathebula was from cell 2. In the morning when the police realised that he was seriously injured they hand cuffed him together with Mathebula and with other two injured inmates. They were taken to Mapulaneng Hospital to where they were transported by a police motor vehicle.

[20] A police officer he did not know insisted that he should go to hospital and said he must also open a case against fellow inmates but he refused. He told the said policeman that the previous day, before entering the police cells, he had no injuries. After entering the police cells he was assaulted and he cried, the police could hear that but did nothing to save him. They were just seated in the charge-office.

[21] Immediately he was released on bail, he went to be treated at Mapulaneng Hospital where he was also given medicines. On his own he attended Tintswalo Hospital. The medical doctor who treated him had referred him to Rehema which deals with orthopaedic issues. In March 2006 he was referred to Robs Ferreira Hospital in Nelspruit where he still attends and receives medication.

[22] He is now walking with an aid of a stick. It supports him because when he walks for a long distance he hears a clicking sound at the spinal cord which results in an

excruciating pain. Some times he would need something to lean on in order to endure pain.

DEFENDANT'S CASE:

[23] Russel Sibuyi is an inspector in SAPS who was on duty on 30 July 2004 and 31 July 2004 until he knocked off at 07H00. Whilst on duty he patrolled by walking around the police cells and end where the cells are situated. The police ask whilst they are outside the cells if there is any complaint in the cells by shouting to the inmates. Whilst he was on duty no inmate complained.

JAMES MABUZA:

[24] He is an inspector in SAPS who is stationed at Thulamahashe Police Station. He is 16 years in the Police Service. He took some inmates to Mapulaneng Hospital. On Exhibit "B" the Plaintiff's name Is number 3. He was given a list of prisoners by his commander to be taken to hospital.

[25] He had entered Cell 1 and called two prisoners and one other prisoner asked to be taken home in order to fetch some tablets because he had headache. He informed this prisoner that there are other prisoners who are sick and going to hospital and that he could joint them.

[26] He also went to cell 2 and took another prisoner to the charge-office in order to book them. The waiting person asked him their names. He wrote the names of those to be taken to hospital in the OB. He signed the OB took the patrol van and drove the prisoners to hospital. The only person who complained is the one who said he had headache.

THE LAW:

[27] In MABONA V MINISTER OF LAW & ORDER 1988 (2) SA 654 (SE) at 658F-H the court stated: "It seems to me in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie

something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect was in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[28] Section 40 (1) (b) of Act 51 of 1977 provides: "A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to on Schedule 1, other than the offence of escaping from lawful custody."

[29] In Nkambule v Minister of Law & Order 1993 (1) SACR 434 (T) at 437 i-j the court stated: "Had a reasonable man read the complainant's statement he would not have arrested the plaintiff without clarifying with the complainant the correct dates of the Saturday and Sunday. The correct dates, as we know from an affidavit made by the complainant in October 1988, were 23 and 24 January 1988 respectively. It follows that the two oxen were stolen between 18H00 an the 23rd and 06:30 on the 24th. In the result the Plaintiff could not have stolen the ox he delivered to Avondale on Friday might on 22 January from the complainant."

[30] At 438C: "The remaining question is whether there was an obligation on Van Rensburg to read the complainant's statement of 28 January 1988. In my view the reasonable man would have done so."

[31] In RV Van Heerden [1958(3)] SA 15- (T) at 152 D-E the following appears: "Suspect" and "suspicion" are words which are vague and difficult to define. Dictionary meanings and decided cases were quoted to the court as to the meaning of these words. Save for saying that these suggest that suspicion is apprehension without clear proof, I do not intend to deal with the meaning of "suspect" because it seems to me that the words "reasonable grounds" qualifies the suspicion required by the Section. These words must be interpreted objectively, and the grounds of

suspicion must be those which would induce a reasonable man to have the suspicion.

[32] In Duncan v Minister of Law & Order 1986 (2) SA 805 (AD) at 818 F-H the following is stated regarding Section 40 (1) (b): "The so-called jurisdictional facts which must exist before the power conferred by S40 (1) (b) of the present Act may be invoked, are as follows:

(1) The arrestor must be a peace officer
(2) He must entertain a suspicion
(3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence)
(4) That suspicion must rest on reasonable grounds."

[33] In Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 836G – 837B the sentiments are: in order to ascertain whether a suspicion that a Schedule I offence has been committed is 'reasonable', there must obviously be an investigation into essentials relevant to each particular offence.

ONUS:

[34] In Pillay v Krishna and Another 1946 (II) SA 946 (AD) at 947 the court stated that: "Import and guides in determining upon which party the ***onus*** of proof in any action rests are furnished by the general principles that normally the ***onus*** rests upon the party who asserts the affirmative in substance and upon the party who would be unsuccessful if no evidence were led."

[35] In National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199 the test was stated as follows: "Where there are two stories mutually destructive, before the ***onus*** is discharged the court must be satisfied that the story of the litigant upon whom the ***onus*** rests is true and the other false.

[36] In Duncan v Minister of Law and Order 1984 (3) SA 460 (TPD) at 465 H-I the court states the following: "A lawful arrest in terms of that subsection can be made upon a reasonable suspicion. The word "suspicion" connotes an absence of certainty

and of adequate proof, as does the word “verdenking” in the Afrikaans text. As it was aptly put by Lord DEVLIN in the Privy Council in Shaaban Bin Hussien and Others v Chong Fook Kam and Another [1969] 3 ALL ER 1626 at 1630:
“suspicion in its ordinary meaning is state of conjecture or surmise where proof is lacking: “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of ***prima facie*** proof is the end.”

ARGUMENTS:

[37] Arguments on claim A relate to unlawful arrest of the Plaintiff. It was contended on his behalf that Inspector Alfred Mashele had an obligation to read the complainant’s police statement and apprise himself of the contents of the docket before arresting the Plaintiff. It was further argued that the reading of the complainant’s statement was imperative because the alleged commission of the crime was 30 July 2004 and the arrest was effected on 30 August 2004.

[38] In the opening statement counsel for the defendant placed on record that the arresting officer acted in terms of section 40 (1) (b) of Act 51 of 1977 to arrest the Plaintiff. The arresting officer arrested the Plaintiff without a warrant.

[39] The arresting officer had accompanied the complainant to a place in Accornhoek and found the Plaintiff’s car with Obed Maswanganyi who was repairing the said car. Obed Maswanganyi had informed the police that the car had been brought there by the Plaintiff.

[40] As far as claim B is concerned it was argued on behalf of the Plaintiff that the Defendant bears no knowledge of the Plaintiff’s injuries, but agrees that when detained in the police cells he had no injuries. The Defendant has admitted that it had the duty of care in relation to the Plaintiff whilst he was in custody.

[41] On behalf of the Defendant it was argued that it is common cause that the Plaintiff was assaulted inside the police cells in the evening. It was further submitted that without knowing what was happening in the cells Sibuyi did not execute his legal duty of care.

FACT ANALYSIS AND EVALUATION:

[42] Inspector Mashele is 23 years in the police service. He arrested the Plaintiff without reading the complainant's police statement which is always taken under oath. He did not know that the robbery had taken place on 3 July 2004, and at the time of the arrest he did not have the docket. He concedes under cross-examination that with his experience had he read the complainant's statement he would not have arrested anybody on the strength of it. He further concedes that he had arrested the Plaintiff because he relied on what was told to him by Obed Maswanganyi (the motor mechanic).

[43] He had further conceded that the complainant's statement does not describe the assailants and the vehicle's number plates. But he maintains that the Plaintiff was involved in the robbery, because he obtained this information from the Plaintiff's co-accused who informed him that the Plaintiff's vehicle was involved in the robbery.

[44] He further confirmed under cross-examination that when the Plaintiff was arrest on 30 July 2004 he had no injuries.

[45] From all the facts before court it is abundantly clear that Inspector Mashele did not verify the facts contained in the complainant's police statement before arresting the Plaintiff.

[46] To rely on the information of a co-accused in the case without reading the complainant's statement is gross negligence indicating poor execution of duty on the part of Inspector Mashele. The co-accused, Obed Maswanganyi, did not make a written statement clearly stating under oath the involvement of the Plaintiff in the alleged robbery. To have arrested purely on the say-so of a co-accused neglecting to read the statements of all the three state witnesses namely: the complainant, Bernard Chabalala and Nkhensani Sithole is an unthinkable and expensive mistake.

[47] The information given by Obed Maswanganyi could not be checked against any statement under oath. The arresting officer should have formed a suspicion about the information supplied by a co-accused. He should have exercised more care or demanded a statement under oath which could justify an arrest if it tallies with the

contents of the complainant's statement. This would have been a solid ground to found a reasonable suspicion.

[48] He had no reason to arrest the Plaintiff without a warrant if he had not read the complainant's statement which lacks the description of the assailants as they appeared to the complainant and the full descriptions of the motor-vehicle used in the robbery especially the plate numbers of the vehicle.

[49] Moreover, the police statement where Inspector Mashele wrote down a statement regarding his interview with Obed Maswanganyi conflicts with his evidence in court. On paginated pages 96-97 of Exhibit "B" Obed Maswanganyi does not state anywhere that the Plaintiff was involved in the armed robbery. To testify under cross-examination and say Obed Maswanganyi said the vehicle of the Plaintiff was involved in the robbery, is to misstate facts. In any event the credibility of this witness is damaged and his reliance on Section 40 (1) (b) of the Act to arrest without a warrant, about a month after the commission of the offence, is not justified.

[50] On claim "B" the Defendant admits in its plea that it had the duty of care to ensure the safety of the Plaintiff whilst he was in custody. But the Defendant denies that its members had breached the duty of care by not ensuring the Plaintiff's safety whilst he was in custody.

[51] The assault on the Plaintiff by the inmates is denied in the plea but it is not denied by evidence of Inspector Sibuyi. He admits that he did not enter the cells on the night of 30 July 2004. He did not hear anybody scream from inside the police cell wherein the Plaintiff was detained. When they patrol outside the cells they would ask whilst being outside if there is any problem inside the cells.

[52] Under cross-examination he states that the Plaintiff might have cried but he did not hear him. In the case of emergency the police would rely on the report of the inmates. Police enter the cells only when there is a problem reported by the inmates.

[53] This is clearly dereliction of the duty of care on that eventful night. Not to have entered the cells and check if the inmates were all and well demonstrates nothing other than sheer neglect of a legal duty placed upon the Defendant's members and in particular the patrolling police officer that night and the following morning.

[54] Inspector Sibuyi intimating that it is dangerous to get into the cells during the night confirms the Plaintiff's evidence that no police officer entered the cell where he had been on that night. It can be safely accepted that in ***casu***, the statutory procedures to execute the legal duty of care were not carried out by the police. It can further be accepted that on evidence there was no reason advanced by the police exempting them from executing to the letter their legal duty of care towards the detained Plaintiff.

APPLICATION OF THE LAW:

[55] From the above cited decided cases it is clear that as far as claim A is concerned the arrest of the Plaintiff without a warrant was unlawful. On the balance of probabilities the Defendant has failed to show justification of the arrest based on the provisions of Section 40 (1) (b) of the Act. The Plaintiff has succeeded to prove lack of justification on the part of the police to have arrested him without a warrant.

[56] The evidence relating to claim "B" demonstrates that the Plaintiff's evidence as to how, when and the injuries he suffered cannot be controverted. His evidence about what occurred inside the cell where he was with about 19 inmates remains to be considered in the totality of all the other evidence before court.

[57] IN MINISTER VAN POLISIE V EWELS [1975 (3)] 590 (AD) at H the following appears: "that the duty which rested on the policemen to have come to the assistance of the respondent was a legal duty and it was a failure which had taken place in the course of the policemen's duty that the appellant was liable for the damages claimed by the respondent."

[58] It is clear that once the police fail or omit to execute their duties then that failure or omission, where a legal duty exists, is unlawful. If any person, as the Plaintiff is in

casu, suffers any damages from that omission, surely those who omitted to act must compensate the sufferer.

[59] Section 5 of Act 7 of 1958 provides what is the follow. The function of the South African Police shall be ***inter alia***:

(a) The preservation of the internal security of the union;

(b) The maintenance of law and order;

(c) The investigation of any offence or alleged offence, and

(d) The prevention of crime.

[60] Pursuant to this provision I venture to state that whilst the police were patrolling outside the cells they had the duty to check the inmates in the police cells. If any crime was committed inside any cell their function was to prevent it. There is nothing on evidence that suggests that there was an impossibility to perform their legal duties to prevent the beatings on the Plaintiff that could have been beyond their control. From the evidence of Inspector Sibuyi it is so that at the time of the alleged assault on the Plaintiff he was performing police duties imposed by the law. The duty to act in order to prevent crime of assault on the citizens and the Plaintiff did exist on the part of the police and they failed and omitted to fulfil that duty.

[61] From the totality of the evidence before court, the various pronouncements in the above cited cases and the applicable law in the circumstances of the facts I find as follows:

(1) that the arrest of the Plaintiff by the Police was unlawful because ultimately his case was withdrawn on 1 February 2005 for the lack of a ***prima facie*** case;

(2) that the arresting officer did not analyse and assess the quality of the information at his disposal to check it against the complainant's police statement together with the statements of Bernard Chabalala and Nkhensani Sithole to formulate a suspicion to justify an arrest;

(3) that the arresting officer who had not read the complainant's statement and who was not in possession of the docket should himself have taken a new

statement from the complainant for points to be clarified to assist him formulate a ***prima facie*** and reasonable suspicion to justify an arrest;

(4) that the police were in duty bound to have checked the cells wherein the inmates were detained during their routine patrols;

(5) that the police did not execute the duty of care imposed on them by law, by not checking on the inmates in the police cells in particular to prevent any assault on the Plaintiff and protect him;

(6) that on each claim there is no mutually destructive evidence before court;

(7) that in claim A the Defendant has failed to discharge an ***onus*** of proving the lawfulness of the Plaintiff's arrest;

(8) that in claim B the Plaintiff has succeeded to discharge an ***onus***, on a balance of probabilities, resting on him to prove liability for damages he suffered as a result of the police omissions to execute their duty of care.

In the result, the Plaintiff's actions on claims A and B on liability succeed with costs.

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K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

Advocate for Plaintiff: *Adv. KK Kekana*
Instructed by: *Rammutla-at-law Inc. (HD Rammutla)*

Advocate for Defendant: *Adv. DM Kekana*
Instructed by: *MA Masenamela*

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