REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case no:65356/2012

In the matter between:

KGAOGELO MOTSEI **PLAINTIFF**

VERSUS

MINISTER OF POLICE **DEFENDANT**

AND

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

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Case no:65249/12

In the matter between:

KUTLANO PHEFADU **PLAINITFF**

VERSUS

MINISTER OF POLICE **DEFENDANT**

Coram: **Baqwa J**

Heard: **29 April 2014**

Delivered:

JUDGMENT

BAQWA J

Summary:

In an action for wrongful arrest, detention and assault-onus on defendant to prove lawfulness of actions-upon failure to discharge onus-upon application by plaintiffs for judgment at close of defendant's case-judgment for plaintiffs without hearing their evidence.

Annotations

Case law

Brand v Minister of Justice 1959(4) SA 712 A at 714

Minister of Law and Order v Hurley 1986(3) SA 568(A) at 587-589

Minister van Wet and Order v Matshoba 1990(1) SA 280(A)

Stambolie v Commissioner of Police 1990(2) SA 369 (25C)

Lombo v African National Congress [2002] 3 All SA 577 (SCA); 2002(5) SA 668(SCA) at paragraph 32

Mhaga v Minister of Safety and Security 2001(2) All SA 534 (TK)

Manqalaza v MEC for Safety and Security Earstern Cape [2001] All SA 255(TK)

Minister of Law and Order v Hurley 1986(3) SA 568(A)

Tsose v Minister of Justice 1951(3) SA 10(A) at 18

Smith v Meyerton Outfitters 1971(1) SA 137(T)

Ramsay v Minister van Polisie 1981(4) SA 802(A) at 818

Rex v Jolly and Others 1923 A.D at p179

See Ex Parte Minister of Safety and Security: In re: S v Walters 2002(4) SA 613(CC) paragraph 53 and 54

Govender v Minister of Safety and Security 2001(4) SA 273(SCA) 2001(2) SACR 197(SCA)

Macu v Du Toit 1983(4) SA 629(A)

Malahe v Minister of Safety and Security [1998] 4 All SA 246(A); 1999(1) SA 528(SCA)

Gordon Lloyd Page and Associates v Rivera 2001(1)SA 88 SCA at 92-93

Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403 (A) at 409 G-H

Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26 (A)

Corbridge v Welch (1892) 9 SC 277 at 279

Louw v Minister of Safety and Security 2006(2) SACR 178(T) 186a-187e

Dreyer v Sonop Beperk 1952(2) SA 392(O)

Union Government v Sykes 1913 AD 156 at 173

Goosen v Stevenson 1932 TPD 223 at 226

[1] This is a claim for damages for wrongful arrest and detention and assault against the Minister of Police who is being sued in his capacity as the Head of the South African Police Services. It is alleged by the plaintiffs that the arrests, detention and assault was committed by members of the South African Police Services acting with the course and scope of their employment by the defendant.

[2] Summons were issued separately by the plaintiffs under two case numbers. It was however agreed by the parties that the two cases be heard at the same time in order to curtail proceedings as the incidents which gave rise to the two cases happened at the same time and place and that the parties would essentially rely on the same set of witnesses to prove or disprove the cases brought by or against them.

[3] By agreement between the parties the issues of liability and quantum were to be separated in terms of the provisions of Rule 33(4). I accordingly separated the issues and postponed the aspect of quantum **sine die**. The matter proceeded on the question of defendant's liability only.

[4] The defendant accepted the duty to begin after which he proceeded to call five witnesses. He thereafter closed his case whereupon plaintiffs applied for judgment in their favour.

[5] <u>Background</u>

5.1. Four members of police were patrolling in two vehicles in the Mabopane area in the early hours of 2 September 2012 at or near Morula Sun when they came upon a group of about four to ten people walking on foot along the Lucas Mangope Highway. They stopped to search them. Whilst busy with the

searching, a maroon Toyota Corolla came to a stop on the opposite side of the road. Three male occupants alighted from the vehicle and walked to the spot where the search was taking place. Upon arrival they accused the group that was being searched of having fought with them and stealing their wrist watch. The two groups then accused each other of possession of a firearm. The policemen decided to order the two groups to lie down to enable them to search for the firearm.

5.2. The second group did not lie down. One of the policemen grabbed the driver and searched him. No firearm was found. The police escorted him towards the Toyota Corolla vehicle with a view to searching it. They could not do so due to interference by the two plaintiffs who tried to grab the driver away from them. They also obstructed access to the vehicle by closing the doors which the police were trying to open.

5.3. The police then tried to arrest the two plaintiffs and in doing so got hold of Motsei who resisted the attempt to take him to the police van. Phefadu tried to record the police action using his cell phone but this was knocked to the ground by one of the policemen. Phefadu was also shouting obscenities to the policemen. Motsei, during the grappling with the police managed to get underneath the police van. The police tried to pull him out but their efforts were in vain. He later crawled out from underneath the van an ran away only to come back after a shot while.

[6] Arrest and detention

6.1.Section 40 of the Criminal Procedure Act 51 of 1977 provides the list of offences where police officers may arrest offenders without a warrant. It states that the peace officer must entertain a suspicion that the arrestee committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds. The rationale for this stringent approach is that in most claims for damages at common law for wrongful arrest, the courts have always adjudicated upon the requirement for such a claim that the defendant acted without reasonable and probable cause for effecting the arrest. There

are a myriad judicial, academic and media reports about the public disquiet on the abuse by some peace officers of the provision of section 40(1) because they arrest persons merely because they have the 'right' to do so but where under the circumstances an arrest is neither objectively nor subjectively justified.

6.2. The liberty of an individual is constitutionally enshrined in the right of freedom and security **section 12 of the Constitution of the Republic of South Africa Act 108 of 1996**. This point was restated by Bertelsman J in **Louw v Minister of Safety and Security 2006(2) SACR 178(T) 186a-187e** that an arrest is a drastic measure invading a personal liberty and it must be justifiable according to the demands of the Bill of Rights..'' *'' [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned.''* The Constitution does not espouse a dispensation of arbitrary deprivation of freedom of movement and security. The court authoritatively cited the case of **Mhaga v Minister of Safety and Security 2001(2) All SA 534 (TK)**, where the court held that in a case where a police officer had arrested and detained a person, once the arrest and detention is admitted, the onus of proving the lawfulness thereof rests on the State.

6.3. Arrest and detention is **prima facie** wrongful and unlawful and it is therefore for the defendant to allege and prove lawfulness of the arrest or detention.

See Brand v Minister of Justice 1959(4) SA 712 A at 714

Minister of Law and Order v Hurley 1986(3) SA 568(A) at 587-589

Minister van Wet and Order v Matshoba 1990(1) SA 280(A)

Stambolie v Commissioner of Police 1990(2) SA 369 (25C)

Lombo v African National Congress [2002] 3 All SA 577 (SCA); 2002(5) SA 668(SCA) at paragraph 32

6.4. An arrest can be effected without a warrant and is lawful if, at the time of the arrest, the plaintiff has committed an offence in the presence of an arresting officer who has a reasonable belief that the plaintiff had committed a Schedule one offence. The defendant has to show not only that the arresting officer suspected the plaintiff of committing the offence but also that the officer reasonably suspected the plaintiff of having committed a Schedule one offence.

Mhaga v Minister of Safety and Security 2001(2) All SA 534(TK)

Manqalaza v MEC for Safety and Security Eastern Cape [2001] All SA 255(TK)

6.5. The principle that a defendant must justify an arrest without a warrant is also applicable where the arrest allegedly took place in terms of a statutory authority.

Minister of Law and Order v Hurley 1986(3) SA 568(A)

6.6. An honest belief in the legality of the arrest or detention is no defence.

Tsose v Minister of Justice 1951(3) SA 10(A) at 18

Smith v Meyerton Outfitters 1971(1) SA 137(T)

Ramsay v Minister van Polisie 1981(4) SA 802(A) at 818

A defence available to the defendant is justification or proof of lawfulness of the crime.

6.7. Physical interference, which affects a person's bodily intergrity constitutes assault.

In **Rex v Jolly and Others 1923 A.D at p179**, the following definition of assault, taken from an early edition of Gardiner and Lansdown, was said by Innes C.J to appear to be 'satisfactory for all practical purposes':

''The act of intentionally and unlawfully applying force to the person of another, directly or indirectly, or attempting or threatening by any act to apply

that force, if the person making the threat causes the other to believe that he has the ability to effect his purpose."

6.8. The onus of alleging and proving an excuse for, or justification contained in section 49(1) of the Criminal Procedure Act (defence of necessity where force was necessary in order to effect a lawful arrest or to prevent an escape from arrest), rests on the defendant.

See Ex Parte Minister of Safety and Security: In re: S v Walters 2002(4) SA 613(CC) paragraph 53 and 54

Govender v Minister of Safety and Security 2001(4) SA 273(SCA) 2001(2) SACR 197(SCA)

Macu v Du Toit 1983(4) SA 629(A)

Malahe v Minister of Safety and Security [1998] 4 All SA 246(A); 1999(1) SA 528(SCA)

[7] Judgment at close of plaintiff's case

Absolution from the instance is explained by De Villiers CJ in the case of **Corbridge v Welch (1892) 9 SC 277 at 279** where he stated as follows;

''By long practice in the courts of South Africa ''absolution from the instance" has acquired a wider range than it possessed in the Dutch Courts. The latter courts confined this form of judgment to those cases in which a plea in abatement would be successfully pleaded according to the practice of the English Courts…[i]t has been a constant practice to grant absolution in cases where the plaintiff has not established the facts in support of his case to the satisfaction of the court. At first it was treated as equivalent to a nonsuit, and confined to cases in which evidence had been given for the plaintiff only. In course of time, however, it was extended to cases in which evidence for the defendant had also been given. It was found convenient to have a form of

judgment which would enable the plaintiff to take fresh proceedings without exposing himself to a plea of ***lis finite****.''*

Rule 39(6) provides as follows:

''(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of plaintiff or his advocate.''

In terms of this rule, after the plaintiff has closed his case, the defendant, before commencing his case, may apply for the dismissal of plaintiff's claim. The applicable approach was enunciated by Harms JA in **Gordon Lloyd Page and Associates v Rivera 2001(1)SA 88 SCA at 92-93**

''The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403 (A) at 409 G-H** *in these terms:*

'…(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. ***(Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307(T).'***

This implies that a plaintiff has to make out a ***prima facie*** *case in the sense that there is evidence relating to all the elements of the claim-to survive absolution because without such evidence no Court could find for the plaintiff (****Marine & Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26 (A) at 37G-38A****; Schmidt Bewysreg 4th ed at 91-92). The test has from time to time been formulated in different terms, especially it has been said that the Court*

*must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (**Gascoyne (loc cit)**)- a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (**Ruto Flour Mills**). Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or Court. Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interests of justice.''*

The established criterion for ascertaining whether or not a plaintiff had adduced sufficient evidence to avert a ruling of absolution from the instance (prima facie evidence, prima facie proof or prima facie case), as espoused by the dictum in **Gascoyne v Paul and Hunter 1917 TPD 170** is entangled with ambiguity. In **Dreyer v Sonop Beperk 1952(2) SA 392(O)** the court described the situation thus:

*'There is no doubt that the amount of evidence which will be regarded as prima facie evidence in a case depends very much on the circumstances. It was pointed out by Sir James Rose-Innes in the case of **Union Government v Sykes 1913 AD 156 at 173**: 'The important point is that less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required…'' The concept of prima facie proof is better understood by the exposition given by Tindall J in **Goosen v Stevenson 1932 TPD 223 at 226** that;*

''If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then, in such circumstances, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof.' The question is whether the evidence given in this case amounts to prima facie evidence in that sense, and whether, in the absence of an answer, it amounts to sufficient proof.''

The test is similar where a defendant upon whom the onus rests fails to lead such evidence in discharge of that onus with the result that a reasonable man could not come to the conclusion that it might be accepted, the Court is entitled to give judgment for the plaintiff.

Herbstein and Van Winsen-The Civil Practice of the High Courts P20

[8] Application of the law to the facts

8.1. **In casu**, the defendant had to establish the lawfulness of the arrest and detention. In doing so he tendered the evidence of three of the arresting officers. Their evidence was to the effect that there was an allegation regarding the possession of a firearm by a member or members of the group that they were searching for drugs and weapons when three other males arrived during the search. These three male also alleged that the group that was being searched possessed a firearm. There were counter allegations concerning possession of a firearm. This information triggered a search by the police officers of both groups.

8.2. What is to be noted is that there was no inquiry as to who exactly had possessed the firearm and there was no consent given for the search. This happened against a background of the defendant's witnesses having admitted that they were conducting random searches in a crime prevention operation. The defendant's witnesses Moloi and Kola admitted that they did not suspect the plaintiffs and associates to have committed any crime. In the circumstances, any purported suspicion leading to the arrest could not have been formed on reasonable grounds.

8.3. The defendant's pleaded case is that the plaintiffs were arrested on the statutory authority accorded to the police officers by section 67 of the South African Police Service Act, 1995 (Act no 68 of 1995).

8.4. The allegation by defendant is that plaintiffs interfered with the police in the execution of their duties. A most superficial examination of the

surrounding facts gives a lie to this allegation. According to Moloi and Kola, plaintiffs interfered with them when they were trying to search the Toyota motor vehicle. Plaintiffs closed the doors of the motor vehicle as the police officers tried to open them in order to search. This triggered the decision to arrest the plaintiffs. According to Constable Papo the decision to arrest plaintiffs was triggered by the plaintiffs trying to pull the driver Kenneth away as he was being led to the motor vehicle. He states that the arresting officers never reached the motor vehicle. The arrest of plaintiffs gave rise to this action. There are two irreconcilable versions of how the arrest occurred. The defendant therefore establishes two prima facie cases on the same facts.

8.5. Counsel for the defendant has sought to minimise these contradictions by defendant's witnesses as being immaterial. This I do not accept. Cumulatively the contradictions in my view go to the foundation of the defendant's defence. Taking into account that defendant has closed his case there can be no further opportunity to reconcile the conflicting versions in the defendant's case.

[9] The testimony of the defendant's witness is riddled with inconsistencies and contradictions.

9.1. They all testified that they observed a group of pedestrians walking alongside the Lucas Mangope Highway and they stopped to randomly search the group without any suspicion of the group having committed an offence. The search was random to look for drugs or weapons. Moloi and Kola testified that they were walking alongside the road. Papo testified to the contrary that the pedestrians were walking in the middle of the road and disturbing traffic and causing a disturbance.

9.2. Moloi testified that Motsei had a bloody shirt and some blood on his head and that Phefadu had blood on his lip. Kola testified that street-lighting was good and visibility clear. According to Kola he only saw blood on Motsei's head and blood on the lip of Phefadu. Papo on the other hand testified that

Motsei was not wearing a shirt and had blood on his ear whilst he did not see any injuries on Phefadu.

9.3. They all testified that the driver of the vehicle, Kenneth was escorted to his motor vehicle. Moloi and Kola testified that it was them who did the escorting whilst Papo testified that it was Papo and Kola not Moloi.

9.4. Moloi testified that he searched the driver only after he grabbed the driver by the arm and forcefully searched him. It was only then that the driver co-operated. Kola and Papo denied seeing Moloi grabbing the driver by the arm and seeing Moloi search him.

9.5. Moloi and Kola testified that when they got to the vehicle they opened the doors and that Motsei and Phefadu kept on closing the doors every time they opened them. Papo, however, testified that he and Kola took the driver, but that they never came as far as the vehicle. He denied that the doors of the vehicle were opened by Moloi and Kola and then closed by Motsei and Phefadu. According to him they never got to the vehicle.

9.6. Moloi and Kola testified that they decided to arrest Motsei and Phefadu for interfering by keeping on shutting the motor vehicle doors. Papo testified that they decided to arrest Motsei and Phefadu because they were trying to get the driver away from the police and that there was no interference at the vehicle because they never reached the vehicle.

9.7. They all testified that Motsei crawled underneath the police van. Moloi testified that he, Kola and Papo tried to pull Motsei from under the vehicle by his legs. Papo said that Moloi and Kola pulled him by his shoulders and that he only joined them once he had finished searching the pedestrians.

9.8. All the witnesses had filed affidavits regarding the incident into the police docket. Kola testified that he , Moloi and Papo sat together during the drafting of the affidavits. Under cross-examination he admitted that they compared notes and discussed the events in order to elicit the best grammar in recording the statements. Papo denied the sequence of events. He testified that Moloi was in the cells, Kola in the station and he in the office. He denied

discussing grammar with any of the members. What has been notable is that the affidavits were identical, word for word and paragraph by paragraph.

[9.9] An affidavit is a statement under oath regarding the observations of the deponent regarding any set of facts. It is not meant to contain the observations of others hence the swearing to the veracity thereof by the deponent. These were police officers who commissioned each other's affidavits and who ought to have understood the gravity of making a statement under oath. The alleged collaboration in the making of the statements and the contradictions regarding the manner in which they were produced is further proof not only of the mendacity of the witnesses but also of the unreliable nature of their evidence.

9.10. The only conclusion I can therefore come to is that the arrest and detention of the plaintiffs was not based on the reasonable grounds and was therefore not lawful. The defendant has therefore failed to establish an essential element of their defence: lawfulness.

[10] Assault

Regarding the question of assault, the evidence of warrant office Makgale is to the effect that both plaintiffs had severe injuries which included swollen faces, bruised eyes and when he saw them in the afternoon of 2 September 2012 and that they had bloodied clothing. They had to be taken to receive medical attention. In the pre-trial conference the application of force was admitted even though defendant alleged that such force was applied in order to effect an arrest.

[11] In the matter of **Hodgkinson v Fourie 1930 (TPD) 740 at 743** the Court stated as follows:

''At the close of the case of the one side upon whom the onus lies, the question which the judicial officer has to put himself is : ''is there evidence on which a reasonable man might find for that side.''

If the evidence is not only not convincing but actually found by the trial court to be utter fabrication, then it is evidence on which a reasonable man would not check find, and the Court would then be perfectly justified in granting absolution.''

[12] The Court thus confirmed the converse of absolution at the end of the plaintiff's case, namely, that judgment can be sought at the end of a defendant's case where the onus rested on that defendant without evidence being led by plaintiff and without plaintiff closing its case.

[13] Counsel for the defendant has sought to persuade the Court to counter balance the position in which the defendant finds himself by considering certain inconsistencies in plaintiff's pleadings. At this stage the application for judgment in favour of the plaintiffs is based upon the failure by the defendant to prove justification by tendering evidence that does not establish the lawfulness of his actions. The tendered evidence however comes short and fails to establish a **prima facie** case. The onus on the defendant is accordingly not discharged. I cannot as counsel submits bring to bear speculative considerations regarding evidence that has not yet been tendered by plaintiffs. That would not be applying the test referred to in the **Hodgkinson** case properly.

[14] <u>Costs</u>

13.1. During the pre-trial stages defendant was informed by plaintiffs that should it proceed to conduct the proceedings in the manner they did, a punitive costs order would be sought against defendant.

The conduct referred to was pertaining to the fact that the defendant only discovered after being compelled to do so. He also had to be compelled to furnish a reply to plaintiff's request for further particulars and to provide a reply to plaintiff's Rule 35(3) application.

13.2. Plaintiffs' counsel has pursued the application for punitive costs and this has been opposed by the defendant. I have considered the matter and I agree with defendant's counsel that plaintiff would be covered for costs in the court orders compelling defendant to comply as aforesaid. Moreover, plaintiff could have applied for defendant's defence to be struck off in terms of the Uniform Rules of Court upon failure to comply. This would have led to curtailment of proceedings and enabled plaintiffs to obtain the relief sought without much ado. Plaintiffs did not bring such an application and it would be an inversion of the rules to grant a punitive costs order at this stage. I am accordingly of the view that party and party costs should be awarded.

[15] In the result the following order is made:

15.1. Judgment is granted against the defendant as follows:

15.2. The defendant is liable for 100% of the agreed or proven damages of the plaintiff resulting from plaintiff's unlawful arrest, detention and assault which occurred on 2 September 2012.

15.3. The remaining issue of quantum is postponed **sine die** to be decided or agreed upon at a later stage.

15.4. The defendant is ordered to pay the plaintiff's costs of suit to date on a party and party scale in respect of the determination of merits on the High Court scale.

15.5. Should the defendant fail to pay the plaintiff's party and party costs as taxed or agreed within 30 (thirty) days from the date of taxation, alternatively

date of settlement of such costs, the defendant shall be liable to pay interest at a rate of 15.5% per annum and any outstanding amount, as from and including the date of taxation.

15.6. The plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraph 15.5 above, serve the notice of taxation on the defendant's attorneys and shall allow the defendant fourteen court days to make payment of the taxed costs.

15.7. The taxed or agreed costs, as referred to above, shall be paid into the trust account of Gildenhuys Malatji Incorporated, ABSA Bank, Brooklyn Branch, Account Numer […], Branch Code 335345 under Reference: [….]

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S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the first plaintiff:	Adv A Vorster
Instructed by:	Gildenhuys Malatji Attorneys
Counsel for the second plaintiff:	Adv JC Van Eeden
Instructed by:	Gildenhuys Malatji Attorneys
Counsel for the respondent:	Adv P Nonyane

Instructed by: State Attorney