




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:96776/2015

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED. NO/ YES
<div style="display: flex; justify-content: space-between;"> <div style="width: 30%;"> <u>15</u> JUNE 2022 DATE </div> <div style="width: 60%; text-align: center;">  SIGNATURE </div> </div>	

In the matter between:

Fanka Fanky Issac Makopo

Plaintiff

And

Minister of Police

Defendant

JUDGMENT

MAKHOB A J

1. The plaintiff is claiming damages against the defendant for unlawful arrest and detention on the 11th January and 14th February 2015 respectively. The two claims under case number 9677/2015 and 96776/2015 were consolidated.
2. The plaintiff was first arrested on the 11th February 2015 and released on the same day. He was again arrested on the 14th February 2015 and released on the 16th March 2015. On both instances the plaintiff was arrested without a warrant of arrest.
3. It was agreed between the parties that since the onus rests with the defendant to establish the lawfulness of the plaintiff's arrest. The defendant called two witnesses to testify.
4. The first witness called was Busani Skhosana who testified that on the 10th January 2015 he was driving his motor vehicle going to a village called Mteti in Mpumalanga province. He noticed a vehicle driven by the plaintiff and it was following him. This vehicle bumped the rear of his vehicle and he stopped. The passenger travelling with the plaintiff that is Mr Nkwana approached his vehicle. He heard Mr Nkwana informing the plaintiff that he (Mr Skhosana) was travelling alone.
5. Upon hearing this Mr Skhosana thought it was a robbery "*Hijacking of his vehicle*" and he decided to run away. Mr Nkwana chased him and tripped him and he fell.
6. He pleaded with the plaintiff and Mr Nkwane he asked them to call the police. The plaintiff told him that he is a police officer. The plaintiff told

him that they must go to Kuaggafontein police station. Mr Skhosana told them that the police station that has jurisdiction is Siyabuswa police station.

7. They tied him with a tie when he asked why he was told that it is because he tried to run away. They drove away with him, Mr Nkwana followed the plaintiff with Mr Skhosana's vehicle. When they passed the police station, Mr Skhosana asked why is the plaintiff driving past the police station.
8. Eventually they arrived at a tavern in Moloto village where he was taken into the tavern. Inside the tavern there was a traditional healer (sangoma) the plaintiff and Mr Nkwana spoke to the traditional healer. The plaintiff and Mr Nkwana were in another room talking to each other and he could not hear them
9. The plaintiff emerged from this room in possession of a sjambok and a knife. The plaintiff requested him to undress and he hit him with a sjambok while Mr Nkwana undressed him.
10. The plaintiff grabbed his genitals and started cutting his genitals with a knife. He tried to fight him off because it was painful but to no avail. Whilst the plaintiff was cutting his private parts there was a knock at the door and it was three men who wanted to buy cigarettes. One of these men asked him whether he was assaulted or involved in an accident. The plaintiff and Mr Nkwana reprimanded them but the three men started shouting.
11. The plaintiff and Mr Nkwana spoke to each other and he overheard them saying *"lets drop this thing in Moloto road."*

12. The plaintiff brought to him a note book and asked him to write in IsiNdebele. The plaintiff could not understand what was written, he became angry and assaulted him with a sjambok.
13. He was taken away from the tavern and left at Moloto road. He was assisted by an unknown police officer who summoned an ambulance which took him to hospital.
14. In hospital he was given a J88 form. From the hospital he went to the police station to register a case against the plaintiff and Mr Nkwana. He took the police to the plaintiff's house. In the presence of the police and the plaintiff he showed the police the chair he was seated when the plaintiff assaulted him and the same chair was still full of blood. The plaintiff assaulted him in the presence of the police accusing him why he brought the police to his house. A female police officer reprimanded the plaintiff not to assault him.
15. He was ordered by the police to open the case at the police station. The plaintiff and Mr Nkwana were also taken to the police station. The plaintiff and Mr Nkwana were both placed in a room together and he was in a separate room.
16. At the police station a police officer brought the plaintiff and Mr Nkwana in a room where he suggested that he should not open a case against the plaintiff.
17. Mr Skhosana protested to the suggestion and pointed out to the officer that he was injured by the plaintiff. The officer shook hands with the plaintiff and Mr Nkwana and said "*this is not a court*" and Mr Skosana was made to sign a document.

18. All three of them travelled in a police van where the vehicle was kept by Mr Nkwana. When they arrived there Mr Skosana asked them for money for petrol. They refused to give him money for petrol and complained that he caused them too much trouble and they had to work overtime because of him. That is the last time he saw the plaintiff and Mr Nkwana.
19. The wound on his genitals swelled and became septic. He was admitted in hospital from 19th January 2015 until towards the end of February 2015. On his discharge from hospital he had to go to hospital every day to have the wound cleaned.
20. After he was discharged he went back to the police station to open the case again against the plaintiff and Mr Nkwana. He pointed the plaintiff and Mr Nkwana to the police officer Tladi who arrested both of them.
21. In addition, Mr Skhosana testified that the wound is still septic he is not completely healed. In cross- examination it was put to Mr Skosana that he was never assaulted in fact he was taken to the tavern in order to sign the agreement between the plaintiff and himself. Mr Skosana denied the version of the plaintiff.
22. In re-examination he testified that when he went to hospital the first time he was taken home by ambulance and the following day he went to fetch his vehicle at Mr Nkwana's house.
23. The second witness to testify for the defendant was Sergeant Tladi who has been a police officer for fourteen years. He testified that he is the investigating officer of the case where Mr Skhosansa is the complainant.

24. He received the docket for assault with the intent to cause grievous bodily harm and he spoke to Mr Skhosana. Mr Skhosana took him where the suspects were and he arrested him.

The defence case was closed.

25. After the close of the defence case counsel for the plaintiff asked for absolution from the instance arguing that there is no justification for the arrest of the plaintiff. Assault with the intent to do grievous bodily harm is not schedule 1 offence and an officer cannot arrest and detain someone for assault with the intent to do grievous bodily harm. The application was opposed by counsel for the defendant.
26. The court refused the application because the onus is on the defendant and the court cannot after the defendant has led evidence give judgment for the plaintiff unless and until the plaintiff closes his case.¹
27. The plaintiff testified that he is an educator by profession. On the 10th January 2015 he collided with a vehicle driven by Mr Skhosana the first witness for the defendant. Mr Skhosana after the collision failed to stop but he followed him until Mr Skhosana's vehicle collided with a school fence.
28. Mr Skhosana alighted from the vehicle and ran away. He chased him until he caught him. He was travelling together with Mr Nkwana. He asked Mr Nkwana to drive Skhosana's vehicle while he travelled in his vehicle together with Mr Skhosana on their way to the police station.

¹ Erasmus D1-534 Volume 2 (iii) Rule 39

29. Whilst travelling Mr Skosana pleaded with him not to report the matter to the police as he was drunk because his wife had left him and he has no drivers licence. Mr Skhosana agreed to write and sign the agreement how he was going to pay for damages to his vehicle.
30. Mr Skhosana wrote in isiNdebele that he will pay the damages in two instalments of R 2500.00 (two thousand five hundred) to the total being R 5000.00 (five thousand rand) he will fetch the vehicle after the last instalment.
31. Whilst at his tavern three men came to the premises to buy cigarettes. They saw Mr Skhosana and asked him whether he was okay. Mr Skhosana replied that he was fine. Mr Skhosana told him that he has relatives nearby. He then suggested to him to go sleep there since it was late at night but Mr Skhosana refused. The plaintiff testified that he then asked Mr Nkwana to use Mr Skhosana's vehicle and take him to the road.
32. The plaintiff denied that he in any way assaulted Mr Skosana or tied him up with a tie. He asked Mr Nkwana to take Skhosana's vehicle and park it at his house since he did not have a parking space in his tavern.
33. The following morning at about 5am the police arrived at his tavern he explained to them what happened between him and Mr Skhosana and that Mr Skhosana had signed an agreement with him. Nevertheless, he and Mr Nkwana were arrested for assault with intent to do grievous bodily harm.

34. At the police station Mr Skhosana said he does not want to open a case all what he wants is his vehicle. He was released and he thought the matter was over.
35. On the 13th February 2015 he went to the police station after he was told the police were looking for him. He was not detained and he was told to leave as he must first be identified. He left only to be arrested again for the same case the following day being the 14th February 2015. He was told that he was being arrested for assault with the intention to do grievous bodily harm. At the police station Skosana identified him and Mr Nkwana they were arrested and detained. On the 16th March 2015 he was released on bail of R 500.00 (five hundred rand).
36. Whilst testifying the plaintiff started crying saying he was traumatised by the arrests. He testified that the state did not proceed with the criminal case against him because of insufficient evidence.
37. Mr Johannes Nkwana is the witness called by the plaintiff. In his testimony he confirmed the evidence of the plaintiff. He testified further that although he was arrested exactly the same way as the plaintiff however he decided not to sue the defendant.
38. Plaintiff closed his case. Both parties submitted their heads of argument which were uploaded on the caseline system.
39. The only issue between the parties pertains to whether or not the plaintiff's arrest and detention on both the 11th January 2015 and 14th February 2015 was lawful.

40. It is common cause between the parties that the plaintiff was arrested on the 11th January 2015 and was released on the same day without appearing in court. Again it is common cause that the plaintiff was arrested the second time on the 14th February 2015 and released on the 16th March 2015. The injuries sustained by Mr Skhosana are not in dispute. However it is in dispute that the said injuries were inflicted by the plaintiff or Mr Nkwana.
41. Counsel for the plaintiff submitted that in respect of the arrest of the 11th January 2015 the defendant failed to call a witness to justify the arrest.
42. In regard to the second arrest of the 14th February 2015 counsel for the plaintiff submitted that Sergeant Tladi who arrested the plaintiff for assault with the intent to cause grievous bodily harm which is not a schedule 1 offence. In addition, the version that the plaintiff committed the offence of assault with the intent to cause grievous bodily harm at the time of his arrest and detention was not pleaded by the defendant.
43. On behalf of the defendant counsel submitted that he plaintiff inflicted a dangerous wound on Mr Skhosana even after seven years Mr Skhosana has not fully recovered. With the first arrest the police refused to register a criminal case against the plaintiff.
44. The respondent relied on the provisions of s 40(1) (b) of the Act which authorizes a peace officer to effect an arrest without a warrant. The respondent conceded that assault with intent do grievous bodily harm is not one of the offences referred in Schedule 1 but argued that the assault in this matter a dangerous wound was inflicted.
45. Section 40 (1) (b) of Act 51 of 1977 reads thus:

“40. Arrest by peace officer without a warrant.

A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escape from lawful custody”

46. Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of assault where a dangerous wound was inflicted. It is also trite, that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in schedule 1 and that the suspicion must rest on reasonable grounds.²
47. It is clear that the arresting officer relied on the interview he has with the complainant and the statement by the complaint as well as the J88.
48. In the J88 the doctor says *“laceration on the right scrotum exposing the testicle”*. The complainant testified that he was admitted in hospital until towards the end of February 2015. After he was discharged he went to hospital on daily basis for the wound to be cleaned. When he testified he told the court that he was still receiving treatment.
49. Taking into account the nature of the injury sustained by the complainant and the duration of his stay in hospital. I am satisfied that the injury sustained is likely to endanger life or the use of a limb or organ.³I am therefore of the view that the offence the plaintiff was arrested for is listed in schedule 1. I am also of the view that when Sergeant Tladi arrested the plaintiff he exercised his discretion properly⁴.

² Duncan v Minister of Law and Order 1986 SA (2) 805 (A) at 818 G-D

³ R v Jones 1952 (1) SA 327 (E) at 332 D-F See also Bobbert v Minister of Law and Order 1990 (1) SACR 404 (C) at 409 paragraph e-h

⁴ See Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) at paragraph 46

50. With regard to the arrest on the 11th January 2015, the plaintiff was taken to the police station but released without being charged. It is not clear whether he was arrested or simply taken to the police station. However even if he was arrested I am of the view that he was arrested lawfully since he had inflicted a dangerous wound on the complainant.
51. In addition, an arrest will not be unlawful if it was the intention of the arresting officer to arrest pending further investigations into the alleged offence prior to releasing the arrestee⁵.
52. It is not a requirement that the arresting officer must form the view on the likelihood or otherwise of a conviction of the person that was arrested in terms of section 40(1) the Criminal Procedure Act. It is likewise not required that the arrestee is later charged or convicted.⁶
53. I am furthermore of the view that in light of the facts and evidence before me that sufficient facts existed at the time on which officer Tladi arrested the plaintiff. I am satisfied that the arrest was lawful in the circumstances and that the discretion to arrest and detain the plaintiff was properly exercised. I am further satisfied that in arresting the plaintiff the arresting officers acted within the ambit of section 40 (1) of the Criminal Procedure Act. This court accepts the evidence of Mr Skhosana as being true and rejects the evidence of the plaintiff and his witness Mr Nkwana as a fabrication to misled this court.

⁵ Duncan v Minister of law and order *supra* at 812H-813B

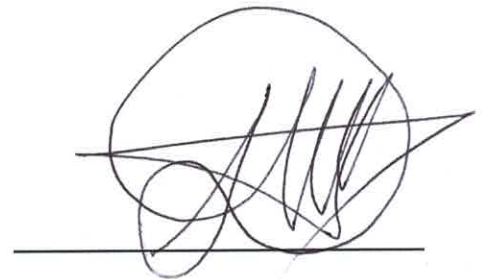
⁶ Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG)

54. In my view the evidence of the complainant and the doctor's comments on the J88 is enough to criminally prosecute the plaintiff and Mr Nkwana. The J88 corroborate the evidence of Mr Skhosana that he was almost castrated by the plaintiff. The plaintiff failed to prove his case preponderance of probabilities.

55. I am of the view that there are no merits in the plaintiff's claim. The plaintiff broke down in tears whilst he was testifying in my view this was a ploy by the plaintiff to try and influence the court to find in his favour

56. In the premises I make the following order:

(a) Claim under case number 96065/2015 and claim under case number 96776/2015 are dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by several vertical strokes and a horizontal line extending to the right.

D MAKHOB
JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the plaintiff : **Advocate Mosoma**

Instructed by: **Gildenhuys Malatjie Attorneys**

For the defendant: **Advocate Mahasha**

Instructed by: **The State Attorney**

Date heard: **28 April 2022**

Date of Judgment: **15 June 2022**