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IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]

CASE NO: 3970/2020

Heard on: 01/09/2022

Delivered on: 04/10/2022

In the matter between:

P[....] M[....]2

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

[1] On 04 November 2020 the plaintiff instituted action proceedings against the defendant for payment of damages arising out of the arrest of the plaintiff on 01 April 2020 and his detention for 40 hours that followed without criminal proceedings being pursued. Payment of damages are also being sought for assault upon the person of the plaintiff, defamatory statements made at the time of arrest as well as for the attorney and client costs incurred by the plaintiff in hiring a legal representative to prosecute these civil proceedings. The action is defended vigorously.

[2] At the trial that served before me, I was advised that since the defendant bore evidential *onus* to justify the arrest and detention, as admitted in the pleadings, the members of the police have to adduce evidence to justify the police actions as

envisaged in the provisions of s 40 (1)(b) of the CPA Criminal Procedure Act No. 51 of 1977.

[3] Mr Siyabulela Mputha, Mr Mziwekhaya Ntsonte and Goodwill Diko are the employees in the SAPS who testified on behalf of the defendant. Mr M[....]1 K[....] M[....]2 and Mr T[....] M[....]2 were called by the plaintiff to testify in support of his case. Plaintiff himself also testified.

[4] The following facts are not in dispute. M[....]1 is the father of the plaintiff, and grandfather to T[....]. M[....]1 has two places of residence, in Kokstad and Ntabankulu. At the time relevant to the arrest and detention of the plaintiff on 01 April 2020 he was trading under the name and style: Aba-Koena Store, which is situated in the district of Ntabankulu and retailing in groceries and related products. However, on 01 April 2020 he was in Kokstad, he having asked the plaintiff to purchase business stock at Ohlanga Wholesalers, Kokstad and deliver it to the Aba-Koena Store on a bakkie. Since the Covid 19 regulations, dated 26 March 2020, framed in terms of the Disaster Management Act, 2002, restricted the movement of persons and goods, and travelling on public roads between the provinces including Kokstad, KZN and Ntabankulu, Eastern Cape plaintiff had in his possession a permit (Permit To Perform Essential Services) drawn up in accordance with Annexure C, Form 1 of Regulation 11B (3)(i). This permit is exhibit "A" in this matter. Accordingly, the plaintiff bought the business stock, loaded it on the bakkie and travelled from Kokstad to Ntabankulu. Such travel involved showing the permit to government officials deployed on both sides of the N2 Road that crosses the boarder between KZN and Eastern Cape, which were situated near Mr Currie Engen Garage and Pakade Junction respectively. Upon arrival at Ntabankulu the plaintiff found T[....], a 17 years old boy, present at the Ntabankulu residence. T[....] was lying on the sofa and exhibiting symptoms of terrible flue, with features of bronchitis and compromised immunity system. The plaintiff immediately telephoned Dr Jama, a family doctor running a medical private practice in Kokstad, for an appointment that was accepted. The plaintiff then took T[....] into the bakkie and they both drove off to Kokstad. However, the plaintiff never reached Kokstad as his trip came to an end at Pakade Junction where Ntsonte arrested and caused him to be locked-up in a prison cell of Mt Ayliff Police Station. The plaintiff was charged with assault and interfering with

police duties arising from an alleged failure to produce a permit that would have entitled the plaintiff and T[...] to pass the road block at Pakade Junction. The plaintiff was detained in a police cell until 03 April 2020. However, the prosecution of the plaintiff never followed after the date of his release from police custody. At the time of arrest, T[...] was left in the van and unattended by the members of the police until his grandfather M[...]1 arrived to fetch him and take him to Dr Jama where he finally received treatment.

[5] The upshot of the evidence adduced by M[...]1 is that the police at Mt Ayliff Police Station refused him access to his son; the situation that left him without redress as he never had the opportunity to obtain information from his son about the circumstances of his arrest and detention. M[...]1 could only meet his son upon his release from the custody on 03 April 2020.

[6] The plaintiff testified that upon reaching Pakade Junction on 01 April 2020 and producing the permit and a driver's licence to Mputha he was prevented from passing the road block for the reason that he had T[...] in his bakkie who did not have a permit. Confronted with this problem he asked for the audience of the senior police officer to explain that his passage on the road block with T[...] to seek urgent medical attention in Kokstad was permitted in terms of Regulation 11B (1)(a)(i). Having been referred to Ntsonte and Col. Moto the request for passage was still refused. He thereupon telephoned his father, M[...]1, for assistance. When he did not find his father he telephoned one Mr Pat Mgejane, a traffic officer attached to Mt Ayliff Police Station who advised him to leave Pakade Junction and take an alternative route to Kokstad that did not require him to produce permits. As he was still engaged in that call, and the advice he got having been overheard by the members of the police, one of the members (Ntsonte) approached him from behind and grabbed the hand that was holding the cell-phone. When he protested against such action Ntsonte assaulted him by pushing, punching with fists; kicking with booted feet; and hurling insults at him. When Mr Ntsonte reached to the gun holster around his waist, the plaintiff dropped his cell-phone and lifted his arms stretched-up towards the sky as a sign of complete surrender. Many other police joined in the assault by pulling him between the bull-bar and the front part of Inyala motor vehicle where Ntsonte also joined by spraying pepper from a gun into his face, nostrils and

eyes. When attempting to protect his face from toxic pepper spray gun. Ntsonte kicked him all over the body, hit him with clenched fists; and in full view of members of the public the present hurled insults to the effect that the plaintiff was “a piece of shit”, “a drunk”, and “a clever man from M[....]2 family”. According to the plaintiff the insults were defamatory to him and his family name. Having been subdued, the plaintiff fell to the ground when the police hand-cuffed him and tied his legs with a leg irons. Thereafter, he was taken into a police vehicle on which he was transferred to Mt Ayliff Police Station.

[7] At Mt Ayliff Police Station the plaintiff was charged and kept in a police cell that had no bed, mattress or a sponge to use at night. The cell had the lights switched off during the day and night times. Although the cell measure approximately 5 x 10 square metres he was kept there with 27 other inmates under the circumstances of intolerable congestion. The food supplied was of substandard / unhealthy quality. He described his ordeal as having been traumatic that his memory relived that experience well after he was released from the police cell on 03 April 2020.

[8] The plaintiff stated that he consulted Dr Jama upon his release from police custody. Annexure “D” is the supporting medical report that was admitted in evidence by consent between the parties. He also told the court that his permit and driver’s licence that he had given to the police was never returned to him. He stated that the police conduct was unlawful, and that he would like to be compensated for the arrest, detention, assault and defamation in the sum of R200 000,00; and R10 000,00 for the costs of hiring the services of a lawyer in prosecuting the claims on his behalf.

[9] T[....]’s evidence confirms the evidence of the plaintiff in so far as reference is made to him. In particular, he stated that after the plaintiff parked the bakkie at the road block and alighting to talk to Mputha, Ntsonte and other policemen, the plaintiff never returned. Whilst the plaintiff was engaging with the police he, T[....], was situated at a vantage position from which he saw the plaintiff being kicked by six to seven members of the police force. He also stated that Mputha, the first policeman that the plaintiff spoke to at the road block, was told that he did not have a permit

because he was sick and being rushed to Kokstad for a consultation with Dr Jama. During that interaction the plaintiff did hand over to Mputha a permit and the driver's licence. According to T[...], the passage to Kokstad was prevented for the reason that the plaintiff could not produce his, Tebogo's permit. When the plaintiff had been whisked away on a Polo Vivo from the road block area he used his cell-phone to telephone his grandfather and reported about the fact that he had been left alone in the bakkie. When M[...]¹ arrived at the road block he explained to the police that he, T[...], did not have a permit, and was in need of urgent medical attention by a family doctor. Eventually, the bakkie was driven by Masupa, a relative who had been brought along by M[...]¹, not only across the Pakade Junction but also across the road block situated in the KZN area.

[10] The evidence of T[...] was not challenged when he testified under cross examination. The same happened when M[...]¹ was cross examined. The only matter that was put to T[...], which he denied, was that the plaintiff had pushed and / or assaulted the police. M[...]¹ proffered no comment to the police version of assault for the reason that he was not at Pakade Junction when the alleged incident occurred.

[11] Certain issues were raised on behalf of the defendant when the plaintiff was cross-examined. It was put to the plaintiff that the Regulations did not authorize transportation of sick people from the Eastern Cape and KZN, there was no need for medical care to be provided to T[...] in Kokstad as there was a doctor in Ntabankulu, Dr Issa, who was available to attend to Tebogo; and that the care of T[...] was not a medical emergency that required a trip to Kokstad. The plaintiff answered that there was no medical doctor available in Ntabankulu on 01 April 2020, including Dr Issa. He disputed the version that the Regulations placed a blanket prohibition upon referral of medical emergencies across provincial borders.

[12] Further, it was put to the plaintiff that he had to be arrested by Ntsonte because he had pushed him. To this, the plaintiff answered that when Ntsonte grabbed him from behind, as he was speaking on the phone and over-heard that he was going to reach Kokstad despite the road block, he protested that Ntsonte had no right to take away his cell-phone and must, therefore, leave him alone. At that

junction Col. Moto told Ntsonte to leave the plaintiff alone. The plaintiff insisted that he was prevented from proceeding to Kokstad simply because a permit for T[...] was not available, despite the fact that he had produced exhibit "A" together with a driver's licence. The plaintiff repeated his evidence in chief that he was assaulted and injured by the police and that exhibit "D" was the proof that he was injured.

[13] Mputha testified that he stopped the plaintiff's bakkie at the road block, observed that the plaintiff had a passenger sitting in the cab next to him; approached the plaintiff and asked him to produce a permit; which he did not do. He asked the plaintiff about his destination and got to know that plaintiff was driving to Kokstad. Having been asked by the plaintiff to refer the issue of non-production of the permit to Ntsonte he did so. In turn, Ntsonte felt that it was necessary to refer the plaintiff to Col. Moto. Finally, both Ntsonte and Moto told the plaintiff that he will not be allowed to pass the road block. Then the plaintiff pushed Ntsonte, pulled out a cell-phone and begun to take pictures of Ntsonte, the conduct that infuriated Ntsonte. Upon being stopped from taking pictures, the plaintiff's ran towards the Inyala police vehicle that was situated at a distance of 10 metres away. Ntsonte ran after the plaintiff until they reached the area at the back of Inyala where he arrested the plaintiff for assaulting the policeman and failing to produce a permit. Mputha denied that the plaintiff had been assaulted and his movement confined between the bull-bar and the front section of the Inyala vehicle. He also told the court that T[...] was not prevented from gaining access to a doctor in Koskstad due to emergency medical attention that he required. However, according to Mputha, T[...] would have also been required to produce a written authority of the doctor or a Clinic to pass the road-block. If not, T[...] would have had to satisfy the road-block personnel that he was sick and in a state that required deviation from the prescript of a permit issued in terms of the Covid regulations. However, Mputha disavowed knowledge whether T[...] was sick or not for the reason that his attention was not brought to the condition of T[...]. He accepted the fact that M[...]1 had arrived at the road-block and took T[...] to Kokstad without T[...] having been checked or his permit / authorization produced. He also accepted the fact that the plaintiff had passed earlier on the road-blocks at both KZN and Pakade when delivering stock to Aba-Koena Store. The witness stated that the plaintiff had pushed, not assaulted, Ntsonte.

[14] Ntsonte testified that he was present at the Pakade road-block when Mputha brought the plaintiff to him about an argument relating to a permit that the plaintiff would not produce when asked to do so. He referred the plaintiff to Col. Moto who told the plaintiff that he would not be allowed to pass the road-block without an official permit having been produced. According to him the fact that T[...] was in need of urgent medical attention was not revealed to him. However, he did become aware that the plaintiff had a passenger in his motor vehicle. When the plaintiff was not happy with the order that he was not allowed to go to Kokstad, he begun making a cell-phone call and he, thereafter; returned and took photographs of him without permission, uttered words that he was going to Kokstad notwithstanding the police stoppage, and proceeded towards his vehicle that was parked at a distance of 20 metres away. However, when the plaintiff was announcing that he was going to Kokstad he pushed him (Ntsonte), the conduct that prompted the arrest. Ntsonte denied that he assaulted the plaintiff in any manner, including that he had sprayed pepper into his face, eyes and nostrils. Ntsonte also denied the version of the plaintiff that he sustained injuries whilst at the hands of the police and locked-up in a police cell without medical intervention.

[15] Ntsonte accepted the fact that T[...] would have been allowed to pass the road-block as he was very sick. He accepted that the permit of the plaintiff, exhibit "A", would have entitled the plaintiff to pass the Pakade road-block had that permit been produced to him and Mputha. He denied that he and other members of the SAPS assaulted the plaintiff. But he accepted that the medical certificate of the plaintiff, exhibit "D" does show that he sustained certain injuries due to assault. His attention was brought to the inconsistencies between two written statements, annexures "E" and "F" he had made for the docket dated 01 April 2020 and to the Ipid investigators on 06 July 2021 showing that the plaintiff had co-operated with him and that he had to be subdued for resisting arrest respectively.

[16] Sergeant Goodwill Diko's evidence is that when he interviewed the plaintiff on 02 April 2020 he was not told that plaintiff was injured by the police at the time of arrest and detention on the previous day. He also testified that the docket placed at his disposal did not have in it the permit of the plaintiff, exhibit "A". When asked under cross examination as to how he got the information that there was an issue

about the production of a permit at the road-block he answered that he got it from the charge sheet. He also stated that he only talked to the plaintiff about a charge of assault against the policemen because the plaintiff did not report to him that he was assaulted.

[17] It was submitted on behalf of the plaintiff that the evidence of the plaintiff and his witnesses is probable, and therefore it supports the version that the plaintiff was arrested and detained unlawfully; he was assaulted by the members of the police; and that he was defamed by the insults that were hurled at him in the presence of many people and with intention to injure his personality.

[18] The court was asked to reject the evidence of the defendant's witnesses for reasons that their evidence is contradictory in material respects; more particularly in that:

(a) Mputha and Ntsonte testified that compliance with Regulation 11B (1)(a)(i) provides that the medical urgency of T[...] required personal assessment of the sickness or a certificate by a private doctor or Clinic. They also say that they would be required to telephone the doctor to verify the sickness.

(b) In Ntsonte's written statements it appears that, on the one hand, the plaintiff was not touched by any of the members of the police, but on the other hand there was personal contact between them.

(c) Diko stated that the plaintiff did not have a permit and that the plaintiff did not have visible injuries when he was locked-up in a police cell on 01 April 2020. However, Diko failed to record those crucial statements which were reported to him by the plaintiff.

[19] It was argued strenuously on behalf of the defendant that the evidence of the plaintiff is not worthy of credit in that the plaintiff refused to produce the permit; was evasive and exaggerated the manner in which the events unfolded, and his version of assault by the police was uncorroborated. With regard to the defendant's witnesses it was submitted that their evidence may be accepted as the essential features thereof were true. It was submitted further that the arrest and detention was

justified in law; and that the claim based on defamation is not proved by the evidence.

[20] It is common cause that the disputed versions of the parties are not reconcilable and therefore, the test adumbrated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) finds application. Based on this case this court will evaluate the credibility, reliability and probability / improbabilities of the parties' versions so as to be determined if the *onus* thrust upon the plaintiff to prove unlawfulness of arrest and detention, assault and defamation claims has been discharged.

[21] The defence in terms of s 40 (1)(b) of the Criminal Procedure Act 1977 that the arrest and detention took place for the reason that the plaintiff had committed crimes of assault and interference with police duties. Therefore, for the plaintiff to be arrested and detained he must be shown to have committed crimes with which he was charged in front of Mputhi and Ntsonte. A failure to produce a Regulation 11B permit, allegedly on the basis that Mputhi did not see one is not an offence as in its absence the plaintiff would simply not be permitted to pass the road-block. But the arrest by Ntsonte happened because, according to him, the plaintiff interfered with his duties and assaulting him. On the facts of this case, interfering with police duties presupposes that the plaintiff prevented Ntsonte from attending to the road-block. But the evidence does not support this claim. Since the discussions about the plight of the plaintiff to take T[...] to Dr Jama took place far away from the road-block line, Mputhi having removed himself from it to connect the plaintiff to Ntsonte and Moto, the act of preventing police duties never occurred. The plaintiff merely told the police that he was going to use an alternative route, whereupon, he walked towards his vehicle that was parked far-away from the road-block area. On the terms of the police witnesses arrest did not follow interference but the complaint that the plaintiff assaulted Ntsonte. No such proof exists in this case as the entire evidence, including the written police statements by Ntsonte, only speaks of physical contact between the plaintiff and Ntsonte that was provoked by the taking of photographs or the telephonic conversation overhead by Ntsonte that the plaintiff would still be able to reach Kokstad using a different route. The pushing could only have happened when the plaintiff was preventing dispossession of his cell-phone by Ntsonte. The

explanation for arrest is far from satisfactory. As there was no commission of a crime by the plaintiff, I reject the version of the defendant that reasonable grounds existed that are envisaged in s 40 (1)(b) of the CPA. I find support for this in the fact that the plaintiff has, inferentially, proved that he was assaulted by the police. The injuries that he sustained, proved by the medical record, bolster his version. Diko's evidence on the issue of visible injuries could only have been led to confuse, rather than to clarify matters. In light of this, it is not conceivable that the interviewing of the plaintiff about the material evidence of absence of visible injuries and a permit in the docket would have ended without recordal of such evidence in a written statement. It is not surprising that the outcome thereof was not recorded by Diko. It is Diko who stated that the plaintiff gave a version of events. But the absence of such material events in the warning statement that was administered by Diko leads to the conclusion that Diko tailored his evidence merely to bolster the version of Ntsonte. In any event, Diko's evidence cannot trump that of the plaintiff because it was never put to the plaintiff when he testified. The evidence of the plaintiff that Moto warned Ntsonte for bad conduct and Mputha's evidence that Ntsonte was not assaulted, but pushed, counts very much against the credibility of the version of defendant's witnesses that the plaintiff committed crimes for which he had to be arrested and detained. In my opinion, the contradictions, inconsistencies and the resultant improbability of the evidence adduced by the defendant's witness are not insignificant. The defendant's witnesses were simply not truthful to the court. I believe the version of the plaintiff as being a reflection of truth – see the case of *Jagers* at 440G.

[22] The unchallenged evidence of T[...] is that he did see the members of the police at a reasonable distance of 20 – 25 metres away assaulting the plaintiff by kicking with booted feet. This evidence is crucial and revealing in that its admission must water down the version of the defendant's witnesses that the police members did not assault the plaintiff. Therefore, not only are the defendant's witnesses incredible but they are unreliable on the central version that the plaintiff was arrested for assaulting the police and interfering with their duties. The plaintiff's version that he was also orally abused by Ntsonte in a way that was demeaning to his personality and the reputation of his family is not a stand-alone feature of the conduct of the police and that day. The submission that the claim based on defamation of character has not been proved, yet it had been pleaded pertinently and supporting evidence of

the plaintiff adduced without any challenge, cannot be sustained. That the plaintiff was not granted police bail and only kept in a police cell for 40 hours without a reason given as to why he was not prosecuted speaks volumes not just about the abuse of the plaintiff's constitutional rights that are protected under ss 10 (dignity) and 12 (freedom) of the Constitution, 1996 but also the absence of justification for the arrest and detention of the plaintiff.

[23] Although the evidence led in this matter does prove that the plaintiff's permit and driver's licence were taken by the police, and order for the return thereof is not competent because those exhibits were not recorded in the appropriate register of the defendant.

[24] All that said, the plaintiff as an *onus* bearing party has succeeded in proving on a balance of probabilities that:

- (i) the arrest and detention was unlawful;
- (ii) the police members assault him;
- (iii) the police member(s) defamed his character;
- (iv) legal expenses were incurred towards vindicating the rights of the plaintiff during the time of arrest and detention.

[25] The liability issue having been answered in favour of the plaintiff, it remains for the court to address the issue of *quantum* of damages to be paid. I do so below.

[26] In terms of the plaintiff's particulars of claim, in para 9, *quantum* is pleaded as follows:

- (a) R150 000,00: for assault;
- (b) R 50 000,00: for unlawful arrest;
- (c) R150 000,00: for unlawful detention;
- (d) R 10 000,00: for lawyer's fees incurred in the criminal case.

Total: R510 000,00

[27] Based on all the recognized principles that are currently applied by the courts in fixing reasonable *quantum* for general damages, I am of the opinion that a total

sum of R240 000,00 is an appropriate award to be made. I justify my conclusion as follows:

- (a) Assault injuries as reflected on exhibit "D" are the kicking on the body; spraying into the face, nostrils and eyes with a spray gun; which resulted in pain on the chest, left shoulder, left lower leg from ankle to the calf muscle and achilles tendon and on the right lower leg. There were also minor injuries (chipping) on the head. Psychological harm was also suffered by the plaintiff. There was also an element of *contumelia* suffered due to maltreatment. I estimate damages for these injuries in the sum of R60 000,00;
- (b) Unlawful arrest and detention for 40 hours with *contumelia* should be a total sum of R120 000,00. In other words, separating arrest from detention is not appropriate;
- (c) The damages for defamation should be fixed at R50 000,00;
- (d) Fees incurred in the magistrates' court may reasonably be fixed at R10 000,00.

[28] The defendant shall pay the costs of the trial at the High Court scale.

[29] In the result the following order shall issue:

- 1. The defendant is liable to compensate the plaintiff for unlawful arrest and detention; assault; defamation and legal fees (legal representation during arrest and detention) in a total sum of R240 000,00.**
- 2. The defendant to pay the costs of suit.**

**Z M NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA**

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