

SOUTH AFRICA / JUDGMENT

Chiloane v Minister of Police (49928/11) [2017] ZAGPPHC 734 (31 October 2017)

[2017] ZAGPPHC 734

COURT

North Gauteng High Court, Pretoria

BEFORE

MA Hawyes

CASE / FILE NUMBER

49928/11

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 49928/11

31

OCTOBER 2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

WELCOME

KHAMO CHILOANE

Plaintiff

and

THE

MINISTER OF POLICE

Defendant

JUDGMENT

HAWYES, AJ:

INTRODUCTION

AND COMMON CAUSE FACTS AD THE MERITS

- [1] The Plaintiff instituted action in the High court against the Defendant following Plaintiff's arrest on the 21 October 2010 at approximately 6h30 at his mother's home in Hazview near Numbi.
- [2] Summons was issued against the Defendant in March 2013.
- [3] The Plaintiff was hospitalized for approximately a week following his arrest.
- [4] After his discharge from hospital, he was further detained at White River Police Station.
- [5] The Plaintiff was released on bail of R1500-00 on the 29th October 2010.
- [6] The Defendant bears the onus of proving that the arrest itself was lawful. The Plaintiff on the other hand bears the overall onus of proof with regard to the alleged assault and the sequelae.

ISSUES

TO BE DECIDED

- [7.1] Whether Plaintiff's arrest was affected with or without a warrant;
- [7.2] If effected without a warrant whether the arrest was lawfully effected in accordance with the provisions of Section 40 (1) (b) of the Criminal Procedure Act No 51 of 1977(as amended) (hereinafter referred to as the CPA);
- [7.3] Whether Plaintiff was assaulted whilst in custody of the Defendant;
- [7.4] If a finding on the merits is made in favour of the Plaintiff due consideration must be given to the amount of damages to be awarded.

SURVEY OF PLAINTIFF'S EVIDENCE AND ARGUMENT

- [8] The Plaintiff started with the leading of evidence and called Mr Coert Jordaan as his first witness. The evidence of this witness can be summarised as follows:
 - 8.1 He is an attorney - practising as such since 1997;
 - 8.2 Previously he was an advocate in the office of the Director of Public Prosecutions;

- 8.3 The father of the Plaintiff consulted with him and informed him that the South African Police were looking for the Plaintiff and alleged that he had stolen money;
- 8.4 After establishing that one, Captain Ramala was the investigating officer, Jordaan made arrangements that the Plaintiff, accompanied by an advocate, travel to Polokwane so that the Plaintiff could be interviewed by the aforesaid Captain Ramala;
- 8.5 A warning statement as well as an affidavit for purposes of a bail application were drafted - should the plaintiff be arrested and the need for such affidavits and statements arise;
- 8.6 Plaintiff and the advocate duly travelled to Polokwane where, after being interviewed, the Plaintiff was told that there "was no evidence against him" and that he was free to go. This happened some one or two weeks prior to the arrest of the Plaintiff;
- 8.7 On 21 October 2010 Plaintiff's father informed Jordaan that the Plaintiff had been arrested and the he, after numerous enquiries, had established that the Plaintiff was detained at White River Police Station;
- 8.8 Because the Plaintiff's father had informed him that the Plaintiff had been severely assaulted, Mr Jordaan took his camera with him when he went to the police station in White River;
- 8.9 At the police station Jordaan was refused permission to see the Plaintiff or interview him. He was advised to first telephone the Chief Prosecutor for Mpumalanga which he did and on latter's advice he telephoned the Independent Police Investigating Directorate (IPID);
- 8.10 When the police heard Jordaan talking to a member of the IPID they suddenly had a change of heart and brought the Plaintiff from the cells;
- 8.11 Jordaan immediately saw that the Plaintiff had been seriously assaulted and informed the officer at IPID accordingly;
- 8.12 Jordaan then proceeded to take photographs of the Plaintiff, which photographs were provisionally admitted into evidence at Exhibit 'D';
- 8.13 The police informed Jordaan that the Plaintiff had been arrested on a charge of possession of an unlicensed firearm and ammunition;
- 8.14 A member of the IPID had, in the meantime arrived and insisted together with Jordaan that the Plaintiff immediately be taken to hospital for medical treatment;
- 8.15 On the 29 October 2010 Plaintiff appeared in Court and was granted bail of R1500-00 (unopposed) on the charge referred to in paragraph 8.13;
- 8.16 Nothing happened with regard to the allegations of theft of money. At the behest of Jordaan the Plaintiff was eventually charged with theft on the 19 November 2010;
- 8.17 With regard to the charge of possession of an unlicensed firearm, the state subsequently declined to prosecute and issued a certificate nolle prosequi on the 6 April 2011 (See Exhibit 'E');

8.18 The charge of theft was also subsequently withdrawn by the state. However, during 2017 the Plaintiff was out of the blue again charged with theft and this case is still pending. In fact, prior to the commencement of the civil trial the Defendant brought an application for its postponement pending the commencement of the criminal trial. Defendants application was refused, and the civil trial continued as scheduled;

[9] The Plaintiff testified under oath and his evidence is summarised as follows:

9.1 On 21 October 2010 Plaintiff was alone at his mother's house in Hazview near Numbi when he was awoken by the sounds of people running on the property at approximately 6h30;

9.2 He saw that the people were in fact policemen and some of them were "heavily armed";

9.3 He suspected that they were there to arrest him as he was aware of the allegation that he had stolen money from his employer. He telephoned his father and informed him of the position;

9.4 He then heard glass breaking and locked his bedroom door. He was scared and after hearing a door being broken, the police eventually came to his room. The door to his room was broken down and two policemen entered the room, pointing their firearms at him;

9.5 Plaintiff testified that he was assaulted whilst his hands were tied behind his back. These assaults continued throughout the day at various places to which he was transported;

9.6 Eventually he was taken to the White River Police Station where, later he met with Jordaan and his father. Jordaan took the photographs which the Plaintiff identified as those in Exhibit 'D';

9.7 Later that night Plaintiff was taken to the Themba hospital where he was detained for approximately a week. He was then transferred back to the police station where he was detained until his release on 29 October 2010;

9.8 Plaintiff testified further that he was accused of being in possession of an unlicensed firearm and that he was actually arrested on this charge (not the alleged theft/ robbery charge);

9.9 Plaintiff denied that he was at any stage in possession of an unlicensed firearm or ammunition or that his so called "rights"

were read to him by anybody;

9.10 Plaintiff brought charges against his assailants, but they were all found not guilty after a trial;

9.11 Somewhat surprisingly, during cross examination Counsel for the Defendant put it to the Plaintiff that he had been arrested with a warrant. Both Plaintiff and Jordaan denied this emphatically. Counsel for the defendant later indicated that this statement had been mistakenly put to the Plaintiff and Jordaan.

SURVEY OF RELEVANT DEFENDANTS EVIDENCE AND ARGUMENT.

[10] The Defendant called three witnesses, all policemen, being Sergeant Khosi, Constable Nkuna and Sergeant Mahlangu.

- [11] At paragraph 2.3 (page 2) of the Defendant's heads of argument, it was stated that Plaintiff was arrested on the date and place alleged by the Plaintiff by one Warrant Officer Zitha after having read to the Plaintiff his rights and arrested him in terms of Section 40(1)(b) of the CPA.
- [12] It is common cause that Warrant Officer Zitha was not one of the witnesses called by the Defendant.
- [13] At paragraph 2.5 (page 2) of the Defendant's heads of argument Defendant contended that Plaintiff's arrest was a direct result of him having been involved in theft of a substantial sum of money from his former employer SBV Security in Giyani, Limpopo Province.
- [14] All three of the Defendant's witnesses remarked that Station Commander, Lieutenant Colonel Manyike, had advised them (and others) that he had received information from an informant about a subject who was hiding at a certain house at Hazview, near Numbi. The suspect, it was said, was dangerous and armed with a firearm.
- [15] The three witnesses (together with other police officials, Detectives and members of the Rapid Response Team) then descended on the Plaintiff's mother's residence during the early hours of the 21 October 2010.
- [16] The door to the house was knocked at and the occupant was verbally requested to open. After several requests there was still no response. It was then decided to force open the garage door to gain entry to the premises.
- [17] Sergeant Khosi, Detective Constable Nkuna and one Detective Constable Mabuza entered the house which was searched room by room. One room was found to be locked. They knocked on the door and there was no response. After several requests to open the door the occupant refused to open.
- [18] Thereafter a verbal warning was made to the occupant to open the door, failing which the door would be forced open. When the occupant failed to open the door, it was then pushed at and kicked in for the purpose of gaining entry.
- [19] Khosi testified that on entering the room he observed an African/ Coloured male pointing a firearm toward them. He held the firearm with both hands. Sergeant Nkuna testified that he observed the suspect (the Plaintiff) with a firearm in his hand. During cross-examination Nkuna admitted that he had made a mistake. The Plaintiff had actually held the firearm with both hands.
- [20] All the witnesses denied assaulting the Plaintiff.
- [21] All the witnesses testified that Sergeant Mabuza lawfully arrested the Plaintiff for being in possession of a firearm, the serial number of which was filed off. His legal rights were read out to him and the Plaintiff was taken to the Masoyi Police Station free from any injuries.
- [22] It is common cause that Sergeant Mabuza was also not called as a witness by the Defendant.

- [23] During cross-examination, the witnesses vehemently denied that a firearm was planted on the premises in order to frame the Plaintiff and justify an arrest for the Plaintiff being in possession of a firearm.
- [24] Sergeant Mahlangu testified that he remained outside during the arrest of the Plaintiff.
- [25] Both Nkuna and Mahlangu referred to the recovery of a large amount of money although the details of how they came to be in possession of the money and what they did with it is somewhat sketchy.
- [26] Defendant's Counsel argues at paragraph 7.7 (page 14) of his heads of argument that because a substantial amount of money was recovered from the Plaintiff's mother, the irresistible inference that can be drawn is that this money must be the money that was stolen. The question
- was then posed "but by whom?"
- [27] Defendant's Counsel challenged the admissibility of the photographic (real) evidence tendered at trial.
- [28] A number of arguments were raised in this regard. The first argument stated that the author of the photos must write on the reverse side of each photograph that "I certify that this is a true picture of the plaintiff". This alleged mandatory requirement was not done and on that basis, I was enjoined to find that the photographs should be rejected as inadmissible.
- [29] The second argument related to non-compliance with Rule 36 (10) of the Uniform Rules of the High Court.
- [30] The third argument was that attorney Jordaan was not a photographic "expert" and as such the photos should be rejected as inadmissible.
- [31] Defendant's Counsel argued that the Plaintiff was a single witness and if the cautionary rule applicable to such witnesses was properly applied his evidence was not satisfactory in all material respects and should be rejected.

ANALYSIS

OF EVIDENCE AND ARGUMENT:

- [32] It is common cause that Plaintiff was arrested in this matter. What is not clear are the circumstances surrounding the arrest.

[33] I remain intrigued why Defendants Counsel felt the need to put it to the Plaintiff that he was arrested with a warrant only later to retract the statement. This allegation was also never pleaded. In any event, the probabilities support the contention that Plaintiff was in fact arrested without a warrant. The police officers apparently proceeded to Plaintiffs mother's home to arrest him as a suspect on a charge of theft of monies (a large sum) from his former employer.

[34] For some unknown reason Plaintiff was not arrested on this charge (despite money being found) but on a charge of alleged unlawful

possession of a firearm and ammunition. It is obvious that Plaintiffs alleged possession of a firearm could not have been foreseen prior to the arrest itself. It follows that the police officials were not in possession of a warrant pertaining to an alleged unlawful possession of a firearm prior to departing for the arrest. No mention was made about having a warrant for the criminal charge for which the sting operation was initiated in the first place.

[35] I therefore find that Plaintiff was arrested without a warrant and I must now decide whether the lawfulness of the arrest is proven with reference to Section 40 (1) (b) of the CPA.

[36] The relevant section reads as follows:

"(1) A peace officer may without a warrant arrest any person:

(a) ...

(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody"

[37] It is common cause that the offences for which the Plaintiff could potentially be arrested are contained in Schedule 1 as referred to above.

[38] According to the testimony of all three of the Defendant's witnesses Plaintiff was suspected of having stolen money from his employer. However, Plaintiff is not arrested for this. He is arrested on the equally dubious charge of alleged unlawful possession of a firearm and ammunition. It is common cause that the Director of Public Prosecutions flatly refused to prosecute the Plaintiff on the firearm charge and only after having been prodded by Plaintiff's lawyer to initiate a prosecution on the theft charge, did they do so only to withdraw it a short while later. All of this begs the question: what crime did the Defendant's witnesses have a suspicion that Plaintiff has committed?

[39] I would have expected the arresting officer to have given direct evidence at the trial about why he arrested the Plaintiff and the processes followed prior to effecting the arrest. Not only did the arresting officer not testify at the trial, it is not clear who the arresting officer was. In their pleadings the Defendant mentions that Warrant Officer Zitha was the arresting officer Whereas Defendant witnesses Khosi and Nkuna testified that Constable Mabuza was the arresting officer. Neither of these two police officials ventured to testify at the trial.

[40] I find that the arresting officer (whoever he was) did not entertain a reasonable suspicion of the Plaintiff having committed a Schedule 1 crime. I find that the Defendant officials lacked sufficient information to formulate a reasonable suspicion at the time of the arrest. They proceeded with the arrest nonetheless.

[41] Faced with this predicament the officials resorted to a different course of action to supplement the lacunae in evidence. I will expand on this aspect later on in the judgment. (see paragraph 55).

[42] I deal now with the evidence pertaining to Plaintiff's alleged assault whilst in custody since in my view the issue of the assault informs the issue of the arrest.

[43] The first issue in respect of the alleged assault relates to the admissibility or not of the photographs provisionally admitted at Exhibit "D".

Counsel for the Defendant argues that the Plaintiff had not complied with Rule 36 (10) with the Uniform Rules of the High Court and thus the photographs should not be accepted as forming part of the body of evidence that may be considered for evaluation at the trial.

[44] It is not clear to me which part of Rule 36 (10) was not complied with.

Rule 36 (10) requires any party who intends using, inter alia photographs in evidence, to, not less than fifteen days before the trial, deliver a notice stating his intention to do so, offering inspection thereof and requiring the party receiving the notice to admit the same within ten days after receipt of the notice.

[45] Plaintiff complied with Rule 36 (10) by sending the required notice, which was received by the Defendant's attorneys on the 25 January 2013 (four and a half years approximately before the trial commenced). See Pages 31 - 33 - Bundle of notices.

[46] Not only was there no reaction whatsoever to this notice, but in answer to a question by the Plaintiff as to whether the Defendant

admits that the photographs, which were supplied by the Defendant, were taken by Jordaan on 21 October 2010 at White River, their answer was an unequivocal and emphatic "no" (See minutes of pre-trial held on 5 February 2013 - page 49).

[47] Jordaan testified that he took the photos at White River and vouched for their authenticity. I know of no requirement in law that requires the taker of photographs to write at the back of the photographs that he took photographs of a particular subject. Jordaan's viva voce evidence is sufficient proof of that. Even less of a requirement for admissibility is that the taker of the photographs

must be an "expert" before cognizance can be taken of what the photographs purport to depict.

- [48] Jordaan was a reliable honest witness and I have no reason to doubt his testimony or question the fact that he took photographs of Plaintiff's physical state whilst in custody at the White River police station on the 21 October 2010.
- [49] It is common cause that Plaintiff was in fact arrested in the early hours of 21 October 2010.
- [50] It is also common cause that the Plaintiff had no injuries at the time of his arrest.
- [51] It is common cause that the Plaintiff was in the custody of the police for the whole day, in fact up to his release from custody on 29 October 2010.
- [52] Defendant at all material times denied that Plaintiff was ever assaulted whilst in police custody. Why was it then necessary for Plaintiff to be taken to hospital and detained in hospital for approximately a week?
- [53] The only reasonable and probable inference to be drawn from the facts following Plaintiff's arrest is that he was assaulted repeatedly and in the manner described in Plaintiff's pleadings as well as in the evidence given at this trial.
- [54] I concur with Counsel for the Plaintiff's question posed at paragraph 41 of his heads "If the police did not assault the Plaintiff then who did?"
- [55] The reason for the assault seems self-evident given the deep uncertainty surrounding the reasons for Plaintiff's arrest. The
- police lacked sufficient information to affect an arrest (on any charge) and pinned their hopes on extracting a confession or at least damning admissions from the Plaintiff whilst in their custody. It also seems probable that as the Plaintiff resisted so the methods of the assault intensified.
- [56] Plaintiff has described being hit with sticks, kicked with booted feet, slapped with open hands, suffocated with a sheet of rubber which rubber was placed over his face and drawn so tight that he could not breathe. Further by placing an irritant in a bag and pulling the bag over his head so that he was forced to inhale the irritant.
- [57] The photographs taken by Jordaan and the injuries that they reveal are consistent with the method of the assault described by the Plaintiff. I accept the evidence of the Plaintiff as being a truthful and reliable account of what transpired on the 21 October 2010.
- [58] I find that the Plaintiff has proven both an unlawful arrest and an unlawful assault whilst in Defendant's custody, on a balance of probabilities. Plaintiff was unlawfully detained from the 21 October 2010 to the 29 October 2010.

AD DAMAGES:

- [59] As a result of the unlawful arrest and detention, Plaintiff claims general damages in the sum of R800 000,00 being R500 000,00 for the unlawful arrest and detention and R300 000,00 for the assault and the sequelae.

[60]In the "Law of Damages", third edition authored by Visser and Potgieter on page 545 - 546, the following was said with regard to the quantum of a claim:

"In deprivation of liberty the amount of satisfaction is in the discretion of the court....Factors which can play a role are the circumstances under which deprivation of liberty took place, the presence or absence of an improper motive or "malice" on the part of the Defendant the harsh conduct of the defendants', the duration and nature (e.g. solitary confinement) of the deprivation of liberty, the status, standing, age and health of the Plaintiff, the extent of the publicity given to the deprivation of liberty, the presence or absence of an apology or satisfactory explanation of the events by the defendants, awards in previous comparable cases, the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty, the effect of inflation and the fact that the actio iniuriarum also has a punitive function."

[61] I am mindful of the comments of my brother Makgoka J in *Moramang v The Minister of Safety and Security* case no 44055/2009 which judgment was handed down on 15 December 2010.

[62] Makgoka J stated as follows:

"The purpose of an award for general damages in the context of the present matter ... is to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) Bosielo AJA (as he then was) remarked that the primary purpose is "not to enrich the claimant but to offer him or her some much needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that that damages awards are commensurate with the injury inflicted" [paragraph 26].

[63]In the same case Makgoka J stated that:

"Although the determination of the appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases, which afford a useful guide in this regard. The process of comparison is not a meticulous examination of awards and should not interfere upon the court's general discretion: *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 5358 - 536A [Paragraph 9].

[64]A quote from the most recent SCA decision with regard to damages for unlawful arrest would certainly be appropriate. In the *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) at 325 [17] it was stated that:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are but a useful guide to what other courts have considered to be appropriate but have no higher value than that" [page 325].

- [65] Counsel for the Defendant referred me to numerous cases in his heads mostly from the mid nineteen nineties and early two thousand's. The facts of those cases referred to are not an all fours with the facts of this case. It was also noticeable that in all the other matters referred to by him small amounts of damages were awarded.
- [66] Counsel for the Plaintiff pointed out that the police had acted callously when confronting the Plaintiff in his mother's house and subjecting him to a brutal assault.
- [67] His hands were tied with shoelaces behind his back, which in itself caused pain and in that position, he was assaulted and conveyed from place to place.
- [68] He was assaulted in front of the public and his humiliation was evident for all and sundry to see.
- [69] The assault, it was argued, was particularly brutal. Apart from bodily pain, the psychological trauma that was caused by the suffocation and the forceful inhalation of an irritant must have been "indescribable".
- [70] When asked during the trial what the effects of the arrest and the assault were, Plaintiff became very emotional and at one point could not speak whilst tears rolled silently down his cheeks. After composing himself Plaintiff summed up the whole position by saying that even if he was a thief (which he denied), why could the police not arrest and detain him instead of assaulting him and submitting him to torture.
- [71] The facts have proven that Plaintiff was put in a cell without medical attention for some time. Only later at the insistence of an IPID official was he taken to hospital.
- [72] It is common cause that Plaintiff received medical attention in hospital for approximately a week. This is indicative of the extent of his injuries.
- [73] Plaintiff gave unchallenged testimony that he suffered damage to his ears as a result of the assault. Seven years after the fact he still experiences ringing in the ears.
- [74] I have to say that I was shocked at the conduct of the police in this matter. Given that we reside in a country with an enlightened

Constitution with many entrenched rights I none-the less found myself disturbingly transported back to the dark days of apartheid. I had visions of the security police of old acting with impunity and trampling upon the rights of its citizens. I must confess that the conduct of the police in this matter differs little from similar conduct back then.

- [75] At no stage did the Defendant concede liability and offer a settlement of some kind to the Plaintiff in the face of damning

evidence. Instead they chose to take technical points whilst trying to delay the finalization of the civil trial and complaining about prejudice in light of a pending criminal trial. A trial on a charge that had been withdrawn for many years, but which is now ostensibly being reinstated. The motives and the timing of this decision also seem somewhat questionable. The conduct of the Defendant rightly calls for the court, in addition to damages, to consider the granting of a punitive costs order.

[76] I find that the facts of this case are significantly more serious than all the other unlawful arrest cases I was referred to by Defendant's counsel. As such there must be a substantial difference in the amount of general damages awarded to address the mental anguish and physical pain suffered by the Plaintiff at the hands of the police.

[77] It is also important to factor in the eroding effect of inflation on the value of the rand in determining the appropriate amount of damages.

[78] I hereby make the following findings and order:

78.1 Plaintiff was unlawfully arrested on the 21 October 2010 and subsequently unlawfully detained until 29 October 2010;

78.2 Plaintiff was unlawfully assaulted and tortured by members of the Defendant;

78.3 With regard to the unlawful arrest and detention the Defendant is

ordered to pay the amount of R500 000-00 to the Plaintiff as damages;

78.4 With regard to the unlawful assault of the Plaintiff by members of the South African Police Defendant is ordered to pay the amount of R300 000-00 to the Plaintiff as damages;

78.5 The Defendant is ordered to pay the costs of suit as between attorney and client;

78.6 The amounts of R500 000-00 and R300 000-00 will bear interest at the rate of 15.5% per annum a tempore morae from 3 February 2011 to the date of payment.

MA HAWYES

ACTING JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE PLAINTIFF: Frey & Slabber Inc.

COUNSEL FOR THE PLAINTIFF: Adv. C.F.J Brand SC

ATTORNEYS FOR THE DEFENDANT: The State Attorney

COUNSEL FOR THE DEFENDANT: Adv. A. Musa

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