

SOUTH AFRICA / JUDGMENT

Mnyamezeli and Another v Mfiki (57/10)

[2010] ZAECMHC 25 (23 September 2010)

[2010] ZAECMHC 25**COURT**

Eastern Cape High Court, Mthatha

BEFORE

F.B.A Dawood, Dukada A.J

CASE / FILE NUMBER

57/10

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT: MTHATHA)

In the matter between: CASE NO. 57/10

INSPECTOR GONTSANA MNYAMEZELI

& ANOTHERAPPELLANTS

VS

ANELE MFIKIRESPONDENT

APPEAL JUDGMENT

DAWOOD, J:

The Plaintiff herein sued the First Defendant personally and the Second Defendant vicariously in his capacity as employer of the First Defendant and other officers, the Appellants herein, for damages in the sum of R100 000-00; R50 000-00 in respect of the unlawful or wrongful arrest and R50 000-00 in respect of unlawful/ wrongful assault.

The Magistrate at the conclusion of the trial found in favour of the Plaintiff and awarded him R100 000-00 as damages.

The Magistrate concluded in her reasons that the Plaintiff had established a prima facie case and awarded the damages as claimed.

The Defendants/Appellants in their notice of Appeal indicated the following as their grounds of appeal:-

That the Magistrate erred or misdirected herself when she found that the claim of unlawful arrest has been proved on a balance of probabilities since the Respondent/Plaintiff was arrested in respect of Schedule 1 offence of murder and they did not require a warrant of arrest, and the first defendant denied arresting the Plaintiff.

That the amount awarded in respect of unlawful arrest is disproportionate to the duration of the detention.

That the Magistrate erred or misdirected herself in accepting the evidence of the Plaintiff that he was assaulted since it was highly improbable that the police would have assaulted the Plaintiff and released him on the same day with visible injuries.

That the quantum of damages awarded was excessive since the Plaintiff did not sustain serious injuries and was not hospitalized.

The Respondent/ Plaintiff did not oppose the Appeal and there was no appearance for the Respondent at the hearing of the matter.

The Plaintiff's version in the court a quo was briefly as follows:-

That whilst he was at his brother's residence two men, the First Respondent, Mr Gontsana, and Mr Tuswa arrived at his home and identified themselves as police officers and requested him to go to Savoy with them to be questioned in connection with a young man who had passed away.

They asked if he had any problem with going to Savoy with them and he said no.

He stopped eating because he had to comply with their instructions.

When they arrived at the car the First Respondent asked him if they could tie him and they asked at the same time if he would run away.

They said he must get in the back of the bakkie and they drove away with him.

He was unable to identify the person who did not alight from the vehicle and he is unknown to him.

At Savoy all three of them entered the office and closed the door. Mr Tuswa instructed him to sit behind the door. The First Defendant asked him why he killed Viki and he responded that he did not kill him and he was not there at Ziphunzana.

They said he was lying and the First Defendant made him face the mat with his head and said that he was going to tell the truth.

They thereafter switched off the light and locked the door after saying to him that he must remain in the same position.

They returned after approximately 15 minutes and Mr Gontsana, the First Defendant lifted the back of the Plaintiff's T-Shirt and hit him with an open hand several times.

The First Defendant then said they will take him to Central Police Station but instead took him back towards Ziphunzana and dropped him off at the deceased, Viki Dyasi's, home.

Mr Tuswa asked for his number and told him that he must not delay when they phoned him.

He went to the doctor the following day and the J88 reflects that the Plaintiff sustained a swelling on the forehead and back of the neck as well as contusions on the back.

The conclusion on the J88 was that the findings were consistent with alleged complaints/assaults.

Under cross examination he indicated that they said that they were going to question him so he therefore had to accompany them.

The defendant's version that was put to him was that they denied that either the First Defendant or Mr Tuswa went to the Plaintiff's residence.

Under cross examination the Plaintiff further indicated that he laid charges of assault against the First Defendant on the very same day of the incident at Central Police Station.

That concluded the Plaintiff's testimony.

The Plaintiff thereafter called Nomande Memela to testify.

According to her, a Mr Gontsana, the First Defendant, and Mr Tuswa arrived at her home in a white van without a canopy and there was a third person in the vehicle.

They asked her about the whereabouts of her son, as they were looking for him in connection with the death of Viki Dyasi, as her son was implicated in his death.

She was told by the Plaintiff that he had been arrested when he had been assaulted.

She denied the First Defendant's version that he had never gone to Ziphunzana on the day in question.

That concluded the Plaintiff's case.

The First Defendant, Mr Gonstana, thereafter testified.

According to him he did not know the Plaintiff or his witness.

He denied that he assaulted or arrested the Plaintiff.

He did not handle a police docket in connection with the death of Viki Dyasi.

According to him he is being mentioned by the Plaintiff because Mr Tuswa stays next to his residence and he usually picks him up when he goes home.

According to him Mr Tukayi was the investigating officer of the Dyasi case.

That concluded his testimony.

The Defendant then called Captain Govusa who testified that he was given the docket of Viki Dyasi's death and he handed it over to Inspector Tukayi to investigate and he did not give the docket to Inspector Gontsana and Inspector Tuswa.

The Defendant then called Inspector Tukayi who testified as follows:-

That he was under the command of Captain Govusa and was the investigating officer in the case of Viki Dyasi.

The relatives had told him that the deceased was seen with Anele and another friend.

He went there in the company of Inspector Siganya and Constable Zongqa, in a bakkie with no canopy.

They requested the Plaintiff to accompany them as they were investigating the case and they had questions to ask.

They were not arresting him so they put him in a van without a canopy.

The three of them questioned the Plaintiff at Savoy.

They took him back home and went to the deceased person's family to tell them that there was no evidence to lead to the arrest or detention of the Plaintiff.

That concluded the Defendant's case.

The Defendant's witnesses confirmed the Plaintiff's version regarding the following issues:-

That the Plaintiff was taken in for questioning;

That he was requested to accompany them;

That he was questioned at Savoy; and

That he was taken back to the deceased person's home.

The defendant disputed the following:-

The identity of the officers who took the Plaintiff in for questioning, the Defendant alleging that it was Mr Tukayi, Inspector Siganya and Constable Zongqa whereas the Plaintiff alleges that it was Inspector Manyawezeli Gontsana, Mr Tuswa and another unknown officer.

The Defendant denied that the Plaintiff was assaulted whereas the Plaintiff alleged that he had been assaulted and in this regard put up a J88 that establishes that he had been assaulted.

The Plaintiff's version was not substantially challenged under cross examination. His witness did not confirm his arrest but did provide confirmation of the fact that:-

It was the First Defendant and Inspector Tuswa who had indicated that they were investigating the murder of the deceased;

Wanted to question her son in connection with the case;

Had come with another person in a white Bakkie without a canopy; and

Accordingly placed them in the area at the relevant time.

The Defendant's version had not even been put to the Plaintiff regarding who took him in for questioning.

The probabilities in this case favour the acceptance of the Plaintiff's version having regard to the fact that:-

He on the very same day of the incident went and laid a charge of assault against the First Defendant at Central Police Station.

That he went to the doctor the following day and received medical attention.

The medical report confirms that he was assaulted.

That he was obeying the command/ instruction from the police.

That the police witnesses confirmed that he was taken in for questioning at Savoy Hotel Park and dropped off without being formally arrested or detained.

The evidence tendered by the Plaintiff has established that he was assaulted and the probabilities favour the acceptance of his version as to how he sustained these injuries particularly having regard to the fact that he reported the incident and laid charges of assault on the same day of the incident.

The Plaintiff has accordingly established on a balance of probabilities that he was wrongfully assaulted by the First Defendant and other officers acting within the course and scope of their employment.

The issue that remains is whether or not he had been arrested. It is evident that the Defendant did not intend to formally arrest the Plaintiff. An arrest as contemplated by section 39 of Act 51 of 1977 is intended to bring a person before a court of law to answer a criminal charge.

State President and Others v Tsenali 1986 (4) S.A 1150 (ID) AT1185.

It is evident that the Plaintiff was never formally charged or detained.

The Defendant's counsel correctly argued that the mere request by the Police for a person to go to the police station would not in itself constitute an arrest or a deprivation of the Plaintiff's freedom according to the case of *Isaacs v Minister Van Wet En Orde* 1996 (1) SACR 314 (A) at 320 I – J.

However in that case the Plaintiff was requested to go to the Police Station unaccompanied whereas in this case the Plaintiff was taken in a police van and was tied, and was instructed to accompany them to be questioned.

In *R v Majema* 1948 (2) S.A 152 (E) AT 154 it was held that a person is under arrest as soon as the police assume control over his/her movements.

This is so even if the police officer who assumes the control does not know that he is acting unlawfully.

See *Smith v Mayaton Outfitters* 1971 (1) S.A 157 (7).

In this case it is evident from the facts that the police assumed control over the Plaintiff and accordingly arrested him and deprived him of his freedom.

The issue of whether or not they could have arrested him without a warrant does not arise if one has regard to the testimony of Inspector Tukayi who states that they told the deceased's family that they had no evidence to lead to the arrest or detention of the Plaintiff.

There accordingly was, on the defendant's version, no reasonable suspicion which would justify an arrest without a warrant, irrespective of whether or not the suspicion was in connection with a Scheduled offence.

The Plaintiff has accordingly established on a balance of probabilities that he was wrongfully arrested.

The Plaintiff was quite certain about the identity of two of the officers.

He laid a charge on the very same day.

He also described correctly the vehicle that he was taken in.

The probabilities favours the Plaintiff's version with regard to the identity of the officers, especially having regard to the fact that the identity is confirmed by his witness and the fact that the Defendant's version with regard to who the arresting officers were was never put to the Plaintiff, for him to respond to the allegations.

The Second Defendant is in any event vicariously liable for the actions of its employees who acted within the course and scope of their employment.

It is evident that the Plaintiff was, even on the Defendant's version, taken in for questioning and thereafter released without being formally charged.

The Defendant's witnesses did not indicate that they intended arresting the Plaintiff with or without a warrant but just instructed him to come in for questioning.

In the circumstances the Plaintiff has established on a balance of probabilities that:-

He was wrongfully arrested; and

That he was wrongfully assaulted.

The Plaintiff has discharged the onus resting upon him to prove that the defendant is liable for payment of such damages as he is able to prove arising from his wrongful arrest and wrongful assault, by the First Defendant.

The Appeal accordingly fails in respect of the issue of liability.

There however appears to be merit in the Appeal against the quantum of damages awarded.

The Plaintiff did not tender sufficient evidence with regard to quantification of his damages, nor has it been properly or adequately particularised in his Particulars of Claim.

The Plaintiff was on his own version detained for a period of approximately an hour.

a brief examination of the amounts awarded in other cases is warranted:-

In *Minister of Safety and Security and two others vs Lungile Matiki and another* Case number 75/2009. In this case the Plaintiff who were detained for a day commencing at 4pm until 8am the following day were awarded R10 000-00 damages each.

In *Sibiya v The Minister of Safety and Security* [2008] ZAKZHC 44; [2008] 4 ALL SA 570 (N), Balton J stated as follows (at 575a-j):

"The following cases serve as a guidance for awards for unlawful arrest and detention:-

In *Mthimkhulu and Another v The Minister of Law and Order* 1993 (3) SA 432 (E) [also reported at [1993] 4 ALL SA 315 (E) – Ed] the Plaintiff, a 26 year old unmarried male with standard 5 level of education, earned R120 per week and had a blue belt in karate. He was awarded R909 per day which equates to a present day value of R2 800 per day.

In *Minister van Wet en Order v van der Heever* 1982 (4) SA 16 (C) at 22F [also reported at [1982] 2 ALL SA 218 (C) –Ed], the Plaintiff, a respected man in the community, was detained for four and a half days and awarded R250 per day which equates to a present day value of R3 000 per day.

In *Donono v Minister of Prisons* 1973 (4) SA 259 (C) at 263H-265 (also reported at

[1973] 4 ALL SA 190 (C) – Ed] the Plaintiff was detained for three weeks and did not inform the prison authorities of his true identity. He was awarded R120 per day which equates to a present day value of R4 400 per day.

In *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 935 [also reported at [1978] 4 ALL SA 820 (D) – Ed], the Plaintiff, a married man with six children and employed for six years at a company, was placed in a

cell with 30 or more prisoners. He was awarded R500 per day which equates to a present day value of R10 000 per day.

In *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 849B [also reported at [1989] 3 ALL SA 140 (V) – Ed], the Plaintiff, a 41 year old businessman and director of companies, was detained for eight days. The Police closed his business and opposed bail. He was awarded R2 500 per day, which equates to a present day value of R15 000 per day.

In *Thandanani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707B [also reported at [1991] 1 ALL SA 30 (E) –Ed], the Plaintiff, a 37 year old man of some standing and organizer of the General Workers Union, was arrested in the presence of employees and detained for 68 days. He was awarded R324 per day which equates to a present day value of R1 500 per day.

In *Manase v Minister of Safety and Security and another* 2003 (1) SA 567 (Ck) at 578 C [also reported at [2002] JOL 10101 (Ck)-Ed] the Plaintiff, a 65 year old, married successful businessman, was detained for 49 days. He was awarded R1 837 per day which equates to a present day value of R2 500 per day.

In *Minister of Safety and Security v Seymour* 2006 (5) SA 495 (W) at 498E-500 the Plaintiff, a 65 year old chairman of an Association of Small Scale Farmers and managing director of a Co-operation, was detained for five days. He was awarded R90 000 per day which equates to a current day value of R118 000 per day.

In *Todt v Ipser* 1993 (3) SA 577 (A) [also reported at [1993] 2 ALL SA 296 (A)-Ed] a female estate agent was detained for eight to ten hours as a result of a section 65 warrant, and awarded R4 000 which equates to a present day value of R14 000 per day.”

“In Sibiya’s case supra the Plaintiff, a 24 year old unemployed man with a grade 11 level education who was a paraplegic was unlawfully arrested. He was first detained in hospital (from 8 March 2005 to 11 July 2005) and later in police cells (from 11 July 2005 to 23 August 2005). The court considered an amount of R5 000 per day to be reasonable as damages for unlawful arrest and detention and pointed out that the failure of the police to provide special care for a physically disabled person played a pivotal role in the determination of that award.

In *Ziyanda Mzileni v Minister of safety and Security*, case number 488/09 (unreported decision of Eastern Cape High Court, (Mthatha) the Plaintiff, a married female educator was unlawfully arrested at her home and put in the back of a police van. She was eight months pregnant at the time and her husband and children were present at home when she was arrested. She was transported to the police station in the back of the van. She was transported back home in the same manner. Her curtailment of liberty was for a short period of time – a matter of minutes in the back of the van and $\frac{3}{4}$ of an hour in all. She was awarded R15 000 for unlawful arrest,

deprivation of liberty and contumelia.”

The Plaintiff in this matter has not set out any factors that indicate that due to his standing in the community or his educational background, a higher amount of damages should be awarded to him.

Having regard to the fact that he was mistreated, the period of his detention at Savoy that rendered his arrest and detention, although for a short duration, more traumatic an amount of R10 000 is an appropriate amount of compensation for the wrongful arrest in the circumstances of this case.

The Plaintiff in this case was assaulted during this arrest. The physical integrity of an individual is fundamental and an infringement of this right is indefensible.

Such invasions are deplorable and are condemned in the strongest terms.

The Plaintiff’s injuries were fortunately not of a serious nature and no evidence was tendered to demonstrate any long term emotional trauma or serious sequelae arising from the assault, or the confinement in the darkened room. The incident would nonetheless most certainly have been traumatic.

An amount of R20 000-00 is considered a just and equitable amount for damages sustained in respect of the unlawful/ wrongful assault, mainly due to the fact that any form of invasion of a person’s physical integrity no matter how minor is indefensible and unacceptable in any civilised society, particularly by persons who are enjoined to protect individuals against such invasions of their physical integrity.

The evidence failed to demonstrate that the First Defendant acted in his personal capacity or on a frolic of his own, nor was this alleged by the Second Defendant.

The evidence demonstrates that the First Defendant acted within the course and scope of his employment and accordingly the Second Defendant is vicariously liable for the First Defendant’s conduct, and the conduct of the other two officers.

See: *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) S.A 419 (CC) and *Minister of Safety and Security v Luiters* [2006] ZASCA 11; 2006 (4) S.A 160 SCA and [2006] ZACC 21; 2007 (2) S.A 106 C.C.

There accordingly does not appear to be any justification to hold the First Defendant personally liable.

The Appeal accordingly partially succeeds, with regard to the quantum of damages awarded.

The award of damages of R50 000-00 in respect of wrongful arrest and R50 000-00 in respect of wrongful detention is set aside and substituted with an award of R10 000-00 damages in respect of unlawful arrest and R20 000-00 in respect of the wrongful assault.

The Plaintiff has proven its case on the merits and has been awarded damages and accordingly ought to be granted costs of the action in the Magistrate's court.

The Plaintiff did not oppose the Appeal and the Defendants only partially succeeded, there accordingly ought to be no order as to costs of the Appeal in the circumstances of this case.

The following order is accordingly made:-

The Second Defendant/Second Appellant is found liable to compensate the Plaintiff/Respondent for the wrongful arrest and wrongful assault of the Plaintiff by the First Defendant and other officers who were acting within the course and scope of their employment, with the second Defendant.

That the order by the Magistrate awarding to the Plaintiff the sum of R50 000-00 in respect of unlawful/ wrongful arrest and R50 000 in respect of wrongful assault is set aside and substituted with the following order:-

That the Second Defendant/ Second Appellant be and is hereby directed to pay to the Plaintiff:-

The sum of R10 000-00 as damages arising out of the Plaintiff's wrongful arrest; and

The sum of R 20 000-00 arising out of the Plaintiff's wrongful assault.

The Second Defendant/ Second Appellant is directed to pay the Plaintiff's/Respondent's cost of the action in the Magistrate's court.

No order as to costs is made in respect of the Appeal.

F.B.A Dawood

Judge of the High Court

I AGREE

Dukada A.J

Acting Judge of the High Court

Heard on : 27 AUGUST 2010

Delivered on : 23 SEPTEMBER 2010

FOR THE APPELLANT : MR SODO

FOR THE RESPONDENT : NO APPEARANCE

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