

SOUTH AFRICA / JUDGMENT

Mthembu v Minister of Police (2018/14036) [2024] ZAGPJHC 813 (22 August 2024) [2024] ZAGPJHC 813

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Van Nieuwenhuizen

CASE / FILE NUMBER

2018/14036

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****(GAUTENG DIVISION,
JOHANNESBURG)****CASE NO: 2018/14036****1. REPORTABLE:****NO****2. OF****INTEREST TO OTHER JUDGES: NO****3. REVISED.****22/8/2024 S****VAN NIEUWENHUIZEN AJ****In**

the matter between:

**SIMPHIWE
WONDERBOY MTHEMBU
Plaintiff
and
THE
MINISTER OF POLICE
Defendant**

JUDGMENT

VAN NIEUWENHUIZEN AJ

[1] In this matter, the plaintiff alleges that, on 28 May 2017 at 15h00 near Claim and Noord str in Johannesburg he was arrested without a warrant by a member of the South African Police Services (“SAPS”), who was a peace officer acting within the course and scope of his employment with the defendant, on a charge of “M12P” (which I understand to mean malicious injury to property) and interfering with police duties. The parties could not come to any agreement as to the merits or the quantum and, as a consequence, evidence had to be heard. The trial commenced on 30 April 2024 and ran (interrupted by the public holiday on 1 May 2024) till 3 May 2024. Thereafter the parties agreed to postpone the matter and to prepare heads of argument. Ultimately the matter was argued before me between 09h00-10h00 on 13 May 2024. At the commencement of the trial the legal representatives of the Minister of Police accepted that they bear the onus and had to prove that the plaintiff was lawfully arrested in terms of section 40(1) of the Criminal Procedure Act 51 of 1977 for wilfully obstructing a police officer in the execution of his duty, as well as malicious injury to property and was lawfully

detained.

[2]

The defendant admitted that the plaintiff was detained until 30 May 2017 until about 09:55, whereafter he was taken to court for

his first appearance.

[3]

The legal representative for the Minister of Police, Ms Buthelezi, presented the evidence of Constable Chauke. After Cst Chauke testified, Warrant Officer Ngobeni was called. The plaintiff, represented by Mr Malema, only called the Plaintiff to testify. For

the sake of convenience the plaintiff will be referred to as Mr Mthembu or “the plaintiff” as may be convenient.

SUMMARY OF THE EVIDENCE

Cst. Chauke

[4] The following is a brief summary of his evidence in chief. Cst Chauke testified that, on 28 May 2017, he and a Cst Ngobeni (the driver of an unmarked police van), a member of the CPF (community police forum), Mr Sikhumbuzo Simelane (Mr Simelane) were busy with crime prevention duties near the corner of Claim and De Villiers str in the central part of Johannesburg. They were focusing on vagrants and people who were drunk in public.

- [5] Cst Chauke testified that he was sitting in the van, which was moving forward slowly being driven by Cst Ngobeni, when he noticed in the side view mirror of the van that the plaintiff, Mr Mthembu was hanging onto a padlock, utilised to lock one of the compartments in the van. At the time, Mr Simelane, who was in plain clothes was outside the truck on the pavement. Cst Chauke requested Cst Ngobeni to stop. He alighted from the van and, at that point, Mr Mthembu ran away. Shortly thereafter, Mr Simelane returned with Mr Mthembu and, when, Cst Chauke enquired why Mr Mthembu was hanging onto the padlock on one of the compartments of the van, Mr Mthembu allegedly told him that he was merely trying to set his friend, Mpho, free. Cst Chauke then took him to the padlock and found a key that broke off in the padlock. He decided to arrest him for malicious injury to property and interfering with police duties. Cst Chauke initially made no mention of warning Mr Mthembu of his rights prior to asking him any questions. Shortly after relating this tale he alleged that he read Mr Mthembu his rights and warned him that anything he might say might be used against him in evidence and told him he had the right to apply for bail.
- [6] After they arrived at the Johannesburg Central Police Station (no further people were arrested after Mr Mthembu's arrest), Mr Mthembu was escorted into the police station where he was detained in two different locations whilst waiting for a considerable period still in handcuffs.
- [7] Cst Chauke alleged that, after the arrival at the police station he discovered that the padlock which Mr Mthembu was hanging on to was damaged and he could not open same. Apparently, there was a part of a broken key inside the lock. He had to open the padlock with force. He was unsure what to charge Mr Mthembu for and went to the crime office to obtain advice in this regard. Afterwards, he returned, having obtained advice and he charged Mr Mthembu with malicious injury to property in respect of the lock, as well as wilful interference with police duties. This despite the fact that he testified from the outset that he arrested Mr Mthembu on the same charges.
- [8] Although Mr Mthembu was arrested at approximately 15h00, Cst Chauke could only process the paperwork relating to Mr Mthembu by 21h50 and open a docket containing the necessary documentation, as well as completing the police investigation section of such docket, reflecting that he handed the padlock in as an exhibit under the SAP13 exhibit section.
- [9] During his evidence in chief I was given a bundle of documents, which was marked Exhibit A, which consisted of the defendant's discovery. Not all the documents in this bundle were proved or referred to and I will only make mention of those actually dealt with in evidence. Cst Chauke wrote his own statement and same differs in minor respects from his evidence in chief and the sequence of events.
- [10] Cst Chauke was clearly unsure as to what he should charge Mr Mthembu for, hence he sought advice from the crime office. According to him, this took some time which explains the long delay before the docket was finally opened and all the entries in the docket were

completed. It is clear from Exhibit “A”, and specifically document number R5231774, styled “Notice of rights in terms of the Constitution (section 35 of Act No 108 of 1996)”, that this document was signed by Mr Mthembu, having been completed by Cst Chauke, around about 21:51 in the evening. There is no reference in this document to the effect that he advised Mr Mthembu earlier on of his rights.

- [11] Only after this was done Mr Mthembu was detained in a cell with other arrested persons. When Cst Chauke was asked whether he considered Mr Mthembu as a candidate for bail he initially relied on the fact that with his rank he is not permitted to consider bail. He ultimately did not dispute that Mr Mthembu requested to be released to go to work but it is clear that Cst Chauke did not apply his mind as to how bail could be procured for Mr Mthembu. This makes a mockery of part of his evidence in chief. I have in mind the part already referred to when he allegedly read Mr Mthembu his rights and told him on the scene of the arrest that Mr Mthembu had a right to ask for bail.
- [12] I specifically point out that the statement regarding the interview with the suspect, which starts on page 030-11 and ends at 030-24 of Exhibit “A”, was not specifically proved before me, nor any evidence led about same. I was specifically referred to his own statement (already referred to) and the fact that he also wrote Mr Simelane’s statement for him because Mr Simelane could not do so himself.
- [13] I was referred to the entries made in the police diary, and specifically the SAP13 section (030-10) as well as the reference to the document 030-26, which was completed by Warrant Officer Ngobeni as part of his investigations, while Mr Mthembu was still in detention, relating to the fact that although Mr Mthembu had a fixed address no recommendation was made regarding bail. This was indicated by an X under the block marked “No”. Under the block, marked “Yes”, which is supposed to signify that bail should be opposed, no mark was applied suggesting that bail could in fact be fixed. Apparently, this document was prepared for the prosecutor. It also reflects that Mr Mthembu could be placed in the care of a guardian and, with regard to the questions as to whether he had to report to a police station or whether there are witnesses he should not be communicating with, all the relevant blocks were marked “No”.
- [14] I should point out that Mr Mthembu’s name was not completed at the top of this form, but it was nevertheless presented to me as the form completed by Warrant Officer Ngobeni with regard to Mr Mthembu.
- [15] It is common cause that the charges were dropped by the prosecutor on 30 May 2017 allegedly on humanitarian grounds. What these “humanitarian grounds” were, was never explained.
- [16] The police diary entries in Exhibit “A” only commence with serial number 1980 at 21h40 and refer to the detention of Mr Mthembu by Cst Chauke for malicious damage to property and to him frustrating the ends of justice. It also reflects that his rights were explained to him and his next of kin informed. As for the rest, the policy diary has no specific significance,

other than reflecting that his cell was visited at 22:36 the same evening and 23:00 and all seemed to be in order. I do not refer to the other diary entries as no reference were made to them during the trial.

- [17] Under cross-examination, Cst Chauke at times had difficulty in remembering all the details (which is not surprising given that he was testifying in 2024 and the events played out in 2017) and made it clear that his initial arrest was based on Mr Mthembu interfering with the duties of the police.
- [18] He at times had difficulty in answering certain questions and, by and large, could not really explain the time lapse since the arrest and the arrival at the Johannesburg Central Police Station, which was not far from the place of arrest, and the fact that the docket and the notice pertaining to the accused's rights only reflects the completion of the paperwork at 21:51 in the evening. His only explanation related to the advice he had to obtain from the crime office which made no sense given what he stated from the outset.
- [19] The only evidence suggesting that Mr Mthembu inserted a key in the lock came from Cst Chauke who was at the time sitting in the police van. The value of the lock was estimated between R50 and R150. The lock was also not available in Court as an exhibit and according to the evidence forfeited to the State (sic)

Warrant Officer Ngobeni

- [20] Warrant Officer Ngobeni came on duty on 29 May 2017 and was handed the docket for further investigation. He followed up as to whether Mr Mthembu had a fixed address and made such enquiries as he could but could not really add to any evidence justifying the arrest. He also could not cast any light on the subsequent release of Mr Mthembu on 30 May 2017 or the failure to grant him bail before the Court date. He completed the recommendations to the prosecutor on 30-26 of Exhibit "A".

Mr Mthembu

- [21] Mr Mthembu testified that, on the day in question, he and his friend, Mpho, were on their way to work. He testified that he was a trained barman and waiter and, according to him, was placed with Mpho at the Italian Club. As I understand it, this was a prestigious position for him to work in and, as a consequence of his arrest and the fact that he never arrived at work that day he lost this position there. Notwithstanding this no claim for loss of income was instituted.
- [22] He testified that whilst walking along with Mpho on their way to work he decided to enter a shop to buy some earphones and, when he came out, he could not find Mpho and then tried to make contact with his friend by phone and his friend informed him that he was under arrest in a police van.

- [23] He then looked around and saw an unmarked vehicle (which apparently was the police van) and went there to try and procure the release of his friend. Immediately prior to his arrest, the truck was moving slowly and Mr Mthembu, was moving along with the truck trying to hear from his friend, Mpho, as to who he must contact about the arrest. He was warned to stay away from the truck (most probably by Mr Simelane) and when the truck stopped and Cst Chauke alighted, he decided to run away. He was eventually “caught” in the Universal Church by Mr Simelane and brought back to the scene where the truck was waiting. He admits that Cst Chauke, who was in uniform, spoke to him and arrested him. He tried to explain his conduct to Cst Chauke. He understood that he was arrested for interfering with the police in the execution of their duties. He denied that any reference was made to a damaged padlock when Cst Chauke arrested him or to malicious injury to property.
- [24] Thereafter the van proceeded to the Johannesburg Central Police Station. No further people were arrested before his arrival at Johannesburg Central Police Station.

EVALUATION OF THE EVIDENCE

- [25] On a conspectus of all the evidence, and specifically the demeanour of Cst Chauke in the witness box, I am far from satisfied that his recollection of the events is accurate or reliable. His ability to see exactly what Mr Mthembu was doing must have been impaired given that he was still at the time sitting in the police van.
- [26] Cst Chauke, had difficulty remembering the detail of the events of the day and, in general, did not make a good impression. I find it unlikely that a constable with approximately 10 years experience would need advice as to what charges he should lay against a person who allegedly damaged the padlock and interfered with police in the execution of their duties.
- [27] The police officials were clearly irritated by Mr Mthembu’s attempt to get close to the van to obtain the necessary information as to who he should contact on behalf of Mpho and the fact that he moved even closer to hear what Mpho was saying to him from inside the van.
- [28] As already stated, Warrant Officer Ngobeni did not add any eye witness evidence to the defendant’s case. If anything the investigations he performed pointed to the fact that Mr Mthembu was not a flight risk. (Warrant Officer Ngobeni should not be confused with Cst Ngobeni, who was the driver of the truck and was also not called as a witness).
- [29] Mr Mthembu came across as an honest witness and had a clear recollection of the events of the day. He was clearly quite upset that he was incarcerated, handcuffed and treated in this way by the police and vehemently denied that he had at any stage hung onto the padlock as alleged or tried to insert a key into it.
- [30] I find the version of Cst Chauke highly unlikely and improbable. For the events to have played out the way Cst. Chauke alleged he saw it play out, it would mean that Mr Mthembu had hung onto the padlock trying to open it with an incorrect key whilst Mr Simelane (and to some extent perhaps Cst Chauke), could see him doing so and was close enough to prevent him from doing so and would be able to arrest him with ease. For a man like Mr

Mthembu to have done such a thing would have been extremely daring and highly improbable, amounting to an act of sheer madness, given that he allegedly tried to insert a key into the padlock and was hanging onto it so as to set free Mpho and other prisoners whilst the truck was moving (albeit slowly).

- [31] When Cst Chauke's evidence is weighed against the probability of Mr Mthembu enquiring, while he was next to the police van to find out from Mpho who he must contact about the arrest, and the number he must use, makes much more sense. The notion that he would display any act of daring or even aggression in any physical way is simply inconsistent with his general demeanour and conduct in court. He came across as a fairly refined and educated man and very proud of his station in society and specifically with the fact that he enjoyed the honour of performing duties as a barman waiter at the Italian Club.
- [32] If the quality of Mr Mthembu's evidence is compared with that of Cst Chauke, it is simple and easy to conclude that it is highly improbable that Cst Chauke could possibly have seen what he alleges he saw, or alternatively had made it up so as to explain the fact that he ended up with a defunct padlock. The fact that the padlock, broken as it was, was no longer available as an exhibit in the trial court also does not help the case of the defendant.
- [33] The fact that the defendant failed to call Mr Simelane meant that as to the actual event itself Cst. Chauke's evidence is not corroborated. No other evidence was presented excluding the probability that one or more of the other arrestees tampered with the lock prior to Cst Chauke's alleged observations.[1]
- [34] On balance, the probabilities favour the version of Mr Mthembu and in all the circumstances, I accept his version of the events. To try and find out from one's friend who one should contact once you are arrested by the police can hardly be construed as interference with police duties and, in the circumstances, I reject the version of Cst Chauke and also the denial of any liability on the part of the police.
- [35] In addition Mr Simelane was apparently present on 30 April 2024 and thereafter did not attend court again. Why I was not asked to warn him to appear on the 2 May 2024 and remain present or why he was absent or could not be called as a witness was never explained. In addition the defendant accepted the onus to prove the lawfulness of the arrest and detention.
- [36] As a consequence, I find that Mr Mthembu was unlawfully arrested on the scene at approximately 15h00 on 28 May 2017 and was thereafter unlawfully detained until his release on 30 April 2024 at the Johannesburg Magistrate's Court.

DAMAGES

[37] The next question is whether Mr Mthembu is entitled to any damages and if so, what the quantum thereof should be. The total claim as formulated by Mr Mthembu's legal representative is clearly excessive. Although a total of R650 000 is claimed it would appear R450 000 was meant to be for wrongful arrest and unlawful detention until Mr Mthembu's case was processed and the subsequent unlawful detention accounts for the differential.[2]

[38] During argument my attention was drawn to the humiliation he suffered, the fact that he remained handcuffed for several hours, the torrid conditions prevailing in the cell he was ultimately detained in, and the duration he was detained (about 45 hrs). I also take into account the absence of an explanation why he was not taken to court on Monday 29 May 2017 and the fact that he was nearly 22 years old at the time of the unlawful arrest and detention.

[39] I was referred to several court cases on quantum by both parties none of which quite fit the facts in this case. I accept that the damages award has to be fact specific as contended by Ms Buthelezi.

[40] In arriving at an appropriate award for the damages suffered by the plaintiff I specifically take into account the cases considered and the conclusion arrived at in *Minister of Safety and Security v Seymour*[3] where Nugent JA observed that:

"[20] Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."

[41] I am of the view that Mr Mthembu is only entitled to compensation of R150 000 as a lump sum for all his damage suffered.

COSTS

[42] At the time the summons in this matter was issued the plaintiff was entitled as of right to approach the High Court same having inherent jurisdiction. I regard this as a serious matter given the premium the Constitution places on a person's liberty. I am therefore not prepared to subject the plaintiff's claim to the lowest scale of costs. Bearing in mind the most recent changes to the Uniform Rules of Court pertaining to taxation of costs as between parties and the factors enumerated in the amendments of the Uniform Rules of Court (as recently amended) I am of the view that the costs in this matter should be taxed on scale "C" as between party and party.

[43] Accordingly, I make the following orders:

43.1 The defendant is ordered to pay the plaintiff damages for wrongful arrest and unlawful detention in the amount of R150,000;

43.2 The defendant is to pay the plaintiff's taxed costs based on scale "C" as between party and party.

S VAN NIEUWENHUIZEN AJ

Representation for plaintiff

Counsel: Adv JMV Malema

Instructed by: Madelaine Gowrie Attorneys,

107 Market (Albertina Sisulu) Street,

Elephant House,

4th Floor,

Suite 405,

Johannesburg,

P.O. Box 10757,

THE FALLS,

1522,

TEL NO: (011) 333 1830,

REF:MG/MOP/1185

Email: admin@mgowrieattorneys.co.za

Representation for defendant

Counsel: Adv Z. Buthelezi

Instructed by: The State Attorney,

10th Floor North State Building,

95 Albertina Sisulu,

Private Bag X9,

Docex 688

Ref:Mr Poee (RPoee@justice.gov.za)

REF NO: 2188/18/P6

[1] Cf in general the approach to be followed as set out in Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA)

[2] See para 8 and p of the Particulars of Claim the latter being formulated in the alternative.

[3] 2006 (6) SA 320 (SCA)

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