

SOUTH AFRICA / JUDGMENT

Ruiendo and Others v Minister of Police (29/2021) [2023]

ZANWHC 198 (27 October 2023)

[2023] ZANWHC 198

COURT

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

29/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTHWEST DIVISION –
MAHIKENG

Case

No.: 29/2021

Reportable:	NO Circulate
to Judges:	NO Circulate
to Magistrates:	NO Circulate to Regional Magistrates: NO In

the matter between:

MAIBE
RUIENDO RUIENDO
First
Plaintiff
FILIPE
JOAO
Second
Plaintiff
MANUEL
SEGUNDA FERREIRA
Third
Plaintiff
and
MINISTER
OF POLICE
Defendant

Summary:

Assault –
unlawful arrest and detention – ss 40(1)(a) and 40(1)(b) of the
Criminal Procedure Act – whether arrest
and detention were
justified.

This
judgment was handed down electronically by circulation to the
parties' representatives via email. The date and time
for hand-down are deemed to be 27 October 2023.

ORDER

(1)

The defendant is liable for damages arising from the assault of the
first, second
and third plaintiffs.

(2)

The defendant is liable for damages arising from the unlawful arrest
and detention
of the second and third plaintiffs.

(3)

The defendant shall pay the costs.

JUDGMENT

Mfenyana J

Factual matrix

- [1] The plaintiffs instituted claims against the defendant for damages arising from their arrest, assault, and detention, it being alleged that the plaintiffs were assaulted, arrested, and detained by members of the defendant, pursuant to an incident which took place on 2 October 2020, at McKenzie Street, in the area of Vryburg, North West Province.

- [2] In respect of the first plaintiff, it is alleged that on 2 October 2020, and at McKenzie Street in Vryburg, the first plaintiff (Ruiendo) was assaulted by six unknown police officers, who shot him with rubber bullets, and kicked him with booted feet. It is further alleged that as a result of the said alleged assault, the 1st plaintiff sustained injuries.
- [3] In respect of the second plaintiff, it is alleged that on that same day of 2 October 2020, also at McKenzie Street, the second plaintiff (Joao) was assaulted by approximately six police officers who shot him twice on his left hand and stomach, choked him with a taser, and kicked him with booted feet, from which assault he sustained injuries.
- [4] In the particulars of claim, it is stated that following his assault, the second plaintiff was arrested by Constable Morwe (Morwe) at approximately 23h50, on a charge of robbery. It is common cause that he was subsequently detained at the police cells in Vryburg until his release at 15h00 on Monday, 5 October 2020. He did not appear in court.
- [5] In respect of the third plaintiff (Ferreira), it is alleged that on 2 October 2020, at McKenzie Street, in Vryburg, the third plaintiff was assaulted by approximately six unknown police officers who shot him

with rubber bullets on his left knee, left elbow, back, and arm, as a result of which he suffered injuries.

- [6] Likewise, on the same day, and subsequent to being assaulted as aforesaid, it is further alleged that the third plaintiff was unlawfully arrested without a warrant, by Constable Morwe, on a charge of robbery, and detained at the police cells in Vryburg until his release at approximately 15h00 on 5 October 2023, without appearing in court.
- [7] It is common cause that at the time of his arrest, the police officers were acting within the course and scope of their employment with the defendant, which renders the defendant vicariously liable for their actions.
- [8] The plaintiffs contend that their arrests, assault, and detention were unlawful, as the police officers did not have reasonable grounds to suspect that they had committed an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977, as amended, and further that they did not commit an offence in the presence of the arresting officers.
- [9] The plaintiffs claim damages against the defendant as follows:
- (i) An amount of R500 000 in respect of the assault of the first plaintiff.
 - (ii) An amount of R500 000 in respect of the assault of the second plaintiff, and R500 000 for his arrest and detention.
 - (iii) An amount of R500 000 in respect of the assault of the third plaintiff, and R500 000 in respect of his arrest and detention.

- [10] The defendant denies that the arrests and detention of the second and third plaintiffs were unlawful. He further denies that the police officers assaulted the plaintiffs or that they acted unlawfully in any way.
- [11] In his plea, the defendant relies on the provisions of s 40(1)(b) and s 49(1) and (2) of the Criminal Procedure Act No. 51 of 1977 (CPA). He denies that any of the plaintiffs was assaulted by the defendant's employees. In the alternative, the defendant pleads that the employees of the defendant, acted lawfully in terms of Section 49(1) and (2) of the CPA, which inter alia, permits the arresting officer to use force as may be reasonably necessary, and proportional in the circumstances to subdue a suspect and effect the arrest.
- [12] That the second and third plaintiffs were arrested on 2 October 2020 and detained at the Vryburg police cells until their release on 5 October 2020, is not denied by the defendant.
- [13] Inasmuch as the plaintiffs bear the onus of proof in respect of the assaults, and the onus of proving the lawfulness of the arrests lies with the defendant, the parties agreed that the plaintiffs would have the duty to begin in respect of both the assault and unlawful arrests.
- [14] The matter proceeded on merits with issue of quantum having been postponed sine die by agreement for later determination by this Court. In accordance with rule 33(4) this court, on 21 November 2022 granted an order

separating the issue of merits from the quantum.

Issues

to be decided

- [15] The following issues fall to be determined:

- (i) Whether the defendant is liable for the assault allegedly committed by its members on the first, second and third plaintiff.
- (ii) Whether the defendant is liable for the for the arrest and detention of the second and third plaintiffs.

Evidence of the first plaintiff

- [16] The first plaintiffs' case is essentially that on the day in question, at approximately 23h00, he was at a tavern. Upon exiting the tavern gate, he witnessed commotion on the street between the police and some members of the public, who are unknown to him. As it was during the period of the Covid- 19 restrictions, he together with his nephew and two other people proceeded home on foot. He saw the police van leave and drove up French Street. Before he could reach his house at McKenzie Street, a fleet of approximately 12 to 15 police vehicles approached them on both sides of the street, blocking their way. A group of approximately 20 armed police officers alighted from the vehicles and ordered them to lie on the ground, and they complied. The police demanded their passports and as his nephew

was attempting to take out his passport, one male police officer kicked him on the chest. When he tried to intervene, objecting to his nephew's assault, the same police officer hit him on his head with the back of the shotgun he was carrying and told him to "shut up". The same police officer dragged him and shot him on his left thigh as he was trying to stand up. He continued to fire four more shots as he tried to stand up again, shooting him on his lower calf. Another police officer hit him on the head with a shotgun and he became unconscious.

[17] He further testified that he was thrown into the back of a police vehicle where he found the second plaintiff lying there unconscious. Two more people were

brought in, and they were all taken to hospital where the second plaintiff was admitted. He did not receive any medical attention, as the police refused that he be treated. At approximately 24h00 he was taken to the police station.

[18] On his arrival at the police station, he was detained and released at approximately 04h00 the next morning. He was told that he was liable for a fine of R1 000.00 for contravening the Disaster Management Act. This, despite the fact that in the docket, the fine is stipulated as R100.00.

[19] Five days after his release, he consulted with a doctor. The J88 completed by Dr Dam indicates that the first plaintiff sustained bruises on his left thigh and left leg.

[20] During cross examination, when asked why there was no indication of the any head injuries in the J88, Mr Ruiendo testified that the swelling on his head had already subsided as he only went to the doctor, five days after he was assaulted. It was also the reason why there were only bruises, and no visible scars on his legs from the open wounds he had sustained.

[21] He denied that he tried to rob a police officer of his firearm. According to him, he was only with his nephew and two other people when they were accosted by the police. He testified that he saw no reason to flee as he had not done anything wrong. He simply stood and watched when the police were engaged in a scuffle with members of the community. He further denied that it was after midnight when the incident happened.

Evidence of the second plaintiff

[22] The second plaintiff testified that on the day in question, he had been working at a butchery as a security guard. He left work at approximately 17h30 and went home. At approximately 22h00 while at home with his cousin, who was also his co-worker, he went outside to have a smoke. His girlfriend, their daughter, and newborn baby were inside the house. As they went outside, they saw a convoy of police vehicles on the street. Four policemen entered his yard and started shooting at them without saying anything. At first he assumed that they came to search for drugs as that was a usual occurrence. They shot him on his belly and twice on his hand. Later, other policemen joined in and started beating him with the shotgun, calling him a Nigerian and a drug dealer. One police officer tried to shoot him on his private parts, but he blocked the bullets with his

hands, and that is how he sustained injuries on his hands.

[23] Mr Joao described how he was dragged by police as he tried to enter his house. He further testified that his girlfriend came out and asked the police why they were treating him that way. The next thing he remembers was when he woke up in hospital. It was approximately 06:00. There was a policeman next to him. The said policeman tried to handcuff him, but the doctor prevented him.

[24] The police officer instructed him to cooperate and get into the police vehicle. He gave him a document to sign, and he signed as instructed. He was later driven to the Vryburg police station where he found the third plaintiff, Mr Ferreira, already inside the cells. He was not told that he was being arrested, and why. It was only when the police asked him to remove his belt, shoelaces, cell phone, and wallet that he realised he was under arrest. The police officer insulted him and manhandled him as he was locking him up. He further testified that the medication he received from the hospital was also locked away when he was detained.

[25] In cross-examination, Mr Joao was taken to task about the entries on the J88. In the main, that it made no mention of an injury on the belly. His response was that the J88 was completed by the doctor in his absence, as the doctor was not available previously when he went to see her. One of the doctors told him to leave the form there, and it was later completed in his absence without indicating the wound on his belly. It is worth mentioning that the J88 indicates that it was completed on 17 October

2020. It is common cause that the second plaintiff was released from hospital on 3 October 2020.

[26] He denied that the police informed him of his rights, or the reason why they shot at him. He testified that all the documents he signed, were signed under duress. Upon perusal of the case docket, the following documents were found:

(i) An SAPS14 form bearing the date of 3 October 2020, signed by the second plaintiff at 03:55. This document indicates that the second plaintiff was charged with robbery.

(ii) A J534 form bearing the date of 3 October 2020, signed by the second plaintiff at 00:25. In this document the second plaintiff was notified to appear in the “Vry” court on 02 November 2020 for drinking in public.

(iii) An SAPS 3M bearing the date of 3 October 2020 and signed by the second plaintiff at 03:55. This document indicates that an interview was conducted with the second plaintiff on 03 October 2020 at 03:55 and was signed by him on 04 October 2020 at 11:40. According to this document, the second plaintiff was charged with attempted robbery. The document further stipulates that the second plaintiff sustained injuries to his left hand, belly and left leg. The photographs discovered by the 2nd plaintiff in this regard indicate an open wound on the left palm and a wound on the stomach.

Evidence of the third plaintiff

- [27] The third plaintiff testified that on the day in question, he was at the second plaintiff's house. At approximately 22:00 or 23:00 as the second plaintiff was about to escort him home, they saw a group of police vehicles coming towards them. They went back inside the yard and had a smoke. Four police officers in uniform, entered the premises and started shooting at them without saying anything. They shot him on his right arm. When he asked why he was being shot at, the police officer shot him again on his left leg. As he walked away, the police shot him again close to his elbow. Another shot hit him on his back, and he fell on the ground. The police took him to hospital where he received medical attention. He was thereafter transported to the police station, after being told that he would be taken home. He was not told that he was under arrest, and only realised this when he was told to remove his shoelaces and wallet. He was given documents to sign and was told not to ask questions. He did not appear in court.
- [28] During cross examination, Mr Ferreira was questioned at length about the discrepancies between the injuries he sustained, and what he told the police. He maintained that he told the police about all the injuries he sustained as a result of being shot at by the police, except the injuries he sustained when he fell on pieces of glass that were on the ground after being shot in the back. He testified that he could not see the pieces of glass as it was dark. The photographs discovered by the third plaintiff depict injuries to the back, left leg, upper right arm and back of left arm.
- [29] He denied that he took himself to hospital and reiterated that he was taken to hospital by the police. On his arrival at the hospital, he found the second plaintiff. At approximately 24:00 he was taken to the police station, and at 04:00 his constitutional rights were explained to him. He was released at 6:00.
- [30] The next time he saw Mr Joao was when he was brought to the 'detention room' at approximately 06:00. He further testified that no J88 was completed for his injuries as the hospital staff refused to assist him. He further testified that the police refused to register a criminal case against the police who shot him. As in the case of the second plaintiff, the docket refers to attempted robbery, robbery, and contravention of the Disaster Management Act of 18 September 2020.

Evidence of the defendant

- [31] Three witnesses testified on behalf of the defendant. The first witness, Constable Morwe (Morwe), testified that on 2 October 2020 at approximately 23h55, while on duty with his colleague, Sergeant Mothlamme (Mothlamme), he saw a group of approximately 20 people walking in the street. One of them was the second plaintiff. He was holding a beer in his hand. He enquired from the second plaintiff why he was drinking in public. As he was about to arrest him, the third plaintiff who was also part of the group, grabbed his firearm and attempted to take it away from him. The second plaintiff joined in. All the while, the other people in the group took turns in assaulting him. In an attempt to stop the second and third plaintiffs from taking his firearm, he pulled the trigger two or three times, and shot the

second plaintiff on the palm of his hand. He also fired about eleven other shots to disperse the group that was assaulting him.

- [32] Morwe further testified that while Mothlamme was inside the vehicle, the suspect (second plaintiff) was on the ground. They called for backup as they were travelling in a kombi[1]. When the backup vehicle arrived, they transported the second plaintiff to hospital where he received medical attention. Whilst at the hospital, somebody alerted him that one of the people who were trying to disarm him was there to seek medical attention. It turned out that it was the third plaintiff. He informed the hospital staff to attend to the third plaintiff whereafter he was going to arrest him. After the third plaintiff had been assisted, he transported both the second and third plaintiffs to the police station. He denied that he was arresting them at that stage.
- [33] He entered in the J534 that the second plaintiff was drinking in public and thereafter charged both of them with attempted robbery. Whether drinking in public constitutes an offence that warrants detention is a moot point. In the absence of any evidence of robbery, it requires further probing. According to Morwe, he arrested the third plaintiff, while the second plaintiff was arrested by Mothlamme. After charging them, he informed them of their constitutional rights and detained them. What appears from Morwe's testimony is that he himself is not certain of when he arrested the plaintiffs. His evidence points to various possibilities.
- [34] When asked whether he could identify the third plaintiff in court, Morwe testified that he did not recognise him, but could recall that his name is Phillip Ferreira. This is apparently a conflation of the second and third plaintiffs' names. He further testified that on the day in question, he was the only police officer who fired shots, and denied that he shot Ruiendo (first plaintiff) while he was lying down. He further stated that had Ruiendo been shot with rubber bullets, as alleged, he should have had an open wound and should have bled.
- [35] In respect of the second plaintiff, Morwe denied that he was at his place of residence when the incident occurred and reiterated that he was on the street. He denied assaulting the second plaintiff. He testified that he arrested Joao, as the second plaintiff, at the scene of the incident and thereafter took him to hospital before locking him up and informing him of his constitutional rights. His intention was not to arrest Joao but to give him a fine or a J534, but he did not listen and together with Ferreira they started assaulting him and trying to take away his firearm. This led him to arrive at the conclusion that the two plaintiffs were drunk. He further testified that his duty was to arrest, and it was the responsibility of the investigating office whether to release the plaintiffs on warning or bail.
- [36] During cross-examination, Morwe testified that he did not see what the other people in the group were doing, as his focus was only on the second plaintiff who was drinking in public. He only paid attention to the second plaintiff. This was challenged by the defence as improbable. He conceded that he took the second plaintiff to the police station to issue him

with a J534, which is different from warning a suspect. He later conceded that he arrested the second plaintiff at the scene of the incident, contrary to his earlier evidence that the second plaintiff was arrested by Mothlamme. In his answers under cross-examination, Morwe was evasive and sarcastic, which is not a model of forthright demeanour and exemplary behaviour expected of a police officer in court. For example, he evaded to answer where his colleagues were all along and sarcastically answered that they should answer for themselves. The above was not a difficult question and a polished police officer should have simply said: "I do not know", or simply said where they were if he knew. He also testified that he fired two or three shots, then 11 more but later changed his version. It was not difficult to decipher that he made his case up as he went along.

[37] It was put to Morwe that his testimony that he only focused on one suspect and did not see what other people out of a group of 20

were doing, was improbable.

[38] The second witness for the defendant, was Sergeant Mothlamme. He testified that on the day in question he was patrolling with Captain Moruti (Moruti) and Warrant Officer Moss (Moss). His colleagues saw people holding beer bottles. His colleagues alighted from the vehicle while he remained in the car. He noticed that the group of people was fighting with his colleagues. He alighted to go and assist, but they were outnumbered as more than eight people were attacking the police officers. He further testified that Morwe had to use his shotgun to disperse the crowd. The group fled, and they arrested those who remained. He further testified that one of the people in the group tried to disarm Morwe. With regard to the first plaintiff, Mothlamme testified that he did not witness him attacking Morwe, and that the main reason he arrested the first plaintiff was for contravention of curfew, as he did not have any liquor on him. He got injured and they took him to hospital, thereafter to the police station. At the police station, he gave him a J534 notice and released him.

[39] Mothlamme confirmed that while they were at the hospital, the third plaintiff arrived, and was also taken to the police station. He testified that he was not aware of the charges of robbery against the second and third plaintiffs and he did not detain them. He denied that the incident happened at the second plaintiff's premises.

[40] Warrant Officer Moss was the last witness to testify for the defendant. He testified that on the day in question, he witnessed a group of men drinking in public and contravening Covid regulations. Interestingly, Morwe's evidence in this regard was that only the second plaintiff was drinking, hence he issued him with a J534. He further testified that they warned the group, but some of them failed to cooperate. Two people from the group grabbed Morwe's shotgun and a scuffle ensued. Morwe fired shots to disperse the crowd and managed to arrest one suspect. The suspect was transported to hospital as he was badly injured. The other suspect was pointed out by Morwe at the hospital, and he too, was arrested. Mothlamme

told them he had another suspect in custody. He stated that he could not confirm whether the suspect was shot while lying down, as there were a lot of things happening. He disputed Joao's account of the incident, stating that Joao was shot in his hand during the scuffle. He further denied that Joao had passed out as he was talking to the driver. When he was asked during cross-examination, what role each of the plaintiffs played, Moss stated that he could not remember, as everything happened very fast. He confirmed that only Morwe fired shots that day.

Analysis

and evaluation

[41] The dispute in this matter turns on whether the plaintiffs committed an offence in the presence of the police officers. Although in their defence (in the defendants' plea) the defendants sought to rely on section 40(1)(b) of the Criminal Procedure Act[2] (CPA) which allows a police officer to arrest without a warrant, any person who commits an offence in his presence, evidence adduced at trial pointed to a different direction. It became apparent during the trial proceedings, and it was conceded as much, that the applicable section is section 40(1)(a) which authorises a police officer to arrest any person who commits an offence listed in Schedule 1 of the CPA, in his presence.

[42] At trial, two contradictory and mutually destructive versions were put before Court. This Court is thus saddled with the responsibility to analyse and evaluate the evidence tendered, in order to determine which of the two versions is true. Citing a passage in Jagers[3] the court, in *Nomabhele Platjie v Minister of Police*[4] said:

"In this matter the version of the plaintiff and that of the defendant are mutually destructive. The useful approach to be used by the court in the evaluation of evidence and determining which evidence is true in such cases was set up by Eksteen AJP (as he then was) in Jagers. In this case the learned Judge President reasoned:

"...In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept the version as being probably true. If, however, the probabilities are evenly balanced, in the sense that they do not favour the plaintiff's

case any more than they do the defendant's, the plaintiff's case can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the evidence of the defendant is false."

[43] In relation to the general principles applicable to the evaluation of evidence, the learned Judge said:

"The general principles applicable to the evaluation of evidence in general are that when evaluating evidence, the court may draw

inferences and consider probabilities. However, such inferences and probabilities may be distinguished from conjecture or speculation.

There must be proven facts from which the inferences should be drawn and there should not be speculation as to the possible existence of certain facts.”[5]

[44] In their respective testimonies, which were identical in all material respects, the plaintiffs proffered a sordid and pitiful tale

of how they were arrested, tortured, brutally assaulted and shot at by the police who later detained them in police holding cells.

This evidence has not been meaningfully challenged by the defendant’s witnesses, who not only tried to invent implausible evidence of how they were attacked by the plaintiffs, but also conceded to discharging a firearm which resulted in the plaintiffs being shot under mysterious circumstances. The injuries sustained by the first and second plaintiffs, which include bruises and open wounds on various parts of their bodies, are well recorded in the J88. In respect of the second plaintiff, it is further recorded that he had an open wound on his left palm which was actively bleeding.

[45] Clearly, the defendant’s version in justifying their shooting is far-fetched and is tailored to create an impression that they were under attack from the unarmed civilians. It is patently false. Their plea constituted nothing less than a bare denial blended with some degree of falsehood designed to twist the sorrowful episode of that ill-fated day.

[46] In their dramatic account of the events of that day, the defendant’s witnesses, who also happen to be the same police officers implicated in the plaintiffs’ assault, arrest and detention, attempted to paint a different, movie-like picture of what occurred at the scene. This dramatic account is not supported by any evidence. There is no evidence that the plaintiffs committed or attempted to commit robbery. It is clear that the defendants’ witnesses were trying to recreate the scene to suit their tailor-made defence.

[47] What remains an inexplicable mystery, though, is how a group of approximately 20 armed police officers could be terrified by a group of equally numbered, unarmed civilians to the point of randomly shooting at them, injure them and deny them treatment at the hospital. Their defence that they did not assault the plaintiffs, when evidence adduced by the plaintiffs points to the contrary, and that they were justified in using force, as contemplated in section 49(1) and (2) of the CPA, as well as their defence that the plaintiffs committed a Schedule 1 offence justifying their arrest and detention, is simply untenable. It falls to be rejected.

[48] Similarly, the unexplained failure by three other police officers to come to the assistance of their colleagues in what according to Morwe was a precarious situation of robbery on which he was allegedly being robbed of his firearm, defies any logic. Morwe's response that this question be posed to his fellow police officers when he was asked by the plaintiff's counsel as to where his colleagues were during his brawl with the plaintiffs, was arrogant and evasive.

It did not assist the defendant's case.

[49] Further, the authenticity and origin of the photographs, taken by the third plaintiff and tendered into evidence by the second and third plaintiffs, was not seriously contested at trial. It was never put to the plaintiffs that the photographs were not what they purport to be. Ferreira testified that he took the photographs using his mobile phone. This was not disputed by the defendant.

Legal framework

[50] A peace officer effecting an arrest on anyone in terms of section 40(1)(b), as averred in the defendant's plea, must satisfy the jurisdictional requirements set out therein. Key to these, is that at the time of the arrest, the peace officer must have entertained a reasonable suspicion that the plaintiffs have committed a Schedule 1 offence. It is not in dispute that, they, being police officers, the members of the South African Police Service who effected the arrest are, within the meaning and contemplation of section 1 of the CPA, peace officers.

[51] Inasmuch as the defendant, in his plea, seeks to rely on the provisions of the above section, the evidence adduced by the defendant at trial pointed to a different provision, namely, section 40(1)(a). Section 40(1)(a) authorises a peace officer to arrest any person who commits an offence in his presence. It is not in dispute that the police officers effected the arrests on the basis of an allegation that an offence, which is denied, was committed in their presence.

[52] As alluded to above, the defendant's pleaded case is inconsistent with the evidence presented during the trial. That notwithstanding, the critical question is whether the defendant's reliance on section 40(1)(b) instead of section 40(1)(a) vitiates the defendant's case in accordance with the evidence presented during the trial. In my view it does not.

[53] If one considers the jurisdictional facts for a defence in terms of section 40(1)(a), the offence must have been committed in the presence of the peace officer. Whilst the evidence of Constable Morwe suggests that this is the case, irrebuttable evidence presented at trial suggests that the arresting officer was on a frolic of his own, and that he assaulted the plaintiffs without any provocation, or reason to do so. There can never be any justification for assaulting a person as the Constitution[6] specifically prohibits corporal punishment.

- [54] An assault, being a violation of a person's right to freedom and security of the person, which includes a right to be free from all forms of violence, and to the protection of the law, is a criminal offence which is punishable by law. In terms of section 12(1)(a) of the Constitution, everyone has a right to freedom and security which includes a right to the protection of the law. It is the same right that has been violated by the same police officer charged with the responsibility to uphold.
- [55] Further, arrest and detention, unlawfully committed, is a violation of the right to personal liberty, which includes a right not to be deprived of freedom arbitrarily and without just cause. This right finds expression and is enshrined in section 35 of the Constitution. There is a duty on our courts to preserve this right against infringement.[7] The same sentiments were echoed by the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development and Another* (CCT54/07)
- [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (11 March 2008) when the court said:

"[24] There is another more important reason why this court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily and without just cause as well as the founding value of freedom... "[8]

- [56] In casu, there is no denial that the plaintiffs were arrested without a warrant and were subsequently detained. They were deprived of their right to freedom in violation of the Constitution. Thus, it is sufficient for the plaintiffs to simply plead that they were unlawfully detained. The defendant then bears the onus to prove that the deprivation of liberty was lawful and justified.[9] It is without an iota of doubt that the defendant in this case has failed to discharge that onus.

Conclusion

- [57] Having analysed and evaluated the evidence in this matter, I have no doubt in my mind that the conduct of the arresting officer in assaulting the plaintiffs, and in depriving the second and third plaintiffs of their personal liberty, was not justified. The conduct of the arresting officer is thus, unlawful, and flies in the face of the Constitution.
- [58] The manner in which the police officers conducted themselves in this whole conundrum is appalling. Their conduct constitutes a classic abuse of power. It is deplorable. The assaults were committed in a callous, repugnant and barbaric manner and the conduct of the police officers concerned is inimical to the right to bodily integrity and personal liberty enshrined in the Constitution of the Republic. Their conduct ought to be reported to the authorities to avoid its repletion in future and also to protect everyone from any future acts of police brutality. Such conduct has no place in a constitutional democracy, is abhorrent and needs to be condemned.

Costs

[59] In this case, I have reason to deviate from the general rule that costs should follow the result.

Order

[60] In the result, I make the following order:

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

APPEARANCES

For the plaintiffs: D Smit Instructed by: Nienaber & Wissing Attorneys Email: charl@nwatt.co.za

For the defendants: T Masike Instructed by: State Attorney, Mmabatho NDogo@justice.gov.za

Email: masike.masike@gmail.com Date of hearing: 21-22 November 2022; 23-24 January 2023

Date reserved: 01 March 2023 (heads of argument filed) Date of judgment: 27 October 2023

[1] A kombi is an alternative name for a commuter mini-bus motor vehicle.

[2] Act 51 of 1977.

[3] National Insurers General Insurance Company Limited v Jagers 1984

(4) SA 437 (A) at 440E-G.

[3] National Insurers General Insurance Company Limited v Jagers 1984

(4) SA 437 (A) at

440E-G.

[4] Unreported decision of the Eastern Cape Division, Mthatha High Court: Case No.1903/2019 (delivered on 7 July 2020), per Toni AJ.

[5] Op cit, at para 26.

[6] The Constitution of the Republic of South Africa, 1996

[7] See in this regard: Thandani v Minister of Law and Order 1991

(1) SA 702 (E) at 707B.

[8] At para 24.

[9] Ibid; also see: Minister of Law and Order & Others v Hurley and Another 1986

(3) SA 568 A at para 568 E-F.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ruiendo-and-others-v-minister-unknown-topic-anwhc-2023>

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