

SOUTH AFRICA / JUDGMENT

Sebogodi v Minister of Police (1201/2016) [2017] ZANWHC 68 (27 October 2017)

[2017] ZANWHC 68

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1201/2016

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO. 1201/2016

LLOYED AOBAKWE SEBOGODI Plaintiff

and

THE MINISTER OF POLICE Defendant

CIVIL MATTER

DATE OF HEARING : 20 SEPTEMBER 2017

DATE OF JUDGMENT : 27 OCTOBER 2017

COUNSEL FOR THE PLAINTIFF : Adv. Du Plessis

COUNSEL FOR THE DEFENDANT : Adv. Williams

JUDGMENT

KGOELE J.

[1] The plaintiff in this matter claims damages against the Minister of Police in his capacity as Head of the South African Police Services (SAPS). In his first claim the plaintiff alleged that he was wrongfully arrested on the 26th April 2015 without a warrant by members of the SAPS and unlawfully detained. His second claim is for an assault allegedly perpetrated by members of SAPS upon him on the same day.

[2] The defendant opposed the action. The matter proceeded before this Court on the question of the defendant's liability only because by prior agreement between the parties the issue regarding quantum was separated in terms of Rule 33(4) of the Uniform Rules of Court.

[3] The defendant accepted the duty to begin and proceeded to call three witnesses, Constable Mothibi, Constable Kgorogobe and Constable

Matsaunyane. After the defendant closed his case, the plaintiff applied for judgment in his favour without leading evidence and without closing his case.

[4] The defendant's version of arrest from the viva-voce evidence of the three police officers was that the incident occurred at the time they were coming from attending one of the reports they received during their patrol duties they were doing. They were driving back to the police station in two marked vehicles following each other.

[5] As they were approaching the robots at James Moroka Street, here in Mahikeng, they were stopped by certain gentlemen standing on the robots, who were wearing the Zion Christian Church (ZCC) uniform. These gentlemen drew their attention to a lady who was coming towards the road running by pointing towards her. This lady was not wearing shoes, had only a bra on the top part of her body, and was even crying. They stopped and waited for her to arrive where they were. Upon arrival the lady reported to them that she was being assaulted by her boyfriend. On asking how they could help her, she then requested them to accompany her to her boyfriend's place in order that she can be able to collect her car and bags as she intended going back to Pretoria where she was working. They agreed and accompanied her.

[6] Upon arrival at her boyfriend's place they found the plaintiff before this Court. After explaining to him the purpose of coming there, the plaintiff refused with the keys of the car of the said lady whilst he was having them in his hand. Before

refusing with the keys, he started by throwing two bags at the complainant. When they reprimanded him from doing that, the

plaintiff became more angry and then head butted Constable Mothibi who was at that time the one talking to him. Constable Mothibi decided to arrest him for assaulting him. After explaining his rights and that he was to be arrested, the plaintiff resisted arrest. The police officers who were there being four in number, had to use minimum force to take him into the police van that was waiting outside the house as the incident happened in the house.

[7] According to the police officers who testified, they arrested the plaintiff for having committed an offence of assault in their

presence without a warrant of arrest. They furthermore denied having assaulted him but alleged that the injuries he sustained might have been caused by the time they were using minimum force to arrest him. According to them the arrest was made in terms of Section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA) and was therefore lawful including the detention

thereof. Constable Mothibi in particular, testified that he opened a case of Assault Common at the police station but later withdrew it because the plaintiff and his legal representative pleaded with him to do that. The police officers claimed that in terms of Section 2 of the Domestic Violence Act 116 of 1998 (the Domestic Violence Act) they were obliged to assist the girlfriend and to enter into the premises of the plaintiff.

- [8] The plaintiff's version gathered from the cross examination and the pleadings is to the effect that the arrest and detention was not lawful. Further that Constable Mothibi's discretion was not objective when he arrested the plaintiff. His version included the fact that the assault on the plaintiff was not even necessary and the force they claimed they had used on him was excessive and amount to Assault as there was no lawful cause for his arrest.
- [9] During the submissions for and against the application for judgment at the close of the defendant's case by the plaintiff without leading evidence and closing his case, his legal Counsel submitted that the following proves that the arrest was unlawful:-

9.1 The arresting officer confirmed that the purpose of the arrest was inter alia to punish the plaintiff for the offence of assault on him. He said this is his general approach and never made mention of the arrest with the aim of bringing a suspect before the Court.

9.2 The defendants have admitted entry into the plaintiff's residence without a warrant but justified such conduct on the provision of section 2 of the Domestic Violence Act 116 of 1998, yet the arresting officer confirmed that they did not go to the plaintiff's residence for the purpose of investigating an act of domestic violence nor to arrest the plaintiff for such alleged conduct. He furthermore confirmed during cross-examination that the plaintiff's conduct did not in the circumstances that were prevailing not cause imminent harm to the safety, health or wellbeing of the complainant (as per definition of the Domestic Violence Act 116 of 1998). It has to be kept in mind that Mothibi testified that he had 14 years experience as a constable who deal with domestic violence cases on a daily basis, he has dealt with an uncountable amount of domestic violence cases during his career, he received the necessary training in the field of the Domestic Violence Act and the Criminal Procedure Act including training on the issue of effecting arrests without warrants;

9.3 His testimony further bears evidence of his complete denial of an individual's constitutional rights to liberty. On his own version he said that he frequently removes husbands or boyfriends in domestic violence cases from their homes without warrants and without effecting an arrest on them, even against their will if the circumstances warrant such conduct;

9.4 The arresting officer testified that on the day in question he was in the company of Constable Matswanyane, Kgorogobe and Karele and further confirmed that the four of them never colluded or even had a discussion concerning this matter or the evidence which they will tender on behalf of the defendant's case. He also said that they have never seen or read each other's statements, but later on during cross examination confirmed that they have commissioned each other's sworn statement. This is proof on a balance of probability of collusion between witnesses.

9.5 There were a lot of contradictions as far as the assault on Constable Mothibi is concerned including how they used the alleged minimum force to such an extent that their evidence is not only not convincing but should be found by this Court to be utter fabrication.

[10] In reply to these submissions the legal Counsel appearing on behalf of the defendant submitted that:-

10.1 The plaintiff committed an offence which warranted an arrest and subsequent detention in accordance with Section 40(1)(a) of the CPA;

10.2 The plaintiff committed the offence of assault on a Police Officer in their presence and the plaintiff was arrested in that regard;

10.3 In light of all of the above evidence the second defendant used his discretion to arrest reasonably in the circumstances;

10.4 The arrest and the detention of the plaintiff was made in terms of Section 40(1)(a) and as such the defendant has therefore discharged the onus to prove that the arrest and detention was lawful;

10.5 Looking at all the circumstances of this case, including what caused the members of SAPS to accompany the plaintiff's girlfriend, the police officers acted in terms of Section 2 of the Domestic Violence Act and did not need any warrant to enter;

10.6 The onus is on the plaintiff to prove that the police assaulted him;

10.7 If the absolution is granted there will be no evidence by the plaintiff before this Court about the alleged assault;

10.8 Issues of contradictions, commissioning of the statements of each other or collusion are not issues to be looked into at this moment. The only issue which the Court has to consider at this stage is whether there is a prima-facie lawful arrest and whether proper discretion to arrest was exercised.

[11] It is trite law that arrest and detention is prima facie wrongful and unlawful and it is therefore for the defendant to allege and prove lawfulness of the arrest or detention.

See: Brand v Minister of Justice 1959(4) SA 712 A at 714;

Minister of Law and Order v Hurley 1986(3) SA 568(A) at 587 – 589;

Minister van Wet and Order v Matshoba 1990(1) SA 280(A);

Stambolie v Commissioner of Police 1990(2) SA 369 (Zimbabwe) at 376 J – 377 A.

Lombo v African National Congress [2002] Stambolie v Commissioner of Police 1990(2) SA 369 (25C);

Lombo v African National Congress [2002] 3 All SA 577 (SCA); 2002(5) SA 668(SCA) at paragraph 32

[12] The onus of alleging and proving an excuse for, or justification contained in Section 49(1) of the CPA (defense of necessity where force was necessary in order to effect a lawful arrest or to prevent an escape from arrest), rests on the defendant.

See: Ex Parte Minister of Safety and Security and Others: In re: S v Walters and Another 2002(4) SA 613(CC) paragraph 53 and 54;

Govender v Minister of Safety and Security 2001(4) SA 273(SCA) 2001(2) SACR 197(SCA);

Macu v Du Toit 1983(4) SA 629(A);

Malahe v Minister of Safety and Security [1998] ZASCA 64; [1998] 4 All SA 246(A); 1999(1) SA 528(SCA)

[13] The application by the plaintiff for judgment at the close of the defendant's case is best described in the words of Nkosi AJ in the case of Pather v Minister of Police (14512/13) [2016] ZAGPPHC 215 (31 March 2016) at para 31.1-31.3 as follows:-

'31.1... Plaintiff is entitled to apply for judgment at the close of the Defendant's case without leading evidence and without closing its case. It was submitted on her behalf that the test to be applied is similar to that of absolution from the instance where a Plaintiff has not discharged its onus. It was further submitted that if a Defendant upon whom the onus of proof rests has failed to lead such evidence in discharge of that onus to the effect that a reasonable man could have not come to the conclusion that it might be accepted, the court would be entitled to give judgment for the Plaintiff.'

Unlawful detention and arrest

[14] In casu, the defendant had to establish the lawfulness of the arrest and detention. From the defendant's own evidence, the plaintiff was arrested for the assault on Constable Mothibi and not for a Domestic Violence complaint. It therefore becomes clear that the alleged assault on Constable Mothibi is the foundation of the defence of the defendant.

[15] The evidence of the three police officers which is before Court is cumulatively unsatisfactory, is riddled with a lot of contradictions

that go to the root of the alleged assault itself, is not only not convincing, but is found by this Court to be utter fabrications to such an extent that there is no need for this Court to check find.

[16] In the matter of Hodgkinson v Fourie 1930 (TPD) 740 at 743 the Court stated as follow:-

"At the close of the case of the one side upon whom the onus lies, the question which the judicial officer has to put himself is: "is there evidence on which a reasonable man might find for that side"

If the evidence is not only not convincing but actually found by the trial Court to be utter fabrication, then it is evidence of which a reasonable man would not check find, and the Court would then be perfectly justified in granting absolution". [My Emphasis]

[17] The following contradictions appears from their evidence:-

17.1 In the statement which was written by him dated 26 April 2015, Mothibi alleged that he was head-butted by the plaintiff on his nose (exhibit “B”); In his other statement dated 11 March 2016, he alleged that he was head-butted by the plaintiff on his forehead (exhibit “C”). During his evidence in chief, he alleged that he was head-butted twice by the plaintiff just below his right eye. These are three irreconcilable versions of where he the alleged complainant was assaulted. Constable Kgorogobe initially said it was on the head and later changed to say that it was on the nose. Constable Matsaunyane said he did not witness the assault as he was still outside but only saw Constable Mothibi bleeding from the nose.

17.2 As to how the assault started, Constable Mothibi testified that at the time the plaintiff refused with the key, the plaintiff approached him, grabbed him with his clothes on the collar and head butted him. He explained further that he was caught unaware because he thought the plaintiff was approaching him in order to hand over the keys. Constable Kgorogobe exposition of how the assault started is that Constable Mothibi is the one that approached the plaintiff with the aim of taking the key from him, the plaintiff still refused with them and instead head-butted Constable Mothibi. Unfortunately on this aspect there are two prima-facie case established by the defendant. If we want to accept the latter one, it unfortunately indicates some form of aggression on the part of Mothibi directed towards the plaintiff to forcefully take the keys from him, otherwise how were the keys going to be retrieved from him in any other way rather than force when according to them he publicly announced his refusal to hand the keys over. According to them he showed them the keys by dangling them in the air at the same time uttering the words that “she will not get them”. But above all, these contradiction goes to the root of the defense of the defendant when it comes to who was the aggressor.

17.3 There is a contradiction also as to who explained the rights of the plaintiff when they arrested him. Mothibi said it was him whereas Kgorogobe said it was Constable Karele.

17.4 There were also contradictions as far as the purpose of arresting the plaintiff is concerned. In his evidence Mothibi indicated that he was arresting him for “assaulting me as a police officer on duty” and “because he was aggressive”. In cross-examination he indicated that he arrested him to punish the plaintiff for the offence of assaulting him. According to him this is generally how he approached cases of assault irrespective of the type of assault. Kgorogobe indicated that he was arresting plaintiff upon instructions of Mothibi. Matsaunyane testified that he arrested plaintiff for the assault on Mothibi and to also remove him from his house as he feared that he will further assault the lady upon realizing that a case of assault was going to be opened for him. Besides these contradictions, what is noticeably absent is the fact that no one amongst the three indicated that he or they effected the arrest after exercising a discretion, let alone that the purpose of the arrest was to secure his attendance for the purpose of trial. In addition, the Constitution does not espouses a disposition of arbitrary deprivation of freedom of movement and security.

17.5 The arresting officer testified that on the day in question he was in the company of Constables Matsuanyane, Kgorogobe and Karele and further confirmed that the four of them never colluded or even had a discussion concerning this matter or the evidence which they will tender on behalf of the defendant's case. He also said that they had never seen or read each other's statements, but later on during cross examination confirmed that they had commissioned each other's statement. There is therefore a possible collusion between witnesses.

17.6 To this end, Matsuanyane, who commissioned the statement of Mothibi, indicated in that statement that the statement of Mothibi was taken by him. When confronted with this during cross-examination, he indicated that this was a mistake that he made when commissioning the statement. He said this was a mistake because he remembered that earlier on he had indicated that he never saw Mothibi's statement and did not at all collude but only commissioned the statement. The same averments applies to the statement of Karele, which was commissioned by Mothibi. He also indicated therein that that statement (of Karele) was taken by him.

[18] But above all, all of these are not only contradictions, but touches on the reliability of the defendants' witnesses, most importantly that there is a possibility that they had colluded with one another. The following unfortunately strengthen this possibility:

18.1 In their viva-voce evidence they testified about the lady running, not wearing anything on the top but a bra, and was crying with no shoes. This important aspect is distinctively absent in all their statements which they themselves also commissioned. The issue of the plaintiff dangling the key in the air is also missing in their statements but both testified about it. The issue of plaintiff throwing bags towards the lady is also absent.

18.2 The statements that have been discovered are those of Mothibi and Karele. That of Matsuanyane and Kgorogobe although they testified in Court are noticeably absent. When asked how they could remember everything so accurately without refreshing from anywhere, Matsuanyane could not give a source from where he refreshed from. When asked about what he did the following days of the incident, he could not remember. As to how he could remember everything that happened on this day without having made a statement at all (according to him) is a misty. On the same breath, although Kgorogobe testified that he made a statement, his statement was nowhere to be found. He also could not indicate that he refreshed himself from this statement.

[19] In an unreported case of Kgaogelo Motsei v Minister of Police: Case no. 65356/2012: North Gauteng Court the Honourable Judge remarked as follows in a situation that is similar to our matter where police officers commissioned their

statements:-

“The affidavit is a statement under oath regarding the observations of the deponent regarding any set of facts. It is not meant to contain the observations of others hence the swearing to the veracity thereof by the deponent. These were police officers who commissioned each other’s affidavits and who ought to have understood the gravity of making a statement and the contradictions regarding the manner in which they were produced is further proof not only of the mendacity of the witnesses but also of the unreliable nature of their evidence.”

- [20] The last contradiction that one can mention relates to the person who actually stopped them at the robots. Mothibi said it was the ZCC members. Matsaunyane said they were stopped by a car which was flickering its lights signaling them to stop.

Assault

- [21] The defendants’ Counsel submitted that in as far as the assault is concerned the onus lies with the plaintiff to prove that the police was assaulted and if absolution is granted there will be no evidence by the plaintiff before this Court about the alleged assault. I fully agree with the first part of this submission as to who bears the onus, but do not agree with the last part of it. The reason is that although the defendant denied the assault on the plaintiff, in amplification of such denial, has pleaded Section 49 of the CPA to wit, the use of force that was necessary in order to effect a lawful arrest on the plaintiff.
- [22] It is trite law that the onus of alleging and proving an excuse for, or justification contained in section 49(1) of the CPA (defense of necessity where force was necessary in order to effect a lawful arrest or to prevent an escape from arrest), rest on the defendant.

See the cases quoted in paragraph 12 of this judgment.

- [23] I fully agree with the submissions by the plaintiff’s Counsel that although the arrest and the use of force are two concepts, they are so interwoven in the circumstances of this matter that it will justify the proposition that where the balance of probability proves that the arrest was unlawful, the use of force will automatically also be unlawful in that the grounds for the use of such force (to arrest) are non-existent. The defendant’s use of force will thus automatically constitute assault on the person of the plaintiff in the event of defendant’s failure to prove the lawfulness of such assault. Physical interference, which affects a person’s bodily integrity constitutes assault.
- [24] Assessing the evidence that is before the Court of using the minimum force as claimed by the defendant’s witnesses also reveals some contradictions that add up to the many other mentioned above. Mothibi indicated that Karele did not take part when they forcefully arrested the plaintiff as she is a woman whereas Kgorogobe indicated that all of them including Karele had to push plaintiff onto the ground for them to be able to handcuff him. Mothibi did not mention the pushing to the ground and the handcuffing, and described the minimum force used as follows:-

“Two of his colleagues held him by his arms dragging him towards the door whilst he was pushing him at the back. They use force to get him in the van”.

In her statement, Karele said that they managed to grab him whilst standing, there was no pushing onto the ground, they handcuffed him whilst he was standing. On his own he freely walked to the van after handcuffing him and into the back of the van. This is a completely different version to that of Mothibe and Kgorogobe. There is no doubt that these are contradictions that relate to the core of their defense.

[25] Another contradiction that can be found is in relation to whether the lady was hit with the bags by the plaintiff or not. Mothibi said the plaintiff hit the lady with the bags. Kgorogobe said they were thrown towards the door and did not hit the lady at all. This, according to Kgorogobe and Mothibi, occurred inside the house. Matswanyane only saw some bags of clothes thrown outside the door of the house as he was approaching. He was not yet inside the house at that time.

[26] What makes matters worse for the defendant is that amongst the documents discovered by the plaintiff is the J88 wherein the injuries of the plaintiff are described as:-

- Bruise lower left scapula +- 3cm
- Bruise bilateral neck +- 2sm
- Bruise left eye and right eye
- General body pains

Cognisance should be taken of the fact that although the defendants' witnesses admitted to have seen the bruises / injuries on the plaintiff when they arrived at the police station, which fact was confirmed by the cell register entry, they could not give an explanation as to what caused the above injuries.

[27] An important consideration in this regard is the fact that the plaintiff pleaded the following as allegations of assault against the defendant:-

- The second defendant slapped the plaintiff with open hands and attacked him with clenched fists, all the blows were directed at the plaintiff's face;
- Whilst plaintiff was lying on the ground all three kicked him with booted feet;
- The plaintiff was then forcefully dragged to and thrown into the SAPS vehicle.

All of the alleged injuries are in a way corroborated by the following evidence by the defendant which is before Court:-

- He was forcefully dragged into the van;
- Was at a certain stage on the ground;

· Was pushed.

There is therefore in my view sufficient evidence before this Court of the assault of the plaintiff.

[28] Taking into consideration the effect of the contradictions cumulatively, the fact that there is a possibility of collusion on the part of the defendant's witnesses, the fact that the defendant has closed his case and there can be no further opportunity

to reconcile the conflicting versions in the defendant's case, I am of the view that it would be a useless exercise and waste of time to proceed with the matter further when the evidence of the defendant is so poor. In my view, there is no evidence on which this Court might find for the defendant.

[29] As to the issue of law raised by the defendant's Counsel that when arresting a suspect in terms of Section 40 (1) (a), the offence which the suspect committed in the presence of the police need not be an offence in Schedule 1 that relates to Section 40 and 42, I am of the view that there is no need for this Court to analyze and pronounce on this issue simply because of the finding that I made above to the effect that the defendant failed from its own evidence to make a case which this Court might find at this stage for the defendant.

[30] I therefore come to the conclusion that the defendant has failed to establish the essential element of their defense in as far as the lawfulness of the arrest and detention of the plaintiff is concerned, including the assault thereof.

[31] Consequently the following order is made:-

31.1 Judgment is granted against the defendant at the end of the defendant's case without the plaintiff leading evidence and closing its case;

31.2 The defendant is liable for 100% of the agreed or proven damages of the plaintiff resulting from the plaintiff's unlawful arrest, detention and assault which occurred on the 26 April 2015;

31.3 The issue of quantum is postponed sine die to a date that will be arranged with the Registrar;

31.4 The defendant(s) are ordered to pay the costs the one paying the other to be absolved.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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