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SOUTH AFRICA / JUDGMENT

## Subjee v Minister of Police (13/06352) [2017] ZAGPJHC 396 (10 November 2017)

[2017] ZAGPJHC 396

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COURT

South Gauteng High Court, Johannesburg

BEFORE

Ramapuputla

CASE / FILE NUMBER

13/06352

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no:13/06352

10/11/2017

Not reportable

Not of interest to other judges

Revised.

In the matter between

SHANAAZ SUBJEE PLAINTIFF

AND

MINISTER OF POLICE DEFENDANT

JUDGMENT

RAMAPUPUTLA AJ

### INTRODUCTION

- [1] This is an action for damages against the defendant for the unlawful arrest and detention of the plaintiff.

- [2] The plaintiff alleges that members of the police, who were acting within the course and scope of their employment with the defendant,

unlawfully arrested and detained or alternatively maliciously arrested and detained her on the accusation that she was intoxicated.

The arrest and subsequent detention at Lenasia police station lasted for a period of 4(four) days without her been taken to court.

- [3] The trial proceeded on both merits and quantum. The plaintiff sues the defendant for an amount of R 200 000-00 (Two Hundred Thousand Rands).

## FACTS

### OF THE CASE

- [4] The plaintiff alleges that on the 14th December 2012 at around 14h00 she and her neighbours (about 8 in number) were standing outside her premises gate, planning a surprise party for her friend known as Portia Simpson. They were approached by the 1st police van. The police members in that van approached them and asked them if they were drinking and they replied in the negative. The 1st police van went past and left them.

- [5] The 2nd police van, with 2 police officers, clad in their full uniform approached the plaintiff and her neighbors. 1 police officer (referred to as the arresting officer) asked them if they were drinking and they still replied in the negative. The arresting

officer then opened the door of the van and the neighbors dispersed. The arresting officer thereafter arrested the plaintiff and tied her hands behind her back with what the plaintiff describes as 'cable ties'.

- [6] When she asked why she was being arrested, she was told it is because she was intoxicated. She was allegedly told the police will teach her manners.

- [7] The plaintiff denies being intoxicated because she had just finished praying as she is of Muslim religion.

- [8] The police officer put the plaintiff inside the back of the van wherein she found an unknown arrested lady.

- [9] The police drove around the township with the plaintiff and the unknown lady for about an hour before taking them to police station cells. At the time of the driving around, the plaintiff's hands were still tied with the 'cable ties' behind her back.

The police station is about two minutes away from her premises.

- [10] The plaintiff and the unknown lady were taken to Lenasia police station where they were left at the charge office.

[11] A different police officer asked for their names and addresses. They waited for about 30 minutes to an hour before they were taken to the female cells by another male police officer, the plaintiff still with her hands tied.

[12] The plaintiff was still tied with 'cable ties' when she was locked in the cells.

The tightness of the 'cable ties' caused her hands to swell and caused some marks.

The plaintiff was still breast-feeding and her breast-milk started spilling.

[13] The cell was filled with about 30 people. The size of the cell is about 12 by 7 meters. There were about 15 blankets and 15 mattresses allocated. Two cell-mates shared 1 blanket and 1 mattress. The plaintiff describes the condition of the cell as dirty, horrible and stinky. There was no hot water. The toilet was not in working condition because it was not even flushing.

[14] The plaintiff did not eat because as a Muslim she did not know how the food was prepared. She only survived on the fruit-juice she received from her other cell-mates. The plaintiff could not even wash herself because of her swollen hands and was assisted by another lady who washed her. Her mother was denied access to see her and even to bring the baby for breast feeding.

[15] The plaintiff was not released from police custody from 14 to 18 December 2012. On the 18th December 2012 she and other suspects were taken by a big truck to the Lenasia Magistrate Court. The Lenasia Magistrate Court is a minute away from the police station.

[16] The plaintiff was then left to wait at the court cells. She saw her mother who was carrying her baby passing and called her. When the plaintiff's baby heard her voice she started to cry. Her mother and her baby were denied access to give her changing clothes as she was very dirty.

[17] The plaintiff and her court cell-mates kept asking when were they going to appear in court but they were ignored by the police. Towards the close of the court day (around 15h00 or 16h00) she was released from the court cells. She was not charged with any offence and she was not taken to Court to appear before a Magistrate. She was just told to go home.

#### COMMON CAUSE

[18] Both parties agreed that:-

1. The plaintiff did comply with the legal requirements in that a notice in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 was served within time.
2. The defendant abandoned its special plea;
3. The plaintiff was arrested at Lenasia Police station;

4. The plaintiff was detained until the 18th of December 2012 when she was moved to Lenasia Court.
5. The defendant's applications for postponement and amendment of pleadings was dismissed at roll-call.
6. The defendant has confirmed in its discovery affidavit dated 17 September 2013 that the whereabouts of the following documents are unknown:-
  - 6.1. Original Lenasia CAS Prints out of (340/12/12) 14th December 2012.
  - 6.2. Notification of Rights
  - 6.3. Lenasia SAPS, SAP4, SAP10, SAP13 AND SAP 14 (299/12/12) 14/12/2012 TO 18/12/2012
  - 6.4. Arrest and complainant affidavit in respect of plaintiff.

#### BURDEN OF PROOF

- [19] The parties agreed in the pre-trial conference that the defendant bears the burden of proof.
- [20] In this regard it is worth noting that the arresting officer, known as Warrant officer Mulaudzi, was not called to testify. It follows that the defendant could not discharge the burden of proof and as a result the plaintiff's arrest and detention could not be justified.
- [21] The plaintiff chose to begin to testify.

#### ISSUE TO BE DECIDED

- [22] The main issue to be determined is:-

Whether the plaintiff's arrest and detention by the members of the defendant was unlawful.

#### ARGUMENTS

- [23] The plaintiff's Counsel rightfully submitted that since the defendant failed to call the arresting officer and the officer on the duty at the time of the detention, the plaintiff's evidence is uncontested.
- [24] The plaintiff's Counsel argued that the mere fact that the arrest was admitted and the defendant failed to offer any justification for it, is sufficient to persuade the court to decide in favor of the plaintiff. The arresting officer was not called to give reasons for the plaintiff's arrest.
- [25] "Page 9 of the Defendant's plea, paragraph 4 and 5 states that the arrest happened in terms of Section 40 of the Criminal Procedure Act, as a result of a suspicion of a Schedule 1 offence". The defendant led no evidence in this regard.

- [26] It is submitted on behalf of the plaintiff that the evidence of the plaintiff as stated in the facts indicates that there is no justification for the arrest. The horrible conditions of the cell are not in dispute. The plaintiff's Counsel proposes that the court must accept the plaintiff's evidence regarding the conditions of the cell in the absence of contrary evidence.
- [27] The defendant's Counsel argued that since her application for amendment was refused, she will argue the matter on the plaintiff's papers alone and or alternatively on the evidence.
- [28] The defendant's Counsel argued that the name "Shanaaz" appearing on the document referred to as SAP10 on page 13 and 14 of bundle D does not refer to the plaintiff. This document which was discovered by the plaintiff, does not have a surname and therefore it cannot be referring to the plaintiff.
- [29] The defendant's Counsel drew the court's attention to the agreement between the parties regarding the burden of proof. This she did because the Plaintiff chose to testify first despite the agreement.
- [30] The defendant's Counsel argued that the plaintiff's arrest was not proven despite the fact that the arrest was admitted in the plea and pre-trial minutes.
- [31] The defendant's Counsel further argued that there are two mutually destructive stories and the plaintiff can only succeed if she satisfies the court on a preponderance of probabilities that her version is true and accurate.
- [32] The defendant's Counsel continued to argue that the defendant cannot justify an arrest that had never occurred. This is in spite of the fact that the arrest is admitted in the plea and pre-trial minutes. This argument is baseless and very confusing and clearly confirms that the defendant had no defence.

## REASONS

### FOR JUDGEMENT

- [33] It is trite law that an arrest and detention is prima facie wrongful and unlawful. It is a violation of a person's right to personal liberty as entrenched in the bill of rights as incorporated

in the Constitution of the Republic of South Africa. The cause of action is constituted by proving a mere violation of the right to personal liberty.

- [34] It is not necessary for the plaintiff to allege and prove wrongfulness or unlawfulness. The defendant has to allege and prove

the lawfulness of the arrest.

- [35] The defendant has confirmed and admitted the arrest in its plea and in the pre-trial minutes.

[36] The plaintiff personally testified in proving that her arrest and the subsequent detention were unlawful. She did not call any witnesses.

[37] The plaintiff has led evidence to the effect that she was detained for a period of 4 days without being charged or taken to Court to appear before a Magistrate. She led evidence that no notification of rights was given to her.

[38] The horrible conditions of the cell are not in dispute. Section 35(2)(e) of the Constitution of the Republic of South Africa provides as follows:

'(2) Everyone who is detained, including every sentenced prisoner, has the right -

....

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state

expense, of adequate accommodation, nutrition, reading material and medical treatment.'

The plaintiff evidence is exactly as is depicted in the facts of the case and I have no intention of repeating it here.

[39] The plaintiff came across as an honest witness. The plaintiff was not shaken during cross-examination and therefore the court is persuaded she is telling the truth. The evidence as depicted in the facts of the case above is uncontested.

[40] The burden of proof did not shift to the Plaintiff. The Plaintiff only had to prove that the deprivation of her personal liberty by the police was unjustified and she has done so with distinction.

[41] The defendant in a desperate attempt to salvage it's case, called a last minute witness in the name of Warrant Officer Nkwinika who works as a cell administration Commander at Lenasia Police Station. It seems, this officer was called to explain the procedure for detaining a suspect and that the plaintiff was never detained in the cells. May I at this stage mention that Warrant Officer Nkwinika confirmed in his evidence that he was not present at the time of the arrest of the plaintiff. Further, he was not even on duty when the plaintiff was detained.

[42] The absence of the arresting officer is a factor which weighs heavily against the defendant. The arresting officer could have clarified the court of the circumstances of the arrest and the subsequent detention. He could have brought what the police refer to as the "occurrence book" and the docket which would contain his hand- written notes. No docket was brought to Court to shed some light on the arrest. The failure by the police to produce documentary evidence (Case docket, notification of rights, SAP 10,13,14 and arrest and complaint affidavit which would have potentially exculpated the plaintiff) justifiably call for the invocation of the maxim *res ipsa loquitur*".

[43] The defendant's failure to call the arresting officer and the police cell Commander who was on duty constitutes failure to discharge the onus to prove the lawfulness of both the arrest and detention.

[44] The admissions by Warrant Officer Nkwinika during cross-examination that he was not on duty at the time the plaintiff was allegedly

brought to the police station cells and that he can neither confirm nor deny that the name "Shanaaz" appearing on the police document referred to as "SAP10", is the name of the Plaintiff is confirmation that Warrant Officer Nkwinika evidence is irrelevant to say the least. He cannot in all probability confirm nor deny the arrest and subsequent detention of the plaintiff because he was not present at the time of the arrest and was not on duty at the time of the subsequent detention. Therefore, his evidence is completely irrelevant. The less said about Warrant Officer Nkwinika the better.

[45] I conclude that the defendant's Counsel's argument is misplaced. At the beginning of the trial the defendant had no witnesses. This is confirmed by the

fact that the defendant made an application to amend its plea and that application was dismissed. Furthermore, the Defendant's

application to postpone the matter was also dismissed.

[46] Therefore, the Defendant's whole argument is dismissed.

[47] I therefore conclude that the Plaintiff has proven on a balance of probabilities that her arrest and detention were unlawful.

#### THE AWARD

[48] The court is rested with the discretion as to the amount it can award for damages. There is a myriad of cases this Court can use as its guideline for determining the amount to be awarded in cases of this nature.

In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) the court stated that

*"it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy..... The correct approach is to have regard to all the facts of the particular case*

*and to determine the quantum of damages on such facts".[1]*

[49] In *Masisi v Minister of Safety and Security* 2011

(2) SACR 262 (GNP) Mokgoka J very wisely described the purpose of an award of general damages as a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress.[2]

[50] In order to do so, I take the following factors into account:-

[51] The plaintiff's age, the circumstances of her arrest, the nature and duration of the arrest, her social and professional

standing, the fact that she was arrested for improper motives, the attendant's mental anguish and distress, the trauma she

experienced as a resulting of being separated from her 2 year old baby who was still suckling.

[52] The Plaintiff was born in 1981. At the time of the arrest and detention the Plaintiff was a mother of 4 children. The youngest

child was 2 years old and the plaintiff was still breast-feeding. Her hands got swollen and bruised as a result of tight cable ties. She was separated from her 2 year old child. She was placed in horrible police-cell conditions.

[53] The police drove around with her for about an hour before taking her to a police station which is 2 minutes away from her premises. She was released without appearing in Court despite the fact that she was taken to Lenasia Magistrate's Court cells. The plaintiff was arrested at her home. Plaintiff was arrested before the public holidays.

[54] I therefore conclude that not only was the arrest and subsequent detention unlawful, but it also violated her right to personal

liberty as enshrined in our bill of rights.

[55] I find that the Defendant is liable to the Plaintiff.

[56] In the result the following order is made:

1.The defendant is to pay the plaintiff an amount of R 200 000-00

2.Costs

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N.E. RAMAPUPUTLA AJ

ACTING JUDGE OF THE HIGH COURT

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[1] Minister of Safety and Security v Tyulu 2009

(5) SA 85 (SCA) para 26

[2] Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP) para 10

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