

SOUTH AFRICA / JUDGMENT

Thusi and Another v Minister of Safety And Security (1442713) [2014] ZAGPJHC 387 (12 December 2014)

[2014] ZAGPJHC 387

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

1442713

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REPUBLIC

OF SOUTH AFRICA

GAUTENG

HIGH COURT

Johannesburg

Local Division

CASE NO: 1442713

DATE: 12 DECEMBER 2014

In the matter

between:

Thusi Nkanyezi
Kingslakey.....First
Plaintiff
Khumalo
Nhlanhla
Elvis.....Second
Plaintiff
And
The Minister of
Safety And
Security.....Defendant

JUDGMENT**Introduction**

1. The two plaintiffs allege that they were unlawfully arrested by members of the South African Police Services (the SAPS/ the police) acting within the course and scope of their duties and were detained for eight days. They also claim that they were unlawfully assaulted by unknown members of the SAPS. They seek compensation from the defendant for the unlawful conduct they were forced to endure at the hands of the members of SAPS. The defendant admits that the plaintiffs were arrested and detained for that period but denied that their arrest and detention were unlawful, and further denied that they were assaulted by members of the SAPS whether during or after their detention.
2. The parties agree that the following is common cause:
 - 2.1. Both plaintiffs were employed with a company operating under the name and style of SBV and which operates in the Security Industry. They were both involved in collecting, transporting and handing over large amounts of cash on a daily basis. They were both part of a First National Bank (FNB) cash-in-transit armed crew of four. They had been employed for a period in excess of one year when the incident that forms the subject of this case occurred.
 - 2.2. On Monday 19 December 2011 the plaintiffs reported for work at 06h30. Upon their arrival, the first plaintiff's manager informed him that they would not be working on that day as money transported by them on 12 and 13 December 2011 had been found to be short, with the alleged shortage amounting to R3m.
 - 2.3. The entire FNB cash-in-transit crew of four were informed that they were going to be subjected to polygraph tests. They were taken to the head office of their employer, the SBV, where they spent the day being subjected to polygraph tests.
 - 2.4. Thereafter, at or about 22h00, they were all taken to the Midrand Police Station where three of them, including the two plaintiffs, were arrested. The plaintiffs were detained in the cells at Midrand until Wednesday 21 December 2011, (one and a half days later) when they appeared in the Midrand Magistrates Court on a charge of theft of R3m. Their case was remanded to 28 December 2011. They were not granted bail and were placed in custody at the Johannesburg Central Prison until their next appearance, on 28 December 2011.
 - 2.5. On 28 December 2011 they re-appeared in the Midrand Magistrates Court on a charge of theft of R3m. They were released on bail of R10 000.00 Their case was transferred to the Wynberg Regional Court (Regional Court) and was postponed to 20 February 2012. On 20 February 2012 they appeared in the Regional Court when their matter was called. They were not asked to plead to the charges as the prosecution elected to withdraw the charges against them.

3. Apart from claiming that their arrest was unlawful, the plaintiffs allege that on 20 December 2011 they were unlawfully assaulted by members of the SAPS.

The viva voce evidence

4. Each plaintiff testified in support of his own case, while the defendant called two witnesses, a Detective Sergeant Edward Sehlomla Dikgale (Det Sgt Dikgale) who was the arresting officer, and Sergeant Aubrey Makgoshing (Sgt Makgoshing).
5. The first plaintiff's testimony was that after being subjected to the polygraph test by his employer, he was told that he had failed the test and that he was going to be arrested for the theft of the R3m that was in the care of the crew of which he was member. He outlined the process involved in the receipt and delivery of cash by himself and his fellow crew members. The process he outlined demonstrates that great care is taken to ensure that employees such as himself have almost no opportunity to pilfer any money while carrying out their duties of collecting it from one place and delivering it to another. Money is kept in bags and boxes. The bags are carefully checked for holes, and the seals of the boxes are checked to see if any of them were broken or had been tampered with. Great care is also taken to ensure that they are not victims of a heist while carrying out their duties. Upon the completion of their shift they hand over all the money in their care, which is carefully checked by others for any discrepancies between the amounts received and the amounts delivered, before they are allowed to leave the premises. The procedure is very strict, carefully monitored and carefully executed. The margin for error is zero. As a result, they were surprised to learn on 19 December 2011 that their delivery of 12 and 13 December 2011 was short in the amount of R3m. According to him, if there was a shortage in the amounts delivered by them on those two days it should have been discovered on those days and not a week later on 19 December 2011.
6. Notwithstanding the implementation of this very strict procedure he and his colleagues stood accused on 19 December 2011 for committing thefts on 12 and 13 December totalling R3m. The accusations were made by their employer. He was told that the accusations arose solely from the fact that he had failed a polygraph test, as his employer had no evidence that he, alone or together with any of the other members of the crew, had unlawfully taken the money. He was subjected to more than one polygraph test that day. He had also not eaten for the whole day. In fact his last meal was the supper he had on Sunday 18 December 2011.
7. After failing the polygraph test, he and his three colleagues were taken to Midrand Police Station where they were handed over to the police who only arrested three of them. The fourth colleague was not arrested as he had passed the polygraph test. Their belts and shoe laces were removed and he was separated from his colleagues and locked up in a cell. The cell was dirty. He was given a filthy blanket and a sponge to use for sleeping purposes. He was not given anything to eat. At 02h00 he was taken from the cell by three policemen, who claimed to belong to the unit popularly known as the Hawks, who said that they had come to question him about the alleged theft of R3m. He was taken out of the police station to his

home, where they conducted a search of his house. All this time his hands were so tightly cuffed behind his back that his wrists eventually bruised. While two of the policemen searched his house the third one punched him several times in the stomach asking him to reveal where he had hidden the R3m that he was alleged to have stolen. Each time he said he knew nothing of the R3m he was beaten by all three policemen. The beating was severe and was concentrated on his abdomen and on the sides of his body. After completing the search, which was in vain, they drove off to a garage where the policemen bought some ice cubes. They drove to an isolated site, stopped the vehicle, put the ice cubes in the front of

his underpants, waited a few minutes for the ice to melt and then released an electric charge on to his genitals causing him to suffer a considerable pain. He was repeatedly asked where he had hidden the R3m that he allegedly stole from his employer. Each time he answered that he did not steal any mone, and after each answer the electric charge was released onto his genitals. All this time he was very fearful of his fate. After that they stopped assaulting him and drove him back to the Midrand Police Station where they had him detained in the cells. He fell asleep. He was awoken later that morning and given breakfast. At about 15h00 hours that day he was taken out of the cell to a private room at the police station where three policemen were waiting. They cuffed his hands behind his back, took a black plastic bag, put a little bit of water inside it and placed it over his head. They forced him to lie on his stomach. One of the policemen sat on his back and tightened the plastic bag over his head. He was informed that if he could not breathe he should kick the floor to inform them that he was having difficulty breathing. The tightening of the bag around his head was suffocating. Each time he kicked the floor the policeman would remove the bag altogether, thus allowing him to breathe. He would then be kicked on the side of his body while at the same time being asked where he hid the money. He always replied that he had not taken it, and immediately thereafter the policeman sitting on his back resumed the process of placing the bag over his head and suffocating him. The process continued for a while. He was in great pain and this time, too, he feared for his life. The pain and the fear caused him to involuntarily urinate inside his pants. They stopped and drove him to his house to search it once again. One of the policemen told the others that the house had already been searched, which caused them to abort their search and return him to the Midrand Police Station where he was, once again, locked in the cell. He was in great pain. He was not afforded any medical treatment despite the fact that his pain was visible to all, nor was he given any painkillers. However, he did concede that he did not ask for any medication. The next morning he, the second plaintiff and the other arrested colleague appeared on a charge of theft at the Midrand Magistrates Court. He did not raise the fact that he was assaulted with either his legal representative or with the Magistrate. The rest of his testimony is captured in the common cause facts relayed above in paragraphs 2.4 and 2.5. He also conceded that on the day of his arrest he was asked by the arresting police officer about the missing R3m, and he said that everything he had to say would be said in court. In short, he took refuge in his right to silence.

8. Upon being released from custody on 28 December 2011 he consulted a doctor who booked him off work because he was apparently suffering from “tension headaches”. However, after the case was withdrawn he sought legal advice from the Wits Law Clinic about his assaults. About a year after his assaults the Wits Law Clinic had him consult the relevant medical experts. They examined him and furnished reports about his injuries and their opinions about his claim to being assaulted.
9. The second plaintiff, too, testified. The only evidence additional to that of the first plaintiff that he provided related to the assault he endured at the hands of members of the SAPS. On 20 December 2011, at or about 10h00, he was taken out of the cell to a private room at the police station where he found three men who claimed to be policemen that belonged to the unit commonly known as the Hawks. They told him that they were there to question him about the missing R3m. He said he did not know anything about the missing R3m. They cuffed his hands very tightly behind his back. He was asked to stand on his knees. He obliged. One of the policeman placed his knee on the second plaintiff’s back while another put a wet plastic bag over his (second plaintiff’s) head. The policeman who was behind and who had his knee on his (the second plaintiff’s) back began to tighten the bag causing him to suffocate. The other two policemen held him by the shoulders so that he could not move any part of his body while he was suffocating. After a minute or so, they removed the bag, released their grip on his shoulders and asked him to reveal where he had hidden the missing R3m. He said he knew nothing about the missing money. They began punching him in his stomach and on his sides. He fell onto his stomach. He was pulled back up and the plastic bag was placed over his head again. At that point he involuntarily urinated on himself. He was then taken back to his cell. His colleague who had been locked up in the same cell was missing. He fell asleep. Sometime later he was awoken and taken to the same three policemen who had assaulted him. They cuffed his hands tightly behind his back and drove him to his home, where they commenced searching for the missing R3m. The woman he was living with, and who is the mother of his children, was at home. The search was in vain. They took him back to the Midrand Police Station and had

him locked up in the cell separate from both his colleagues. The handcuffs were so tightly locked to his wrists that they caused

considerable pain at the time, and they left a permanent scar on each of his wrists.

10. The next day he appeared, together with the first plaintiff and his other colleague, at the Midrand Magistrates Court on a charge of theft of R3m. His parents had arranged a legal representative for him. There was also another legal representative who offered his services. He was a bit confused about these legal representatives, but told one of them that he was assaulted. The legal representative told him that when the trial commenced he should reveal that to the court and not immediately. He was not allowed to speak in court as his legal representative addressed the court. The proceeding lasted a few minutes only. The rest of his evidence concerning the case was identical to that of the first plaintiff. He still experiences nightmares about his assault and has become extremely fearful and distrustful

of all policemen. He has also lost his sexual appetite since the assault. The assault has affected him so badly that his relationship with the mother of his children has ended.

11. The plaintiffs submitted reports from medical experts that they consulted with in preparation for the case. The defendant did not submit any contrasting reports from medical experts operating in the same field as those experts relied upon by the plaintiffs. The defendant indicated that it does not dispute the factual material in the reports, nor does it wish to challenge the findings or opinions of these experts.

12. The first plaintiff submitted the reports of:

12.1. Dr Leon A Fine (Dr Fine), a psychiatrist. He examined the first plaintiff nine months after his assault, on 22 October 2012, and

thereafter came to the conclusion that:

“he presents with features of Post Traumatic Stress Disorder with Depression where this is significantly affecting his ability to perform his normal roles and activities of daily living with loss of enjoyment of amenities emotionally, sexually, socially and domestically.

He requires Psychiatric treatment, consisting of the use of Medication and of Psychotherapy and extending over a perhaps 18 months, where the sum of R14, 000 for medication and an additional amount of R16,000 for Psychotherapy and follow-up sessions, would be sufficient for all present and future Psychiatric treatment needs, and where given such optimal therapy, Psychiatric Prognosis would be anticipated to be good.”[1]

12.2. Dr G Perumal (Dr Perumal) is a Specialist Forensic Pathologist who examined the first plaintiff on 9 October 2012. He could not find any observable evidence of the assaults on the first plaintiff except for scars on the wrist and base of a thumb. He concluded that the most likely cause of the scars was the application of the cuffs on his hands at the time of the assault. As for the lack of observable evidence regarding the application of an electric charge to the genitals and the placing of a black bag over his head, he concluded that the description by the first plaintiff of the manner in which these were carried out explained this lack of observable evidence.

12.3. Dr Stan Tenzer (Dr Tenzer) is an Occupational Medical Practitioner. He examined the first plaintiff on 29 July 2014. His report did not take the matter any further.

13. The second plaintiff, too, submitted the reports of:

13.1. Dr Fine who also examined the second plaintiff on 22 October 2012. He came to the following conclusions:

“he presents with features of an incomplete Post Traumatic Stress Disorder which can be solely attributed to the effects of the Incident in question and which has led to far reaching consequences, with loss of life-roles, the ability to perform normal activities of daily living and loss of amenities physically, socially, domestically, sexually and occupationally but where deference is given to other opinions to qualify loss of earnings and of occupational capacity and opportunity.

He requires Psychiatric Treatment to help him adjust to what has been a highly traumatic incident with far-reaching consequences, where such treatment would consist of the use of Medication and of Psychotherapy of the specific Trauma Counselling type, using a Cognitive-Behavioural approach and Desensitisation Deconditioning techniques administered by a Psychiatrist trained and experienced in administering such specialized treatment.

Allowance should be made for the sum of R13, 000 for Medication and an additional amount of R15,000 for Psychotherapy and follow-up

sessions, where given such optimal treatment, Psychiatric prognosis is good”

13.2. Dr Perumal also examined the second plaintiff on 9 October 2011. Here too, he found no observable evidence of the second respondent having had a wet black plastic bag over his head, and he provided the same explanation for this lack of observable evidence as he did with that of the first plaintiff, but goes further and says:

“The consequence of this type of assault which causes smothering results in asphyxia. This was manifest as:

- (1) Urinary incontinence from incontinent bladder sphincter.
- (2) Extreme weakness and exhaustion.”

He also found

“The position and nature of the deep scars on the left and right wrist is entirely consistent with cutting of the metal cuff onto the skin and flesh as Mr Khumalo struggled against the assault.”

13.3. Dr Tenzer examined him on 19 July 2014. In his case too, the report of Dr Tenzer did not add anything to that of Drs Fine and Perumal.

14. The defendant presented the evidence of Det Sgt Dikgale and of Sgt Makgoshing who was the investigating officer. His testimony focussed

on the investigation of the alleged crimes the plaintiffs were accused of having committed. Det Sgt Dikgale was the arresting officer. His testimony was confined to what happened in his presence during the arrests, and to the reason as to why the arrest and detention was necessary.

15. Det Sgt Dikgale stated that on 19 December 2011 he was called by his senior after 22h00 and instructed to go to Midrand Police Station to look into a charge being laid by some people about the theft of R3m. He was informed that those persons had brought the suspects with them to the police station and were asking for them to be arrested. He got to the police station at about 23h00. He found a number of persons waiting in the charge office. He was introduced to the persons who laid the charge of theft. They told him that they were from a company called SBV, which specialises in transporting large amounts of cash on a daily basis. They told him that they are of the view that three of their fellow employees had stolen R3m of the cash, and that those employees were with them. Having laid the charged against those employees, they said they would like to hand the three employees over to the police.

He was introduced to the three employees, which included the two plaintiffs. The persons from SBV furnished him with sworn affidavits from the employees of SBV which indicated, inter alia, that the plaintiffs and their colleague were responsible for unlawfully taking R3m of the cash that was in their care on 12 and 13 December 2011. He read the affidavits and questioned the persons laying the charge. His questions focussed on the issue of how it came about that the plaintiffs had succeeded in unlawfully taking so much cash. The explanation provided to him left him a bit confused. He then chose to individually interview the two plaintiffs and their colleague about the allegation against them. Before doing so, he informed them of their right to silence as well as their right to have a legal representative present during the interview. Both plaintiffs informed him that they elect to exercise their right to silence, and that anything they want to say will only be said in court. He had no information about them. Evaluating the facts and circumstances he found himself confronted with, he came to the conclusion that the plaintiffs and their colleague should be arrested and detained until they could be brought before a court to answer to the case that would be made against them. He informed them that he would be arresting and detaining them. They said nothing to him. After doing so, and after completing the necessary paperwork, he left. He was adamant that had the plaintiffs at least assisted him to understand how they could have managed to steal such a large amount of cash he may not have detained them, but since they were unwilling to engage with him he had no choice but to detain them and let the legal process takes its course.

16. It was vigorously contended by the plaintiffs that he acted unreasonably and should not have detained them. Instead he should have merely given them notice to appear in court and released them. I cannot agree with this contention. He was in a difficult situation. He had persons who informed him that they were firmly of the view the plaintiffs and their colleague had stolen a large sum of money. He had affidavits to back this claim up. He could not fathom how the plaintiffs and their colleague could have done so and so he sought their assistance. They refused to assist him. They did not even engage him to say that the allegations are false and logically untenable. He had no information about them. That he had to charge them is beyond doubt. He could not be sure that they would not abscond once charged. The only route open to him in these circumstances was to detain them and have them brought to a court of law within forty-eight hours, as the law allows. Failure on his part to do this could result in justice being defeated. That was a risk he was not, correctly in my view, willing to take. Finally, he claimed he was acting in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA).
17. In terms of this section a peace officer, which Det Sgt Dikgale is, may arrest any person without a warrant if s/he “reasonably

suspects” that person of having committed an offence referred to in schedule 1 (the offence the plaintiffs were accused of

committing was such an offence) of the CPA. In the light of the facts and circumstances relayed here, there can be no doubt that Det Sgt Dikgale acted lawfully by arresting and detaining the plaintiffs.

18. Accordingly, the claim that they were unlawfully arrested has to be rejected.
19. The issue of them being unlawfully assaulted is independent of the issue regarding their arrests. It is to this issue that I now turn.
20. The defendant presented no evidence in rebuttal of the plaintiffs' claim that they were assaulted. However the defendant contended that the plaintiffs were not credible witnesses, and, on that basis only, their evidence regarding their assaults should be rejected. In this regard the defendant placed great emphasis on the fact that there were some minor discrepancies in the evidence between the two plaintiffs, as well as between the evidence of the two plaintiffs and that of Det Sgt Dikgale. These discrepancies related to matters completely unrelated to the alleged assaults. They related to matters such as who actually effected the arrests, who was in court on 21 December 2011 to represent them. These discrepancies in the evidence of the two plaintiffs, and between the evidence of the defendant and that of each plaintiff, in my view, are not of such a magnitude as to render the testimonies of the two plaintiffs unreliable or improbable. The defendant contended that the fact that the plaintiffs did not report the assaults to the police or the court at the first, or even at the subsequent appearances, means that this court should disbelieve them and hold that the assaults did not take place. The plaintiffs explained their failure to report the assaults by the fact that they were unaware of their right to do so, as well as the fact that they were fearful of their lives at the time. These explanations

are reasonable. In any event just because they did not report the assaults earlier does not mean they had manufactured their versions.

To reach such a conclusion would require a leap in logic and would defy the basic rule of evidence, which is that there must be a real and substantive basis to disbelieve a witness' testimony. There is no such basis in this case. On the other hand, the defendant's failure to produce any evidence to rebut what the plaintiffs testified to is fatal to its case. This relates not only to the personal testimonies of the plaintiffs concerning their assault but also to the reports of their medical experts. Evaluating the evidence as a whole leads to a single conclusion: the plaintiffs have established that they were assaulted by members of the SAPS on 20 December 2011.

21. It follows then that they are entitled to compensation for having to endure this unlawful conduct.
22. The courts have, over the years, grappled with the issue of what would be an appropriate compensation for a plaintiff who complains of and proves that s/he was unlawfully assaulted by members of the SAPS, whose duty it is to protect individuals from assault and not to be perpetrators of such unacceptable conduct. The amount of damages a plaintiff is entitled to

has to be determined on a case-specific basis. In general though, the court must act according to equity and good conscience (*ex aequo et bono*); its decision must be fair and just. It must consider the circumstances of the assault, the nature thereof, the need to punish

the perpetrators, or their employers (who have the power to prevent such unlawful conduct and who, hopefully will take steps to deter such conduct in the future). Of course, previously comparable awards will, too, provide some guideline of what is fair and just in the circumstances. [2]

23. In the present case, both plaintiffs were unlawfully assaulted. The first plaintiff had an electric charge administered to his genitals,

but not so the second plaintiff. This has to be taken into account in determining what would be regarded as fair compensation for the harm they suffered. They have both suffered severe trauma and to this date still bear the pain of the horrible assaults they were subjected to. Their dignity was taken away from them and they are still in the process of regaining it in full. They remain fearful of the police, which is something no person residing in our constitutional democracy should have to bear. Bearing all this mind, I conclude that would be fair and just to award One Hundred Thousand Rands (R100 000.00) to the first plaintiff and Eighty Thousand Rands (R80 000.00) to the second plaintiff.

Costs

24. The defendant agreed that should the plaintiffs succeed in their action they are entitled to their costs. There was no suggestion that these costs should be taxed on the Magistrates Court scale.

The order

1The defendant is ordered to pay the:

1.1 first plaintiff the sum of One Hundred Thousand Rands
(R100 000.00);

1.2 second plaintiff the sum of Eighty Thousand Rands
(R80 000.00);

1.3 Plaintiffs' costs of suit.

Vally J

Gauteng High Court, Johannesburg Local Division

Appearances:

For the plaintiffs : Adv H C Johnstone

Instructed by : Wits Law Clinic

For the defendant : Adv L Tyatya

Instructed by : State Attorney

Dates of hearing : 24, 26, 27 November 1, 2 December 2014

Date of judgment : 12 December 2014

- [1] All quotation in this judgment are verbatim and thus all emphases are in the original.
- [2] In this regard the court should take heed of the warning by Innes CJ in *Hulley v Cox* 1923 AD 234 at 236, who reminds that comparisons are always instructive never decisive.
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