**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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|---|---|---|
| (1) | REPORTABLE: NO/YES | |
| (2) | OF INTEREST TO OTHER JUDGES: NO/YES | |
| (3) | REVISED. | |
| (4) | Signature | Date 17/02/2016 |

**CASE NO: A214/14**

17/2/2016

**JAQUES QUINTIN NAGEL** — **APPELLANT**

**and**

**MINISTER OF POLICE** — **RESPONDENT**

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**JUDGMENT**

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**KHUMALO J**

[1] The Appellant is appealing against the dismissal with costs by the court a quo (Magistrate Mkanzi in the Magistrate's Court, Pretoria) on 4 September 2012 of his claim against the Respondent for damages for unlawful arrest, assault and detention by the members of the South African Police Services ("SAPS").

[2] The salient facts are that on 2 June 2009, Appellant, a medical officer, was arrested at a Roadblock in Centurion during an altercation that ensued between him and two members of the SAPS, one N Mdluli and A Legoro (hereinafter referred to as ("Mdluli") and ("Legoro"). He was detained at Lyttelton and charged with *crimen inuiria*, for having called Mdluli a "kaffir", also with the negligent handling of a firearm, for leaving his gun in the car unattended, interfering with the police duties and disturbing the police officers whilst carrying out their duties. After 3.4 hours of his detention, he was released and warned to

appear in court on 3 June 2009. A further court appearance was set down on 10 June 2009. Appellant paid an admission of guilt fine on the charge of *crimen inuiria* and the other two charges were withdrawn.

[3] Subsequently, Appellant instituted a damages claim against Respondent, the Minister responsible for the conduct of the members of the SAPS who were at all relevant times acting within the course and scope of their employment with the Respondent, for arresting him on the charges of *crimen inuiria* and negligent handling of a firearm without a warrant, his detention and assault.

[4] The learned magistrate in the court a quo found Appellant's arrest to have been lawful, being in compliance with s 40 (1) (a) of the Criminal Procedure Act ("the Act") in that the Appellant committed the offence of *crimen inuiria* in the presence of a policeman. He also found the Appellant to have failed to prove his claim for assault on a balance of probabilities.

[5] Appellant's ground of appeal is that the court a quo erred by:

[5.1] **finding for the Defendant/Respondent in respect of onus;**

[5.2] disregarding the material contradictions between the Respondent's witnesses;

[5.3] **failing to consider the improbability as suggested by the Respondent that Appellant fled and returned to swear at his arrestors;**

[5.4] Failing to consider the cogent evidence of the Appellant and his witnesses corroborating the Appellant.

[5.5] **failing to consider the charges being trumped up against the Appellant;**

[5.6] **Failing to consider the reasons advanced for the payment of the admission of guilt fine and its impact upon the guilt of the Appellant;**

[5.7] Failing in its judicial assessment in regard to the appropriate costs order.

[6] In *S v Manyane* and Others 2008 (1) SACR 543 (SCAA) the court held that:

> "This court's powers to interference on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[7] Section 40 of the Act reads:

> (1) A peace officer may without warrant arrest any person-
>
> (a) who commits or attempts to commit any offence in his presence;

The onus is upon the arrestor to prove that a crime was committed in his presence. The following are the jurisdictional requirements that Respondent has got to prove to discharge the onus:

[7.1] The arrestor was a peace officer;

[7.2] An offence was committed or attempted to be committed;

[7.3] The arrestee committed the offence or attempted to do so in the presence of the arrestor.

[8] The fact that the arrestee is later not prosecuted or being prosecuted is acquitted does not make the arrest unlawful; see *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) par [18]. In *Gulyas v Minister of law and Order* 1986 (3) SA 934 (C) the court found the use of an obscene language in a telephone conversation with a police official to have occurred in his (the police official) presence as contemplated in s 40 (1) (a).

[9] It is common cause that at the time of Appellant's arrest, he was altercating with Mdluli. Legoro was at a hearing distance of about 3 meters from them. Mdluli and Legoro testified in the court a quo that during that time Appellant called Mdluli "a kaffir" and promised to f..k him up, whilst disturbing them in their work at the road block. Appellant, later, represented by an attorney, admitted to the charge of *crimen inuiria* for having uttered the offending words to Mdluli and paid a fine before the date the matter was set down for trial. Respondent's counsel correctly argued, that Appellant's admission consists of overwhelming evidence of an offence committed in the presence of a peace officer, and satisfy the jurisdictional requirements of a lawful arrest, upon which the court a quo found that the onus upon the Respondent to prove a lawful arrest was as a result discharged.

[10] At the time the Applicant paid an admission of guilt fine, he was aware of the charge/s proffered against him and what it entailed, specifically that of *crimen inuiria*. He, duly represented by his attorney, admitted absolute guilt for insulting Mdluli and paid the fine. He was then deemed to have been convicted and sentenced for the offence. His admission synonymous with prove of his guilt beyond reasonable doubt because then it is the only time a conviction can be returned. The conviction stands as from that date since there are no proceedings pending to set it aside. Indeed the jurisdictional requirements of a lawful arrest was established. Therefore the court's finding on the question of onus in favour of the Respondent was judicious.

[11] The Appellant contends that the court a quo failed to consider the charges as being trumped up against him. According to Appellant, he returned to the scene, notwithstanding prior, leaving the scene in an unpleasant way, to obtain Mdluli's name as he was going to lay a charge against him (Mdluli). Why would Appellant then admit to a trumped up charge that would result in him having another criminal record and vindicating Mdluli? Which he did. Also he hasn't laid a charge against Mdluli till to date. Furthermore, there is also no evidence of Appellant mentioning at the time of his arrest, his intention to do so either to Viljoen, who assisted him at the cells, his attorney or the prosecutor. The court a quo tried to find clarity from the Appellant by quizzing him on all these aspects he still could not provide sensible or credible answers. A further probe by this court just led to Appellant's counsel referring to an assault case that Appellant was previously convicted of in another matter. The only inference that can be drawn is that the account he gave for coming back to the scene is contrived and that of the Respondent validated.

[12] Appellant also criticized the court a quo for not accepting his explanation that he admitted to the charge so as to be able to go back to his work overseas without an inconvenience of a trial. It does not make sense to make that allegation when his evidence was that he was so offended by Mdluli that he was going to lay a criminal charge against him, notwithstanding his work overseas and also the inconvenience of a trial being a possibility. The same considerations applicable.

[13] Once more, regarding Appellant's return to the scene, what should be taken into account as well is that he confirmed that there was another way he could have obtained the information on Mdluli without having to go back to the scene. He nevertheless went back despite the first encounter with the police officers not being pleasant. It is therefore not reasonably possibly true that he went back to the scene for the reason proffered. The only inference that can be drawn is corroborated by his admission of guilt. There was therefore no reason for the court a quo to **consider it an improbability that Appellant fled and returned to swear at his arrestors as suggested by the Respondent or to** find that the charges were trumped up against the Appellant.

[14] Respondent's counsel also pointed out that a gun was found in Appellant's motor vehicle allegedly left unsecured. The record indicates that Appellant admitted to having left the gun unattended and appreciated that it was exposed. He apparently left instructions with his young sister to lock the doors, but she opened her door and stood outside the vehicle. It is not disputed that when the police found the gun, the doors of the vehicle were all opened. That is the second offence that Appellant committed in the presence of a peace officer. The fact that the charge was withdrawn is irrelevant as pointed out in *Scheepers*.

[15] In respect of the unlawful assault claim, Appellant alleged to have been assaulted by Legoro and Mdluli. Also that he suffered a severe neck injury as a result of the assault during arrest. He however agreed that he resisted arrest therefore the police officers had to use minimum force to effect the arrest. He fell when they pushed him to get him inside the Quantum. Besides that, he only had visible abrasions on the wrist resulting from being handcuffed. There were no other injuries found to have been caused by the assault. The x-ray revealed an old fracture of cervical vertebrae. No medical evidence was led in that regard and the issue therefore could not be taken any further.

[16] In assessing the evidence the court a quo in its judgment systematically went through the evidence of the state witnesses, compared and found that the two main witnesses corroborated each other in all the material aspects of the case, specifically on what transpired when the Appellant was arrested, the reasons for the arrest and how he was behaving during the arrest.

[17] The court went through the same exercise with the evidence that was tendered on behalf of the Appellant and pointed out that except for the sister's evidence all other witnesses arrived at the scene when all has happened or were not in close proximity to hear what was said between the Appellant and the peace officers. Appellant contradicted himself in material facts also alleging that he was never arrested before.

[18] I am satisfied that the court covered all the grounds of appeal that are raised by the Appellant and dealt with the evidence judiciously to arrive at its conclusion on the merits.

[19] The Appellant has therefore failed to make a case for the setting aside of the decision of the court a quo, having failed to show that the court a quo erred when it dismissed its claim. Under the circumstances

[20] I hereby propose the following order:

[20.1] The Appeal is dismissed with costs.

**N V KHUMALO**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION: PRETORIA**

**I agree and it is so ordered**

**D FOURIE**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**
15/2/16

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