

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



CASE NO: 16/06499

- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: Yes

Date: 20/12/ 2018

Signature

In the matter between:

PAKAMA TSHIKILA
ZODWA MALINGA
FLOYD MALINGA
IDA MALINGA
CEKISO GEMIKILE

First Plaintiff
Second Plaintiff
Third Plaintiff
Fourth Plaintiff
Fifth Plaintiff

and

THE MINISTER OF POLICE

First Defendant

J U D G M E N T

MAIER-FRAWLEY AJ:

1. In this action the first to fifth plaintiffs claim damages from the defendant arising from their unlawful arrest and detention by members of the South African Police, acting in the course and scope of their employment with the defendant.
2. The plaintiffs were arrested without a warrant for crimes of assault and kidnapping¹ on Friday, 2 October 2015 and detained at the Hillbrow police station until Sunday, 4 October 2015 before being released on bail. It is common cause that charges were subsequently withdrawn by the State.
3. The defendant admitted the arrest without warrant and subsequent detention but pleaded that the plaintiffs 'were lawfully arrested by members of the South African Police Services, being peace officers, pursuant to the provisions of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended, ('CPA') upon receipt of a complaint of common assault and kidnapping by one Sweetness N. Jita, in that the said peace officers reasonably suspected that the plaintiffs had committed an offence referred to in Schedule 1 of Act 51 of 1977.' The defendant averred that the plaintiffs were lawfully detained in terms of section 50 of Act 51 of 1977, subsequent to their lawful arrest.
4. The issue for determination at trial was whether the arrest of the plaintiffs was justified in terms of section 40(1)(b) of the CPA, thus rendering the arrest lawful. In this regard, the sole issue in dispute related to whether or not the peace officer, in effecting the arrest, had reasonable grounds for suspecting that the plaintiffs had committed a schedule 1 offence.

¹ Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement. The elements of the crime are the following: (a) the *deprivation* of (b) a person's *freedom of movement* which takes place (c) *unlawfully* and (d) *intentionally*.

5. In the event of a finding that the plaintiffs were unlawfully arrested and detained, the court was called upon to decide upon a fair and reasonable award. The plaintiffs claimed an amount of R2, 100 000.00 in the action, made up as follows:

| | | |
|------|----------------------------------------------------------------------------------|-----------------------------------|
| 5.1. | General damages, past and future medical expenses for the first plaintiff: | R600 000.00 |
| 5.2. | Unlawful arrest and detention for all plaintiffs: | R1, 000 000.00 (R200 000.00 each) |
| 5.3. | Contumelia | R500 000.00 |
| | <u>TOTAL:</u> | <u>R2,100 000.00</u> |

6. Accepting that it bore the onus to justify the arrest and detention,² the defendant assumed the duty to begin at trial

7. The defendant called one witness, Constable Makaleng, who was both the investigating officer and the arresting officer in the matter. All five plaintiffs testified in support of their claim for wrongful arrest and detention.

8. Before considering whether the arrest of the plaintiffs was wrongful, I shall briefly set out the events that gave rise to the arrest as they emerged from the evidence presented at trial.

9. On 26 September 2015 an incident occurred at a building known as Kelemberg (consisting of residential apartments) situate at 40 Joel Street, Berea, Johannesburg. The building has 36 units and houses approximately 200 people, some units being occupied by 5 to 10 people per unit. The building had debt owing

² This is in keeping with that articulated by the then Appellate Division in *Minister of Law and order v Hurley* [1986] 2 ALL SA 428 (A) at 442 (4) where the following was said: 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

to the municipality in respect of municipal services. It was discovered that the body corporate was not paying certain municipal fees, resulting, on occasion, in electrical services being terminated at the building.

10. A meeting had been arranged on that day between the various owners and tenants at the building to resolve payment issues and to determine which persons were in arrears with their payments. Occupants were required to provide proof of payment at the meeting.
11. The complainant, Ms. Sweetness Nosicelo Jita, together with Ms. Busisiwe Mlambo and Khozi Nkosi (her ensemble) attended the meeting.³ The occupants of 5 units failed to attend. The five plaintiffs in the present action, being occupants of three of the five units in question, were amongst the persons who initially failed to show up at the meeting. The complainant and her ensemble took it upon themselves to disconnect the electricity in those 5 units, to force the absent occupants to come downstairs and provide proof of payment. This duly caused the respective plaintiffs to arrive downstairs and to confront those responsible for disconnecting their electricity. A commotion ensued during the confrontation, with Ms Jita, Ms Mlambo and Mr Nkosi each allegedly being assaulted and locked into the basement against their will and without their consent, with demands being made that the electricity be switched on under threat they would not leave the building alive if that did not happen.
12. Although the complainant did not testify at the trial, her statement was referred to in the evidence of Constable Makaleng during the course of his testimony. In her statement the complainant stated that she had managed to persuade her assailants to allow her to go to her vehicle in order to fetch proof of payment of rent in respect of the unit owned by her. They instructed that she be escorted by the

³ Both the complainant and Ms Mlambo own units in the building. Ms Mlambo resides in one of the units whilst Mr. Nkosi, who is not resident at the building, merely accompanied the complainant to the meeting.

security guard. Ms Jita seized upon the opportunity to phone the police for help and waited for the police to arrive before returning to the building.

13. It is common cause that unknown members of the police arrived at the scene of the incident thereafter. Pursuant to the intervention of the police, the electricity was allegedly switched back on and the gate of the basement garage was unlocked.

Evidence of Constable Makaleng

14. According to Const. Makaleng, Ms Jita (complainant) had laid a complaint of assault and kidnapping ('the complaint') on 27 September 2015, to which end, she deposed to a sworn statement the same day. She also underwent a medical examination which confirmed that she sustained bruises in the alleged assault. The docket was allocated to Const. Makaleng subsequent to the lodging of the complaint. Upon receipt of the docket, he read the complainant's statement and had sight of the J88 medical report as contained in Exhibit F at paginated page 17. In her statement, the complainant alleged that she had been assaulted and kidnapped by persons from the five units referred to earlier, having being locked together with her ensemble in the garage basement of the building under threat that no-one would leave the building alive if the electricity was not reinstated.
15. He conducted further investigations, which included conducting an interview with the complainant and obtaining statements from other witnesses. He testified that he 'needed to get a full story from each person to establish that assault and kidnapping' in fact occurred. He verified the facts through interviews conducted with other witnesses. He obtained sworn statements from Ms. Mlambo and Mr. Nkosi⁴ wherein they *inter alia*, alleged that they had themselves been assaulted and locked in the basement against their will.

⁴ As is apparent from her statement, Ms Nkosi confirmed that she, Nkosi and the complainant were each assaulted on the day in question and that she, Nkosi and the complainant were all locked inside the basement against their will. Mr Nkosi stated what had happened to him. He stated that he had been assaulted and that he was locked inside the basement until such time as he was rescued by the police.

16. Const. Makaleng also obtained a statement from an independent witness, namely, Keith Gwaze, a security guard at the building. As is apparent from his statement, he indicated that the third plaintiff had taken the keys to the gate of the basement garage from him. He also confirmed that the complainant, Ms Mlambo and Mr Nkosi had been locked inside the basement garage. Mr. Gwaze confirmed that the meeting had taken place in the building basement. Occupants of unit numbers 401, 901, 701, 403 and 804 did not initially attend the meeting. When the electricity was switched off, the said occupants came downstairs, making a lot of noise. He was able to see the third and fifth plaintiffs assaulting the complainant and her ensemble.
17. Const. Makaleng testified that the complainant was not able to identity all of the suspects involved in the incident of assault and kidnapping by name. She identified some by name. She could only identify others by pointing them out to him.⁵
18. During his evidence-in-chief, Const. Makaleng stated that he investigated the complaint first in order to establish the facts. On the strength of interviews conducted and statements obtained, he stated that 'I had a reasonable belief that crimes of assault and kidnapping had occurred.' He testified that when more than one suspect is involved, each person has a role to play. The evidence pointed to the fact that a group of suspects were working together in order to accomplish their goal. He stated, for example, that one person may lock the gate whilst the rest may look on and associate themselves with that act.
19. A week later Const. Makaleng arrested the plaintiffs. The complainant was present during the arrest and accompanied the arresting officer from unit to unit in pointing out the arrestees as the persons who were involved in the incident forming the basis of her complaint. Before making the arrest, Const. Makaleng identified himself as a police officer and informed each individual of the allegations

⁵ As is apparent from the complainant's statement, she identified certain suspects by name, including among others *Gemikile Cekiso* (fifth plaintiff) [unit no. 401]; *Ida Malinga* (fourth plaintiff) and *Floyd Malinga* (third plaintiff) [unit 901]; and *Tshikila Pakama* (first plaintiff) [unit 804].

against them. He stated that he tried to speak to each person so identified in order to obtain their response. The plaintiffs were upset and refused to respond positively towards him. They refused to give their version. Instead, they informed him that as a police officer, he should stick to his mandate⁶ and not interfere in housing issues. Upon arrest, the suspects were informed of their constitutional rights. The complainant was threatened by the fifth plaintiff in the presence of Const. Makaleng at the time of his arrest.

20. It is common cause that 8 people⁷ were arrested at Kelemberg building on Friday 2 October 2015. The suspects were taken to the Hillbrow Police Station where they were formally processed through the system and where they, *inter alia*, received a written notice informing them of their constitutional rights.
21. The suspects were detained in the holding cells as from Friday evening until Sunday evening on 4 October 2015. Const. Makaleng testified that bail was granted by a standby prosecutor on Sunday evening, whereafter the plaintiffs were released and warned to appear in court. According to Makaleng, the complainant deposed to a withdrawal statement sometime thereafter, which subsequently led to the withdrawal by the State of the case against the plaintiffs.
22. During cross-examination, Const. Makaleng admitted that common assault was not a schedule 1 offence but added that two separate offences were committed in the case at hand, namely, common assault and kidnapping, with kidnapping falling under Schedule 1.
23. It was put to Const. Makaleng that he arrested the plaintiffs in compliance with an instruction from his captain to arrest the suspects and that he did not exercise an independent discretion in this regard. Const. Makaleng disputed this, stating that he had investigated the complaint independently and if he did not believe that he could arrest, then he would not have made an arrest.

⁶ To enforce and uphold the law and preserve public order.

⁷ The five plaintiffs in the present action were amongst the 8 arrestees.

Evidence of the plaintiffs

24. The plaintiffs each testified at the trial. It is not necessary to summarise the evidence of each individual plaintiff. Suffice it to say that all the plaintiffs disputed having assaulted the complainant or her ensemble or that such persons had been locked inside the basement garage. Each plaintiff to some extent or another sought to distance him or herself from the commission of any offence on the day in question or from a display of aggression towards the complainant (who was referred to as the building manager in their evidence) or Mr. Nkosi (who was unknown to the Plaintiffs) or Ms. Mlambo (who held the keys to the electricity box located in the basement of the building and who was known to the plaintiffs).
25. A common thread in the evidence of the plaintiffs is that they either personally questioned Ms. Mlambo or observed others questioning Ms. Mlambo about why their electricity had been disconnected on 26 September 2015. According to the plaintiffs, these discussions took place in the foyer of the building. Save for the first plaintiff, none of the other plaintiff's personally interacted with the complainant on the day of the incident. The plaintiffs admitted however that they were all angry at the complainants for switching off their electricity.
26. All the plaintiffs were singularly unable to answer why the police were called to the scene if nothing adverse had happened that day.
27. All the plaintiffs confirmed that the police holding cells were in a despicably dirty condition with dysfunctional ablution facilities, unwashed basin and toilet, and that only hard and dirty blankets were provided to them. They were however granted access to visitors and obtained legal representation on Sunday the 4th September 2015 at the behest of the first plaintiff. The first plaintiff was unfortunate in that her menstruation cycle started after she was placed under detention, this whilst she had no sanitary towels with her. She asked the police for assistance, which was allegedly not provided.

Reasonable suspicion

28. In terms of section 40(1)(b) of the CPA, a peace officer may without a warrant arrest any person whom he reasonably suspects to have committed a Schedule 1 offence, other than the offence of escaping from lawful custody.
29. It is clear that on the defendant's version, the plaintiffs were arrested and detained on charges of common assault *and* kidnapping. Whilst the offence of kidnapping is listed in Schedule 1, common assault as such, is not.⁸ The arresting officer therefor ordinarily enjoyed no power to arrest suspects whom he reasonably suspected of having committed the offence of common assault, without a warrant. He did however enjoy that power in relation to the offence of kidnapping.
30. In *Minister of Safety and Security v Van Niekerk*,⁹ the Constitutional Court reinforced the notion that the lawfulness of an arrest is highly fact-specific, meaning that the lawfulness of an arrest will be closely connected to the facts of the situation.
31. As was held in *Duncan v Minister of Law and order*,¹⁰ the jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.
32. I was informed at the outset of the trial that the primary issue in dispute concerned item (iv), namely, whether the peace officer had reasonable grounds for arrest.
33. What the section requires is that the police officer must have had a reasonable suspicion and in that regard the test is objective.¹¹ On an objective approach the

⁸ The offence of 'assault, when a dangerous wound is inflicted' is listed in Schedule 1.

⁹ 2008(1) SACR 56 (CC at paras [17] & [20].

¹⁰ 1986 (2) SA 805 (A) at 818G-H.

¹¹ See: *Olivier v Minister of Safety and Security and another* 2008 (2) SACR 387 (W)

police officer must show that he had reasonable grounds for his suspicion. See: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at p. 818.

34. In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H, Jones J, in dealing with the requirement of a reasonable suspicion, said the following:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1) (b) is objective (*S v Nel and another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e., something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

(own emphasis)

35. I agree with the submission made by the defendant’s counsel that Const. Makaleng did not just go and arrest the plaintiffs. He first conducted his own investigation. He did not accept the information at his disposal¹² blithely or without due consideration, but checked it, by interviewing two further witnesses and also the complainant. Even then, he proceeded cautiously. He went to the length of tracing an independent witness (security guard) and obtained a statement from him. Only then did he consider that the information at his disposal allowed him to entertain a suspicion that would justify an arrest, at least in relation to the offence of kidnapping.

¹² The information at his disposal at that stage was the complainant’s sworn statement and the medical report depicting her injuries.

36. Although Const. Makaleng did not specifically attempt to interview the various plaintiffs during the course of his preliminary investigations, he did endeavour to obtain their version of events before formally arresting them. As later transpired, the plaintiffs refused to co-operate with him or to provide their version.
37. The plaintiffs' counsel suggested that Const. Makaleng was motivated by an erroneous belief that he could arrest the plaintiffs without warrant for the offence of common assault, which, so the argument developed, prompted him to effect the arrest primarily, if not singularly, based on a suspicion that an offence of common assault had been committed, no reasonable grounds having existed for the arrest on account of any kidnapping of the complainant. I do not agree with the submission for reasons that follow.
38. Const. Makaleng testified that he was well aware of his powers under section 40(1)(b) – he knew he could not arrest for common assault without a warrant – but he had a kidnapping charge too, which he investigated. The information he obtained was that police officers were called to the scene of the incident to rescue 'the complainants' (referring to the complainant and her ensemble). He had evidence that people were locked in a basement; the complainant had feared for her life in circumstances where she (and her ensemble) had been assaulted and had been warned that no-one was going to leave, at least not alive;¹³ He considered that this amounted to her having being held against her will, which pointed to kidnapping. All four witnesses confirmed that the lock-up occurred.
39. Const. Makaleng considered that the group of persons (being the occupants of the five units whose electricity had been switched off, of which the plaintiffs formed part) had, on the evidence at his disposal, associated themselves with what occurred at the scene of the incident. In this regard, I agree with the submission by

¹³ the evidence of the complainant in her sworn statement was to the effect that she was not allowed to leave the basement garage freely of her own accord – the group made the security guard accompany her.

the defendant's counsel that the actions of one in the group could be attributed to the others under the doctrine of common purpose and in so far as they associated themselves with what had been done, then they could all be charged under that doctrine. The evidence at Const. Makaleng's disposal showed that persons in the group were all angry at those responsible for disconnecting their electricity; they went downstairs with the goal of confronting the responsible persons about switching off the electricity; they were intent on forcing those responsible to switch the electricity back on; those that did not themselves physically participate in the assaults or the locking of the gate in order to prevent the complainant and her ensemble from leaving, must have been aware of the commission thereof, since they were alleged to have been present at the scene of the altercation; they did not disassociate themselves with the forced lock-up, which occurred under threat of further violence, but performed their own act of association therewith by acquiescing therein and allowing it to continue. In my* view, on those facts, invocation of the doctrine of common purpose¹⁴ would have been justified.

40. Const. Makaleng had a discretion to arrest persons whom he reasonably suspected of having committed the crime of kidnapping. He was mindful of the fact that he was not *obliged* to arrest the suspects implicated, but he had information that supported his belief that Ms Mlambo and Ms Jita were under threat, based on a report obtained from Ms. Mlambo and his witnessing of the fifth plaintiff having threatened the complainant in his presence before he actually arrested him. He therefore exercised the discretion afforded to him to arrest all the suspects who were implicated in the alleged commission of the crimes, after they were pointed out by the complainant.¹⁵

41. On the facts of the matter and in all the circumstances discussed above, I am unable to conclude that Const. Makaleng acted arbitrarily in exercising his

¹⁴ The doctrine of common purpose and its requirements are discussed in *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706C; The said doctrine was ratified in the constitutional era by Justice Moseneke in *Thebus and Another v S* 2003 (6) SA 505 (CC) at paras 65 & 68.

¹⁵ Const. Makaleng further stated that in his experience, people who live* in the city and surrounds often come and go and rent out their apartments, making it difficult to trace them thereafter.

discretion or that he did not have reasonable grounds on which to entertain the suspicion that the plaintiffs had been involved in the commission of a schedule 1 offence.

42. I accordingly find that the defendant has succeeded in justifying the lawfulness of the arrest of the plaintiffs in relation to the offence of kidnapping. Although this was not in issue at the trial, the evidence in any event established that the detention of the plaintiffs' was justified.

43. The general rule is that costs follow the result. I see no reason to depart therefrom.

44. In the circumstances, I make the following order:

ORDER

The Plaintiffs' claims are dismissed with costs.


MAIER-FRAWLEY/AJ

Date of hearing:
Judgment delivered

21-23 November 2018
20 December 2018

APPEARANCES:

Counsel for Plaintiffs:
Attorneys for Plaintiffs:

Adv. M. Courtenay
Dudula Incorporated

Counsel for Defendant:
Attorneys for Defendant:

Adv. NM Mtsweni
State Attorney