REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE
SIGNATURE

CASE NO: **A3134/2021**

In the matter between:

MFANELELI MNCOBA MATHUNJWA	Appellant
And	
MINISTER OF POLICE	Respondent

Coram: **Crutchfield J et Dlamini J**

Date of hearing: 16 August 2022

Date of delivery of Judgment: 11 January 2023

This judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] This is an application to appeal against the decision of Magistrate Mr. Adrian Jacobs, sitting in the Sub-District of Emfuleni held at Vereeniging, handed down on 8 April 2020.

[2] Mr. Mfaneli Mathunjwa, the Appellant / Plaintiff had brought a claim for damages arising from his unlawful arrest and detention against the Respondent/ Defendant.

[3] Upon hearing the matter on 14 April 2020, the Magistrate dismissed the Appellant's claim with costs.

[4] Not satisfied with this decision the Appellant launched this appeal.

[5] On 5 August 2021 leave to appeal was granted to the Appellant by this Court to the full Bench of this Court.

[6] It is common cause that the Appellant was arrested without a warrant of arrest on 16 June 2017, and was released on 20 June 2017. The Appellant was arrested and detained at Lenasia Police Station by Captain Nkosi employed by the Respondent as a police officer in the South African Police Service.

[7] At the commencement of the trial in the court *a quo*, the Respondent admitted that it had the onus to prove that the arrest was lawful and justifiable.

[8] The Respondent called Captain Nkosi, and Sergeant Ndlovu to testify on its behalf.

[9] The Appellant testified on his behalf and did not call any witnesses.

[10] In his grounds of appeal the Appellant submits that;

10.1. The Magistrate ignored the evidence that the arresting officer did not use his discretion when there were two contradictory statements in the docket regarding what happened to the deceased.

10.2. The Magistrate erred in not finding that the arresting officer failed to read the docket and familiarize himself with the contents of the docket and that he should have taken the docket to the Prosecutor for a decision instead of arresting and detaining the Appellant.

10.3. The Magistate ignored the evidence that the arresting officer failed to use his discretion, in that, the arresting officer failed to read the docket and to consider other statements which were in the docket detailing how the deceased passed away and that the arresting officer conducted an unlawful informal identity parade.

10.4. The Magistrate ignored evidence that there were statements in the docket by eyewitnesses who indicated that the deceased was stabbed by a group of people and not one person. Further, that the deceased was assaulted and not shot at.

10.5. Finally, the Appellant submitted that the Magistrate erred in not finding that the arresting officer failed to exercise his discretion by following up on the explanation given by the Appellant, instead he said he did not trust the explanation and arrested the Appellant.

RESPONDENT'S CASE

[11] Captain Nkosi, testified that he is a member of the South African Police Service ("SAPS"), stationed at Lenasia Police Station. He was a member of SAPS for the past 34 years. Nkosi said he was on duty on 17 June 2017. His task on that day was to trace and arrest suspects that were involved in the death of a person at the water works. His station commander advised him that there was a witness at the military base who witnessed the incident. He proceeded to the military base and met the witness. The witness gave him the nail gun, apparently the equipment the witness claimed was used by the perpetrator to attack the deceased. According to the statement of this witness, the perpetrator after assaulting the deceased put the nail gun under a tree and drove off in a motor vehicle.

[12] Nkosi said, he then ran a computer trace of the registration number of the vehicle and discovered that the owner of the car was staying in Orange Farm. He proceed to the address. He found the Appellant sitting with a group of other people. He averred that upon questioning the Appellant, the Appellant confirmed that he was at the water works the previous day, and he admitted that he drove the said vehicle on that day. Further, the Appellant told him that the owner of the said vehicle was his wife. Furthermore, Nkosi stated that the Appellant acknowledged possession of the nail gun. However, Nkosi averred that the Appellant denied that he was the person who assaulted the deceased.

[13] Captain Nkosi testified that he then asked the Appellant to accompany him to the Lenasia Police Station. Upon their arrival at the Station, they went to his office. The military police officer came and pointed out the Appellant as the person who was involved in the murder of the deceased. Nkosi said that he then informed the Appellant that he was being arrested for the murder, informed him of his Constitutional rights and detained the Appellant.

[14] Seargent Ndlovu testified that he was a member of the South African Police Service, stationed at Lenasia Police Station. On 19 June 2017, he received a murder docket in which the suspect was already arrested and detained in the

police cells. He took the docket and placed it for decision by the prosecutor. However, the docket was declined and the prosecutor raised certain queries that he had to investigate further Accordingly, the Appellant was released. The Respondent closed its case.

APPELLANT'S CASE

[15] The Appellant testified that at the time of his arrest he was working as a bricklayer at a construction company and earned around R1000 per month. He said that on the day of his arrest he was at home with friends and children. Two policemen arrived and enquired about who was driving the Jetta motor vehicle at the water works on 15 June 2021. He advised the police officers that the owner of the Jetta was his wife and confirmed that he was at the water works the previous day as his wife has a shack there. The police officer then asked him to accompany them to the Lenasia Police Station, which he did.

[16] The Appellant averred that he admitted to Captain Nkosi that he was in possession of the nail gun. However, the Appellant said the nail gun belonged to one Jabu. He and the said Jabu had agreed that the Appellant should put the nail gun under a certain tree where they usually smoked and that Jabu would fetch the nail gun there. Mathunjwa denied that he assaulted the deceased with the nail gun or at all.

[17] Under cross-examination, the Appellant denied that he used the nail gun to assault the deceased. The Appellant insisted that the nail gun was old and not in working condition and that Jabu intended to fix it. The Appellant then closed his case.

[18] At issue in this appeal is whether the arresting officer had reasonable suspicion to arrest the Appellant.

[19] Section 40 (1) (b) of the Criminal Procedure Act[1], sets out the essential jurisdictional facts that have to be present to justify an arrest without a warrant. These are;-

(a) The arresting officer must be a peace officer;
(b) The arresting officer must entertain a suspicion;
(c) The suspicion must be that the suspect committed an offence referred to in Schedule 1; and
(d) The suspicion must be based on reasonable grounds.

[20] In *Biyela v Minister of PoliceI*[2]*,* the court affirmed that the test whether a suspicion is reasonable, is objectively justiciable. At [34] Musi AJA said " *The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should be not be an unparticularised suspicion. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence".*

[21] Before us, Counsel for the Appellant submitted that they were now only pursuing the requirements of paragraph (d) that is, whether the suspicion was based on reasonable grounds.

[22] The Appellant submitted that the arresting officer failed to follow up on the explanation made by the Appellant at the police station and failed to verify other statements contained in the case docket that contradicted the statement that the officer relied on during the arrest.

[23] The Appellant contended that the fact that he was on the scene and that he drove the motor vehicle does not mean that he committed the offence or participated in the commission of the offence. Further that the arresting officer conducted an informal identity parade in his office, without the knowledge of

[1] Act 51 of 1977
[2] (1017/2020) [2022] ZASCA 36 (01 April 2022)

the Appellant and without following the proper procedure of conducting an identity parade.

[24] The Appellant submitted that the arresting officer's failure to familiarize himself with the facts of the case did not give him a chance to form a reasonable suspicion and the police officer failed to approach the case objectively. Furthermore, that the arresting officer ignored the version that according to the statement in the police docket the deceased was assaulted and not shot at and had multiple wounds on his body, and further that he was assaulted by a crowd of people not shot at by one person.

[25] As a result, the Appellant argues that the court *a quo* misdirected itself when the court concluded that the arresting officer followed procedure when arresting the Appellant. Further, that the Magistrate erred when he held that the Appellant failed to prove that his arrest was unlawful because the Appellant admitted being on the scene and that he was driving the aforesaid motor vehicle. The Appellant submits that these factors alone do not mean that he committed the offence. The Appellant seeks reliance for this proposition in *Minister for Safety and Security v Sekhoto & another*[3].

[26] The Respondent submits that Captain Nkosi premised his arrest on the basis that the Appellant admitted that he was on the day of the incident present at the water works, that he was driving the car that was linked to the murder. That Appellant admitted that the nail gun belonged to him. Further that Captain Nkosi relied on the statement of the military police officer who saw the Appellant using the weapon on the deceased. Finally, that on the day of the arrest, the military police officer identified the Appellant at the police station as the person who shot at the deceased with the nail gun.

[3] (2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10 (19 November 2010)

[27] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court materialy misdirects itself insofar as its factual and credibility findings are concerned. In *S v Francis*[4] at 198 and 199, this approach was summarized as follows " *The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage a trial Court has of seeing, hearing, and appraising a witness. It is only in exceptional cases that the Court of appeal will be entitled to interfere with the trial Court's evaluation of oral testimony*.

[28] A well established principle of our law is that the onus rests on the arresting officer to prove the lawfulness of the arrest and detention. In *Barnard v Minister of* ***Police*** *and Another*[5], at [25] the Court held that a police officer should investigate an exculpatory statement offered by a suspect before they can form a reasonable suspicion for the purpose of a lawfull arrest. In *Sandle Biyela v Minister of Police* [2022] ZASCA 36 (1 April 2022) the SCA held at [36] *that the arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.*

[29] It is common cause in this case that on 15 June 2017 there was unrest at water works. The scene was fluid and there were violent scenes between the shack dwellers and the security personnel of a company that was trying to remove the shack dwellers. Based on this fact, Captain Nkosi should have exercised greater caution in investigating and arresting the Appellant. Captain

[4] 1991 (1) SACR 189 (A)
[5] 2019 (2) SACR (ECG)

Nkosi testified that he, personally never read the docket. He does not know the nature and the cause of death of the deceased. It is common cause that at the time of the arrest of the Appellant, no post-mortem report has been conducted on the deceased, consequently, the deceased’s cause of death is unknown.

[30] Further, the Appellant denies that he used the nail gun to kill the deceased. Significantly, the Appellant testified that the nail gun was old and it was not working. This evidence was never disputed or challenged under cross examination. It was incumbent upon Captain Nkosi to have first taken the nail gun for testing to establish whether in deed it was in a working condition and was capable of causing harm as alleged by the military police.

[31] Furthermore, Captain Nkosi, admitted under cross-examination that he did not read the statements of Captain Muthumsamy and Bernard Louw in the docket, that stated that the deceased was assaulted and stabbed as opposed to being shot by a nail gun. A police officer with his years of experience should have first investigated the obvious glaring contradictions that related to the cause of death of the deceased before arresting the Appellant.

[32] Captain Nkosi premised his arrest on an illegal and unlawful identity parade that he conducted in his office, where the military police pointed out the Appellant as the person who shot at the deceased.

[33] In *Mabona and Another v Minister of Law and Order and Others*[6] the court held that the reasonable person “*will 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 the arrest”.* See also *Lamula and Others v Minister of Police*[7].

[6] 1988 (2) SA 654 (SE) at 658 E-G
[7] 2012/310 2013 ZAGPJHC 130

[34] In all the circumstances that I have mentioned above, it is my view that Captain Nkosi did not hold a reasonable suspicion that the Appellant had committed the offence for which he was charged and detained. It follows therefore that the arrest and detention of the Appellant were unlawful and the Respondent has failed to discharge the onus on a balance of probabilities that the arrest and detention were justifiable.

[35] In the result the learned Magistrate misdirected himself when he held that the arresting acted on a suspicion that was based on reasonable grounds. It is thus, my view that the Respondent failed to discharge the onus that rested on its shoulders to prove that the arrest was lawful.

[36] it follows then that the appeal on the merits must succeed.

[37] The next issue for determination is what is a just and equitable compensation to be awarded to the Appellant. The Appellant's counsel argued that should the appeal succeed on the merits, that this Court should proceed and make a determination on the quantum. Both parties' counsel submitted that there exists sufficient evidence on the record to enable this Court to make the award.

[38] The general approach regarding the amount of damages for unlawful arrest and detention was appropriately captured by Bosielo AJ in *Minister of Safety and Security v Tyulu*[8], at [26], the Judge remarked thus " *In the assessment of damages for unlawfull arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are comensurate with the injury inflicted.* Therefore, 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.

[8] 2009 (5) SA 85 SCA

[39] Our Courts have cautioned that previous awards in a claim for damages of this nature should only serve as a useful guide and should not be followed slavishly. In *Minister of Safety and Security v Seymour,*[9] Nugent JA remarked at [17] that "*The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that".*

The Court went on and said at [20] that " *Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss….It needs to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection..*

[40] The Appellant submits that he was unlawfully detained at Lenesia police station for five (5) days. However, on the second and third day, he was allowed to bath and was provided with decent food and a mattress to sleep on. The Appellant avers further that as a result of his unlawful detention he also lost his job. As a result, the Appellant submitted that he should be awarded a sum of R200 000.00. The Appellant seeks reliance for this amount in *Mofokeng and Another v Minister of Police,*[10] on appeal in that case, the plaintiffs were awarded R90 000.00 each for being detained for two days. In *Lamula and Others v Minister of Police,*[11] the appellants, in that case, were awarded amounts of R100 000,00 to R115 000.00 for being detained for five days.

[41] It is now a well-established principle of our law that a person's freedom and security are sacrosanct and are protected by our Constitution. In *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) Tshiqi J captured this principle as follows at [43], *It is now trite that public policy is informed by*

[9] (295/05) [2006] ZASCA 71; [2006] SCA 67 (RSA); [2007] 1 All SA 558 (SCA) (30 May 2006

[10] 2014 / A3084/ 2015 ZAGP JHB 30

[11] 2012/310 21013 ZAGP JHC 130

the Constitution. Our Constitution values freedom, understandably so when regard is had to how, before the dawn of democracy, freedom for the majority of our people was close to non-existence. The primacy of "human dignity, the achievement of equality and the advancement of human rights and freedoms" is recognized in the founding values contained in section 1 of the Constitution… These constitutional provisions and the protection in section 12 of the right of freedom and security of the person are at the heart of public policy consideration.

[42] I have taken into account that the Appellant's arrest and detention were unlawful. The Appellant suffered great indignity and was detained for five days in circumstances where conditions on the first night can be termed to be inhuman and unacceptable and he was denied food. The Appellant slept on the floor and was only provided with a mattress on his second day of detention. He spend the whole night sitting having been given no blankest and mattress. However, the conditions improved on his second and third days of detention, when he was provided with blankest and given food. The Appellant was gainfully employed and earned a salary of R1000.00 (one thousand rands). However the Appellant lost his employment as a result of his unlwafull arrest and detention. Consequently, he was financially unable to support his wife and children. He was shunned by members of his community who branded him a murderer.

[43] in light of all the above circumstances, the Appellant's period of detention, the effects of that detention on the reputation and standing of the Appellant and the conditions of his detention, together with the relevant awards in related cases, it is my considered view that an award of R90 000.00 is just and equitable.

ORDER

1. The appeal succeeds with costs.
2. The order of the court a quo is set aside.

3. The Appellant is awarded damages of R 90 000.00.

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DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(I concur)

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CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	16 August 2022
Delivered:	11 January 2023

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