



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 2020/22087

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 24 MARCH 2023
SIGNATURE: **ML SENYATSI**

In the matter between:

VELAPHI EPHRAIM MASHININI

PLAINTIFF

And

**THE NATIONAL COMMISSIONER
OF THE SOUTH AFRICAN POLICE**

FIRST DEFENDANT

THE MINISTER OF POLICE

SECOND DEFENDANT

Neutral Citation: *Velaphi Ephraim Mashinini v The National Commissioner of the South African Police and Another* (Case No: 2020/22087) [2023] ZAGPJHC 332 (23 March 2023)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 24 March 2023.*

JUDGMENT

SENYATSI J:

[1] This is an action for damages arising from an alleged unlawful arrest and detention of the plaintiff by members of South Africa Police Service at Protea Glen, Soweto, on 18 September 2019 without a warrant.

[2] At the hearing of the matter, the parties agreed that there would not be separation of merits and quantum. The court ordered that the aspect of special pleas revised by the defendants be dealt with in the heads of arguments after the hearing of evidence on merits and this was duly complied with.

[3] The defendant raised the following special pleas and defence on merits:

(a) *Locus standi* and misjoinder

The defendant pleaded that the plaintiff failed to comply with section 2 of the State Liability Act 20 of 1957 by not citing the Minister as a nominal defendant but instead the National Commissioner South African Police Services. The defendants plead that the Minister ought to have been cited as a nominal defendant instead of being cited as the second defendant. Only the second defendant is participating in the proceedings and will be referred to as the defendant in this judgment.

(b) *Non-compliance with section 2(2) of the State Liability Act 20 of 1957 read together with section 3 of Judicial Matters Amendment Act 8 of 2017.*

The defendants contend that the plaintiff failed to serve the process on the office of the State Attorney of Johannesburg and that on that ground alone, the claim should be dismissed.

- [4] In replication to the special pleas, the plaintiff contends that it complied with the State Liability Act by also serving the Minister of Police with the summons, but concedes that it was not necessary to cite the National Commissioner of the South African Police Services, who, is in any event, not participating in the litigation.
- [5] In regard to the defence on the merits, the defendant pleaded that the arrest and detention of the plaintiff was in accordance with section 40(1)(e) read together with section 50 (1)(a) and (b) of the Criminal Procedure Act no 51 of 1977 ("the CPA").
- [6] On 18 September 2019 he was in the store when he was stopped by a security officer after leaving the pay point, allegedly after not having paid for the two bottles of alcohol in his possession. The security officer searched him and when he failed to produce proof of payment, he was detained and the police were called.
- [7] The defendant were the first to lead evidence and one witness testified on their behalf, namely Mr Amos Nduma Maluleke, who was the police constable at the time, but now a police sergeant. He testified that he was on an early night patrol at Protea Glen, Soweto, driving a police vehicle when he heard on the radio control that he needed to proceed to Boxer Store at a nearby shopping complex where a shoplifting offence had been committed.

[8] Upon arrival at Boxer Store, he was shown the plaintiff and the two bottles of alcohol which he was accused of stealing as they had not been paid for. The security officer pointed out the plaintiff who was detained at a room at the store. He proceeded to effect an arrest and took him to the police station, together with bottles of alcohol where the plaintiff was processed. He testified that he had a reasonable suspicion that the plaintiff had committed the theft and as a result he did not need a warrant to effect an arrest. He was subjected to cross-examination which sought to challenge the fact that the warrant was without a warrant and that he ought not to have arrested the plaintiff on account of hearsay information.

[9] The plaintiff testified that when he was apprehended by the security guard, he had nothing on him and that he had paid for his bottles of alcohol. He was also subjected to cross-examination where he made concessions about his previous shoplifting convictions.

[10] The issues for determination in this matter are whether the special pleas as pleaded can be sustained, if not, whether the defendants can seek refuge in Section 40 (1) (e) of the CPA.

[11] I will now deal with the law relating to special pleas raised by the defendants first.

[12] Section 2 of the State Liability Act 20 of 1957 states that:

“In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the Department concerned must be cited as the nominal defendant or respondent.”

The executive authority of the South African Police Service is the Minister of Police. The section is peremptory and must be complied with.

[13] Section 5 (1) of Institution of Legal Proceedings against Certain Organs of State Act no 40 of 2002 states that:

“(a) any person by which any legal proceedings contemplated in Section 3(1) are instituted must be served in the manner prescribed by the rules of court in question for the service process.

(b) despite paragraph (a), any process by which any legal proceedings contemplated in section 3 (1) are instituted and which the

(ii) Minister of Safety and Security is the defendant or respondent, may be served on-

(aa) The National Commissioner of the South African police services as defined in section 1 of the South African Police Services Act, 1995 of the provinces in which the cause of action arose.”

It is evident that the Minister of Police is the only party that should be cited.

[14] Section 6 of the South African Police Service Act deals with the appointment of the National and Provincial Commissioners of the South African Police Service, who are merely the servants of the State.

[15] In *Dumasi v Commissioner, Venda Police*¹, the court held that the Commissioner “...is not the politically responsible officer but merely a servant

¹ 1990 (1) SA 1068 (A) at 1070 G - H

of the State. The court in this case correctly refused the application for amendment as it became evident that the introduction of the new party, namely, the President was designed to obtain the benefit of the “*nunc pro tunc rule*”, where it appeared that the action against the existing party is a nullity and that the amendment was not a *bona fide* attempt at placing the true case before court. In the instant case, not only is the Commissioner of police cited but the Minister of Police as well. It is my view that the order of citation of the parties does not render the proceedings a nullity. Despite the peremptory nature of the provisions of the State Liability Act provisions on citation of the Minister, the facts in this case do not support a proposition that where the Minister is cited as a second defendant, the proceedings are rendered null and void.

[16] I am fortified by the fact that not only was the Minister of Police cited in the summons, but the summons was also served on him.

[17] The defendant contends that because the summons was not served on the State Attorney, that renders the proceedings a nullity. This proposition was dealt with by the Supreme Court of Appeal in *Minister of Police and Others vs. Malokwane*². The court in that case had to consider whether the plaintiff's omission to serve a copy of the summons issued against the Minister of Police on the State Attorney, rendered the summons a nullity, despite a copy having been served on the Minister. The court held that the service to the Minister was adequate and the special plea was dismissed.

² [2022] ZASCA 111 (15 July 2022)

[18] In *All Pay Consolidated Investment Holdings Pty Ltd and Others v The Chief Executive Officer, South African Social Security Agency and Others*³, the strict mechanical approach of drawing formal distinction between “mandatory or peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on the proceedings of non-invalidity and latter only substantial compliance or even non-compliance has been discarded. The court found that the approach was too mechanical and not serving the interests of justice.

[19] In the instant case, I find no justification to find the proceedings a nullity because the Minister received the summons and is before court. This is so when regard is had to the injunction in Section 39(2) of the Constitution, which enjoins the courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Consistent with this injunction, the interpretation of Section 2 (2) of the State Liability Act must be one which promotes the right of access to court, as enshrined in Section 34 of the Constitution.⁴

[20] Having regard to the law and the facts of this case, I hold the view that the special pleas as raised by the defendants cannot be sustained and stand to be dismissed.

³ [2013] ZACC 42, 2014 (1) SA 60A (CC); 2014 (1) BCLR 1 (CC)

⁴ Section 34 of the Constitution of the Republic of South Africa, 1996 states that everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before court or another independent and impartial Tribunal

[21] I now consider the law on the merits and quantum of this case. It is trite that every arrest and detention are *prima facie* unlawful in the absence of a valid justification.⁵

[22] The arrest and deprivation of liberty are both, as already stated, wrongful and *iniuria* actionable under the *actio iniuriarum*.⁶

[23] When the police wrongfully detain a person, they may also be liable for the post - hearing of that person. Case law demonstrates that such liability will lie where there is proof on a balance of probabilities that:

(a) the culpable and unlawful conduct of the police;

(b) was the factual and legal cause of the post-hearing detention.

[24] The arrest and detention of the plaintiff, so contends the defendant, was justified in terms of section 40 (1) (e) of the CPA which states as follows:

“(1) A peace officer may without warrant arrest any person-

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed or is about to commit an offence.”

⁵ Gellman v Minister of Safety and Security 2008 (1) SACR 446 (WLD) at 457 E -F

⁶ Minister of Police and Another v Erasmus [2022] ZASCA 57

[25] In *Setlhapelo v Minister of Police*⁷ it was held that to rely on the justification offered by section 40 (1) (e) of the CPA the following jurisdictional points should be present at the time of the arrest:

- (a) The arrestor must be a peace officer;
- (b) The suspect must be found in possession of the property;
- (c) The arrestor must entertain a suspicion that the property has been stolen or illegally obtained;
- (d) The arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property; and
- (e) The arrestor's suspicion must rest on reasonable grounds.

[26] I was referred by counsel for the plaintiff to *Mabona and Another v Minister of Law and Order*⁸ where the court held that the test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA, is objective: would a reasonable man in the arrestor's position and possessed on the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of the offence for which he sought to arrest him. The reasonable man 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. This test therefore requires that the evidence of the arrestor should be analysed.

⁷ 2015 JDR 0952 (GP) at para 21

⁸ 1988 (2) 654 SEC

[27] In the instant case, Constable Makhubele was on an evening shift patrol in the police vehicle within his sector at Protea Glen when he received a radio call about a shoplifting incident at a Boxer Store. He proceeded to the store where upon arrival the security officer informed him of the suspect who was apprehended while in possession of a stolen bottle of Jamaican rum. During testimony the witness was shown the exhibit of the suspected stolen bottles of alcohol, which he confirmed as the ones handed to him by the security officer. The security officer indicated to him that the suspect was being kept in a holding room, which he was directed to after. Constable Makhubele testified that he proceeded to the holding room after he was directed and interviewed the suspect. He stated that he could see the plaintiff was guilty although he could not explain the basis of his opinion. After he interviewed the plaintiff, he then effected the arrest and took the plaintiff to the Protea Glen Police Station where he recorded the exhibits given to him by the security officer at the Boxer Store. I am of the view that he acted reasonably upon the information made available to him which was supported by the exhibits of the alcohol. There was no evidence that he was shown proof of payment of the alcohol by the plaintiff and that he proceeded to effect the arrest in the circumstances where a reasonable man would not have arrested the plaintiff. Accordingly, the plaintiff has failed to prove *animus iniuriandi* in the circumstances.

[28] The plaintiff denied that he had stolen the alcohol and instead reiterating that he had paid for it and was arrested by the security officer despite having made payment. He conceded under cross-examination by the defendant's counsel that he had a number of previous convictions of shoplifting and other offences.

He did not state that the arresting officer ignored the proof of payment for the alcohol.

[29] The charges against the plaintiff for the shoplifting which is the subject of the wrongful arrest claim were withdrawn. No evidence was laid on the reasons for the withdrawal and I will accordingly not make any further comment on that point.

[29] Constable Makhubela had a reason to react to the radio call about the shoplifting incident that had been reported that day. He acted reasonably effecting an arrest based on the information provided to him by the security officer on guard at the Boxer Store. I am of the view that any reasonable man in his position would have taken the steps he took and arrested the plaintiff.

[30] The facts of this case are distinguishable from *Mabona*⁹ because in that case, the arrestor had acted on a tip-off from an informer who informed the investigating officer that a suspected large sum of money was being kept by two female plaintiffs. The informer had not seen the money himself. The court found that the arrest was not reasonable as the investigating officer had not taken further steps to analyse critically the information from the informer. I take judicial notice that stores such as Boxer Stores, deal with shoplifting offences quite regularly and for that reason they employ security officers who are posted at the strategic points to watch the shoppers and are knowledgeable on what to look out for in such instances. There is no reason by Boxer Store to call the police if a customer has paid for what has been purchased at the store. The only inference to be drawn is that the police were called because the plaintiff

⁹ Supra

had not paid for the alcohol found in his possession and that the arrest was justified in terms of section 40(1) of the CPA.

[31] Accordingly, I find that the justification for the arrest is reasonable under the circumstances.

ORDER

[32] The claim is dismissed with costs.

A handwritten signature in black ink, appearing to be 'ML Senyatsi', written over a horizontal line. The signature is somewhat stylized and includes a large loop on the left side.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE APPLICATION HEARD: 20 January 2023

DATE JUDGMENT DELIVERED: 24 March 2023

APPEARANCES

Counsel for the Applicant: Adv L Matsiela

Instructed by: Yonela Bodlani Attorneys

Counsel for the Respondent: Adv J Mogodi

Instructed by: State Attorney