

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 49336/2014

DATE: 03 August 2018

In the matter between:

MOKALAPA; EMANUEL HLAMOSALE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NYATHI, AJ:

1. The plaintiff has instituted two delictual actions for damages against the defendant, namely:

That the plaintiff was wrongfully and unlawfully arrested and detained by members of the defendant, acting within the course and scope of their

employment with the South African Police Services on 10 December 2013;

That the plaintiff was wrongfully and unlawfully shot and wounded on his right foot while he was handcuffed and lay on his stomach by the members of the South African Police Services.

2. The plaintiff is claiming against the defendant an amount of R1 364

000.00 in respect of wrongful arrest and detention and R500 000.00 for pain and suffering as a result of the gunshot wound.

3. The parties have agreed to a separation of the merits and quantum in terms of Rule 33 (4) of the Uniform Rules of the High Court.

4. The parties have further agreed that the defendant bears the onus of proof and the duty to begin.

5. It is common cause that the plaintiff was arrested by members of the

South African Police Services at about 22h00 on the 10th December 2013 at Mamelodi Township outside Pretoria. He was charged with possession of a Toyota Fortuner with registration number [...], bank cards, medical aid card and clothing account cards. The said items were allegedly taken from a crime scene at a robbery committed at 168 Cragg Street, Queenswood in Pretoria.

6. The plaintiff was further charged with attempted murder in that on the 10th December 2013 he had unlawfully and intentionally attempted to kill Nare Peter Maharela by shooting in his direction.

7. The plaintiff was detained by members of the defendant at Mamelodi East police station holding cells from the 10th December 2013 until he was released on bail on the 2nd December 2013, a period of 18 days.

8. The charges against the plaintiff were eventually withdrawn on the 23rd April, 2014.

9. The issues for determination are therefore:

9.1 The lawfulness or otherwise of the plaintiffs arrest.

9.2 The lawfulness or otherwise of the plaintiffs detention.

9.3 The issue of liability.

9.4 Which party bears liability for the costs of the action and at what scale.

Evidence of Warrant Officer Maharela

10. The defendant's first witness was Warrant Officer Maharela (Maharela). He testified as follows:

He has been a police officer since 1994 and is stationed in Brooklyn Police Station.

On 10 December 2013 he was on duty since the morning and was working under Trio Task Team which deals with crimes relating to house robbery, business robbery and hijacking of motor vehicles. He was attached to the Sunnyside cluster of this Trio Task Team.

At around 20h00 he was in the Mamelodi area tracing wanted suspects. He then received a radio message that there had been a house robbery that had been committed at the Villeria area. A Toyota Fortuner had been taken during the robbery. Four suspects were said to have been involved. Maharela had in his possession a hand radio which was on a channel for "trackers". He received a message that the Fortuner had a tracker unit fitted. Tracker control said that the signal indicates that the Toyota Fortuner is in Mamelodi.

One Raymond Lekoatsipa (Lekoatsipa) was doing standby duties for Tracker and picked up Maharela's communication. They met on Tsamaya Road in Mamelodi East. The signal reflecting on their devices was strong next to the Phase 1 shacks and they followed it, turning into Waterkloof Road. Next they turned into Peete Street and at that stage their tracker devices were indicating that they were closer to the stolen motor vehicle with the bar on the tracker signalling a reading of 24.

They parked their respective vehicles before a small passage that joins Peete Street and the street where the stolen motor vehicle was parked. At that stage the information on their tracker devices was reflecting that they were approximately 50 metres away from the stolen motor vehicle.

Since their motor vehicles were sedans with a low ground clearance they could not drive through the passage as it was not in a good condition. They decided to walk through the passage in the direction where the stolen motor vehicle had been parked.

They then saw the stolen motor vehicle parked about 25 metres away from them. Visibility was clear as there was a tall street light of the type known as "Apollo lights".

They saw four men positioned as follows:

- 10.1 Suspect No. 1 was standing in front of the motor vehicle approximately 5 metres away from it.
- 10.2 Suspect No. 2 (Plaintiff) was seating inside the vehicle on the driver's seat looking for something beneath the dashboard.
- 10.3 Suspect No. 3 was standing next to the rear right seat. His head was bending inside the motor vehicle as if he was looking for something inside the car.
- 10.4 Suspect No. 4 was standing at the back of the car. The boot was opened and he was also busy looking for something inside the car.

As they were approaching, Lekoatsipa received a message from his radio. Unfortunately the volume of his radio was set high and it alerted the suspects that they were police. Suspect No. 1 started shooting in their direction. Fearing for their lives they returned fire in the direction of the first suspect. Thus cross firing ensued during which the third and fourth suspects ran away from behind the stolen motor vehicle and disappeared into the shacks. He told the court that,

save for hearing some gunshots coming from the direction where the third and fourth suspects disappeared to, he is not in a position to tell the court who had fired gunshots between the third and the fourth suspects.

The first suspect also ran away using the passage joining Tsamaya Road and he could not see where he disappeared to.

The plaintiff got out of the stolen motor vehicle when he saw Maharela and Lekoatsipa and fled in an easterly direction. He only managed to run approximately 5 metres away from the car when he fell down as if he was trying to hide. Maharela dashed to the plaintiff who was lying down on his stomach at the time.

He handcuffed the plaintiff and searched his pockets so as to make sure that the plaintiff was not in possession of a firearm or other dangerous weapon. The plaintiff was wearing khaki trousers and a red t-shirt. As he was searching the plaintiff he realised that the plaintiff was bleeding from his left leg. Upon further searching he found in one of the plaintiffs pockets the following:

10.5 A driver's licence with a Mr Fourie's details.

10.6 An Edgars shopping card.

10.7 A photograph of a white woman.

He phoned the ambulance and all stakeholders such as ballistic experts, fingerprint experts and photographers.

He went to the stolen motor vehicle and found the following items:

10.8 Gloves;

10.9 Cable ties and

10.10 Jamming devices

The plaintiff was transported to hospital by ambulance

Under cross-examination, Maharela denied seeing the plaintiffs wife that evening.

He also denied shooting the plaintiff on his leg whilst the latter lay on his stomach in handcuffs as a means of preventing the plaintiff from fleeing as set out in the latter's particulars of claim. He confirmed his evidence in chief.

Maharela reiterated that he had arrested the plaintiff because he found him in possession of the goods believed to have been stolen and not because he was involved in a house robbery.

Evidence of Lekoatsipa .

[11] Lekoatsipa was employed by Tracker as a Law Enforcement Officer. He was stationed in Randburg at 340 Republic Road. He was working in the Pretoria area his duties were the tracking of stolen motor vehicles.

On 10 December 2013, he was on standby in the Pretoria area. He had knocked off around 19h00. He testified that being on standby one is permitted to go home, but is supposed to be available to respond to any call or message that may come through about a stolen motor vehicle.

At approximately 20h00, whilst he was at home he received an SMS from his phone mentioning that a white Toyota Fortuner was stolen during a house robbery in Queenswood, Villeria. Four suspects were alleged to have been involved and they had shot the owner of the house.

Subsequent to this he also received a phone call from his office confirming the SMS message. He immediately got to his car and switched on the tracker device fitted thereto. He started to receive information from the antenna towers of the tracker pointing out the direction of the stolen motor vehicle.

He started following the directions and even requested backup from the police. His message was picked up by Maharela who was already en route from Mamelodi West to Mamelodi East he and Maharela met on Tsamaya Road and

proceeded to where the stolen motor vehicle was.

He and Maharela followed each other driving on Tsamaya Road. They turned into Waterkloof Road as directed by the arrows reflecting on the tracker device. They eventually turned into Peete Street. At that stage the information reflecting on the tracker was showing that they were closer to where the stolen motor vehicle was parked because the reading was at 24, which therefore meant that they were approximately 50 metres away from the target car.

They decided to park their motor vehicles before the passage that joins into Peete Street. They walked through the passage and when they were about 25 metres away they saw the motor vehicle parked ahead. As they were approaching the car they saw four suspects next to the car.

The suspects were positioned as follows:

- 11.1 Suspect No. 1 was standing in front of the motor vehicle approximately 5 metres away from it.
- 11.2 Suspect No. 2 plaintiff) was sitting inside the car on the driver's seat busy looking for something underneath the dashboard.
- 11.3 Suspect No. 3 was standing next to the rear right seat bending his head inside the motor vehicle as if he was looking for something inside the car.
- 11.4 Suspect No. 4 was standing at the back of the car behind the boot. The boot of the car was opened.

Whilst they were walking in the passage he received a message from the police as the police wanted to know of their whereabouts. Unfortunately the sound of his radio was high and it alerted the suspects that they were police considering also that they were wearing police bullet proof vests. Suspect No.1 started shooting in their direction. They returned fire in the direction of the first suspect.

The third and fourth suspects ran from behind the stolen motor vehicle and disappeared into the shacks. The first suspect ran through the passage that joins

Tsamaya Road and disappeared. The plaintiff got out of the motor vehicle and ran approximately 5 metres from the car and fell down.

Maharela dashed to the plaintiff and handcuffed him while he lay down on his stomach. Maharela then searched the plaintiff and realised at that point that the latter was bleeding from his left leg. They realised that he had been shot. Maharela found in the plaintiffs possession shopping cards belonging to the complainants, a photograph of a white woman and bank cards. Maharela then phoned all the stakeholders, namely ballistic experts, photographers and fingerprint experts. After the stakeholders arrived, Lekoatsipa left the scene as he was rushing to Hammanskraal because he had to trace another motor vehicle reported to be stolen.

Under cross-examination by plaintiffs Counsel, Lekoatsipa confirmed his version without hesitation. Lekoatsipa further denied that Maharela had shot the plaintiff whilst the latter lay down on the ground on his stomach. He denied the plaintiffs version as put to him.

The Defendant's Counsel at this stage applied for an inspection-in-loco. The parties had had ample opportunity to reconcile their two sketch maps, which were not similar during pre-trial consultations. They had however, opted to come to trial handing in two different sketches, namely Exhibit "A" and "B". In light of the evidence before me, it became clear that not much was turning on the sketches with regards to the *facta probanda*. I accordingly ruled the application unnecessary.

Evidence of Emmanuel Hlamosale Mokalapa (the plaintiff)

[12] The plaintiff gave the following evidence:

- 12.1 He is as a self-employed mechanic working from home. On the 10 December 2013 he had serviced a Mazda vehicle. Later he had prepared a meal for himself and his wife. His wife arrived home after 20h00. They had supper and watched television together

until 21h30.

- 12.2 At 21h30 he went out of his house to smoke. When he was outside he saw the roof of a car that was parked in front of the main gate of his neighbour. He went back to the house to collect the key to the gate and went out again and unlocked the gate. He found a white Toyota Fortuner parked there. He noticed two people busy inside the car as if they were fixing something. He then asked what they were doing and they did not respond. He heard a person who was standing against the wall at approximately 8 metres away from the motor vehicle calling him by his name. He walked to that person. He realised that he knew him and his name is Tophia. He once repaired Tophia's car some time ago.
- 12.3 Tophia told him that he must not worry because they (him and the other two suspects) will be done shortly and they will leave. As he was taking steps towards his home he heard the sound of gunshots coming from the passage. He could not see who was shooting. He just stood there frightened and even dropped the cigarette he was holding. He saw Tophia fleeing using the passage towards Tsamaya Road. The other two people who had been inside the car ran from behind the motor vehicle towards Waterkloof Road.
- 12.4 Prior to the shooting, Tophia had a lady's handbag clutched under his armpit. The plaintiff did not see if he had a firearm. Tophia did not fire, except for fleeing. The other suspects also did not fire at the police they just ran away.
- 12.5 Many police officers appeared on the scene all armed with guns, they were about 15. One officer, whom he later knew was Warrant Officer Maharela, asked him about the whereabouts of the firearm and he told them that he did not have a firearm.
- 12.6 He was instructed by Maharela to lie down on his stomach. He complied and Maharela handcuffed him.

- 12.7 He heard Maharela saying that they must shoot him on his leg so that he cannot flee as most suspects escape despite being handcuffed. Maharela fired the first shot, which missed him. The plaintiff begged Maharela not to shoot him on his leg but rather to handcuff his legs so that he would not flee.
- 12.8 Maharela kicked him on the left side of his body and told him not to teach him how to do his job. He then fired a second shot which struck him on his left leg next to the ankle.
- 12.9 He told the court that as he was handcuffed, his cell phone rang and Maharela answered it and put it on speaker mode. He then instructed the plaintiff to talk to the person who was phoning. The person was making arrangements to have his car serviced by the plaintiff the following day. At that time an officer who identified himself as Captain Moemi started asking him questions and took a statement from him.
- 12.10 Plaintiff's wife tried to approach him but was told by the police that she must stay away because the area was now regarded as a crime scene. The cell phone was taken away from him, he was searched and a lighter was found in his pocket.

[13] Under cross-examination, the plaintiff made several concessions to the effect that aspects of his version were not put to the defendant's witnesses who testified before him in his presence as he was present in court throughout the proceedings.

LEGAL PRINCIPLES

[14] The arrest giving rise to this lawsuit was effected without a warrant. Its parameters are subject to the provisions of Section 40 of the Criminal Procedure Act 51 of 1977 (hereafter "the Act"). This section gives peace officers extraordinary powers of arrest¹.

¹ Hiemstra's Criminal Procedure - A. Kruger 5-6k

[15] In **Minister of Safety and Security v. Sekhoto**², Harms DP held that in order for the defendant to succeed with his defence based on an arrest effected in terms of Section 40 of the Act, the jurisdictional facts mentioned herein below should exist:

(a) the arrestor must be a peace officer; (b) the arrestor must entertain a suspicion; (c) the suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1; and (d) the suspicion must rest on reasonable grounds.

[16] The jurisdictional facts for the other paragraphs of Section 40 (1) differ in some respects. Section 40 (1) (e) of Act 51 of 1977 permits an arrestor to arrest a person who is found in possession of anything which the arrestor reasonably suspects to be stolen or property dishonestly obtained, and whom the arrestor reasonably suspects of having committed an offence with respect to such a thing.

[17] Section 1 of the Act in defining a peace officer, "includes any magistrate, justice, police official, and correctional official as defined in Section 1 of the Correctional Services Act 111 of 1998."

[18] In **Minister of Safety and Security v. Linda**³, Murphy J describes **suspicion** as "(21) *The question whether the suspicion of a person effecting the arrest is reasonable must be approached objectively. As suspicion inherently involves an absence of certainty or adequate proof A police officer is not expected to satisfy himself to the same extent as a court. A suspicion can be reasonable despite there being insufficient evidence for a prima facie case. In **Shabaan Bin Hussein and Others v Chong Fook Kam and Another** the Privy Council said: 'Suspicion' in its ordinary meaning is a state of conjecture or surmise where proof is lacking, I suspect but cannot prove' Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end'.*"

[19] In **Duncan v Minister of Law and Order**⁴ Van Heerden JA held that "if

² 2011 (1) SACR 315 (SCA) at paragraph 6.

³ 2014 (2) SACR 464 (GP) at paragraph 21

⁴ 1986 (2) SA 805 (A) at 818 H-J

the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e, he may arrest the suspect. In other words, he then has discretion as to whether or not to exercise that power... No doubt the discretion must be properly exercised."

[20] From the decision in **Sekhoto**, it is clear that once the jurisdictional facts are present, a discretion arises whether to arrest or not. The peace officer is not obliged to effect the arrest.

The discretion must be exercised in good faith, rationally and not arbitrary⁵

[21] Crisply summarised⁶, the prevailing law governing arrest without a warrant post Sekhoto, is as follows:

21.1 the jurisdictional prerequisites for section 40(1)(b) must be present;

21.2 the arrester must be aware that he or she has a discretion to arrest;

21.3 the arrester must exercise that discretion with reference to the facts;

21.4 there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[22] Maharela and Lekoatsipa have presented a scenario in which they acted in self defence when they opened fire in the direction of the suspect I who had started shooting at them from the moment he was alerted to their presence by the crackling of Lekoatsipa's radio as it came on loudly. This had betrayed their

⁵ Sekhoto Par 28 and 38.

⁶As per Kruger's submission in Hiemstra 5-8

presence near the scene where the stolen vehicle was being worked on by the rest of the suspects.

[23] The plaintiff, on Maharela and Lekoatsipa's versions, had then dashed across from inside the Fortuner in the direction of suspect, presumably in an attempt to flee, and got struck by a bullet on his ankle in the process.

[24] If one weighs the probabilities on the plaintiffs version of being wilfully shot by Maharela to disable him from fleeing with handcuffs on his hands, as against that of Maharela and Lekoatsipa, the plaintiffs version is clearly improbable and impractical. It is a result of a fertile imagination.

[25] How does one begin to explain the presence of the Toyota Fortuner, stolen earlier miles away in Villeria/Queenswood in a violent house robbery in front of plaintiffs house?

[26] The presence of the four suspects inside and just outside the vehicle each in full concentration seemingly in frantic search of something. Something that could only be a tracking device. It is this elusive device that had resulted in Lekoatsipa and Maharela tracking down the vehicle to the spot where they found it.

[27] The contraband found at the scene included jamming devices. This was not just an innocent coincidence at all.

[28] The fact that the criminal charges were withdrawn by the prosecution has no bearing on the matter at hand, namely whether the plaintiffs arrest was lawful or not. The arrest as has already been traversed is governed by the provisions of section 40 of the Act as elucidated in **Sekhoto** *supra*.

[29] Having regard to all the above facts and submissions by counsel, I find that the police officers acted on a reasonable suspicion and within the limits of permissible discretion when they arrested the plaintiff for possession of property suspected to be stolen.

ORDER

[30] In the result I make the following order:

30.1 The Plaintiffs claim is dismissed with costs.

JS NYATHI

Acting Judge of the High Court

Gauteng Provincial Division, Pretoria

HEARD ON: 20th March 2018

JUDGMENT DATE: 03 August 2018

Appearances:

On behalf of the plaintiff	:	Adv. I.S. Ngwetjana
	:	M.S. MOLOTO Inc
	:	POLOKWANE
	:	015 295 9421
	:	Fax 0862742900
	:	Ref: MSM09
	:	C/O M.L. KEKANA INC.
	:	PRETORIA
	:	012 320 8944
	:	Fax 0865184417

On behalf of the defendant : Adv. P. Ngobese

: STATE ATTORNEY

: PRETORIA

: **Ref: 4373/I4/Z59**

: 012 309 1538

: Fax: 012 309 1649/50

: Direct Fax 0866446417

: Enq: Mr B. Minnaar