

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 7202/2020

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

14 December 2023

In the

DATE

SIGNATURE

In the matter between:

ELIAS HANYANE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 14 December 2023.

JUDGEMENT

MOGOTSI AJ

Introduction

[1] This is an action for damages by the plaintiff against the defendant, the Minister of Police, arising from his arrest and detention.

[2] In his particulars of claim, the plaintiff alleged that on 17 July 2019, at Hammanskraal he was arrested without a warrant and was further assaulted by members of the South African Police Services on a charge of theft. He was then detained at the police holding cells at Temba Police Station until 19 July 2019, when he was released before he appeared in the Magistrate's Court, Temba.

[3] The plaintiff alleged that his arrest and detention were wrongful, unlawful and without justification. He further alleged that as a result of his unlawful arrest, detention, and assault he suffered damages in the sum of R1 415 000.00 in respect of the patrimonial and non-patrimonial damages.

[4] The defendant admitted that the plaintiff was arrested by members of the South African Police Services on 17 July 2017 and that he was detained at the cells of the Temba Police Station before his release in court. He denied that the plaintiff's arrest was wrongful and unlawful. He further denies that the plaintiff was assaulted. Relying on the provisions of section 40(1)(b) of the Criminal Procedure Act.¹

[5] The parties agreed that the issue of quantum be postponed sine die. The matter proceeded on the merits only.

Plaintiff's Evidence

[6] Elias Hanyane briefly testified that he resides at Carousel View and is currently unemployed. He was arrested on 17 July 2019 at 19H00 and was detained for two days before he was released in court when charges proffered against him were withdrawn.

[7] During his arrest, he was at home. The police officers dragged and pushed him inside the police van. He was informed that the case against him was that of theft of Mr Lebese's car keys and a spanner on 1 July 2019. On the day of the alleged offence, he was at work thereby denying the allegations against him. He did

¹ 51 of 1977.

not mention whether or not he was injured as a result of the assault. He did not lay a charge of assault nor did he receive medical treatment as a result of the assault.

Defendant's Evidence

[8] The defendant called Constable Sbusiso Gerald Mavulula, the arresting officer and Japie Jacob Lebese, the complainant in the theft matter and a motor mechanic. Both testified that on 17 July 2019, they were at the plaintiff's place of abode. Upon their arrival, they met the plaintiff's wife and requested to call her husband. When the plaintiff emerged he was shouting at the complainant. The latter was instructed to go back to the vehicle. The plaintiff was placed under arrest and he opened the door of the police van because he was not handcuffed. He got into the vehicle on his own. No one pushed him therein.

[9] Japie Jacob Lebese, a motor mechanic, further testified that he is the plaintiff's neighbour and they worked together before his arrest. On 1 July 2019, the plaintiff who had dagga came to him requesting a cigarette. He advised him to get the same from a motor vehicle which was parked outside his premises. On the front seat, there were seven loose cigarettes, a spanner and the car keys. The plaintiff left and after some time he proceeded to the vehicle and realised that the spanner and the car keys were missing. According to him, it was only the plaintiff, Thabiso, who was assisting him and himself. He was certain that Thabiso would not steal from him which is why he suspected the plaintiff. After two days the plaintiff confronted about the missing items without success. He opened a case on 11 July 2019.

[10] After two weeks the complainant's son approached him selling a spanner and he identified one of them as being his because his spanners are marked "J".

[11] Constable Sbusiso Gerald Mavulula further testified that when the complainant approached them he was speaking loud and became aggressive. The complainant wanted to reply and he ordered him to get in the vehicle. He informed the plaintiff that he was under arrest and explained his constitutional rights. He further enquired from him whether or not he was on chronic medication.

[12] He further testified that he arrested the plaintiff because of how he answered questions but failed to elaborate further. He further testified that he decided to arrest the plaintiff because he suspected that he might evade justice and that he might threaten the complainant and other witnesses. The plaintiff denied the commission of the offence alleging that he was at work on that day.

[13] During cross-examination, it became apparent that he did not know the definition of theft. He read the statement of the complaint but did not arrest the plaintiff on the strength thereof. He testified that a suspect can be arrested without a warrant if there are indications that he might evade justice and not be re-arrested.

The law

[14] The Defendant's defence, as already pointed out, is that the Plaintiff's arrest was lawful as it had been executed in terms of section 40(1)(b) of the Criminal Procedure Act. The said section provides that:

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

(a)...

(b) whom he reasonably suspects of having committed the offence referred to in Schedule 1, other the offence of escaping from lawful custody."

[15] *Minister of Safety and Security v Sekhoto and Another*² the court held as follows:

*"As was held in Duncan v Minister of Law and Order,*² the jurisdictional facts for a s 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. For purposes of para (g), the suspicion must be that the arrestee was or is in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.³ The jurisdictional facts for the other paragraphs of s 40(1) differ in some respects but these are not germane for present purposes. It is trite that the onus rests on a defendant to justify an arrest."

² (2011 (1) SACR 315 (SCA) at para 6.

[16] It is not in dispute in the present matter that the arresting officer, constable Sbusiso Gerald Mavulula, was a peace officer as defined in the Act, and that he formed a suspicion that the respondents had committed the offence of theft, which is an offence referred to in Schedule 1 of the Act.

[17] The issues are crisp and are as follows:

[17.1] whether or not the arresting officer exercised his discretion to arrest unreasonably.

[17.2] whether or not the plaintiff was assaulted at the time of his arrest.

Onus of proof

[18] In dealing with the issue of who bears the onus of proving whether or not the discretion exercised by the police at the time of the arrest the court in *Minister of Safety and Security v Sekhoto and Another*³ held as follows:

“A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.”

[19] A similar approach was adopted by the court in *Minister of Police v Dunjana and Others*⁴ which stated that;

“The second issue deals with the exercise of the power to effect a warrantless arrest and is not to be conflated with the jurisdictional facts for the coming into existence of the power to effect an arrest without a warrant. It only arises once it is found that the four jurisdictional facts are present for the existence of the power to arrest. It is accordingly premised on a finding that the arrestor was possessed of the power to effect a warrantless arrest. In *Sekhoto*, Harms DP referred with approval to the pronouncements of Hefer JA in *Minister of Law and Order v Dempsey* with regard to the drawing of a distinction between jurisdictional facts for the existence of a power, and the improper exercise of that power once found to exist. This, Hefer JA said, means that there are two separate and distinct issues, each having its own onus. In the context of section 40(1)(b), the focus of the

³ 2011(5) SA 367 (SCA) at para 49.

⁴ (CA 117/2021) [2022] ZAECKHC 88; [2023] 1 All SA 180 (ECG); 2023 (2) SACR 486 (ECM) (25 October 2022) at para 13-14

exercise of the power to arrest is on the discretionary nature of that power. The section provides that a peace officer “may” without a warrant arrest any person. They are accordingly not obliged to exercise their powers of arrest. “It is permissive, and not peremptory or mandatory.” Not unlike any other exercise of discretionary public power, the traditional common law grounds of review and the objective rationality ground required by the Bill of Rights are used to test the legality of the exercise of the discretion to arrest. However, unlike in the case of the existence of the power to arrest, where the onus of proof is on the person who contends to have been possessed that power, the onus is on the party who contends that the power was improperly exercised, to prove it. ‘The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof.’”

[20] The plaintiff sought to demonstrate that the arresting officer exercised his discretion to arrest the plaintiff unreasonably. In his particulars of claim, the plaintiff does not allege that the arresting officer exercised his discretion unreasonably. The plaintiff failed to lead viva voce evidence to demonstrate that the arresting officer improperly exercised his discretion. Therefore, I find that the plaintiff failed to discharge the onus of proving that the arresting officer exercised his discretion unreasonably.

[21] Having dealt with the issue of the onus of proof, I shall, for completeness's sake, deal with the reasonableness or otherwise of the arresting officer.

[22] The plaintiff's counsel, in line with his cross-examination of the arresting officer, submitted that when the latter arrested the plaintiff there was no evidence that an offence of theft was committed because the complainant, Jacob Jappie Lebesse might have misplaced the missing items.

[23] The test employed in the determination of whether a peace officer acted lawfully when he arrested someone without a warrant is objective. The crucial question would be whether the circumstances prevailing at the time the policeman effected an arrest without a warrant were such that a reasonable man finding himself in the same situation as the policeman involved, would form an opinion reasonably that Plaintiff has committed an offence listed in Schedule 1. It is no excuse for a

peace officer to answer an allegation of unlawful arrest by saying that he acted faithfully. The Policeman shall consider the situation and decide objectively whether it warrants an arrest.⁵

[24] In the case of *The Minister of Police Gqamane*⁶ the court held;

“A suspicion would be reasonable even in the absence of sufficient evidence to support a prima facie case against the arrestee. Accordingly, at the point of a reasonable suspicion, it appears that a crime may have been committed, as opposed to the situation where probable cause exists, that is, when the likelihood is raised that a crime had been committed. A suspicion, by definition, means the absence of certainty.”

[25] The information that was available at the time of the arrest was that the plaintiff requested a cigarette from Mr Jacob Jappie Lebese who was permitted to get one in the vehicle in which the missing items were. He proceeded to the vehicle and thereafter disappeared. Later when Mr Jappie Jacob Lebese went to the same vehicle he discovered that the car keys and a spanner were missing. In my view, there was a reasonable suspicion based on circumstantial evidence that an offence had been committed. Therefore, I am not persuaded by the submissions of the plaintiff's counsel in this regard.

[26] The plaintiff's counsel submitted that the arresting officer failed to provide the court with an accurate definition of the offence of theft and therefore failed to have regard to the elements of the offence. Thirdly, it submitted that the case was reported on 11 July 2019 and the arrest was effected 8 days thereafter. This implies that he had ample time to refer the matter to the prosecutor for his decision or to obtain a warrant of arrest.

[27] The court in *Minister of Police Gqamane 2023 (2) SACR 427 (SCA)* held as follows;

⁵ See *Duncan v Minister of Law and Order 1986 (2) SA 805 (A)*.

⁶ *2023 (2) SACR 427 (SCA)*.

“With this distinction in mind, the test for a reasonable suspicion requires an objective assessment of the information the arresting officer says and is found on the probabilities, to have been possessed by him at the time of the arrest. The test is however not applied in a vacuum. It is subject to the facts and the context. In its application, as in so many other areas of the law, context is everything.”

[28] The submissions of the plaintiff’s counsel do not have a bearing on the crucial enquiry at this stage, viz, whether or not a police official faced with the same facts and circumstances of this matter would have acted differently.

[29] Constable Mavulula testified that he arrested the plaintiff because he was threatening the complainant and he had to instruct the complainant to go back to the vehicle. He thought that the plaintiff might threaten the complainant and other witnesses and that he might abscond. How the plaintiff answered his questions further prompted him to arrest him. In the premises, I am not persuaded that the arrest of the plaintiff was unlawful.

[30] On the issue of assault, the court is faced with two mutually disruptive versions. The plaintiff, on one hand, testified that he was pushed in the van and both defence witnesses testified that he got into the van on his own.

[31] In the matter of *The National Employers' General Insurance v Jagers* 1984 (4) SA 437 (ECD) at 440D- 441A the court held as follows:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be

inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[32] At the time the plaintiff was charged a document entitled 'statement regarding an interview with the suspect' was completed and signed by him and the police officer who completed the same. It indicates that he was not assaulted hence he had no injuries. Both the defendant's witnesses were, in my view, credible witnesses. The missing spanner was found after some time when the plaintiff's son was attempting to sell it. Both witnesses did not fabricate their versions in this regard to strengthen their case. He was asked if he was on chronic medication. Therefore, probabilities favour the version of the defendant that the plaintiff got in the vehicle voluntarily and was not assaulted.

[33] In the premise, the plaintiff's claims based on unlawful arrest and assault fall to be dismissed.

[34] Having observed the plaintiff, who is a pensioner, I am of the view, that to order him to pay the costs in this matter will be purely academic. In the premise, I am of the view that this is not an appropriate matter to issue a cost order.

ORDER

[35] I make the following order:

1. The plaintiff's claim is dismissed.

J MOGOTSI

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing: 14-15 November 2023

Date of judgment: 14 December 2023

APPEARANCES:

For the Plaintiff: Adv. J.S.C. Nkosi
Instructed by Mwim & Associates Inc

For the Defendant: Adv. A. Gxogxa
Instructed by State Attorney, Pretoria