



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

CASE NUMBER: 72804/2014

- (1) REPORTABLE: Yes/ No
(2) OF INTEREST TO OTHER JUDGES: Yes/ No
(3) REVISED.

DATE

SIGNATURE

In the matter between:

SARAH JANE MOLAUDZI

Plaintiff

And

THE MINISTER OF POLICE

Defendant

AND

CASE NUMBER: 71742/2014

In the matter between:

KABELO MARK MOLAUDZI

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] These action proceedings concern two individual claims for damages instituted by the respective plaintiffs under each of the above case numbers. The events leading to the plaintiffs' common cause of action occurred at the same place and at the same time. The plaintiffs' claims are founded on alleged unlawful arrest without a warrant and the detention of the plaintiffs. The evidence necessary for each party to prove its case or disprove that of the other will be tendered by the same witnesses of the respective parties. Only the first mentioned matter was set down for this hearing, but as a result of the nature and circumstances of the cause of action already alluded to, the parties requested that both matters be heard at the same time.

[2] Counsel for the parties informed this court that the police officer who was the investigating officer and had executed the arrest and detention of the plaintiffs was no longer in the police force and, therefore; not available to give evidence in the matter and that it was agreed between them that his sworn statement contained in the docket be admitted in evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998 ('the Evidence Act').

[3] The parties have further agreed that the hearing and determination of the issues of liability and quantum be separated in terms of rule 33(4). The present

hearing will thus be in respect of the determination of the issue of liability and the aspect of quantum postponed *sine die*.

THE PARTIES

[4] The plaintiffs are mother and son, Sarah and Kabelo, respectively, who were arrested and detained on 18 October 2011 following allegations that they had approximately three weeks earlier interfered with the police during the arrest of Sarah's other son, George Nkosi, assaulted the police and attempted to rob one of them of his service firearm.

[5] The defendant has been cited in both claims as the political head of the police force and as such the employer of the police officer who executed the arrest and detention of the plaintiffs. The plaintiffs' claims against the defendant are premised primarily on the common law doctrine of vicarious liability.

[6] The plaintiffs are represented by the same counsel who, together with counsel for the defendant, informed this court that consequent to the defendant's admission of the arrest and detention of the plaintiffs, the defendant has by law and applicable legal principles the duty to begin.

BACKGROUND FACTS

[7] The facts of this case appear from the evidence of the witnesses.

FIRST WITNESS FOR THE DEFENDANT

- [8] The first witness called for the defendant was Constable Nkadimeng ('Nkadimeng'), who testified that he is employed in the SAPS and stationed at the Intelligence Unit in Siyabuswa, Mpumalanga Province. He has remained a member of that unit for the past 18 years as at the date of this hearing.
- [9] Nkadimeng testified that during February 2010 he received information from an informant relating to the identity of persons who were involved in an unresolved murder of a Mr Kubheka ('the deceased') on a plot in the Mmaneng Village, Siyabuswa, in **2002**. Following his investigation, he met and interviewed a Mr Mini Zikhali who admitted to having been involved in the murder of the deceased and also revealed the identity of his accomplices, George Nkosi ('Nkosi') and Bosi Kgopane.
- [10] Nkadimeng made contact with Sgt Shirinda, the investigating officer ('IO') in the murder of the deceased, stationed at the Dennilton police station. He travelled to the Dennilton police station where he handed over Zikhali to the IO.
- [11] Nkadimeng further testified that he knew Nkosi who used to reside in the same area as him in Mokgeletsane Village and had played in his soccer team in the Jikeleza football club.

[12] On 24 September 2011 at approximately 20h00, Nkadimeng received telephonic information that George Nkosi was (had resurfaced) in the village and had been seen drinking at the local Jikeleza tavern. Nkadimeng telephoned the police station seeking that the police proceed to the named tavern and arrest Nkosi, but the telephone was not answered. He then telephoned two of his colleagues, Constable Sibiya and Constable Bogopa, and requested them to come and accompany him to the tavern to arrest Nkosi. Sibiya was the first to arrive at Nkadimeng's place and the two drove in Sibiya's vehicle towards the tavern.

[13] They had not reached the tavern when Nkadimeng noticed the suspect, Nkosi, walking with a group of about eight people. Nkadimeng and Sibiya drove past the group then stopped and parked the vehicle to approach the group on foot. Sibiya's vehicle was unmarked and both him and Nkadimeng were wearing civilian clothing. Nkadimeng testified that on reaching the group he had introduced himself as a police officer. He recognised some in the group, Sarah and her sons, Kabelo, Rori as people who lived in the same street with him. He stated that Nkosi, also a son of Sarah, used to live at his mother's house. Nkadimeng did not know the other people in the group.

[14] Nkadimeng told Nkosi that he was under arrest for the murder of Kubheka. The other members of the group charged towards him and Nkosi ran away. Nkadimeng gave chase, firing ten warning shots in the process and ordering Nkosi to stop. The rest of Nkosi's group and Sibiya were following. Nkosi did not run for long before he tripped and fell to the ground. Nkadimeng was in the

process of arresting him when the group arrived and aggressively approached him. Some in the group were yelling insults and remonstrated with him demanding that he let go of Nkosi.

[15] Nkadimeng testified that Sibiya tried to push the group back and a scuffle ensued. He heard a gunshot and a person screaming that he had been shot. The scuffle stopped for a short while, but restarted when Nkadimeng tried to place Nkosi in the vehicle. Constable Bogopa arrived and assisted in getting Nkosi into the vehicle to take him to the police station.

[16] Nkadimeng testified that before driving to the police station he had offered to call an ambulance for the injured Kabelo to be taken to hospital, but the group refused.

[17] Nkadimeng was at the police station and busy with paper work before Nkosi could be processed when Nkosi's group arrived at about 21h00, shouting and demanding to lay charges of their own. A senior police officer had ordered the group to leave and to return the following morning to lay charges.

[18] Nkadimeng left the police station at approximate 23h00 that Saturday. On Monday, 26 September 2011 at about 16h00 he went to consult with a doctor as he had been feeling pains in his body since his alleged assault by Nkosi's group. He could not have consulted with the doctor on Sunday as the doctor's rooms were closed. The doctor examined him and completed the J88 form recording that:

“assaulted by suspect. Painful right side of face, painful left shoulder, swollen Metacarpal”. The J88 was handed in as an exhibit.

CROSS EXAMINATION

[19] Nkadimeng’s responses during cross examination demonstrated his oblivion to the provisions of the law relating to the execution of an arrest in a group and the proper handling and use of a firearm in such circumstances.

[20] Asked whether the plaintiffs have ever threatened or done anything to harm to him or his family since the occurrence of the 24 September 2011, Nkadimeng testified that he had been threatened while arresting Nkosi, that his house was known to the group and that they would deal with him. He testified further that he had indeed subsequently been followed by Sarah’s son, Rori at the football ground while watching a soccer match and when he left in his car. He had stopped a police vehicle he came across and was able in that way to avert an encounter and possible attack by Rori who drove past as Nkadimeng talked to the police.

[21] It is to be noted that, unlike his mother and his sibling (the plaintiffs), Rori was not arrested, despite the allegations against him.

EVIDENCE OF CONSTABLE SIBIYA

[22] Constable Sibiya was called as the second witness for the defendant. He testified that he is a police officer attached to the Intelligence unit in Siyabuswa

for 23 years. He was telephonically requested by his colleague, Constable Nkadimeng on the evening of 24 September 2011 to come and assist him arrest a suspect, George Nkosi, who was wanted in connection with a murder case. He drove in his vehicle to Nkadimeng's place where he picked him up to proceeded to where the suspect was said to be drinking.

[23] They were on their way when Nkadimeng noticed George Nkosi walking with a group of people. He was present when Nkadimeng introduced himself to the group and advising Nkosi that he was under arrest for a murder case. The group resisted and Nkosi ran away and was pursued by Nkadimeng. Sibiya and the group followed. Nkosi had tripped and fallen to the ground and Nkadimeng was arresting when the group arrived, approached Nkadimeng violently and assaulted him in an attempt to free Nkosi. Sibiya testified that he drew his firearm which he held in his hand facing the ground. One member of the group grabbed his arm and tried to take the firearm from him. A scuffle ensued and a shot went off hitting his assailant on the upper leg.

[24] Nkosi was placed in the vehicle and Nkadimeng's attempt to assist in getting an ambulance to transport the injured person to hospital was rejected by the group. Nkosi was taken to the police station.

[25] On Monday 26 September 2011 Sibiya went to consult with a doctor as a result of injuries he sustained in the scuffle three days earlier. He did not go with nor did he see Nkadimeng at the doctor's rooms though their J88 forms were completed five minutes apart. His J88 form recorded that:

“Assaulted by suspect. Injured right big toe- swollen and tender; painful right side of chest”.

[26] In response to a question, Sibiya testified that he was subsequently investigated for the shooting and that the case against him was withdrawn in court.

[27] Without specifying when, but Sibiya testified that he did lay charges against the group regarding the incident of 24 September 2011, namely:

27.1 interference with police officers while executing their duties;

27.2 assault on officers;

27.3 attempted robbery of a firearm.

CROSS EXAMINATION

[28] Advised that according to information in the docket, he had later on 10 February 2016 withdrawn the charges he had laid, Sibiya denied that he had knowingly withdrawn the charges stating that the IO had requested him to sign a blank form which he said was a warning statement that the IO would complete later. It is to be noted that the charges against the Plaintiffs had been withdrawn in court on 23 March 2012. Sibiya testified that it turned out that the blank form was in fact a withdrawal of the charges against the plaintiffs in terms

of section 309(4)(a) of the Criminal Procedure Act 51 of 1977, as amended. The witness testified that he had never intended to withdraw the said charges.

[29] The comment made above regarding Nkadimeng's responses to questions in cross examination and specifically his lack of knowledge of the laws applicable to effecting an arrest and the handling of a firearm holds true in respect of Sibiya.

[30] Asked why Nkosi's group was not arrested at the scene, Sibiya testified that it was not part of the engagements of the Intelligence Unit he was a member of to carry out the arrest of suspects.

[31] In response to the question whether he had experienced any threat from Nkosi's group, particularly the plaintiffs, since the 24 September 2011, Sibiya response was in the negative.

PAUSE

[32] It is pertinent to mention that the evidence of the two police officers was not intended to constitute the required declaration of the lawfulness of the arrest and detention of the plaintiffs by Detective Mlambo approximately three weeks later on 18 October 2011. It was particularly Mlambo's consideration of the facts underpinning the charges against the plaintiffs and his exercise of his discretion in determining the most less invasive manner of bringing the suspects under the law and securing their attendance in court for possible

prosecution that was at issue in these proceedings. Mlambo's conduct in this regard will be weighed against the applicable legal provisions and principles to determine whether it passed muster and was compliant to render the arrests lawful and thereby exonerate the defendant from liability to the plaintiffs.

THE CASE FOR THE PLAINTIFFS

[33] The witness, Kabelo, who is the plaintiff and party who sustained the gunshot wound in the events of 24 September 2011, testified that he was walking on his way home that evening from a matric dance when he noticed his brother, George, drinking at a local tavern. He decided to call his mother on his phone alerting her as George had not slept at home the previous night. His mother came in the company of his other three siblings, including Rori, to take George home.

[34] Kabelo, his mother and siblings, including George ('the group'), were walking back home when a Toyota Conquest or Tazz vehicle stopped near them and two occupants jumped out and started firing gunshots. He could not tell the direction to which the shots were fired as it was dark. The two people approached them and one told George he was under arrest. The witness's mother was asking questions demanding to know who the two people were when George, who was drunk, began to run away. It transpired shortly that the two men were known police officers and one of them, Nkadimeng, lived in the same street with the group.

[35] George ran for a short distance, being pursued by Nkadimeng who was firing gunshots and ordering him to stop, before tripping and falling to the ground. Nkadimeng was arresting George when Sibiya and the group arrived. Sibiya drew his firearm to prevent the group from getting close to Nkadimeng and George. He fired three shots to the ground but closer to the group to force them to retreat. The group took steps backwards each time a shot was fired. However, in the third shot the bullet had ricocheted and hit Kabelo on the ankle.

[36] The evidence of Kabelo regarding the events relating to the group's encounter with the police was corroborated to a large extent, if not *in toto*, by that of his mother, save that, according to Ms Molaudzi, Kabelo was shot by Sibiya using Nkadimeng's firearm which he had removed from Nkadimeng's waist when Nkadimeng was placing Nkosi in the vehicle.

[37] Both Kabelo and his mother disputed the evidence of Nkadimeng and Sibiya that they had interfered with and assaulted the police, threatened Nkadimeng, and that Kabelo had grabbed Sibiya's arm in an attempt to rob him of his service firearm.

THE ARREST AND DETENTION

[38] The real cause of action in casu is the alleged unlawful arrest and detention of the plaintiffs by Detective Mlambo on 18 October 2011. It is common cause between the parties that Detective Mlambo, drove to the plaintiffs' home on 17 October 2011, three weeks after the events of 24 September 2011, and left a

message that Ms Molaudzi (Sarah) was to report at the police station the following morning at 07h00 together with the people she was with on 24 September 2011 during the arrest of her son, George.

[39] Ms Molaudzi duly reported at the police station on the morning of 18 October 2011 at 07h00 accompanied by Kabelo and her other two children. They had to wait as they were advised that Mlambo was still attending a police morning parade.

[40] When he later arrived, Mlambo took Ms Molaudzi and her children to the back of the office building where he ascertained that two of Ms Molaudzi's children were minors and advised that they leave and go to school. He placed the plaintiffs under arrest, processed and detained them in different cells. He later took them to court where they were detained in the cells until their appearance in court around 13h00. A lawyer called by Ms Molaudzi had arrived and spoken with the prosecutor before the matter was called and postponed with the plaintiffs released on warning. The plaintiffs made several further appearances until the charges against them were withdrawn on 23 March 2012. It is this arrest and detention of the plaintiffs that constitutes their cause of action in these proceedings.

ANALYSIS

[41] It appeared from the evidence that Sibiya had laid the charges against the plaintiffs on 24 September 2011 and that his sworn statement was in the docket that was handed to Mlambo for the investigation of the matter. Sibiya's

statement was the only source available to Mlambo for consideration in his investigations and had led to his ultimate arrest and detention of the plaintiffs.

[42] As stated earlier, the real cause of action in casu was the alleged unlawful arrest and detention of the plaintiffs by Detective Mlambo on 18 October 2011.

LIABILITY

VICARIOUS LIABILITY

[43] Vicarious liability is a common law principle in terms of which an employer may be held liable for the wrongful conduct of his employee committed during the latter's execution of his duties.

LEGAL PRINCIPLES

[44] The circumstances under which an employer may be held liable for the wrongful conduct of his employee in terms of the common law principle of vicarious liability were defined in *Mkize v Martens* 1914 AD 382 para 319, in the following words:

"...a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purpose, and outside his authority, is not in the course of his employment, even though it may have been done during his employment."

[45] The law underpinning the application of the principle of vicarious liability was developed further in various matters, inter alia, *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C - E, where the court set out the two tests necessary in an inquiry to determine whether an employer is vicariously liable for the conduct of its employee. In this regard the court said the following;

“It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of the servant does so fall, some reference is to be made to the servant’s intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.” See also *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA), *F v Minister of Safety and Security and Another* (CCT 30/11) [2011] ZACC 37; 2012(1) SA 536 (CC); 2012 (3) BLC 244 (CC); (2012) 33 ILJ 93 (CC) 2013 (2) SACR 20 (CC)]

[46] It was apparent from the evidence of Ms Molaudzi that Mlambo did not obtain statements from her and her son and had advised them that they would make their statements in court. Mlambo, if at all, had considered only the sworn statement of Constable Sibiya who had laid charges against the plaintiffs in his investigations of the case for the purpose of the exercise of his discretion whether to arrest the plaintiffs in order to charge and secure their attendance in

court. Kabelo had also testified that Mlambo had advised that he had no knowledge of a case the plaintiffs had opened against Nkadimeng and Sibiya.

[47] It is pertinent in casu to state that evidence adduced by the plaintiffs in this court confirmed that Mlambo was on duty on the date he arrested and detained them and, furthermore, that the arrests were founded on the charges laid by Sibiya and had not been motivated by the personal interests and purpose of Mlambo. All these aspects considered, in my view, point to the fact that Mlambo had been acting in the course and scope of his employment when arresting and detaining the plaintiffs and that, unless lawful justification for the arrests be demonstrated, the defendant would be liable for the actions of Mlambo on the principle of vicarious liability

THE ARREST AND DETENTION

THE LAW AND APPLICABLE LEGAL PRINCIPLES

[48] Every person has a right to liberty and freedom of movement in terms of the provisions of section 12 of the Constitution of the Republic of South Africa, 1996, and the Bill of Rights. The arrest and detention of a person is an infraction of that right as it deprives him of his liberty and curtails his freedom of movement. Thus the arrest of a person prima facie unlawful in our law.¹ The plaintiff needs to prove no more than that he was arrested in a claim premised on unlawful arrest and it is for the defendant to declare a justification demonstrating that the arrest was lawful.

¹ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367

[49] The law requires that an arrest be effected on justified grounds or reasonable suspicion that a person has committed an offense. The suspicion must not be arbitrary and without just cause. The arrestor bears the onus to advance a justification for the arrest and deprivation of liberty in whatever form it may have occurred.²

[50] In addition to the factual basis for the arrest described above, Section 40(1) of the Criminal Procedure Act 51, 1977, as amended, provides that a peace officer may arrest any person who, in terms of sub-section 40(1)(e) is found in possession of anything which the officer reasonably suspects to be stolen property or property dishonestly obtained and who the peace officer suspects of having committed an offence with respect to the property / thing. As indicated earlier, it has been held that the suspicion has to be on reasonable and justifiable grounds and that the arrestor / defendant is obliged to advance justification for the arrest and thereby proving that the arrest was lawful.³

APPLICATION OF THE LAW TO THE FACTS.

[51] It is important to state that as the arresting officer, Mlambo was a necessary witness for the defence to give evidence advancing justification for the arrest and detention of the plaintiffs. While Mlambo was not present in court to testify,

² *Zealand v Minister of Justice and Constitutional Development* 2008 (3) SACR 1 (CC)

³ *Minister of Law and Order v Hurley* 1986 (3) SA 558 (A)

the actions he had taken prior to and during his arrest of the plaintiffs were, according to the evidence of the plaintiffs themselves, in my view, well in compliance with the law, taking into account the seriousness of the offences concerned.

[52] As the investigating officer in the case concerning the three charges Constable Sibiya had laid against the plaintiffs, Mlambo would have had regard in particular to the sworn statement of the complainant, Constable Sibiya to:

52.1 satisfy himself from the facts disclosed, that there was sufficient evidence that the alleged criminal offences had been committed;

52.2 consider information pertaining to the alleged suspects to assess and determine, in his discretion, the reasonable and least invasive manner of bringing the suspects before the law and to secure their attendance in court. This is a value judgment and will entail the assessment of all the facts in the particular matter.

[53] In the present case, from his written statement, the IO Mlambo, was aware that the suspects included an adult female and her grown up sons and were known at the least to Nkadimeng and lived in the same street with him. A period of three weeks had lapsed since the occurrence of 24 September 2011 and plaintiffs had done nothing to harm Nkadimeng and/or Sibiya. Mlambo appears, from the evidence of the plaintiffs regarding the manner in which they had been arrested, to have exercised his discretion reasonably to subject the plaintiffs to

the law and secure their attendance in court the following day. He could not have done any better, in my view.⁴ There was in fact no better option available to him.

[54] On the facts of this matter, the evidence of injuries to Nkadimeng and Sibiya described in their respective J88 forms, the allegation of the attempted robbery of Sibiya's service firearm and the accidental firing of the gunshot that injured Kabelo was sufficient to necessitate criminal charges. The arrest and detention of the plaintiffs on 18 October 2011, was as already found, carried out reasonably and within the parameters of the law. The detention itself appears to have been more procedural prior to being granted bail and in light of the appearance in court shortly after the arrest.

CONCLUSION

[55] I cannot find, on the facts of this case that the arrest and detention of the Plaintiff on 18 October 2011 was unlawful. If the plaintiffs had a case, it would have been on the events of 24 September 2011.

ORDER

⁴ *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC)

[56] Following the findings in this judgment, an order is made that:

1. The plaintiffs' claims under case numbers 72804/2014 and 71742/2014 are dismissed.

**MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Plaintiffs:	Adv M Vimbi
Instructed by:	Geldenguys-Malatji Attorneys
For the First and Second Defendants:	Adv S Manganye
Instructed by:	State Attorney, Pretoria

Date of hearing: 23, 24 and 25 August 2023

Date of delivery: 13 June 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 13 JUNE 2024.