



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE No: D12076/2017

In the matter between:

THOBANI KHOMO

PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

AYANDA MTUNGWA

SECOND DEFENDANT

PHATHIZWE PHILIP MALULEKA

THIRD DEFENDANT

NATIONAL PROSECUTING AUTHORITY

OF SOUTH AFRICA

FOURTH DEFENDANT

ORDER

In the circumstances, the following order is made:

The plaintiff's claim is dismissed with costs.

JUDGMENT

Mathenjwa AJ

[1] The plaintiff issued summons against the Minister of Police and the National Director of Prosecutions, claiming damages for unlawful arrest, detention and

malicious prosecution. The particulars of claim alleges that on 8 March 2015 the plaintiff was wrongfully, and unlawfully arrested without a warrant, detained and maliciously prosecuted by the defendants. On 27 June 2016, the charge was withdrawn against the plaintiff after the prosecution consulted with the eye witness, the witness being the person who implicated the plaintiff. The defendants admit arrest without a warrant and detention, but denies all the allegations of unlawfulness and wrongfulness.

[2] At the commencement of the trial, the plaintiff's legal representative informed the court that the plaintiff abandoned the claim for malicious prosecution. Furthermore, the parties agreed to separate the issues of liability from quantum so that liability would be determined first before the issue of quantum in terms of Uniform rule 33(4). This court ruled that the issues be separated, therefore this judgment deals with the issue of liability only.

[3] Thus, the issue for determination in this case is whether or not the plaintiff was wrongfully, and unlawfully arrested and detained.

Defendant's evidence

[4] It is trite that in an action for damages for unlawful arrest and detention, once the arrest and detention has been admitted or proved, the defendant bears the onus to prove the existence of grounds justifying the arrest and detention.¹ For that reason, the defendants began adducing evidence and called witnesses. Ayanda Arthur Ntungwa, is employed by the South African Police Services as a sergeant and stationed at Marian Hill Police Station. He testified that on 8 March 2015 when he was driving a patrol van, he received a call from the police station that a suspect for murder was arrested by members of the community at Sithandu Hill Railway Station. He proceeded to the railway station and on his arrival he found a group of people with the plaintiff at the railway station. He was informed by a member of the Community Policing Forum (the forum) that the forum had received information linking the plaintiff to the murder of the deceased that occurred at the railway station and the forum proceeded to the plaintiff's homestead. On their arrival at the homestead they knocked at the door, the plaintiff refused to open; they pushed open

¹ See *Tsose v Minister of Justice and others* 1951 (3) SA 10 (A).

the door, entered, searched the house and found a bag with blood stains inside the fridge in the house. They took the plaintiff together with the bag to Sithandu Hill Railway Station where the murder was committed. On receiving this information, Sergeant Ntungwa called the police station to verify the commission of the offence. Further, at the railway station a Mr Tumelo Mokoena, who identified himself as the brother to the deceased, informed him that the bag which was found in the possession of the plaintiff and the contents thereof, belonged to the deceased. He arrested the plaintiff after confirming from the police station that the crime committed at the railway station was murder and robbery where a knife was used, and after considering that a bag was found in the possession of the plaintiff with blood stains; the bag and its contents were identified by a witness as belonging to the deceased. He asked the plaintiff about the bag, but he did not respond. He informed the plaintiff of his constitutional rights and then arrested him. He considered the facts before him, and concluded that there was reasonable grounds to arrest the plaintiff. During cross examination, by the plaintiff's legal representative, he explained that he asked the plaintiff at the railway station whether he was assaulted by members of community and whether he had sustained any injury, he answered to the negative. When it was put to him that, what he said was blood stains on the bag, were actually not blood stains, he answered that to him it looked like blood stains. He was not told by the community to arrest the plaintiff, the community suspected him of killing the deceased, and he used his discretion to arrest him. He did not ask him about his involvement in the murder, because he was not charging him at that time when he was placed under arrest. He responded that he did not check each item in the bag, but he accepted the report from the brother of the deceased that the items inside the bag belonged to the deceased.

[5] Sphelele Wendy Ndlela is a senior state prosecutor. She was prosecuting at Pinetown Magistrates' Court during the first court appearance of the plaintiff. She also handled the plaintiff's bail application. The charges against the plaintiff were murder and robbery with aggravating circumstances. She opposed bail because when she read the docket she felt there was a prima facie case upon which a reasonable court could convict the plaintiff; there was strong evidence linking the plaintiff to the offence including the recovery of the deceased's cell phone in the possession of his sister, who had deposed to an affidavit that she received it from

the plaintiff. Further, the plaintiff had made admissions that he killed the deceased, although he did not have the intention to kill him, he was killed by mistake. There was no indication that the admissions were not made freely and voluntarily by the plaintiff. In opposing bail she handed in an affidavit from the investigating officer wherein it was stated that the plaintiff was seen by an eye witness, Mr Tumelo Mokoena, stabbing the deceased to death; the bag and cell phone found in the possession of the plaintiff was identified as belonging to the deceased. Under cross examination she disagreed with the proposition by the plaintiff's legal representative that it was necessary to call the investigating officer to testify in court in person. Her reasons being that it was the plaintiff who brought the application and the investigating officer's affidavit was sufficient to respond to the plaintiff's application. When confronted with the proposition that the cell phone had not yet been positively identified at the time of the bail hearing, therefore the investigating officer misled her, she conceded that in that event then she was misled by the investigating officer. She was further confronted with the differences between the statements of one witness, Mr Mpofo and the eye witness Tumelo Mokoena, wherein Mr Mpofo states that Tumelo Mokoena remained behind with the plaintiff when they met with the deceased, whereas Tumelo Mokoena himself states that he proceeded together with Mr Mpofo and other persons leaving only the plaintiff behind with the deceased. She was adamant that both witnesses place the plaintiff at the scene of crime and the two witness statements were not the only ground for her opposition to bail.

[6] Victoria Sandile Dladla is a police officer stationed at Marian Hill Police Station. She was on a patrol duty with Sergeant Ntungwa when they received a call from the police station informing them that the plaintiff was arrested by the forum at Sithandu Hill Railway Station. She proceeded together with Sergeant Ntungwa to the railway station. She confirmed that Sergeant Ntungwa asked the plaintiff whether he was assaulted and his response was that he was not assaulted. She completed the SAP13 exhibit register and entered the items that were found by the forum in the possession of the plaintiff in the register. Phathisizwe Maluleka is a warrant officer stationed at Marian Hill Police Station and the investigating officer of the murder of the deceased in respect of which the plaintiff was arrested. He explained the plaintiff's constitutional rights to him and was informed that he is not compelled to make a statement, but he opted to make the statement freely and voluntarily. He

opposed bail because an eye witness who saw the plaintiff stabbing the deceased had deposed to an affidavit in this regard; the deceased's cell phone which was in the possession of the plaintiff had been positively identified by the deceased's wife as belonging to him; and the bag that was identified as belonging to the deceased was found with blood stains in the plaintiff's possession. During cross examination he confirmed that the ownership of the cell phone was already linked by a statement from a witness before the date of the bail hearing, therefore he did not mislead Ms Ndlela, when he told her during the bail application that the cell phone was positively identified by the wife of the deceased. Then the defendants closed their case

Application for amendment to plaintiff's particulars of claim

[7] At the close of the defence case the plaintiff's legal representative applied for an amendment to its particulars of claim in terms of Uniform rule 28,² to amend para 9.1 of the particulars of claim by adding the following words at the end of the paragraph, 'despite providing a reasonable explanation for the allegations and his possession of the cell phone, which was given to him by one Tumelo Mokoena, the state witness in the criminal proceedings'. The plaintiff's legal representative contended that there would be no prejudice to the defendant if the amendment was effected because the investigating officer cannot recall whether the plaintiff told him where the phone came from. The defendant's counsel objected to the amendment on the basis that the amendment sought was material. It would be prejudicial to the defendants to allow the amendment after they had closed their case, because the onus of proof lies with them. The proposed amendment introduces new facts that ought to have been introduced timeously to allow the defendants to deal with them before closing their case. I refused the amendment. The law governing the granting or refusal of amendments was reaffirmed in *Affordable Medicines Trust v Minister of Health*.³ At para 9 Ngcobo CJ stated as follows:

² Rule 28 on amendments to pleadings and documents prescribes the following:

'(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

...

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

³ *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC).

'The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed". These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?' (footnotes omitted)

[8] Para 9.1 of the particulars of claim reads: 'On the 8th March 2015, the Plaintiff was wrongfully and unlawfully alternatively, maliciously arrested, charged and detained for murder and robbery with aggravating circumstances by the 2nd defendant'. If the amendment is allowed it would mean that the plaintiff provided a reasonable explanation for the allegations and his possession of the cell phone which was robbed from the deceased. In my view the amendment sought to be introduced, after the close of defendants' case, which introduces new facts, as in this case, would be prejudicial to the defendants. I agree with the defendants' counsel that since they bear the onus of proof, they had planned their case on the facts that were pleaded and strived to satisfy the onus based on these facts. The amendment sought is material, if sought and granted before the close of the defence case that would have enabled the defence counsel to consult and respond to it. The primary objective of allowing amendments has been set out in case law as; 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'.⁴ The amendment would not put the parties back in the same position as they were when the pleadings which it is sought to amend was filed, because it is material and the plaintiff would not have the opportunity to respond to it.⁵

Plaintiff's evidence

⁴ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 638A-B and the discussion that follows, see also *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

⁵ *Zarug v Parvathie, NO* 1962 (3) SA 872 (D) at 876C-F.

[9] The plaintiff testified that on 8 March 2015 members of the community arrived at his home, kicked the door open, entered and searched the house. They assaulted him, took his bag and escorted him to the railway station. The police fetched him at the railway station and took him to the police station. At the police station, he was asked to sign documents, and he signed those documents, although he was not told what he was signing for. He was shown pages in the documents where to sign, by the investigating officer, Warrant Officer Maluleka, but he did not know what he was signing for. He denied that he told the police that he killed the deceased. He contends that he informed the police that he bought the cell phone which is alleged to have been robbed from the deceased, from someone else and gave it to his sister. When cross examined by the defendant's counsel he alleged that the investigating officer was speaking in English when he completed the forms that were signed by him, whereas he is an IsiZulu speaking person. He insisted that the bag that was taken by the forum from his home belonged to him. He denied that he knew Mr Lindani Mpofo and Mr Sandile who according to the eye witness's statement were walking with him when they met with the deceased.

Legal principles

[10] Section 40(1)(b) of the Criminal Procedure Act 51 of 1955 (the Act) authorises a peace officer to arrest without a warrant of arrest any person, 'whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. In *Duncan v Minister of Law and Order*,⁶ Van Heerden JA set out the jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the Act may be invoked. At 818G-H it was stated as follows:

'The so-called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds.'

⁶ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection and arrest the suspect.

[11] The importance of the freedoms and security of individuals are enshrined in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 12(1)(a) of the Constitution guarantees everyone the right to freedom and security of the person, 'which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause'. The *Duncan* decision on the jurisdictional facts for the exercise of powers conferred by s 40(1)(b) predates the Bill of Rights, however, it has been cited with approval by courts in the post constitutional era.⁷ The courts have held that an arrest under the circumstances set out in s 40(1)(b) could not amount to deprivation of freedom which is arbitrary or without just cause. However, bearing in mind that the section authorises drastic and severe intrusion into the freedoms and security of persons, the courts have explained that the test to determine whether the reasonable suspicion was within the meaning of s 40(1)(b) was whether a reasonable person in the defendant's position and possessed of the same information would have considered that there were sufficient grounds for suspecting that the plaintiff has committed the offence.⁸

[12] The discretion whether or not to arrest arises once the jurisdictional facts for an arrest are present.⁹ In *Sekhoto* para 30 it was held that; '... the decision to arrest must be based on the intention to bring the arrested person to justice'. In *Minister of Law and Order v Hurley and another*,¹⁰ it was held that the question whether a peace officer reasonably suspected or had reasonable grounds for suspecting that 'the person whom he arrested without warrant had committed an offence is objectively justiciable'. Therefore, the test is not whether an arresting officer believes that he has reasonable grounds to suspect, but whether objectively he has reasonable grounds for his suspicion. In *Sekhoto* para 39 Harms DP held that: 'This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by

⁷ See *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141, 2011 (5) SA (SCA) 367 para 6.

⁸ See *S v Nel and another* 1980 (4) SA 28 (E) at 33H.

⁹ See *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141, 2011 (5) SA (SCA) 367 para 28.

¹⁰ *Minister of Law and Order v Hurley and another* 1986 (2) SA 568 (A) at 579F.

the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached.’

In *Mabona and another v Minister of Law and Order and others*,¹¹ Jones J stated as follows:

‘This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion’.

Analysis of evidence

[13] It is established from the evidence of Sergeant Ntungwa that when he effected the arrest of the plaintiff, he had first confirmed from the police station that indeed there is a case for murder of the deceased who was killed by knife at the scene where he found members of the forum with the plaintiff. He was shown a bag which contains what to him and the forum looks like a blood stain; a brother to the deceased had identified the bag found in the possession of the plaintiff as belonging to the deceased. He asked the plaintiff about the bag and he did not respond. His evidence was corroborated by the evidence of Sergeant Dladla who was with him when the plaintiff was arrested at the railway station that he read his constitutional rights when he placed him under arrest. Both Sergeants Ntungwa and Dladla were honest witnesses, they stood unshaken under cross examination. As set out in *Mabona*, the suspicion of the arresting officer must be based on solid grounds, but not necessarily on certainty that the plaintiff is in fact guilty. For these reasons there is no doubt that the arresting officer satisfied the jurisdictional requirements for effecting the arrest under s 40(1)(b) of the Act.

[14] The investigating officer, Warrant Officer Maluleka, was an impressive witness. He read, the plaintiff’s constitutional rights, informed him he was not compelled to make a statement, but the plaintiff opted to and made a statement wherein he admitted killing the deceased, although he contested that he did not intend to kill him. Ms Ndlela was an honest witness. She was even prepared to

¹¹ *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) 658G-I.

concede that she was misled by the investigating officer when it was put to her under cross examination that the investigating officer was not honest when he stated in his bail opposing affidavit that the deceased's cell phone was already identified by his wife before the bail hearing. This obscurity was cleared by Warrant Officer Maluleka in his testimony that during the bail application the deceased cell phone was already positively identified by his wife when the bail application was heard. The evidence in the possession of the investigating officer that the plaintiff had made a statement admitting to the killing of the deceased; discovery of the deceased's cell phone in the possession of the plaintiff and the statement by the eye witness who saw the plaintiff killing the deceased were in my view sufficient and reasonable grounds to detain and keep the plaintiff in detention. The alleged discrepancies between the statements of Tumelo Mokoena and Mpofo on whether Tumelo and the plaintiff remained with the deceased or Tumelo left the plaintiff alone with the deceased is not material instead it has the effect of placing the plaintiff at the scene of crime rather than exonerating him.

[15] The plaintiff on the other hand was a dishonest witness. He evaded questions, he even contended that the investigating officer was communicating with him in English when he made him sign the documents containing his constitutional rights whereas both the investigating officer and the plaintiff are IsiZulu speaking persons.

It is instructive to point out that on the facts in the possession of the State at the time when the plaintiff was arrested and detained it is clear that there was prima facie case against him. The fact that the eye witness deviated from his statement on the date of trial does not negate the strength of evidence which the State had from the date of his arrest until the date when the case was withdrawn against him. It is common knowledge that witnesses in criminal trial would deviate from their statements for various reasons unknown and unforeseeable to the State. For this reason withdrawal of a charge against an accused person arising from deviation by a witness from his original statement would not necessary lead to the conclusion that the arrest and detention was wrongful and unlawful.

[16] In the result I find the arrest to have been lawfully effected in terms of s 40(1) (b) of the Act and the detention to be lawful. There is no basis to conclude that the discretion to arrest was wrongfully exercised.

[17] In the circumstances, the following order is made:
The plaintiff's claim is dismissed with costs.

Mathenjwa AJ

Date of hearing: 4 August 2022
Date of Judgment: 13 September 2022

Appearances:

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Judgment duly delivered electronically