REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12/19516

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

26/2/2016
DATE

SIGNATURE

In the matter between:

THABISO PETER MOLLOYI Plaintiff

and

THE MINISTER OF POLICE Defendant

SUMMARY

Arrest – without warrant – lawfulness of – and detention – section 40(1)(b) of Criminal Procedure Act, 51 of 1977 – exercise of discretion by arresting officers – plaintiff claimed damages based on alleged unlawful arrest, detention and assault – possession of property suspected to be stolen – and possession of implements suspected to be used for breaking into or stealing motor vehicles – section 82 of the General Law Third Amendment Act 129 of 1993 – plaintiff failing to give satisfactory account for his possession – claim dismissed.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant for damages based on alleged unlawful arrest and detention and unlawful assault committed on 5 May 2011.

[2] The court is called upon to adjudicate on both the merits of the claim, and if necessary the plaintiff's damages. Both these issues are in dispute.

THE PARTICULARS OF CLAIM

[3] In regard to the alleged unlawful arrest and detention, the plaintiff, in his amended particulars of claim, paras 3 to 11, alleged as follows:

> *"3. On 5th of May 2011 and at Centre Road in Turfontein the Plaintiff was unlawfully arrested without a warrant by police officers all members of the South African Police Service whose full names and rank are currently to the plaintiff unknown, whilst acting within the course and scope of the employment with the Defendant on a charge of 'possession of car breaking equipment and possession of suspected stolen jeans'.*
>
> *4. The arrest of the Plaintiff was unlawful as the Plaintiff did not commit the crime of "possession of car breaking equipment and possession of suspected stolen jeans" and his arrest is not*

justified under the provisions of section 40 of the Criminal Procedure Act 51 of 1977.

5. *Alternatively the plaintiff pleads that in the event that the court finds that the arrest of the plaintiff was justified under the provisions of the Criminal Procedure Act of 1977 (hereinafter referred to as "the Act") (which is denied) then the plaintiff pleads that his arrest was unlawful as the arresting officer knew that the Plaintiff would not be taken to court and not be prosecuted alternatively the purpose of the plaintiff's arrest was not to take him to court to be prosecuted.*

6. *Subsequent to his arrest the plaintiff was detained unlawfully and unreasonably at the Booysens Police station and Johannesburg Central Police Station cells at the instance of the aforesaid policemen and various other policemen whose names and identities are currently unknown to plaintiff.*

7. *The Plaintiff was detained until 6th of May 2011.*

8. *The plaintiff gave proper notice to the Defendant in terms of Section 2(1) of Act 40 of 2002.*

9. *As a result of the above injury to Plaintiff's person privacy, dignity and bodily integrity Plaintiff suffered damages in the sum of R150 000,00.*

10. *The plaintiff gave proper notice to the Defendant in terms of Section 3 of Act 40 of 2002.*

11. *The whole cause of action arose within the jurisdiction of the above Honourable Court."*

[4] In regard to the alleged unlawful assault, the plaintiff, in paras 3 to 8, alleged as follows:

"3. *On 5th of May 2011 and at Carter Road in Turfontein the Plaintiff was wrongfully assaulted by members of the South African Police Services acting within the course and scope of their employment with the Defendant.*

4. *The Plaintiff was assaulted in the following manner;*

   4.1 *Plaintiff was handcuffed so tight that hands started swelling.*

4.2 Plaintiff was manhandled and forcefully shoved into the police vehicle.

4.3 Plaintiff was hit.

5. As a result of the assault the plaintiff suffered the following injuries:

5.1 Plaintiff had bilateral wrist injuries on left and right arms.

5.2 Plaintiff suffered backache and bruising.

5.3 Plaintiff suffered fear, emotional pain and trauma.

6. As a result of the injuries, Plaintiff suffered damages being for injury to his person in the amount of R150 000,00.

7. In terms of Section 2(1) of Act 40 of 2002 proper notice was given to Defendants.

8. The whole cause of action arose within the jurisdiction of the above Honourable Court."

THE DEFENDANT'S PLEA

[5] In its amended plea, the defendant, in essence, denied the above allegations, and put the plaintiff to the proof thereof.

THE COMMON CAUSE FACTS

[6] The following are common cause. The pre-trial minute of 4 December 2013 shows that it is common cause that the plaintiff was arrested on 5 May 2011 before or about 12 midday. He was arrested by two flying squad members. He was arrested for "*possession of car breaking equipment and possession of suspected stolen jeans*". The plaintiff was thereafter detained

at the nearby Booysens police station cells, and thereafter, on the same, at the Johannesburg Central police station cells until the early hours of 6 May 2011. However, the manner of the plaintiff's subsequent release is in dispute. The plaintiff alleged that he was released without appearing in court, whilst the defendant could not agree to this. It is also common cause that the plaintiff was arrested without a warrant, and that the plaintiff was never prosecuted.

THE ISSUES FOR DETERMINATION

[7] The issues for determination in this trial are whether the arrest of the plaintiff was justified; whether his detention was lawful; and whether the plaintiff was assaulted at all by the arresting officers.

THE PLAINTIFF'S EVIDENCE

[8] The plaintiff was the sole witness in his case, whilst the defendant called as witnesses, the two arresting officers.

[9] The plaintiff, a 50 year old male, testified that he was employed by Mr Phondo Brophy Mabunda ("*Mabunda*") at a scrap yard situated at Midway, Devland. On the day in question, he was driving his employer's BMW motor vehicle. He had in the motor vehicle four computer boxes and a pair of new jeans, given to him by his employer. When he approached Carter Street, Rossettenville ("*the arrest scene*"), he was pulled over by a police motor

vehicle with blue lights. The plaintiff stopped the BMW motor vehicle and alighted therefrom. The police asked to search the motor vehicle, to which the plaintiff agreed. The police found four computer boxes and three pairs of Levi's Jeans. The police arrested the plaintiff, but the plaintiff resisted. The plaintiff managed to contact his employer, Mabunda, who arrived at the arrest scene, but the police declined to speak to the employer. The plaintiff alleged that he gave an explanation to the police at the arrest scene as to why he was in possession of the computer boxes and jeans. However, the police did not accept his explanation. He was nevertheless, assaulted, and cuffed very tightly, and taken to the Booysens police station. The plaintiff claimed that in the process of arrest, he was injured on his back after he was thrown forcibly into the police vehicle, and swollen wrists caused by the handcuffs. At the Booysens police station, he was kept in the police vehicle outside for about 30 minutes to one hour before he was taken inside to process the charges against him. The plaintiff alleged that he made a statement to another police officer while detained at Booysens police station, during which he chose to remain silent. It is common cause that the warning statement was not signed by the police officer, and that the police officer who took the statement remained unknown. The plaintiff was taken to the Johannesburg Central police station the same day, where he was detained. He was released the following morning at about 04h00 without appearing in court. The following day, the plaintiff said he consulted with a medical doctor who refused to complete the required documentation. As seen below, the plaintiff's allegations of assault, how and why he was arrested, were denied by the two police officers.

THE POLICE EVIDENCE

[10] Both constables Levi R Seemise ("*Seemise*") and Lawrence Tshepo Malapane ("*Malapane*") of the Germiston Flying Squad testified for the defendant, and were cross-examined. Seemise testified that he was with Malapane when they spotted a suspicion looking BMW motor vehicle driven by the plaintiff along Carter Street, Rossettenville. They pulled over and searched the BMW and found the four motor vehicle computer boxes and three pairs of Levi's jeans. When questioned about these items, the plaintiff became arrogant, and unco-operative and failed to provide a reasonable explanation for his possession thereof. The plaintiff informed the police at the arrest scene that '*he was still new in the field and did not know what he was doing*' (whatever this means). The witness testified that the plaintiff also told them that the police were wasting his time since the plaintiff was well-known at the Booysens police station. Seemise testified that he and his colleague decided to arrest the plaintiff for being in possession of motor vehicle breaking implements and possession of suspected stolen property. Seemise testified further that he knew that car computer boxes were used by criminals to start motor vehicles that they intended to steal.

[11] The plaintiff was taken to the Booysens police station. Seemise denied that the plaintiff's employer arrived at the arrest scene. Once at the Booysens police station, a senior police officer attempted to convince the arresting officers not to arrest the plaintiff, but the plaintiff was nevertheless detained.

He denied ever assaulting the plaintiff, or that the handcuffs were fastened too tightly as alleged by the plaintiff.

[12] When he testified, Malapane corroborated Seemise, his colleague, in all material respects except for a minor contradiction, especially regarding the arrest of the plaintiff, and what transpired at the Booysens police station. He further testified that the plaintiff told him that the items found in the BMW motor vehicle belonged to Mabunda, his employer. However, when questioned further about his employer, the plaintiff became arrogant and unco-operative at the arrest scene. At the Booysens police station, he and Seemise processed the charges against the plaintiff. Significantly, he said that the plaintiff had no injuries.

SOME LEGAL PRINCIPLES

[13] It is so that in the context of this matter, the defendant bore the *onus* in respect of the admitted arrest and detention to prove that same were lawful and justified. On the other hand, the plaintiff bore the *onus* of proving on a balance of probabilities that he was assaulted. Compare *Webster v Mitchell*,[1] where the Court was dealing with the requirements of an interim interdict, the probabilities and the establishment of a *prima facie* case by the applicant.

[1] 1948 (1) SA 1186 (W).

[14] In its amended plea, the defendant relied on the provisions of sec 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("*the Criminal Code*"). Section 40(1)(a)-(e) of the Criminal Code provide that:

> "*(1) A peace officer may without warrant arrest any person –*
>
> *(a) who commits or attempts to commit any offence in his presence;*
>
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody;*
>
> *(c)* [not applicable];
>
> *(d) who has in his possession any implement of housebreaking and who is unable to account for such possession to the satisfaction of the peace officer;*
>
> *(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 an offence with respect to such thing.*"[2]

[15] In *Minister of Safety and Security v Sekhoto and Another*,[3] the Court per Harms JA, dealt with the interpretation of the provisions of sec 40(1)(b) and (g) of the Criminal Code. There the respondents were arrested by police officers without warrant, and on suspicion of a contravention of sec 2 of the Stock Theft Act 57 of 1959. At para [28] of the judgment, the Court said:

> "*Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise*

[2] See the rest of sec 40 of the Criminal Procedure Act 51 of 1977, and Schedule 1 thereof.
[3] 2011 (1) SACR 315 (SCA).

of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice."

At para [29] of the judgment, the Court went on to say that:

"*As far as s 40(1)(b) is concerned, Van Heerden JA said the following in Duncan (at 818H-J):*

> *'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.'* "

At para [44] of the judgment, the Court said:

"*While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose. ...*" (footnotes omitted)

See also, and compare, *Gellman v Minister of Safety and Security*,[4] and *Mabona and Another v Minister of Law and Order and Others*.[5]

[16] As stated before, where the arrest and detention are common cause – as in this case – it is *prima facie* wrongful. The *onus* is on the defendant to allege and prove the lawfulness of the arrest or detention. See in this regard, for example, *Minister of Law and Order v Hurley*,[6] and *Lombo v African National Congress*.[7] The above approach is, of course, subject to the provisions of secs 12 and 21 of the Constitution which guarantee every person the right to freedom and security and not to be detained without trial; and the right to freedom of movement anywhere within the national territory, respectively.

APPLICATION OF LEGAL PRINCIPLES

[17] In applying the above legal principles to the facts of the instant matter, and in determining the questions whether Constables Seemise and Malapane:

17.1 had a reasonable suspicion in exercising their discretion to arrest the plaintiff; and

[4] (WLD) Case Number A3009/2007 (reported at 2008 (1) SACR 446 (WLD)).
[5] 1988 (2) SA 654 (SE) at 658.
[6] [1986] 2 All SA 428 (A), also at 1986 (3) SA 568 (A).
[7] [2002] 3 All SA 517 (SCA), also at 2002 (5) SA 668 (SCA).

17.2 whether the constables were justified to suspect that the "*things or property*", were connected with an offence, it is imperative, in my view, to have regard to the nature of the items found in possession of the plaintiff.

THE NATURE OF THE ITEMS FOUND IN POSSESSION OF THE PLAINTIFF

[18] The items found, it is common cause, were four motor vehicle computer boxes, and three pairs of Levi's jeans. On their version, Constables Seemise and Malapane questioned the plaintiff about these items. The plaintiff failed to give them a reasonable explanation or account about his possession, and they decided to arrest him, and when his co-operation was not forthcoming. In *S v Zondo,*[8] the provisions of sec 82 of the Third General Law Amendment Act 129 of 1993 were discussed. The sec provides, *inter alia*, that '*any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor vehicle or to gain unlawful entry into a motor vehicle, and who is unable to give a satisfactory account of such possession, is guilty of an offence and liable on conviction to a fine, or imprisonment for a period of not exceeding three years*'.[9] *S v Zondo* (*supra*) merely held that the above provisions, "*... cast no more than a burden of rebuttal upon the accused, to furnish a satisfactory account of his possession, and section 82 quoted above, does not infringe the rights*

[8] 1999 (1) SACR 54 (N).
[9] See C R Snyman, *Criminal Law*, 5ed pp 555-556.

entrenched in either section 35(3)(h) (the right to be presumed innocent, to remain silent, and not to testify) or section 35(3)(j) (the right not to be compelled to give self-incriminating evidence) of the Constitution Act 108 of 1996. (Cf S v Mailula.)[10]

[19] In the present matter, it was not disputed, or it could not be disputed validly that the computer boxes found in the plaintiff's possession are capable of being used to start motor vehicles. In fact, the police constables who testified, in exercising their discretion to arrest, expressed the view that in their experience, the computer boxes in question are used by criminals to start stolen motor vehicles. This, coupled with the plaintiff's concession in cross-examination that he omitted to inform the police at the arrest scene that he was a motor vehicle mechanic. He chose instead to resist arrest, and to be unco-operative. In evidence, he confirmed that he in fact resisted arrest. In these circumstances, and based on the legal principles set out by Harms JA in *Sekhoto (supra)*, and other authorities, I am more than convinced that the police acted reasonably, correctly, and within their discretion in arresting the plaintiff based on his failure to provide them with a reasonable account for his possession of the items found in his possession. The omission was perpetuated when the plaintiff allegedly made a statement at the Booysens police station. The arguments advanced to the contrary, in the lengthy heads of argument, were on a proper consideration, without any merit.

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[10] 1998 (1) SACR 649 (T).

THE PLAINTIFF AS A WITNESS

[20] The plaintiff did not impress as a credible witness. He was a single witness in his case. For some inexplicable reason, he did not call the medical practitioners he allegedly consulted after his release from detention. In addition, in similar fashion, he failed to call as a witness, his employer, Mabunda, to support his assertions. In any event, his version that he managed to call his employer whilst the police constables were trying to handcuff him at the arrest scene, which version was denied vehemently by the police, was highly improbable in the circumstances. The plaintiff, at the time of his testimony, was still employed by Mabunda. It is a strange coincidence that Captain J J Mabunda, stationed at the Booysens police station at the time, and who subsequently released the plaintiff,[11] shared the same surname as the plaintiff's employer. This, and the defendant's witnesses' evidence that at the Booysens police station a senior police official tried to stop them from arresting the plaintiff, rather lent credence to the allegation that the plaintiff was '*well connected*' at the Booysens police station. During his evidence, the court gained the distinct impression that the plaintiff tended to exaggerate his evidence. In the end, there was no reason not to believe the evidence of the two police constables. Their evidence was credible save for the immaterial contradiction referred to above.

[11] See Index to Documents Bundle, A7.

THE PLAINTIFF'S CLAIM OF ALLEGED ASSAULT

[21] I deal with the plaintiff's claim that he was assaulted by Constables Seemise and Malapane. I have already found that the evidence of the latter witnesses was credible. For some of the reasons advanced in the preceding paragraph, the plaintiff's version on how he was assaulted was not sustainable. It was a dubious, patchy and dingy version. For example, the version was not supported by any medical evidence, which was allegedly available to him; there was no SAP10 (occurrence book) evidence at either Booysens police station or Johannesburg Central police station that the plaintiff had any injuries when he was placed in the cells. In practice, this view is sometimes easy to express than what meets the eye; and that the plaintiff did not lay any criminal charges against his assailants after his release, and on his version, it never occurred to him to do so. Constables Seemise and Malapane in any evident testified that once the arrest and detention of the plaintiff was processed, they left the plaintiff at the Booysens police station without any injuries recorded. They had no further involvement in the further detention of the plaintiff. The plaintiff was later transferred to the Johannesburg Central police station due to lack of accommodation at the Booysens police station. He was released on warning by Captain Mabunda, and the public prosecutor later declined to prosecute or to enrol the matter. The allegations of assault ought to be discarded completely. What is particularly worrisome in this matter, over and above the strong perception that the plaintiff was well known at the Booysens police station, was the following: the plaintiff testified that immediately after his release, he consulted

a medical doctor, who refused to complete the necessary documentation. The plaintiff's attorneys filed a notice in terms of Rule 36(9)(a) and (b), threatening to call as an expert witness, a Dr Pule W Ramhitshana, to testify on the alleged injuries sustained by the plaintiff and the treatment prescribed. The J88, medical examination report, shows that the plaintiff consulted Dr Ramhitshana on 2 June 2011, just after a month after his release from detention. In this regard, the medical examination form concluded that:

"*Old injuries – healed.*"

This begged the question why Dr Ramhitshana was not called or subpoenaed to testify on behalf of the plaintiff. Surely, a medical doctor faces certain risks professionally if he/she ignores a court process. The inference that, the listed injuries could not be reasonably linked to the incident under discussion, loomed large in the background. I however, make no definitive finding in this regard as no reasonable explanation was proffered. The same applies to the contradictory evidence of the police officers at the arrest scene, which contradiction was in any event, immaterial, in my view.

CONCLUSION

[22] I am compelled to preface my conclusion by commending plaintiff's counsel for putting up a valiant challenge in what was plainly an insurmountable cause. Be that as it may, I have come to the conclusion that, where it mattered most, the plaintiff has failed to discharge the *onus* placed on

him in order to advance his case. At some stage, I considered very seriously to make an order absolving the defendant from the instance. However, due to the nature of the poor quality of the plaintiff's case on the disputed issues, which are sufficiently compelling to dismiss his case outrightly, I decided to do so. It is clear that Constables Seemise and Malapane, once they made their decision to arrest the plaintiff, took him to the Booysens police station, processed the charges against him and left the police station. In essence, they played '*the limited role of arrestors*', as enunciated in *Sekhoto* (*supra*). There was no evidence placed before me about the further detention of the plaintiff after they departed from the Booysens police station to return to their duties at the Germiston Flying Squad. There was no official evidence placed before me surrounding their decision to transfer the plaintiff from the Booysens police station to the Johannesburg Central police station, and why he was further detained there until his release the following morning. It appears to me that in these circumstances, once the arrest itself has been proved to have been lawful, the detention which follows, depending on the circumstances, the reasons therefor, and its duration, such cannot be ascribed to the arrestor/s who is/are detached from the detaining police station. Clearly, the arrestor/s in such circumstances has/have no input on the further detention. This scenario occurred here, undoubtedly. In addition, the public prosecutor who declined to enrol the matter or prosecute the plaintiff, did not testify. This was evidently crucial evidence to assess. The costs of the action should follow the result. It remained truly questionable why the plaintiff elected to institute this action in the high court, based on the alleged quantum of damages. He must pay the costs of being unsuccessful in

this court. In the light of finding made above, the issue of the plaintiff's quantum of damages falls away.

ORDER

[23] I the result the following order is made:

23.1 The plaintiff's action is dismissed with costs.

23.2 The costs shall include any costs previously reserved.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	9-13 OCTOBER 2015
DATE OF JUDGMENT	26 FEBRUARY 2016