

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

**CASE NO: A515/10**

**31**

**DATE: ~~30~~ MARCH 2016**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

30/3/2016

DATE

[Signature]

SIGNATURE

In the matter between:

**PETER MADISENG**

**APPELANT**

And

**MINISTER OF SAFETY & SECURITY**

**RESPONDENT**

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**JUDGMENT**

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**NKOSI AJ:**

1.

This is an appeal from the civil court for the Regional Division of Gauteng held at Pretoria for the whole judgment granted on the 7th of May 2010 by the Regional Court Magistrate Mr Mkansi where the Honourable Magistrate dismissed the appellant's claim for the unlawful arrest, detention and assault.

2.

### **BACKGROUND OF THE CASE**

The Appellant was arrested by Inspetor Boshomane without a warrant on the 5th of January 2009. He was detained at Vaalbank Police Station and released on the 6th of January 2009 without appearing before the court of law.

3.

The Appellant instituted a civil action against the Respondent claiming R100 000.00 for such an allegation of unlawful arrest, assault and detention which was defended by the Respondent.

4.

The arrest and detention was conceded by the Respondent and pleaded that it was not unlawful but in accordance with the Section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 for committing a crime of house robbery and attempted murder.

5.

The Respondent denied that the Appellant was assaulted by the members of the South African Police Service.

6.

### **ISSUES TO BE DETERMINED**

The central issues for determination by this court is whether or not the arresting officer, in respect of unlawful arrest and detention, in effecting such arrest and detention was justified and whether he exercised his discretion properly, following a reasonable suspicion to the committed a Schedule 1 offence.

7.

The other one is whether the Appellant was assaulted by the police. This one was not pursued in this appeal.

8.

### **AD RESPONDENT'S EVIDENCE**

The Respondent, bore the onus to prove its case on balance of probabilities. In discharge of its onus the Respondent called the arresting officer Inspector Boshomani to testify on the circumstances leading to the Appellant's arrest on the 5th of January 2009 and his testimony was that:

- 8.1 The Appellant was arrested following information received and investigations;
- 8.2 He stated that he was given a description of the vehicle which was suspected of being the one used in the commission of the alleged offence of house robbery and attempted murder;
- 8.3 He further testified that he received further information that a vehicle and its occupants was parked at Morake Supermarket, which vehicle according to the

information he received earlier, was or could be the one suspected of having being used in the commission of the house robbery and attempted murder.

- 8.4 Inspector Bushumani together with his crew then proceeded to Morake Supermarket and upon arrival at Morake he informed the Appellant together with his two companions about the charge of house robbery and attempted murder, they are suspected of having committed on the 4th of January 2009.
- 8.5 He further testified that when the arrest took place, the community were furious and wanted to attack the Appellant and his companions. He stated that community actions made him to call for back-up from the other police.
- 8.6 He testified that after the back-up arrived they then drove and arrived at Vaalbank police station, and the appellant was kept in an office and was interrogated and subsequently detained for further investigations.
- 8.7 After inspector Bushumani testified, sergeant Msiza corroborated Inspector Bushumani testimony in so far as the events leading to the arrest of the appellant's concerned.
- 8.8 It was submitted that it was only after receiving the information that Inspector Bushumani effected arrest acting in accordance with the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, and subsequently for further investigation

8.9 In **Duncan v Minister of Law and Order** it was held that "it is not unlawful where the arrestor, having formed the required reasonable suspicion, intends to make further enquiries after the arrest before deciding to initiate a prosecution". The test of a reasonable suspicion must be based on an objective test.

9.

### **AD APPELLANT'S EVIDENCE OF ARREST AND DETENTION**

The appellant testimony regarding arrest was that on the 4<sup>th</sup> of January 2009, his wife and kids together with his brother in law went to Klompor to attend a ceremony. He further testified that late that day, they went back home in Koedoespoort with his family and after dropping his family, they then went back to Klompor to fetch his other daughter who remained there. It was further testified by the appellant that on their way to Klompor they encountered a problem with vehicle and as such ended up sleeping at Klompor.

10.

The Appellant further gave evidence that the following day which was on the 5<sup>th</sup> January 2009 they left Klompor and went back home (Koedoespoort). Upon arrival at home they then decided to go to Morake

7  
Supermarket to buy cigarette, and at this moment the Plaintiff was in the company of one Lebotse and Matlakala.

11.

The Appellant further stated that while they were at Morake Supermarket, Lebotse and Matlakala were sleeping in their vehicle when the appellant saw members of the Respondent arriving at the supermarket. Appellant testified that one member of the Respondent asked them as to who Madiseng was and the appellant answered that he is Madiseng. That's when the Appellant was arrested on the charges of house robbery and attempted murder, which was already reported.

12.

### **AD ASSAULT**

The Appellant testified that he was assaulted by the member of the South African Police Service, this allegation was vehemently denied by all witness called by the Respondent.

13.

The Appellant in his reply to the Respondent's further particulars alleged that assault did not form part of the arrest. This point was raised during cross examination, in which the Appellant was asked as to whether the alleged assault formed part of the arrest? In his response the Appellant said that yes the assault formed part of the arrest.

14.

In light of the abovementioned contradiction by the Appellant in his pleadings and evidence it was submitted that the Appellant was unreliable and untruthful witness and therefore the learned magistrate was correct in dismissing the Appellant claim for assault.

15.

It was submitted that the Appellant's failure to produce medical evidence to corroborate his injuries was a clear indication that he was not assaulted. He failed to report or to lay a charge of assault of the police station.



16.

**AD APPLICABLE LAW**

The arrest of a suspect without a warrant is permitted by section 40(1)(b) of the Act, which provides that a peace-officer may, without a warrant, 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.

17.

The offence listed in schedule 1 includes house robbery and attempted murder. All what the section requires is that the officer must have had a reasonable suspicion. Therefore the test is objective and this requires reasonable grounds for his suspicion (*Duncan v Minister of law and order* above at page 818).

18.

It is trite law in every situation where a claim of unlawful arrest is made, the onus to prove lawfulness of the arrest is on the Respondent (Defendant).

19.

In **Duncan v Minister of Law and Order 1986 (2) sa 805 (A)** at 818F-H the jurisdictional facts which must exist before the power conferred by section 40(1)(b) may be invoked, were set out as follows:

- (1) The arrester must be a peace officer;
- (2) The peace officer must entertain a suspicion;
- (3) It must be a suspicio that the arrestee committed a Schedule 1 offence;
- (4) That suspicion must rest on reasonable grounds.

20.

The above mentioned jurisdictional factors confirmed in **Minister of Safety and Security v Sekhoto and Another 131/10 [2010] ZASCA141 (19 November 2010) par 6,** where the Supreme Court of Appeal overruled the finding that such fifth jurisdictional requirement existed in *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at 186a-187e.

21.

It was not in dispute that there was house robbery and attempted murder on the 4th of January 2009, therefore the Appellant's arrest and

detention without warrant based on the information that was received must be construed within the testimony of the Inspector Bushumani where he stated that he acted swiftly with the suspicion that the Appellant was one of the person suspected of having committed house robbery and attempted murder on the 4th of January 2009.

22.

### **AD APPELLANT'S GROUNDS OF APPEAL**

The Appellant's appeal was based on the following grounds as they appear from Notice of Appeal:

- 22.1 That the Learned magistrate misdirected himself by finding that the onus rested on the appellant to prove that he was unlawfully and wrongfully arrested.
- 22.2 That the magistrate erred by disregarding that the onus of proof that the arrest was lawful vested on the Respondent;
- 22.3 That the Learned magistrate erred and misdirected himself that the evidence of assault should be corroborated by medical evidence, and a part from the Appellant's witness;
- 22.4 That the Learned magistrate erred by rejecting Appellant and his witness evidence thereby accepting respondent's witness evidence.

23.

It was submitted that the allegation that the magistrate misdirected himself in finding that the onus rested with the Appellant to prove that he was unlawfully and wrongfully arrested did not have any merit.

24.

It was submitted that the court finding was that “ Court finds that as far as behaviours of the police, there is nothing untoward the way they acted and in brief the court finds that the plaintiff has not succeeded in proving his case on balance of probability. In brief, the courts dismiss the plaintiff's action with costs”

25.

It is trite law that in every situation where a claim of unlawful arrest is made, the onus to prove lawfulness of the arrest is on the Respondent (Defendant).

26.

Our courts have held, with regard to onus, and in the instance of an arrest, that the onus rested on the defendant to justify the said arrest. In Minister of Law and order and Others v Hurley and Another [1986 (3) SA

568 (A) at 589 E-F], Rabie CJ stated that *'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law'*

27.

It was respectively submitted that the arresting officers discharged the onus rested upon them of proving that their actions was justified in law and they acted in accordance with law. **See paragraphs 6-8 above.**

28.

It was further submitted that the allegation in respect of the second ground of appeal " that the learned magistrate erred in disregarding that the onus of proof that the arrest was lawful vested on the Respondent was incorrect and does not have any bases.

29.

It was submitted that the learned magistrate applied the correct principle of law in respect of the third allegation of the ground of appeal for assault.

30.

The onus of proving that the Appellant (plaintiff) was assaulted rested on the Appellant. When considering whether the appellant's proved the alleged assault by the police officers, the evaluation must depend largely upon the evaluation of the evidence, inferences from other facts and upon the probabilities. See Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another 2002 (4) SA 408 (SCA) at par 24.

31.

The Respondent's witness denied that the appellant (plaintiff) was assaulted, the appellant failed to give a detailed account on how he was assaulted, which assault is still denied for the following reasons:

- 31.1 The officers concerned denied having assaulted the appellant;
- 31.2 The Appellant failed to demonstrate to the court that he still bears the marks of the injuries if he was assaulted
- 31.3 The Appellant failed to lay a charge of assault against the arresting officers;
- 31.4 The Appellant's failed to produce medical evidence and or treatment to court of his injuries if he was assaulted;
- 31.5 The Appellant in his reply to the Respondent's further particulars alleged that assault did not form part of the arrest. This point was raised during cross examination, in which the appellant was asked

as to whether the alleged assault formed part of the arrest? In his response the Appellant said that yes the assault formed part of the arres. **See Record page 17 paragraph 10.**

32.

In light of the above, it was submitted that Appellant failed to discharge onus resting upon him to prove that he was assaulted and therefore, the magistrate was correct in finding that Appellant failed to proof his case of assault.

33.

It was submitted that the magistrate was correct in rejecting evidence of the Appellant witness as same was not corroborated by any medical evidence and as same were baseless.

34.

### **RESPONDENT'S SUBMISSIONS**

In light of the above, it was respectively submitted that the trial court was correct in dismissing the Appellant claim with costs for the following reasons:

- 34.1 The police officers are permitted to arrest a suspect without a warrant by section 40(1)(b) of the Criminal Procedure, which provides that a peace-officer may, without a warrant , arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1
- 34.2 The police officer arrested the Appellant after they received information that the Appellant committed house robbery and attempted murder.
- 34.3 The Respondent admits that on the 5th January 2009, the Appellant was arrested , but denies that the arrest was unlawful by virtue of the following facts and circumstances:
- 34.3.1 The arresting officer was a peace officer as defined in section 1 of Act 51 of 1977 at the time of the arrest;
- 34.3.2 On the date and at the time alleged the arresting officer had a reasonable suspicion that the Appellant was involved in the house robbery and attempted murder, after they got a call from the informer saying that the car they were looking for is at Morake Supermarket. There was a reported case of house robbery and attempted murder.
- 34.3.3 The offence listed in schedule 1 includes house robbery and attempted murder.
- 34.3.4 The police officer was therefore entitled to arrest the plaintiff without warrant in tems of section 40 of Act 51 of 1977
- 34.3.5 The arrest was therefore lawful.



35.

**AD RELIEF SOUGHT/PRAYER**

It is the Respondent's submission that Appellant's appeal be dismissed with costs.

36.

**ALTERNATIVE PRAYER**

In the event the Honourable Court found that the Appellant's arrest and detention was unlawful which was denied, the Respondent submitted that an amount of R20 000,00 will be fair and reasonable in the circumstances.

37.

**In MVU v Minister of Safety and Security and Another 2009 (6) SA 82 GSJ (07/20296)[ZA GPJHC5:** The Plaintiff, a Police Officer was held in custody during the night of 23 September 2004 and set free the following day in the afternoon on warning. The court awarded him R30 000,00

38.

**In Minister of Safety and Security v Tyulu 2009 (5) 85 (SCA):** The Respondent, a 48 year old Magistrate, was unlawfully arrested and detained on a Friday night on a charge of drunken driving. He was released on his own recognition the following day. The full bench of the High Court, reduced the trial court's award of R280 000.00 to R50 000.00. On appeal the court reduced the award to R15 000.00

39.

**Minister for Safety and Security v Scott (969/2013) [2014] ZASCA 84 (30 May 2014)** the first Respondent wrongfully arrested and detained for about nine hours he was awarded R75 000 altered to R30 000 by the SCA.

40.

**Minister of Safety and Security v Seymour 2006 SA 320 (SCA),** the respondent, a 63 year old man, had been unlawfully arrested and imprisoned by the state for **five days**. The high court awarded him general damages in the amount of R500 000. On appeal, this court held that an appropriate award was the sum of R 90 000.00

41.

In Rudolph & others v Minister of Safety and Security & another 2009 (5) SA 94 (SCA) the Supreme court of Appeal, granted the first and second appellants R100 000 each for an unlawful arrest without a warrant and the consequent unlawful detention which **lasted three nights**. The court noted the conditions of their detention: The appellants were arrested and detained under extremely unhygienic conditions in Pretoria Moot Police Station. The cell in which they were held was not cleaned for the duration of their detention. The blankets there were given were dirty and insect – ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water throughout their detention. The first appellant , who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members.

42.

It must be clearly stated that a consideration of quantum is eminently the court's decision having considered all evidence, submissions and the circumstances of each case dealt with on its own merits. Decisions of higher division of the courts serve as guidelines to be properly followed by a judiciously considered discretion. These cited cases will be considered at the right juncture of this judgment.

43.

### **CONSIDERATION OF ALL EVIDENCE AND SUBMISSIONS**

- 43.1 From the foregoing it is abundantly clear that the Plaintiff was arrested on the 5<sup>th</sup> February 2009 and further detained at the Vaalbank Police Station. The arrest and detention was not disputed except for its unlawfulness.
- 43.2 The trial court heard evidence from the Respondent's witnesses and more particularly the arresting officer W/O Bushimane. It was further not disputed that the arrest was without a warrant but pleaded a justification of the arrest as envisaged by section 40(1)(b) of the Criminal Procedure Act of 1977.
- 43.3 The court had to determine whether the arresting officer had entertained a reasonable suspicion in accordance with the jurisdictional requirements as set out in the Duncan case and Others. The test of reasonableness has been the ancient *bonus paterfamilias*, a reasonable man's test. The test has become in use for years and remains reasonable. There is no law or case law which has set the standard higher than this.
- 43.4 Plaintiff's counsel submitted that the arresting officer did not have sufficient information or description of the suspects of the reported case of house robbery and attempted murder:
- 43.4.1 The counsel based his submissions on the fact that the arresting officer conceded, in cross-examination of the

trial court that he did not have sufficient description of the suspects of the reported case; and

43.4.2 That whether the suspects were driving a Mazda or Ford.

43.5 This is in stark contrast to the evidence of Plaintiff's wife who testified in the trial court, that the arresting officer came to their place of abode looking for the Plaintiff a day before his arrest. This demystifies the submission of the lack of sufficient description of the suspect of the reported case.

43.6 On further receipt of a tip-off from an informer as to the whereabouts of the suspects, the Plaintiff was approached and arrested soon thereafter.

43.7 There is no prescribed time of entertaining a suspicion except that it must be reasonable and within reasonable time. The arrest of the Plaintiff could not be faulted by any subsequent submission in this case.

43.8 The cited cases above, more especially in relation to the lawfulness of the arrest are based on different circumstances but the jurisdictional requirements are accepted as a guideline to such cases for which I agree.

43.9 The evolution of our jurisprudence remains consonant to the standard of a reasonable test, the objective one. The arresting officer is not expected to entertain reasonable belief or suspicion that a finding of guilt might emanate from the arrest before effecting it. That would be setting a higher standard for a peace officer. It was re-emphasized in the recent case of Scheepers v

**Minister of Safety and Security 2015(10 SACR 284 (ECG)**

where the court expressed the view that " to place a higher standard on peace officers would unnecessarily discourage peace officers from arresting offenders, who are suspected of having committed offences (my own words). This judgement (Scheepers) will go a long way to establishing consistency in similar cases more especially in that section 40(1)(b) of the Criminal Procedure Act does not set a higher standard on a peace officer to consider before effecting an arrest and a mere fact that an arrested person who is later released without being charged or before appearing in court will not automatically render the arrest unlawful. This can lead to a myriad unnecessary litigation. I therefore agree with the Scheepers case which finds application in this one.

44.

Our case law have spoken loud and clear that where there is another way of getting a suspect to justice in a less invasive manner than detention the arresting officer will weigh such options to avoid a detention. This was a view expressed by Msimang, J and Madondo, J in the full bench of the Natal Provisional Division in the case of **Le Roux v Minister of Safety and Security 2009 (4) SA 491 (N)** paragraph 35: " If an accused is not a danger to society, will stand trial, will not harm others or be harmed by them, and may be able and keen to disprove the allegations against him, an arrest will not be ordinarily be an appropriate way of ensuring the accused's presence in court ..."

This view obliges the police to consider in each case when a charge is

laid for which a suspect might be arrested.

In this matter the Appellant was informed by his wife that the police came looking for him and instead of enquiring from the police station he chose not to do so, until he was accosted by the police with the suspicion that he and his friends have a firearm in their possession. The arrest of the Appellant on suspicion of having committed a house robbery and attempted murder led to his arrest. His arrest in this situation could not be classified as unreasonable, and therefore justifiable in this circumstance.

45.

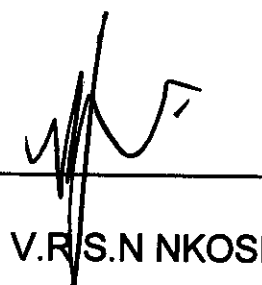
### **FINDING**

Having considered all the submissions and evidence in its totality I am of the view that the court a quo was correct in its decision to dismiss Plaintiff's case. It is further my considered view that his arrest and detention was justified in terms of Section 40(1) (b) of the Criminal Procedure Act 51 of 1977, as amended.

**COURT ORDER**

The appeal is dismissed with costs.

Signed and dated on this 18<sup>th</sup> day of February 2016

  
V.R.S.N NKOSI

Acting Judge of the North Gauteng High Court

I agree

  
N.V KHUMALO

Judge of the North Gauteng High Court

**Adv. K.K Kekana for the Appellant**

**Briefed by The State Attorneys**

**Adv. R Matika for the Respondent**

**Briefed by Maubane Attorneys**