

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

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

CASE NO: 56822/13
12/7/2019

In the matter between:

MAASEFANE PHILIP MATLOU

PLAINTIFF

And

MINISTER OF POLICE
DIRECTOR OF PUBLIC PROSECUTIONS

FIRST DEFENDANT
SECOND DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

The plaintiff issued summons against the defendant for damages resulting from his unlawful arrest, his unlawful detention. The said arrest occurred on the evening of 13 December 2012, by members of the South African Police Service, acting within the course and scope of their employment with the first defendant.

ISSUES FOR DETERMINATION

[2] At the commencement of the proceedings the parties by agreement informed the court that only two issues falls to be determined by the Court:

2.1 Whether or not, the arrest and subsequent detention of the plaintiff was lawful and

2.2 in the event of the Court making a finding on the first question in favour of the plaintiff, what amount in damages is to be awarded to the plaintiff.

ONUS

[3] It is trite an arrest or detention is *prima facie* wrongful and unlawful. It is for the defendant to allege and prove the lawfulness of the arrest and subsequent detention.¹ A defendant who therefore pleads a justification for an arrest (*such as the present defendant*) as a result not only carries the *onus* to prove the lawfulness of such arrest² but also further carries the *duty* to begin.

DEFENCES

[4] In paragraphs 4 and 5 of the Amended Plea the defence by the defendant was pleaded to be as follows:

"AD PARAGRAPH 4

Save to admit that the Plaintiff was arrested on 13 December 2013, the First Defendant avers that:-

4.1 *The Plaintiff was identified by the complainant in the criminal case as the person that committed robbery at her house and took a large sum of money.*

4.2 *The Plaintiff had allegedly committed a schedule 1 offence which is armed robbery.*

¹ Lembo v African National Congress 2002 (5) SA 668 (SCA) at para 32

² Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A): dictum at

AD PARAGRAPH 5

The defendant denies the allegation contained in this paragraph and accordingly put the plaintiff to proof thereof and further avers that:-

5.1 The Plaintiff was arrested at the instance of the complainant for the alleged crime he committed.

5.2 He was arrested in terms of Act 51 of 1977 since he committed a Schedule 1 offence.

5.3 He was further identified by the Plaintiff as the person that allegedly committed the robbery.

LAW

[5] The defence was broadly based on the provisions of section 40(1) of the Criminal Procedure Act³ (*the Act*). The section permits the arrest of a person without a warrant to be carried out by a peace officer under certain prevailing circumstances. It lists a total of seventeen (17) such instances under subsections (a) to (q) and it follows for a defendant who places reliance on section 40(1) at least one or more of such mentioned circumstances ought to be present before an arrest without a warrant can be carried out and considered justified. It should also be borne in mind; certain instances listed under the various subsections mentioned in section 40(1) have additional requirements listed which also have to be met in order to succeed with such specific defence. By way of illustration; a peace officer who carries out an arrest without a warrant in respect of a Schedule I listed offence, would have to have formed a reasonable suspicion a Schedule 1 listed offence had been committed,⁴ by the person to be arrested.

EXPOSITION OF EVIDENCE

[6] Briefly the facts of this case can be summarised as follows: On the 13 December 2013 Detective Netshabako testified that he received a telephone call

589E-F applied

³ Act 51 of 1977

from the complainant in a previously reported house robbery case wherein he was assigned the investigating officer. During such telephone call the complainant reported to him that the alleged perpetrator had been seen walking within the vicinity of the Musina district. Upon receiving such information, he together with his colleague Sergeant Makhondo proceeded to the Musina central business district where he met the complainant who pointed out to him the plaintiff as the alleged perpetrator. He together with his colleague, then approached the plaintiff, identified themselves as police officers and placed the plaintiff under arrest for the alleged offence reported to have been committed against the complainant. The plaintiff was thereafter taken to the police station, processed and the following day he made his first appearance in court. On this day the matter was postponed to another date and on the next occasion the matter was withdrawn against the plaintiff at the instance of the complainant. Mr. Netshabako further testified that that plaintiff was arrested without a warrant as it was reported to him, that he had committed a schedule 1 offence and that his identity and whereabouts was unknown to the police prior to the day upon which his arrest was effected. It is for this reason that he was unable to apply for a warrant prior to the day upon which he arrested the plaintiff, as such warrant would not have been executed upon.

During cross-examination, Detective Netshabako conceded that prior to affecting an arrest that he should verify information obtained about the suspect as far as possible and where necessary he should afford a hearing to both sides before affecting an arrest. He further conceded that in the present instance the complainant was paid a visit prior to the day when the arrest was effected and gave a description of one of the suspects, which description was recorded in the investigating diary of the case docket. He further conceded that the telephone call which he testified was made by the complainant was in fact received by his colleague and that he was not the recipient, but that his colleague had relayed the contents of the call to him. As to the actual pointing out of the plaintiff, he testified that the plaintiff was at a distance of 10 metres when he was pointed out

⁴ See in this regard the provisions of Section 40(1)(b).

by the complainant but that the identity of the plaintiff had not been verified by the complainant after the arrest as she had left the scene. The witness also conceded that although he was obliged to verify the identity of the suspect prior to affecting his arrest that he did not do so, as the arrest was preceded by a pointing out by the complainant and that he was going to interrogate the plaintiff after having affected his arrest. The witness also denied that at the scene that he had failed to inform the plaintiff as to the reason as to why he had placed him under arrest.

[7] Constable Abashani Josua Mukona was the next police officer called as a witness. He in broad terms confirmed the evidence as tendered by Constable Netshabako, save for some minor discrepancies. These discrepancies relate to whom it was who received the telephonic call from the complainant, the distance at which the complainant had pointed out the plaintiff and that the complainant was told by Constable Netshabako to leave their vehicle at the time at which he disembarked their patrol vehicle to go and arrest the plaintiff. During cross-examination the witness also testified that there existed no need for the complainant to identify the suspect after the arrest was effected as she had pointed out the suspect prior to his arrest. He was also adamant that reasonable grounds existed to effect the arrest as a prior case of house robbery had been opened prior to the day when the complainant had pointed out the suspect. Constable Mukona also denied that when the suspect was arrested, that the police was remiss in having informed him the reason as to why they were affecting the arrest.

[8] The evidence of the plaintiff, Mr Masefane Phillip Matlou can be summarised as follows: On the day of his arrest he was walking within the central district of Musina after having collected some post from the local post office. As he was walking along, he was approached by a vehicle from which two police officials emerged. They were not in uniform. They had their firearms drawn. He was requested to lift his hands in the air and started questioning as to the contents of the school bag which he was carrying.

He informed them that he had letters inside the schoolbag. They identified

themselves as police officials and he was further informed that he was being arrested for being a suspect. When he questioned them as to the reason as to why he was a suspect, he was informed that they will further explain at the police station. No further details were given to him as to the reason for his arrest. He was then transported to the police station and upon arrival he was informed that he had been pointed out by the complainant as one of the suspects who committed a house robbery on 3 December 2013. He was then further detained at the Musina Police Station as from the Thursday and only taken to court the following Tuesday. The plaintiff described his condition of detention as deplorable. He was kept in a holding cell with 15 other detainees and only given a sponge and dirty blankets to sleep with. The abolition facilities had no door and it was very smelly and during his period of detention he was also assaulted. Following his assault he was threatened not to report same to the police as he would be killed if he would do so. Mr Matlou further testified that he was a 53 year old married man and a father of three children. He was a soldier and a member of the South African Defence Force for the past 25 years. He further testified that whilst he was kept in detention, his house was searched which traumatised his family who desperately tried to secure bail for him. He also testified that during his detention at the Police Station he was almost sexually violated and because he refused his head was submerged inside a toilet and flushed.

During cross-examination Mr Matlou was confronted with the omissions made by his counsel in having failed to put certain aspects of his version to the witnesses of the defendant. Mr. Matlou further conceded that he could not dispute that he was arrested after the complainant had pointed him out to the police officers in question. During cross-examination he did however concede that he was a well-known man in society and that Constable Mukona had even see him the previous weekend prior to his arrest when he was officiating a soccer game being played in the community.

[9] This then the totality of the evidence presented before the Court.

[10] As previously mentioned the defendant carried the onus that the arrest was justified under the circumstances. In this regard it is apposite to record the

provisions of section 40(1) (b) of the Criminal Procedure Act, which reads as follows:

Section 40(1) (b).

'(1) A peace officer may without a warrant arrest any person-

- (a) ;*
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody;*

.....

.....

[11] It should also be mentioned, the subsections listed under section 40(1) clearly envisages various circumstances which permits the carrying out of an arrest without a warrant by a peace officer and it thus follows reliance can be placed on either one or more of such subsections provided all requirements are met as listed in a specific subsection.

COMMON ISSUES

[12] The following facts were undisputed between the parties:

12.1 The arrest of the plaintiff was carried out by members of the South African Police Service acting within the course and scope of their employment with the defendant and that the arrest of the plaintiff was carried out without a warrant and pursuant to a pointing out having been made by the complainant.

12.2 Following the arrest of the plaintiff that he was further detained at the Musina Police Station until his release on his second court

appearance.

ANALYSIS OF DEFENCE: UNLAWFUL ARREST AND DETENTION

[13] In *Duncan v Minister of Law and Order* 1986 (2) SA 805 at 818F-H, The Court established the jurisdictional facts which must exist and be proven before an arrest can be effected without a warrant based on a reasonable suspicion. These jurisdictional facts are listed as follows:

- 13.1 The arrestor must be a peace officer;
- 13.2 The peace officer must entertain a suspicion;
- 13.3 It must be a suspicion that the arrestee committed a Schedule 1 offence and
- 13.4 The suspicion must rest on reasonable grounds.

[14] To decide what a *reasonable suspicion* is, there must be evidence that the arresting officer formed a suspicion which is objectively sustainable.⁵

[15] In addition thereto, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a schedule 1 offence. In the decision *Mabona and Another v Minister of Law and Order and Others*⁶ Jones J, said the following:

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights

⁵ *Mvu v Minister of Safety and Security & Another* 2009 (2) SACR (GSJ) at [9]

⁶ 1988 (2) SA 654 (SE): dictum at 658E-G applied

and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient 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.'

[16] The peculiar circumstances of a particular case the arresting officer is presented with will therefore determine whether such suspicion would be reasonable or not. The test as to whether the suspicion of the person effecting the arrest is reasonable must be approached objectively.⁷

[17] Furthermore, in general the object of an arrest must be to bring the arrested person before a court to be charged, tried and then either convicted or acquitted. See in this regard the decision *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) at [28]. But if the person effecting an arrest is a peace officer, and he entertains a reasonable suspicion that a person has committed a First Schedule offence, it is not necessary that he intends to bring the arrested person before a court in order to charge him. It is sufficient in such circumstances to intend to detain the suspect in order to first investigate the case and then, depending on the result of the investigation, to either bring him before a court to be charged or release him. This qualification of the general rule on the one hand results from the element of uncertainty implicit in the concept of 'suspect' in section 40(1)(b).

[18] The question to then be answered; is what was the reasonable suspicion entertained by Constable Netshabako on the day in question? On his evidence he did not receive the telephone call made to the station by the complainant but

⁷ See in this regard *R v Van Heerden* 1958 (3) SA 150 (T) at 152E

rather his colleague. Following this report he requested his colleague to accompany him to the central business district in order to go and effect an arrest. On his testimony, the plaintiff was pointed out by the complainant at a distance of about 10 metres whereby he merely approached the plaintiff and excused the complainant prior to affecting the arrest. On his testimony no personal details were asked of the plaintiff, such as his address, his name or even anything about his whereabouts on the evening that the alleged offence was committed. On the day and prior to affecting the arrest the plaintiff was merely asked as to the contents of the schoolbag, which he was carrying. Constable Netshabako, clearly held the view that verification in relation to the identity of the plaintiff was going to take place after the arrest was effected.

[19] This, the court finds to be improbable. In the present instance the complainant was present and seated inside the vehicle of the police prior to the arrest having been effected. It therefore created a favourable and most conducive opportunity for the arresting to analyse and verify the information at his disposal as the complainant in the present instance was present. This verification however the arresting officer failed to do and it follows that it cannot be concluded that a reasonable suspicion was indeed formed by him before he effected the arrest.

[20] As the defendant carried the *onus* to justify the arrest of the plaintiff and as the evidence presented before me, could not establish such a justification, I cannot but conclude the arrest of the plaintiff was unlawful and thus rendered her subsequent detention also unlawful.

[21] As to the conditions under which the plaintiff was detained no evidence in rebuttal was presented by the defendant. A court in determining the amount of damages to be awarded for a person's deprivation of liberty falls within the discretion of the court.

[22] In the decision *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26 at 930F the Supreme Court of Appeal expounded on the various factors to be taken into account by a court in making a determination for the appropriate award to be given by a court. To list but a few, a court will consider the circumstances under which the arrest in question occurred, the standing of the plaintiff, the importance of the right of personal liberty, the injury suffered by

the plaintiff and his conditions of detention and period of detention. To all these factors the plaintiff presented evidence before this Court.

ORDER

[23] Given the totality of the evidence presented before this court and having regard to the relevant case law on point I am of the opinion the following award would be appropriate under the circumstances:

23.1 The First Defendant will be liable to pay the Plaintiff the amount of R 300 000.00 (Three Hundred Thousand Rand) within thirty days in respect of the Plaintiff's claim.

23.2. In the event of the aforesaid amount not being paid timeously, the First Defendant shall be liable for interest on the said amount at the rate of 10% per annum, calculated from 15 (fifteen) calendar days after the date of this order, to date of final payment.

23.3. The First Defendant is ordered to pay the Plaintiff's party and party costs in respect of the determination of the issues of merits and quantum on the prescribe High Court party and party scale, either taxed or agreed, up to and including date hereof, which costs will inter alia include but is not limited to:

23.3.1 The costs of counsel for attending to the trial as well as his costs for preparation for trial, drafting for pre-trial minutes, preparing for the pre-trial conference and attending the pre-trial conference;

23.3.2 The costs of the Plaintiff's attorney and local correspondent, which costs inter alia include but not limited to:

23.3.2.1 The costs of the preparation of the pleadings, notices, pre-trial discovery, court orders and trial bundles as per the directive, including the indexing, pagination and preparation and preparation thereof and providing copies of same to the Honourable Court, the First Defendant and the Plaintiff's counsel;

23.3.2.2. Necessary travelling costs and expenses (time and

kilometres;)

22.3.2.3. Preparation for trial and attendance at court which shall include all costs previously reserved;

23.3.2.4. The costs of attendances to all pre-trial conferences and drafting of all pre-trial minutes;

23.3.2.5. The reasonable travelling and accommodation costs of the Plaintiff, who is hereby declared a necessary witness;

23.3.2.6. The costs of the interpreter for the Plaintiff.

23.4 The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

23.4.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the First Defendant's attorney of record; and

23.4.2 The Plaintiff shall allow the First Defendant fourteen (14) court days to make payment of the taxed costs;

23.4.3 In the event that payment is not affected timeously, the Plaintiff will be entitled to recover interest at the rate of 10% per annum on the taxed or agreed costs from date of allocator to date of final payment.

23.5 The amounts to be paid mentioned above shall be paid into the account of the Plaintiff's attorney of record ERWEE INCORPORATED, by direct transfer into their trust account, details of which are the following:

NAME: ERWEE ATTORNEYS INCOPORATED

BANK: STANDARD BANK

ACCOUNT NUMBER: [...]

BRANCH CODE: MUSINA 05 25 49

REFERENCE: HE/MK/ES0051

23.6 When effecting payments, the above mentioned reference is to be quoted.

23.7 It is recorded that there exists no contingency fee agreement.

COLLIS J

JUDGE OF THE HIGH COURT

Date of Hearing: 06 December 2018

Date of Judgment: 12 July 2019

Counsel for Plaintiff: Adv. M. Fourie

Instructing Attorney for Plaintiff: Erwee Incorporated

Counsel for Defendant: Adv. B. Vibi

Instructing Attorney for

First Defendant: State Attorney Pretoria