

**THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MBOMBELA**

**CASE NO. 4626/2021**

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

DATE: **06/09/2024**

SIGNATURE

In the matter between:

**N[...] F[...] M[...]**

**(OBO A[...] A[...] B[...] P[...])**

**PLAINTIFF**

and

**MINISTER OF POLICE**

**FIRST DEFENDANT**

**THE NATIONAL COMMISSIONER OF POLICE**

**SECOND DEFENDANT**

**MPUMALANGA PROVINCIAL COMMISSIONER**

**THIRD DEFENDANT**

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**JUDGMENT**

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**MSIBI AJ**

**Introduction**

[1] The plaintiff, instituted a claim for damages based on unlawful arrest and detention against the Minister of Police (the first defendant), the National Commissioner of Police (the second defendant), and the Mpumalanga Provincial

Commissioner (the third defendant). The plaintiff was arrested by a police officer and detained together with her four months old baby on the 14<sup>th</sup> of August 2021. On the 16<sup>th</sup> of August 2021 both were released without her appearing in court. The defendants plead that the officer who effected the arrest acted in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The court is called upon to decide whether there was a reasonable suspicion that the accused committed a Schedule 1 offence and if so whether the plaintiff's arrest and detention was lawful. Secondly whether the child's detention was lawful.

[3] The trial dealt with the merits and the quantum.

### **Case for the Defendant**

[4] Mr Eddie Mthandeni Ndlazi is a Detective Constable in the South African Police Service (SAPS) attached to Matsulu Police Station. He was on duty on 14 August 2021 when he received a docket that was opened by B[...] P[...] wherein he laid a charge of malicious damage to property. There was a witness statement of Mr Bheki Fakude (Mr Fakude), the complainant's neighbour which was marked A3.

[5] In his statement, Mr Fakude stated that he saw the plaintiff going into the complainant's premises at about 18:00. He thought that the complainant was in his house. After a few minutes, the complainant came to his house and made a report to him that his Television has been damaged and there was a stone in the house. Thereafter, Mr Fakude told him that he saw his girlfriend minutes earlier going into his house.

[6] The complainant took Constable Ndlazi to his house in order for him to see the damage to his Television screen. On arrival he could see that the Television screen was damaged. He could see that it was struck with a rock from the direction of the door. The rock was on the floor in front of the Television. The burglar door was still locked, the door was not locked. He went to the accused's home in the company of the complainant. The plaintiff was very angry saying that the complainant who is her ex-boyfriend had bewitched her and as a result she cannot have intimate contact with other men, and that he had to undo what he did to her. The accused admitted to

damaging the Television screen, adding that she will continue to trouble and harass him. Constable Ndlazi then arrested her and took her to the police station. He decided to detain her because she was angry, and she was threatening to cause further harm to the complainant.

[7] While at her home, Constable Ndlazi asked the plaintiff to leave the child at home, and she refused to do so. He could have taken the child to a place of safety, but the plaintiff refused. He arrested her only in the presence of her mother and the complainant, he did not handcuff her. He had no other option except to take the plaintiff into custody for her safety and that of the complainant. The plaintiff and her child were taken to Matsulu Court on Monday morning of the 16<sup>th</sup> of August 2021. Her case was not enrolled by the Prosecutor, she was released without appearing in court.

[8] During cross-examination, Constable Ndlazi conceded to the fact that he had no eyewitness who saw the plaintiff damaging the Television set. It was put to him that the complainant was his friend, he had an ulterior motive when arresting the plaintiff. The witness insisted that both the complainant and the plaintiff were unknown to him. He had reasonable grounds to arrest and detain the plaintiff. The witness conceded to the fact that he had a discretion whether to grant her bail or not. He could not grant her bail because the value of the damaged property was above R3 000.00. As a Constable at that time, he did not have the discretion to grant bail where the value of the damaged item was above R3000.00. Constable Ndlazi further stated that after interviewing the plaintiff he reached a conclusion that the plaintiff will return to the complainant's home and cause further damage.

### **Case for the Plaintiff**

[9] The plaintiff testified that on 14 August 2021 she was arrested and detained together with her 4 months old baby. She was released on 16 August 2021 without appearing in court. While in custody she was detained in a cell that was dirty and cold since the weather was also cold. She and her baby had to use cold water. They slept on a dirty sponge next to a toilet. They also used dirty blankets, as a result their bodies were itchy. She personally felt judged as a criminal by people. Upon their release the child had rash and flu. The plaintiff denied that she was afforded an

opportunity to leave the child at home. She never refused to have the child taken to a place of safety or her mother.

[10] She further stated that she knew the arresting officer very well. He was a friend to the complainant. She believes that the officer took her ex-boyfriend's side and arrested her. She disputed the fact that a neighbour saw her going to the home of the complainant. The officer never gave her an opportunity to state her side. Her constitutional rights were not explained. She was only handed a document pertaining to her rights. The plaintiff was referred to the Notice of Rights in terms of the Constitution which was marked Exhibit A. She signed the notice at 20:20 on the 14<sup>th</sup> of August 2021.

[11] On the date that the Television was damaged, she was not in Matsulu. She stated that her incarceration and that of her child were unjustified. She is therefore claiming compensation for herself and her child. During cross-examination she indicated that her highest standard of education was matric. She is able to read and write, she conceded that on the date in question she understood her constitutional rights as reflected in the Notice of Rights and she could enforce them. She further conceded that on the date of the commission of the offence, she left Matsulu and went to attend a funeral in Nkomazi. She left Matsulu at 15:00 on the date in question. Her mother was present during her arrest but she could not leave the child with her due to the fact that she was on a wheel chair.

[12] With this evidence, the case for the plaintiff was closed.

### **Common facts**

[13] It is common cause that the plaintiff was arrested and detained with her baby on 14 August 2021. Both mother and child were released on 16 August 2021, without appearing in court. The arrest was effected by Constable Ndlazi of Matsulu Police Station, who arrested her on a charge of malicious damage to property.

### **Issues for determination**

[14] Was the plaintiff's arrest and detention lawful? In order to answer this question, the court must ask itself if there was a reasonable suspicion that the

plaintiff damaged the property of the complainant on the date in question. Was the child's detention lawful? Findings in these disputes will determine the lawfulness or otherwise of the plaintiff's arrest and detention.

## **Onus**

[15] As a general rule the onus to prove the lawfulness of an arrest or detention rests on the defendant.<sup>1</sup>

## **Applicable law**

[16] As for circumstances under which a peace officer can arrest a person without a warrant of arrest section 40(1) of the Act provides as follows:

“40. Arrest by peace officer without warrant

(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 the offence of escaping from lawful custody.”

## **Evaluation**

[17] It is necessary to point out that the plaintiff's arrest and subsequent detention are two separate acts. In *Rowan v Minister of Safety and Security*,<sup>2</sup> the High Court referred to *Mahlongwana v Kwatinidubu Town Committee*,<sup>3</sup> wherein a distinction was made between arrest and detention. The court stated as follows:

“It is clear that the mere act of arrest itself involves deprivation of liberty, but our law recognises a clear distinction between the act of arrest, which may occur anywhere, and the act of detention in custody, which involves incarceration after the arrest, and pending the taking of further procedural

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<sup>1</sup> *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA) para 21.

<sup>2</sup> [2011] ZAGPJHC 11; [2011] 3 All SA 443 (GSJ) para 57.

<sup>3</sup> 1991 (1) SACR 669 (E) at 675D-F.

steps. The power granted to detain may in particular circumstances include the power to arrest. See *R v Moquena* 1932 OPD 52. However, in my view, the power to arrest does not include the power to detain save insofar as such detention may be a concomitant to the arrest itself. Arrest is the act by which a free person is apprehended, if necessary by the use of force. Once the arrest has been effected, the authority of the person effecting the arrest insofar as any further detention is concerned, ceases. *S v Van Vuuren* 1983 (4) SA 662 (T) at 668E. Any subsequent detention, which involves restraint in confinement for a specified or unspecified period of time, must be in terms of an authority to detain, and is not automatically conferred, without such authority, on the person authorised to arrest.”

### **The arrest**

[18] Section 38(1) of the Act provides that arrest is one of the four methods of securing the attendance of an accused in court for purposes of trial. Because of its intrusive nature on the privacy and liberty of the arrestee, an arrest has to be effected on the authority of a warrant, or, under certain circumstances, without a warrant. Consequently, the onus rests on the arrestor to justify an arrest. In *Minister of Law and Order and Others v Hurley and Another*,<sup>4</sup> the court stated as follows:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.”

[19] The Court, in *Duncan v Minister of Law and Order (Duncan)*,<sup>5</sup> set out four jurisdictional requirements which flow from section 40(1) of the Act, which authorizes arrests without a warrant. They are: that the person arresting must be a peace officer, who entertained a suspicion that the suspicion was that the arrestee had committed a schedule 1 offence, and that the suspicion rested on reasonable grounds. Applying these jurisdictional facts to the matter at hand, Constable Ndlazi was a police officer, who entertained a suspicion after the complainant opened a

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<sup>4</sup> 1986 (3) SA 568 (A) at 589E-F.

<sup>5</sup> 1986 (2) SA 805 (A) at 818G.

case of malicious damage to property against the plaintiff. Malicious damage to property is a criminal offence, punishable in law. The suspicion rested on reasonable grounds since there was a witness who also made a statement placing the plaintiff at the crime scene. There is evidence that the plaintiff threatened to further harm the complainant until her demands are met. It is thus not disputed that, when the plaintiff was arrested, the four jurisdictional prerequisites of s 40(1) of the Act were present.

[20] In this matter Constable Ndlazi testified that he visited the home of the complainant and established that his Television set was indeed damaged. Meaning that he first satisfied himself that a crime had been committed. He also saw the rock that was used to damage the Television set. He considered the information received from the complainant's neighbour, which identified the plaintiff as the suspect. He then went to the home of the plaintiff in the company of the complainant. According to Constable Ndlazi, the plaintiff admitted that she did damage the complainant's property and threatened to do him more harm unless he undoes what he did to her, which made it difficult, if not impossible for her to be intimate with other men. This aspect of the defendant's version is denied by the plaintiff. The plaintiff argues that there is no eyewitness who saw her damaging the complainant's property. The complainant, his neighbour and the officer did not witness the commission of the offence. It is true that there is no direct evidence that the plaintiff was seen damaging the Television set. The objective facts or circumstances that were reported to the arresting officer, taken together with the alleged threats that were uttered by the plaintiff, without a doubt established a reasonable suspicion that the plaintiff was indeed the person that damaged the complainant's Television set.

[21] The next question that arises is whether Constable Ndlazi, in executing the arrest, exercised a discretion. In *Minister of Safety and Security v Sekhoto (Sekhoto)*,<sup>6</sup> the court established three important principles in the exercise of a discretion when effecting an arrest. The first is that once the required jurisdictional facts that flow from s 40(1) of the Act, as stated in *Duncan* are present, a discretion arise as to whether or not to arrest. Second, and related to the first, is where a party alleges the failure to exercise a discretion to arrest, that party bears

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<sup>6</sup> 2011 (1) SACR 315 (SCA).

the onus to prove that allegation. Third, that the general requirement is that any such discretion must be exercised in good faith, rationally and not arbitrarily. The court in *Sekhoto* further stated thus:<sup>7</sup>

“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 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 and so long as the discretion is exercised within this range, the standard is not breached.” (Footnotes omitted)

[22] The officer did not act on the word of the neighbour alone and arrested the plaintiff, he conducted some investigations to satisfy himself if indeed a crime was committed or not. He even gave the alleged suspect an opportunity to explain the allegations against her. Only after having gathered enough information, and having listened to both parties did he exercise a discretion whether to arrest or not. In his own words he arrested the plaintiff after he had interviewed her and seen the need to stop her from carrying out her threats which she uttered in front of him despite the fact that he was a law enforcement officer. This illustrates the fact that he did apply his mind to the surrounding facts of the matter before effecting the arrest on the plaintiff.

## **Rights**

[23] The plaintiff contends that the arresting officer never informed her of her right to be released on bail. This version, which was put before the officer under cross examination, was refuted. Constable Ndlazi testified that at the time he arrested the plaintiff, police bail could not be considered in respect of malicious damage to property valued above R3 000.00. The value of the damaged Television set was R10 000.00. He further testified that he informed the plaintiff at the police station, of her right to be released on bail. In support of this evidence, he referred her to the

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<sup>7</sup> Ibid para 39.



Notice of Rights which he handed to the appellant who read and signed it. Item 3(e) of the notice of rights reads as follows:

“(3) As a person arrested for the alleged commission of an offence, you have the following rights: . . . (e) you have the right to be released from detention if the interest of justice permit, subject to reasonable conditions.”

[24] The plaintiff confirmed the evidence of Constable Ndlazi, that she was given the Notice of Rights document and that she read and signed it. She never informed the police officer that she did not understand the Notice of Rights, nor did she ask the officer to explain the contents to her. When she testified in court, she stated that her highest academic qualification was grade 12. It could, in all probability, be inferred that she could read and write. If the plaintiff had read the document properly, she could have noticed these aspects and could then have exercised her right to request being released on bail.

#### **Detention of the plaintiff**

[25] The arresting officer testified that he decided to arrest the plaintiff due to her continued threats on the person and property of the complainant. Such threats were uttered in his presence and as a result he decided to detain the plaintiff for her own safety and that of the complainant. From the evidence of the plaintiff, the living conditions in custody were appalling, nevertheless her detention was lawful.

#### **Detention of the minor child**

[26] The arresting officer testified that he requested the plaintiff to leave the child at home and she refused. She refused to leave the child with her mother or to take her to a place of safety. The plaintiff disputed the arresting officer's version stating that her mother was not in a position to take care of her child since she was on a wheel chair, this version concerning her mother's disability was never put to the officer during cross examination, if it were, he would have responded to this piece of evidence.

[27] Section 28(1) of the constitution provides that every child has the right –

“ . . .

(b) To family care or parental care, or to appropriate alternative care when removed from the family environment;

. . .

(d) To be protected from maltreatment, neglect, abuse or degradation;

. . .

(g) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has a right to be

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(i) kept separately from detained persons over the age of 18 years; and

(ii) be treated in a manner, and kept in conditions, that take account of the child's age.”

Subsection (2) provides that a child's best interests are of paramount importance in every matter concerning a child.”

[28] In *Raduvha v Minister of Safety and Security and Another*,<sup>8</sup> wherein the Constitutional Court held that the detention of a child should be a measure of last resort. The court found the detention of a child to be unlawful in that it was in violation of her constitutional rights in section 28(1)(g) and section 28(2) of the Constitution.

[29] In case of doubt the arresting officer should have sought assistance from the nearest office of the Social Worker in respect of the safety of the child while her

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<sup>8</sup> [2016] ZACC 24; 2016 (2) SACR 540 (CC) para 4.

mother was in lawful detention. Police cells are not homes for children and are thus not equipped to cater for their needs. The detention of the child was unlawful. The same cannot be said to about the plaintiff's arrest and detention. On the contrary the plaintiff's arrest and detention are found to be lawful. Only the child is therefore entitled to damages that have been proved.

[30] I now turn to the issue of damages for the unlawful detention of the minor child, bearing in mind that the primary purpose of damages as stated in *Minister of Safety and Security v Tyulu*,<sup>9</sup> is as follows:

“In assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.”

[31] The plaintiff testified that they slept in a cold police cell, they were offered dirty blankets that caused their bodies to itch. Upon their release the baby had flu and a rash. She had to buy medication for the child. The experience undoubtedly brought pain and psychological torture to the child.

[32] In the result the following order is made:

1. The plaintiff claim for unlawful arrest and detention is dismissed.
2. The plaintiff's claim for unlawful detention in respect of her minor child is upheld.

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<sup>9</sup> 2009(5) SA 85 (SCA) para 26.

3. The defendant is ordered to pay damages to the plaintiff in the amount of R100 000.00 occasioned by the child's unlawful detention.

4. The defendant is ordered to pay party and party costs of this action on the Magistrates Court scale.

S MSIBI  
ACTING JUDGE OF THE HIGH COURT  
MPUMALANGA DIVISION MBOMBELA

#### Appearances

On behalf of the plaintiff: Adv M S Ngomane

Instructed by: P Mahlalela Attorneys

On behalf of the defendant: Adv S I Mashele

Instructed by: Office of the State Attorney