



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG**

CASE NO: 5183/2022

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
.....	<u>11/06/2025</u>
SIGNATURE	DATE

In the matter between:

ENOCK NHLANHLA XIMBA

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL COMMISSIONER OF POLICE

SECOND DEFENDANT

This judgement was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand down is considered to 11 June 2025 at 12h00

JUDGMENT

Malangeni AJ

Introduction

[1] The plaintiff has instituted an action against the defendants, jointly and severally, arising from unlawful arrest and detention. He further claims damages in the form of bodily injuries he sustained whilst in custody of police. In respect of the latter claim, he claims to have been shot by unknown people thereby suffering gunshot wounds on the stomach. In terms of the law both defendants are vicariously liable for all acts of their employees if such employees act within the course and scope of their employment. The defendant admits arrest of the plaintiff, alleging it to be lawful in terms of section 44 of the Criminal Procedure Act 51 of 1977. They further concede that the plaintiff did suffer injuries whilst in their custody as there was a shooting between them and unknown assailants whilst they were enroute to the Police Station after plaintiff's arrest.

[2] The issue for determination is liability or merits. It was agreed that the duty to begin lies with the plaintiff.

Evidence of the plaintiff

[3] The plaintiff testified first and thereafter called Dr C Roberts as an expert witness. The plaintiff briefly stated that on 26 May 2022, he was at home with his friends playing music softly. He heard one of his friends saying that there are police officers outside looking for him. He approached the police who told him that he was under arrest for creating noise that potentially disturbed his neighbours. Prior to the arrest, the neighbours obtained a protection order under the Protection of Harassment Act against him. Suddenly police were called to attend a crime scene at Spar. They then drove with him to the crime scene where a crowd of people had gathered. Then a shooting ensued between the police and unknown people. He was hit with a bullet on the stomach. Paramedics took him to the hospital where he spent six days in the intensive care unit. Whilst in Hospital, he was not under police guard. He made a statement after he was discharged from the Hospital.

[4] Under cross-examination, the plaintiff disputed the claim that there is only one exit from the place of arrest to Hendrina, stating that there are a lot of exits. He also confirmed that he played music at his residence but stated that it was played softly.

[5] Dr C Roberts then testified and placed on record that she is a Medical Doctor with an MBCHB from the University of Pretoria. She stated that she is the one who examined the plaintiff. The latter was brought to the Hospital by an ambulance, and he had a gunshot wound on the abdomen. After examining him, she completed the J88. Her findings were in line with the history provided. During Cross-examination, she stated that clinically, there was no indication of alcohol although she did not test him.

[6] By consent the following documents were exhibited.

6.1 Statement of Mr Mbokane as "A".

6.2 Statement of Mr Ximba as "B".

6.3 J88 as "C".

6.4 Case docket as "D".

[7] The plaintiff's case was then closed.

Evidence for the defendants

[8] The defendants led the evidence of one witness, Mr Nkosinathi Baleni Mbokani, who briefly stated that he is a constable under the South African Police Service (SAPS), stationed at Hendrina with six years of experience. He is responsible for bringing peace in South Africa and if there is no peace, he must arrest whoever is supposed to be arrested.

[9] On 26 of May 2022, he received a call from the radio of the vehicle that was driven by constable Masango. The nature of the call was that they should attend to the complaint at Arnold. They went to the place of the complaint first and met with the complainant. The complainant showed him the protection order he had against the plaintiff; he then showed him the plaintiff's residence. When they went there, they heard music being played loudly. Then two men came out of that yard, one of them was the plaintiff. They introduced themselves to him. He asked the plaintiff if he was

aware of the protection order against him and he confirmed. He then read the plaintiff his rights from his pocketbook. He then arrested him on a warrant of arrest for having breached a protection order.

[10] Whilst on the way to the Police Station, two unknown people fired shots at the police vehicle. The plaintiff got injured on the stomach. He was taken by an ambulance to the hospital.

[11] Under cross-examination, Mr Mbokani explained that the purpose of arresting a suspect is to ensure that they appear in court and face the charges. However, he stated that he only opens the case and does not know as to when the suspect would be charged. He confirmed that the plaintiff was shot after his arrest but did not know whether he was brought before a court or charged. When asked whether the plaintiff signed any section 35 Constitution rights, he stated that they “do not go along with those rights”. He stated that the plaintiff was being taken to the Hendrina Police Station at the time of the arrest, and he denied that there were multiple exits on the route, insisting there was only one. Lastly, he denied that he or Masango received any call about the robbery at Spar. That concluded the defendants’ case.

[12] Both parties filed written heads of arguments coupled with oral submissions. The plaintiff in paragraph 9.1 of his heads of arguments argued that his arrest was unlawful, and that the gunshot wound is tantamount to attempted murder not only against unknown assailants but also to police who drove with the plaintiff to the crime scene. In paragraphs 6.8 and 8.1 of their heads of arguments, the defendants submitted that the arrest of the plaintiff was lawful, and the liability of the defendants is excluded by section 46 of the Criminal Procedure Act. Further, that no proper case has been made by the plaintiff.

Common cause facts

[13] On the pleadings and from the evidence led at the trial, the following are common cause facts:

13.1 The plaintiff was arrested on 26 May 2022 for contravening a protection order.

13.2 Whilst in police custody, he sustained a gunshot wound.

- 13.3 He was hospitalised consequently thereof.
- 13.4 He was never put in police cells.
- 13.5 He was never charged and brought to court.

The facts in dispute

[14] The following facts are in dispute:

- 14.1 The lawfulness of the arrest;
- 14.2 The place of the crime scene; and
- 14.3 Liability in terms of injuries sustained by the plaintiff.

The law

[15] It is common cause that during the arrest of the plaintiff, there was a warrant for arrest that was coupled with the protection order. Section 11(1) of the Protection from Harassment Act 17 of 2011 provides that whenever a court issues a protection order, including an interim protection order, the court must make an order–

“(a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form.

...

(2) The warrant referred to in subsection (1)(a) remains in force unless the protection order expires in terms of section 9(8), is set aside; or is cancelled after execution.”

[16] The Criminal Procedure Act prescribes the ways or methods of bringing an accused before court. It further emphasises the effect of arrest and what should happen after arrest. Section 38(1) provides “that subject to section 4(2) of the Child Justice Act 75 of 2008, the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of the Act”.

[17] Section 39(1) states that “an arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body

or, if the circumstances so require, by forcibly confining his body. Subsection (2) states that the person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant. Subsection (3) provides that the effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody”.

[18] Section 50(1)(a) states” that any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a Police Station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant. Section 50(1)(c) states that subject to paragraph (d), if such an arrested person is not released by reason that no charge is to be brought against him or her; he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest”.

[19] The defendants plead that sections 44 and 46 of the Criminal Procedure Act justify the arrest of the plaintiff. Section 44 provides that” a warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof. Section 46(2) provides as follows:” any person who is called upon to assist in making an arrest as contemplated in subsection (1) or who is required to detain a person so arrested, and who reasonably believes that the said person is the person whose arrest has been authorised by the warrant of arrest or the communication, shall likewise be exempt from liability in respect of such assistance or detention”.

[20] Section 11(4)(b) of the Protection of Harassment Act states that” if it appears to the member of the South African Police Service concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complaint or related person is suffering harm as a result of the alleged breach of the protection order by the respondent, the members must immediately arrest the respondent for allegedly committing the offence referred to in section 18(1)(a).”

[21] Section 11(5) states that:

“In considering whether or not the complainant or related person is suffering from harm or may suffer imminent harm, as provided for in subsection 4(b), the member of the South African Police Service must take into account the–

- (a) Risk to the safety or well-being of the complainant or related person.
- (b) Seriousness of the conduct compromising an alleged breach of the protection order.
- (c) Length of time since the alleged breach occurred; and
- (d) Nature and extent of the harm previously suffered by the complainant or related person.”

[22] The Constitution guarantees the right to freedom of movement, the right to a fair trial, and the right to be free from all forms of violence. Section 12(1) provides that:

“Everyone has the right to freedom and security of the person, which includes the right–

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources
...”

Analysis

[23] Section 44 of the Criminal Procedure Act and 11(4)(b) of the Protection of Harassment Act gives an arresting officer the discretion on whether to arrest or not. Arrest in the circumstances of these sections is not peremptory.

[24] Even if a warrant of arrest is lawfully obtained, it does not take away an arresting officer’s discretion to arrest. In *Mofokeng v Minister of Police and Another*,¹ the court held that:

“[64] In casu section 44 of the Criminal Procedure Act, prescribes the procedure applicable to an arrest on a warrant of arrest. The section reads as follows:

‘a warrant of arrest issued under any provision of this Act **may** be executed by a peace officer, and the peace officer executing such a warrant shall do so in accordance with the terms thereof.’

¹ *Mofokeng v Minister of Police and Another* [2019] ZAGPPHC 566 paras 64-66.

[65] The section clearly confers a discretion on an arresting officer in possession of a warrant of arrest to arrest. [see: *Brown and Another v Director of Public Prosecutions and Others* 2009 (1) SACR 218 C and *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 GSJ.]

[66] In order to exercise this discretion, the arresting officer must have sufficient knowledge of the evidence against the accused...”

[25] The issue of discretion was furthered in *Weitz v Minister of Safety and Security and Others*,² where it was stated that “even when a warrant of arrest has been issued a Peace Officer has a discretion as to whether or not to execute it.”

[26] The duty to prove the lawfulness of the arrest lies with the defendants whereas the one to prove assault rests with the plaintiff. In *Minister of Law and Order and Others v Hurley and Another*,³ the court stated that:

“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.”

[27] When it comes to the crime scene, both the plaintiff and the defendant’s witnesses are single witnesses. Regarding the evidence of a single witness, it is trite that such evidence should be clear and satisfactory in all material respects.

[28] Both single witnesses adduced two conflicting versions. In *Selamolele v Makhado*,⁴ it is confirmed that where there are two mutually destructive versions, the correct approach to deciding the issues is by determining which of the two version is more probable. I am satisfied that the version of the plaintiff as supported by the credible evidence of Dr C Roberts is on a balance of probabilities true and reliable and the version of Mr Mbokani is inherently improbable and therefore false.

² *Weitz v Minister of Safety and Security and Others* [2014] ZAECHGHC 33 para 12.

³ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F.

⁴ *Selamolele v Makhado* 1988 (2) SA 372 (V).

[29] In terms of the Constitution, police have a major role to play in protecting the country's citizens. Section 205(3) of the constitution provides that "the objects of the police service are to prevent, combat and investigate the crime to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." The SAPS has a legal duty to protect the individuals in their custody.

[30] When the police arrested the plaintiff, no evidence was adduced to the effect that the complainant was in danger, in the form of suffering harm or the possibility of suffering imminent harm. There was no element of violence mentioned and no evidence placed on record that the arresting officer made any investigations in terms of section 11(5)(a) to (d) of the Protection of Harassment Act already raised above. The issue between the plaintiff and the complainant was a nuisance in the form of a loud music. To me, the prevailing circumstances and the nature of the offence did not call for or warrant arrest.

[31] In such circumstances, it was not necessary to arrest. Arrest is a drastic step and must be used as a measure of last resort. In *Minister of Safety and Security v Sekhoto and Another*,⁵ Harms DP, in a unanimous decision, took the opportunity to consider whether a peace officer – when considering the arrest of a suspect under section 40 of the Criminal Procedure Act – must also additionally consider whether there are other less restrictive means of securing the attendance of the suspect at court. This was in the context of the decisions of the various High Courts, which had held that the arrest must be a last resort, in other words, a peace officer must consider alternatives to arrest before actually effecting the arrest.

[32] The arresting officer had other options other than arrest that are listed in section 38 of the Criminal Procedure Act. What does not sound good is that after the arrest, the plaintiff was not brought before the court of law in compliance with sections 39(3) and 50(1) of the Criminal Procedure Act as well as section 35(1) of the Constitution.

⁵ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA).

[33] Furthermore, no evidence was led by the defendants' witness to the effect that he did pay regard to the provisions of section 11(5) of Protection of Harassment Act as mentioned above.

[34] As for what purpose the plaintiff was arrested, this court is in the dark. I am saying this simply because the plaintiff was never taken to a Police Station (police custody) in preparation for the court appearance. In fact, he did not appear in court at all. If the intention was to arrest and bring him to court, whilst in hospital, he was supposed to be in police guard so that when he got discharged, he would be taken to court.

[35] I verily believe the plaintiff when he said police received a phone call about a crime scene. This is evidenced by the fact that they took him there.

[36] It is not in dispute that there was a crime scene of robbery at Spar and such scene was still active when police in company of the plaintiff arrived there as there was still shooting. The content of exhibit "D" (Police Docket) strengthens the plaintiff's case. It cannot be said that there were two scenes. The main scene was the robbery at Spar, and the shooting incident was a continuation showing that robbery was still active or in progress.

[37] The letters appearing from pages 19 to 25 of Exhibit "D" addressed by the Commander (B Madonsela) Forensic Laboratory are the true reflection of what was happening. Such letters in conjunction with the photo album appearing from Pages 31 to 76 depict two scenes. These scenes are in a proximity. The first scene depicts where the owner of Spar fired shots, and the second scene depicts the police vehicle wherein the plaintiff was shot.

[38] This then means that such a vehicle did reach the crime scene whilst the plaintiff was still a passenger. This makes the version of the plaintiff more tangible and credible to the effect that police were driving at high-speed rushing to attend that dangerous scene. There was no other robbery mentioned on that day except the one at Spar.

[39] A robbery scene is a dangerous environment in that it involves the use of dangerous weapons like firearms. That was what happened at the Spar scene. The police, by taking the plaintiff to that active crime scene, risked with his life. The plaintiff is a civilian with no training or skill in terms of firearms and/or lacks training or skill in control of violent scenes.

[40] As proof that the police risked with the life of plaintiff, he was shot at and sustained a wound. That therefore means that the police put his life in danger. There was no evidence tendered to the effect that the police in his company also sustained gunshot wounds.

[41] The police acted negligently. They ought to have foreseen that the plaintiff would suffer harm in that dangerous zone. They had all the means to prevent the harm suffered by the plaintiff but failed to do so.

[42] Their actions cannot be justified in any manner. Their liability is not limited even in terms of public policy. In *Mashongwa v Passenger Rail Agency South Africa*,⁶ it was held that:

“No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer’s liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our constitution and justice also point to the reasonableness of imputing liability to the defendant.”

[43] This is a true reflection of an instance whereby the negligent conduct of police led to the suspect in their custody suffering bodily harm. Such conduct attracts liability. The police are solely liable for bodily injuries sustained by the plaintiff. The defence raised in terms of section 46 of CPA cannot succeed as arresting officer is not sued in

⁶ *Mashongwa v Passenger Rail Agency South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC).

his personal capacity but the employer is held vicarious liable for the actions of the arresting officer.

[44] In arresting the plaintiff, the arresting officer exercised his discretion inappropriately. In consequence thereof, the arrest became unlawful. Therefore, the defence of exclusion of liability in terms of section 46 of Criminal Procedure Act must fail.

[45] In the result, the defendants are held liable for all claims instituted by the plaintiff with costs on scale B inclusive of counsel's fees.

M MALANGENI
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG

Appearances

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