



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

CASE NO: 1171/2014

In the matter between:

BORENOTSWE GEORGE MEKWE

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

Landman J:

[1] Mr Borenotswe George Mekwe, the plaintiff, issued summons against the Minister of Police, the defendant, claiming damages for his alleged unlawful arrest and detention. The defendant admits the arrest and detention but pleads

that the arrest which was performed without a warrant and the detention was lawful as there was a reasonable suspicion that the plaintiff had pointed a firearm at a civilian, Mr Maano.

[2] The defendant commenced the trial by leading the evidence of Mr Maano. Mr Maano testified that the local Community Police Forum (the CPF) inspected a donkey in order to determine how it was castrated. This would determine the disputed ownership of the donkey. The inspection had been completed and the members were repairing to the tribal office to announce that the donkey belonged to the plaintiff. But at that moment the plaintiff moved to a position where he had a clear view of Mr Maano he then took out a firearm that had been tucked into the front of his trousers and pointed it at him.

[3] Mr Maano's sister and brother stood in front of him to shield him. Another man, possibly one of the Mekwe family, seized hold of Mr Mekwe and endeavoured to persuade him to relinquish his firearm. The police arrived; asked who had a firearm and, on Mr Mekwe acknowledging the fact, arrested him and placed him in a police vehicle.

[4] The second witness was Ms K Paul. She says she does not know whether she is related to Mr Maano. She is a member of the CPF. She was one of those who inspected the donkey. They were returning to the tribal office when she heard the plaintiff cock a firearm. She ran and hid behind the tribal office and

called the police. She did not see where the plaintiff had been keeping the firearm. She saw a member of the Mekwe family grabbing the plaintiff, asking him to surrender his firearm. He did not do so.

[5] Four police officials responded to the telephone call. Constable Mogafe and his companions arrived at the tribal office. Constable Mogafe met Ms Paul at the entrance. She identified herself as the person who had made the call for assistance. She told Constable Mogafe what had happened. The Kgosi, the police, CPF members, Mr Maano and the plaintiff entered the building and sat around a table. Other members of the community were also in attendance.

[6] Each police official took a statement from the principal actors. Constable Mogafe recorded the statement of Morobisi. During this time the plaintiff was present at the table where the statements were taken. He asked the plaintiff for the firearm. Constable Maine took the weapon and made it safe and retained it. Constable Mogafe arrested the plaintiff for pointing a firearm and because he threaten the life of Mr Maano and for his own safety. He did not ask the plaintiff whether he had pointed a firearm at Mr Maano. Constable Mogafe took him in the police vehicle to the Morokweng Police station where he was charged and detained until he appeared in court. He was released on bail.

[7] The plaintiff testified. He described what occurred as regards the loan of the donkey to his uncle, Mr Maano's seizure of his donkey, his visit to the police

station, the inspection of the donkey and what transpired at the tribal office before the Police arrived. I do not intend dwelling on this as the focus of the trial is on the information available to the police when they arrived on the scene. What is relevant is that after some time the plaintiff volunteered that he was in possession of a firearm (he was not asked for an explanation) he was arrested and placed in a police vehicle before written statements were taken.

The law

[8] Section 40(1)(b) of the CPA, dealing with an arrest without a warrant, provides that:

‘(1) A police officer may without warrant arrest any person-

... (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody...’

[9] As Eksteen J, in **Jacobs v Minister of Safety and Security** (CA 327/2012) [2013] ZAECHGHC 95 (23 September 2013), observed, in order to sustain a defence based on this section, the defendant is required to establish:

(i) that the arrestor is a peace officer;

(ii) that the arrestor in fact entertained a suspicion;

(iii) that the suspicion which he held was that the suspect (the arrestee) had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and

(iv) that the suspicion rests upon reasonable grounds.

[10] The pointing of a firearm is not an offence listed in schedule 1 of the CPA. In my view it ought to be included in the list. This brings me to the question whether the offence in question is an offence 'the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine' which is listed in schedule 1 of the CPA.

[11] Ms Ntuli, who appeared on behalf of the defendant, submitted that the Firearms Control Act 60 of 2000 (the FCA) provides that a conviction for pointing a firearm carries a sentence of imprisonment without the option of a fine. I beg to differ.

[12] The pointing of a firearm an offence is an offence. Section 120(6) of the FCA provides that:

It is an offence to point -

(a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or

(b)'

[13] In terms of section 121 of the FCA 'any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section'. (My emphasis.) Section 120(6) is listed in Schedule 4 and carries a term of imprisonment not exceeding 10 years. Clearly a person convicted of pointing a firearm may be sentenced to a fine or to imprisonment not exceeding 10 years. The amount of the fine is calculated in terms of the Adjustment of Fines Act 101 of 1991.

Conclusion

[14] In the course of testifying Constable Mogafe attempted to broaden the grounds upon which he arrested the plaintiff. But justification of the arrest falls squarely on the defence that the plaintiff committed an offence by pointing a firearm. Constable Mogafe said, in answer to a question from the bench, that he is entitled to effect an arrest for this offence. He is mistaken.

[15] Constable Morafe was not entitled to arrest the plaintiff for pointing a firearm without a warrant. The arrest was unlawful. It has been observed that:

*'The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly. In **Solomon v Visser and Another** 1972 (2) SA 327 (C), at 345C-E, it was remarked that, where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this I add that, where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice.'*

See **Minister of safety and Security v Sekhota and Another** 2011 (5) SA 367 para 30-31.

[16] In this case Constable Mogafe was *bona fide* under the impression that he was acting in accordance with the law. To this extent the arrest was not malicious notwithstanding that he erred in his appreciation of what constituted a reasonable suspicion (which is irrelevant as the offence is not listed).

[17] There is also something to be said for the fact that the plaintiff's time spent in custody, cooling off, possibly saved him from spending many years of incarceration. He after all, and I find this to be the case, he threatened to kill Mr Maano and he drew his firearm while making this threat. He is entitled to

damages for his loss. But it seems to me that the quantum must be fair but not generous. Taking the time that he was in custody, his experience while confined and his experience in his community and the deprivation of his liberty, I would award him damages in an amount of R75 000 and costs on a Magistrate's Court scale.

[18] In the premises I make the following order:

1. The plaintiff is awarded damages in an amount of R75 000.
2. The defendant is to pay the plaintiff's costs on a Magistrate's Court scale.

A A Landman

Judge of the High court

Appearances

Date of hearing: 7 June 2016

Date of Judgment: 17 June 2016

For the Plaintiff: Adv Strydom instructed by Nienaber & Wissing
Attorneys

For the Defendant: Adv Ntuli instructed by State Attorneys