

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 922/2016

In the matter between:

MOENYANE MODISE HUNTER

Plaintiff

and

THE MINISTER OF POLICE

Defendant

DATE OF HEARING

: 21 NOVEMBER 2017

DATE OF JUDGMENT

: 30 NOVEMBER 2017

COUNSEL FOR THE PLAINTIFF

: ADV. MONTSHIWA

COUNSEL FOR THE DEFENDANT

: ADV. MADLANGA

JUDGMENT

HENDRICKS J

Introduction

[1] On the morning of the 3rd March 2015, Mr. Danny Botha received a text message on the social media network called 'What's App' about a suspicious looking VW

Polo motorvehicle and its details. On his way to work he spotted the said VW Polo motorvehicle. It had three occupants in it. He observed and followed it as it travelled along the streets in Rustenburg town and surrounding areas. At some stage he lost sight of it.

- [2] As he went along his daily chores, he saw it again in the afternoon. He decided to follow it. It proceeded to a Spar grocery store in the vicinity where it parked. One of the occupants that was seated at the back alighted. He had a fire-arm tucked into his waist. Mr. Botha alerted Col. Muller of the South African Police Services (SAPS), who is attached to the Flying Squad Unit. Col. Muller was the driver of a marked SAPS motorvehicle and Lt. Col. Govender was his crew member. They arrived at the parking lot where the suspected VW Polo motorvehicle was parked. As they were not tactical in a good position to approach the said motorvehicle and they decided to drive around the block of streets in order to approach it from the other side. Mr. Botha, who was constantly in communication with them, informed them that the said VW Polo motorvehicle drove off.
- [3] Mr. Botha in his motorvehicle as well as Lt. Col. Govender and Col. Muller in their motorvehicle gave chase after the VW Polo motorvehicle, which drove at high speed and disobeyed red traffic lights and stop signs. Lt. Col. Govender was not only in constant communication with Mr. Botha, but also other members of SAPS. The other SAPS motorvehicles eventually managed to stop the VW Polo motorvehicle near the golf course. Lt. Col. Govender and Col. Muller as well as Mr. Botha arrived at the scene where the VW Polo was ultimately stopped. The VW Polo and its occupants were searched but nothing was found.
- [4] Lt. Col. Govender, the arresting officer, then contacted the Area Detective Commander, Brig. Madoda, and informed him what transpired. Brig. Madoda, based on the information he received from Lt. Col. Govender, instructed him to effect an arrest on the occupants of the said VW Polo motorvehicle. It is common

cause that one of the occupants was the plaintiff. They were taken to the police station for further investigation and to be profiled. They were thereafter detained. The evidence of Warrant Officer (W.O) Mogare was to the effect that the detention occurred from 14H45 on the 03rd March 2015 until 09H10 on the 05th March 2015, which is less than 48 hours.

- [5] The plaintiff testified that on the morning of the 03rd March 2015 he arrived in Rustenburg. He was travelling with a taxi from Klerksdorp. A friend of his picked him up with a VW Polo motorvehicle (the driver). The driver went to pick up his friend who was seated at the back. The three of them travelled to the Spar grocery store where the friend of the driver alighted. He and the driver travelled in Rustenburg and their motorvehicle was stopped by the police near the golf course. He was arrested and detained. After the passage of some days, he was released. He testified that his arrest and detention were wrongful and unlawful.
- [6] The plaintiff instituted an action for damages based on his alleged wrongful and unlawful arrest and detention. In his particulars of claim attached to the summons, the plaintiff avers:

“On or about the 03rd day of March 2015, at or near Rustenburg in the North West Province, unknown members of the South African Police Services ("the members") whilst acting within the course and scope of their employment, alternatively Warrant Officer Mogale whilst acting in the course and scope of his employment with the Defendant, unlawfully and wrongfully arrested the Plaintiff on the allegations and or charge of Business Robbery without the warrant of arrest which authorized the arrest and or subsequent detention.

It is as a result of the aforesaid unlawful and wrongful arrest that a criminal case was registered under CAS No. 25/03/2015 at the

Rustenburg Police Station and the Plaintiff was detained at Rustenburg Police Station for a period of three (03) days, alternatively for more than forty eight (48) hours without made to appear in court, which detention was also unlawful.

The aforesaid members of the South African Police Service;

- were at all material times hereto acting within the course and scope of their employment with the Defendant and or alternatively furthering the interest of the Defendant;*
- acted without any reasonable and or probable cause nor did they have any reasonable belief in the veracity or truthfulness of the information at their disposal or which they might have received from the complainant (if any) which might have influenced or made them to arrest and detain the Plaintiff;*

The aforesaid members of the South African Police Service;-

- failed and/or neglected and or refused to properly investigate the case of Business Robbery leveled against the Plaintiff before they could arrest and detain the plaintiff;*
- failed and or neglected and or refused to ensure that the Plaintiff is brought before a court of law to stand trial on the same allegations and or charge of Business Robbery for no apparent reasons;*
- failed and or neglected to ensure that there is sufficient evidence or proof which justify the arrest and detention of the Plaintiff;*

It is therefore against the aforesaid background, nor is it apparent from the above that, the members of the South African Police Services did fail and or neglect in execution of their duties and or responsibilities as members of the South African Police Services to do the following;-

- Firstly establish in detail from the complainant (if any) as to what transpired between the complainant and the Plaintiff;*
- Secondly to do a thorough and or proper investigation before arresting and detaining the Plaintiff.*

As a consequence of the unlawful and wrongful arrest and detention;-

- the Plaintiff suffered damages in the amount of R1000 000.00 (One Million Rand) which is made up as follows:-*
 - Unlawful arrest and detention R500 000.00*
 - Contumelia, inhuman treatment and emotional shock R500 000.00*
- the Plaintiffs rights to libertas or freedom, fama or good name, privacy, dignity, bodily and psychological integrity, and environment which is detrimental to his health or wellbeing was also infringed.”*

[7] The defendant pleaded that the arrest and subsequent detention of the plaintiff were lawful in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended. Robbery with aggravating circumstances or an attempt to commit the offence is listed in Schedule 1 of the Criminal Procedure Act. In

paragraph 2.4 of the Minutes of the Pre-trial Conference filed on the 31st March 2017, the defendant stated that there should be no separation of merits and quantum. It was agreed amongst the parties that the defendant bears the onus and also the duty to begin. This is indeed trite.

The Law

- [8] It is well established that the onus rests on the arresting officer (the defendant) to prove the lawfulness of the arrest. This is so because, as **Rabie CJ** stated in **Minister of Law and Order and Others v Hurley and Another** 1986 (3) SA 568 (A) at 589E – F:

“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.”

- [9] Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended, states:

“40 Arrest by peace officer without warrant

(1) A peace officer may without 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; ”

Robbery with aggravating circumstances or an attempt to commit such an offence is listed in Schedule 1 of the Criminal Procedure Act.

[10] In **Naidoo v Minister of Police** 2016 (1) SACR 468 (SCA) the following is stated in paragraphs [40] and [41]:

[40] *And, as was explained by Van Heerden JA in Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G – H, once the jurisdictional requirements of the section are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.*

[41] *It is now settled that the purpose of the arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial. (See Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA 141) paras 30 – 31.) Thus it goes without saying that an arrest will be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law.”*

See: **Mvu v Minister of Safety and Security** 2009 (2) SACR 291 (GSJ).
Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at

page 818G – H;

Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) or 2011 (5) SA 367 (SCA) at paragraph [6].

[11] In **MR v Minister of Safety and Security** 2016 (2) SACR 540 (CC) it was held:

“[42] Section 40(1) of the CPA states that a police officer 'may', and not 'must' or 'shall', arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word 'may' suggests that police officers have a discretion whether to arrest or not. It is permissive, and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime.

[43] As s 40(1) grants police officers a discretion whether to arrest, the two courts should have gone further in their evaluation of the evidence to determine whether the facts

justified an arrest. This is so because an arrest is a drastic invasion of a person's liberty and an impairment of their rights to dignity, both of which are enshrined in the Bill of Rights.

[44] *In other words, the courts should enquire whether, in effecting an H arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in Duncan or as per Sekhoto where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in s 40(1) must be exercised 'in light of the Bill of Rights'.*

[45] *Although both the High Court and full court traversed the discretion embedded in s 40(1), as elucidated in Sekhoto, in their respective judgments - they did not appropriately evaluate the facts to B determine if the arrest were justified.*

[46] *As far back as 1986, the Appellate Division (now the Supreme Court of Appeal) enunciated the correct legal approach in Duncan as follows:*

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power ... No doubt the discretion must be properly exercised.'

This salutary approach was confirmed in Sekhoto as follows:

‘Once the jurisdictional facts for an arrest ... in terms of any paragraph of section 40 (1) ... are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute E in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest.’

[Emphasis added.]

[47] Having established that police officers are not obliged to effect an arrest, despite all the jurisdictional facts being present, the next questions arise: what amounts to a proper exercise of discretion? Does the Bill of Rights have an impact on the common-law understanding of how police discretion should be exercised? These are the questions that the paragraphs which follow seek to address.”

[12] The issues to be decided by this Court are whether:

- (a) the arrest and detention of the plaintiff were wrongful and unlawful;
and
- (b) the period of detention.

[13] The question arises as to whether there was a reasonable suspicion formed by the arresting officer that a Schedule 1 offence was committed or attempted. Furthermore, what informed such a reasonable suspicion? It is clear from the evidence of Mr. Botha that there were a lot of house-breakings as well as business robberies committed in that area. This was also confirmed and corroborated by Lt. Col Govender who testified that that area, known as Sector 3, was a “hotspot” for armed robberies of businesses. The social media ‘What’s App’ group identified the VW Polo motorvehicle as a suspicious looking car. Same was spotted by Mr. Botha, observed and followed. The police, Col. Muller and Lt. Col Govender, were summoned. When they arrived with their marked police motorvehicle, one of the occupants alighted. He was in possession of a fire-arm. The VW Polo motorvehicle drove off at high speed. A chase in hot pursuit ensued. Based on these facts, a reasonable suspicion could be formed that the occupants of the VW Polo was attempting to rob the business(es) situated in the complex in which the Spar grocery store is hosted. It was contended by Mr. Montshiwa on behalf of the plaintiff that there could not have been a reasonable suspicion formed. I am holding a different view.

[14] It was furthermore contended by Mr. Montshiwa that the arresting officer Lt. Col. Govender did not exercise any discretion before affecting the arrest of the plaintiff. This is so because Lt. Col. Govender was acting in the instruction from his senior, Brig. Madoda. Lt. Col. Govender testifies that he did exercise his discretion to a certain extent. To what extent he did exercise his discretion is unknown. He was not cross-examined on this aspect in any detail. He and Col. Muller were informed about the suspicious looking VW Polo motorvehicle and they went to investigate. They saw the said VW Polo motorvehicle. When the driver of the VW Polo saw the police, he drove off at high speed and a chase in hot pursuit ensued. This all adds up to the suspicion. After the VW Polo was stopped, he informed Brig. Madoda about what transpired. Brig. Madoda, as the

commander and cluster head of the detectives, instructed Lt. Col Govender to arrest the suspects (plaintiff included) and to bring them to the police station for further investigation and to be profiled. Lt. Col. Govender did form a reasonable suspicion that the occupants of the VW Polo motorvehicle intended to commit armed robbery at the Spar grocery store complex. I am of the view that the arrest affected by Lt. Col. Govender on the plaintiff was lawful.

[15] So too, was the subsequent detention lawful. W.O Mogale's testimony about the time of the detention is correct, as borne out by the Occurrence Book (OB) entries. The plaintiff was not detained in excess of 48 hours as legally prescribed. Consequently, I am of the view that the arrest and detention were lawful and plaintiff's claim should be dismissed. Costs should also follow the result and be awarded in favour of the defendant, as there is no plausible reason why it should not be awarded to the defendant.

ORDER

[16] Resultantly, the following order is made:

- (i) The plaintiff's claim is dismissed.
- (ii) The plaintiff is ordered to pay the costs of suit.

R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG