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Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: 1296/2018

In the matter between:-

JAN ADRIAAN PELSER Plaintiff

and

MINISTER OF POLICE Defendant

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **29 November 2023**.

Summary: Civil law and procedure – arrest and detention – special case for adjudication – rule 33(1) of the Uniform Rules – section 40(1)(b) – whether arresting officer entertained a reasonable suspicion.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

Mfenyana J

[1] This matter served before me in the form of a special case for adjudication (stated case) in terms of Rule 33 (1) of the Uniform Rules of Court. The plaintiff instituted proceedings against the defendant for damages emanating from his arrest and detention from 13 to 15 February 2018.

[2] On 28 February 2023 following agreement between the parties, and application was made for separation of merits from quantum. In accordance with the provisions of Rule 33(4) of the Uniform Rules of this Court I granted an order separating the issue of merits and

quantum. The matter proceeded only on the merits for the determination of the special case. The issue of quantum was postponed *sine die*.

[3] The following facts are agreed between the parties:

(a) The plaintiff's identity and residential address.

(b) The defendant's identity, address and responsibility in relation to the plaintiff's claim.

(c) The jurisdiction of this court.

(d) That the members of the South African Police Service were acting within the course and scope of their employment, and that the defendant is vicarious liable for their acts and omissions.

(e) That the plaintiff has complied with the provisions of section 2 of the Institution of Legal Proceedings Against Certain Organs of State Act.[1]

(f) That the plaintiff is claiming in his personal capacity, and is of full legal capacity. Thus he has *locus standi* to institute the proceedings.

(g) The date and time of the plaintiff's arrest, his detention as well as the date he was released from detention.

[1] 40 of 2002.

(h) That the plaintiff was arrested at his place of employment whilst on duty, without a warrant by Detective Warrant Officer Abram Thabo Nkgodi.

(i) That the plaintiff was taken to court on 15 February 2018 by members of the defendant.

(j) That members of the defendant did not oppose bail and he was released the same day at approximately 15h00 on bail of R2000.00.

[4] Further agreement reached between the parties pertains to the admissibility of documents contained in the defendant's discovery bundle, save that the plaintiff denies the truthfulness of the statement of Frederick Martin Mc Todd (Mc Todd)as contained in page 30 to 32 of the said bundle.

[5] The only questions of law which stand for determination by this court are:

(a) whether the plaintiff's arrest on 13 February 2018 was lawful and,

(b) whether the plaintiff's subsequent detention from 13 February 2018 to 15 February 2018 was lawful.

[6] At the outset, it behoves me to state that the trite principle governing the conduct of a stated case in civil proceedings is that in the presentation of their case, the parties are limited to the four corners of the stated case, without regard to the pleadings. They may not raise issues not agreed upon in the stated case and introduce new argument outside of their statement[2]. Likewise, the court is also confined to what is set out in the stated case.

[7] The defendant contends that the arrest of the plaintiff was lawful. He relies on section 40(1)(b) of the Criminal Procedure Act[3] which authorises a peace officer to arrest without a warrant, any person whom he reasonably suspects of having committed an offence listed in Schedule 1, other than the offence of escaping from lawful custody.

[8] In support of this contention, it is submitted on behalf of the defendant that the arresting officer (Nkgodi), after tracing the plaintiff to a house he was renting in Industrial Site, Mahikeng, he left a message for the plaintiff to report to the police. When the plaintiff did not comply,

[2] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (19 November 2015).
[3] 51 of 1977.

Nkgodi traced the plaintiff to his workplace at Blue Ribbon, Mahikeng where he arrested him.

[9] According to the defendant, the facts leading up to the plaintiff's arrest are that approximately two years before his arrest, the plaintiff intentionally bumped Mc Todd with his car causing him severe injuries. It is alleged that after the incident, the plaintiff drove off, leaving Mc Todd lying on the ground, helpless, and in agony. He obtained assistance from the owner of the complex who had also witnessed the incident and called his family.

[10] The defendant further avers that in the beginning, the police treated the incident as a 'hit and run' and negligent driving case as the driver of the motor vehicle had driven off. It was only after an investigation and after obtaining Mc Todd's version, as the victim in the incident, that the police charged the plaintiff for attempted murder.

[11] According to the defendant, two years prior to the incident, on 2 December 2016, Mc Todd was at the Food Zone complex when he saw the plaintiff coming out of the complex and loading alcohol in his car. He asked the plaintiff why he was always buying alcohol while he was still owing him money. After swearing at Mc Todd, the plaintiff

immediately reversed his car and hit Mc Todd. He thereafter drove off leaving him lying on the ground, helpless. Mc Todd contends that this was done intentionally. He avers that he suffered severe injuries as a result.

[12] It is the defendant's contention that Mc Todd knew the plaintiff quite well before the incident, as he had previously loaned him money when he needed it. There is thus no confusion about the identity of the suspect, so contends the defendant. Mr Rufino De Sousa Deasneves (Deasneves), the complex owner, also witnessed what happened in the CCTV footage and rushed to assist Mc Todd.

[13] After the plaintiff failed to present himself at the police station after being asked by Nkgodi to do so, the defendant avers that the plaintiff was avoiding an arrest. This, the defendant further avers, is also due to the fact that the plaintiff is a former police officer of long service and therefore familiar with, and knows the import of complying with a police request when asked to do so.

[14] The defendant avers that the purpose of arresting the plaintiff was to bring the plaintiff to court, and this was done within the period of 48 hours prescribed by law.

[15] Arguing that the arrest was unlawful, the plaintiff contends that the arresting officer did not entertain a reasonable suspicion that the plaintiff had committed a Schedule 1 offence as the investigation was initially for a 'hit and run' or reckless and /or negligent driving incident, neither of which is a Schedule 1 offence. According to the plaintiff, this was after Mc Todd laid a complaint on 2 December 2016.

[16] The plaintiff further avers that in arresting the plaintiff, the arresting officer had an ulterior motive, and not merely to secure his attendance in court. He further avers that this is the reason why the charge was amended to attempted murder, in order to bring it within the ambit of offences listed in Schedule 1. He further contends that the purpose of his arrest, two years later, on 13 February 2018 was to punish him. Curiously, the plaintiff offers no explanation why the arresting officer would want to punish him.

[17] The remainder of the plaintiff's averments in this regard relates to the evidence at the disposal of the arresting officer with regard to the incident and the injuries sustained by the complainant. The plaintiff goes on to analyse the evidence, as contained in the various statements contained in the docket. He concludes that there was insufficient evidence to support a charge of attempted murder as the

arresting officer amended the charge sheet, simply to justify his arrest.

[18] Further, the plaintiff avers that the arresting officer had a discretion whether or not to effect the arrest, and to consider other less drastic means of ensuring the plaintiff's attendance in court, which he did not exercise.

[19] As to the detention, the plaintiff avers that the defendant acted contrary to the provisions of section 35(1)(d) of the Constitution[4] and section 50(1(d) of the Criminal Procedure Act which he avers require that an arrested person be brought before a court as soon as reasonably possible but not later than 48 hours or the end of the first court day if the 48 hours expire outside of ordinary court hours. Thus the plaintiff avers that having been arrested on Tuesday, 13 February 2018 at 16h20, he ought to have been released on Wednesday, 14 February 2018 at 16h00, being the end of the first court day following his arrest. I deal with this aspect later in this judgment.

[4] The Constitution of the Republic of South Africa, 1996.

Legal framework

[20] The jurisdictional facts for an arrest in terms of section 40(1)(b) are that the peace officer must entertain a reasonable suspicion that the plaintiff has committed a Schedule 1 offence.

[21] There is no question that Nkgodi is a peace officer. There is also no question that attempted murder is a Schedule 1 offence. The issue turns on the whether Nkgodi entertained a reasonable suspicion that the plaintiff had committed an offence listed in Schedule 1.

[22] I consider it apposite to consider the basis provided by the defendant in justifying the arrest. It is submitted that this was premised on the statement provided by Mc Todd who is the complainant in the matter, and who knows the plaintiff quite well. On the basis of the complaint by Mc Todd, a charge of attempted murder was proffered.

[23] It bears mentioning that what the enquiry in terms of section 40(1)(b) is concerned with is the state of mind of the arresting officer at the time of the arrest. The suspicion entertained by the arresting officer must be 'based on credible and trustworthy information'. Whether

such information would be found inadmissible or not stand in court is irrelevant.

[24] The test, as counsel on behalf of the plaintiff correctly pointed out, is objective. The question to be considered is whether "a reasonable man in (Nkgodi's) position and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the (plaintiff was) guilty of… (an offence) …?"[5]

[25] As Jones J stated in *Mabona and Another v Minister of Law and Order*[6], a reasonable man would analyse and assess the quality of the information at his disposal critically and would not accept it lightly without checking it where it can be checked. This is what Nkgodi did. There can thus be no merit to the plaintiff's submission that there was insufficient evidence for a charge of attempted murder.

[26] In *Minister of Safety and Security v Sekhotho*[7] the Supreme Court of Appeal (SCA) held that once the jurisdictional facts are satisfied, the peace officers are entitled to exercise a discretion as they see fit,

[5] *Mabona and Another v Minister of Law and Order* 1988 (2) SA 654, at 658G –H. See also: *S v Nel and Another* 1980 (4) SA 28 E at 33H.
[6] Ibid.
[7] 2011 (1) SACR 315 (SCA).

provided they stay within the bounds of rationality. The court went further to state that '(t)he standard is not perfection'… as long as the choice falls within the range of rationality.

[27] The upshot of this is that it is not necessary that a conviction be secured for an arresting officer to be within the ambit of the section. For as long as he/she entertained a reasonable suspicion and exercised his discretion in accordance with that suspicion, the requirements of the subsection have been met.

[28] The information at the disposal of the arresting officer does not necessarily need to be of high quality and cogency[8]. All that is required is suspicion and not certainty.

[29] What is of relevance is the state of mind of the arresting officer at the time of the arrest. The test, as correctly pointed out by counsel on behalf of the plaintiff, is objective. The question to be considered is whether "*a reasonable man in (Nkgodi's) position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the (plaintiff was) guilty of… (an*

[8] Supra at note 6.

offence) …?"[9] The learned judge goes further to state that in his view, a reasonable man would analyse and assess the quality of the information at his disposal critically and would not accept it lightly without checking it where it can be checked. This is what Nkgodi did.

[30] When Nkgodi effected the arrest, he was already aware of Mc Todd's statement that the plaintiff whom he knew well, had run him over after Mc Todd had confronted him about money he had lent to him. I do not agree with the plaintiff's submission that the arresting officer did not appreciate that he had a discretion to arrest or not to arrest. The defendant's case is that the arresting officer was aware of the discretion he had, and went further to state as much in his statement, that on the basis of the evidence he had obtained at that stage, he was satisfied that there was a *prima facie* case against the plaintiff.

[31] It is trite that the purpose of section 40 (1)(b) is not to create a blanket warrant for peace officers to arrest citizens at will in an unhindered fashion. To the contrary, in terms of this provision, arresting officers are required to exercise their powers with a fair amount of circumspection. If due consideration is had to the explanation

[9] *Mabona,* ibid.

provided by the arresting officer, it is clear that his state of mind at the time was to have the plaintiff charged and be brought to court for attempted murder. This is indeed what happened. He was brought before court within a period of 48 hours and the police did not mischievously oppose bail. He was thereafter released from custody.

[32] The plaintiff's contention that the defendant had an ulterior motive is not supported by the facts before this Court, and ventures on the realm of unjustified speculation and conjecture.

[33] There can be no doubt that an arrest is a serious invasion of a person's liberty. It strikes at the very rights enshrined in the Bill of Rights. It is imperative that in exercising their powers to arrest, peace officers should do so with that in mind. The submissions presented on behalf of both parties do not suggest that the arresting officer 'willy nilly' arrested the plaintiff with no regard to these constitutional imperatives. Not only was Nkgodi in possession of information to the effect that a Schedule 1 offence had been committed, he conducted further investigations and obtained information and statements from other sources. He further made an attempt to have the plaintiff present himself at the police station. This, in my view is also evident from the fact that the incident occurred in 2016 and the arrest took

place in 2018. Accordingly, this dispels any contention that Nkgodi harboured an ulterior motive. That is not evident from the facts before this Court.

[34] As to the plaintiff's averment that he ought to have been released on Wednesday, 14 February 2018, it is clear that the plaintiff misconstrued the meaning of section 35(1)(d) of the Constitution. The section reads:

> *1. Everyone who is arrested for allegedly committing an offence has the right*
>
> *(a)…;*
>
> *(d) to be brought before a court as soon as reasonably possible, but not later than*
>
> *(i) 48 hours after the arrest; or*
>
> *(ii) the end of the first court day* ***after the expiry of the 48 hours****, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; … .*

[35] From the reading of the above provision, it is clear that the 48 hours must have expired before the police could bring an accused person before court on the next court day. The object of the provision is to

ensure that an accused person is brought before court as soon as reasonably possible and within the parameters set out in the provision. The plaintiff was arrested on Tuesday, 13 February 2018 at 16h20. Ordinarily, the 48 hours would have expired at 16h20 on Thursday, 15 February 2018. As 16h20 falls outside of the ordinary court hours, the plaintiff would have been brought before court on the first court hour or as soon as reasonably possible thereafter on Friday, 16 February 2018. There is thus no breach on the part of the police in bringing the plaintiff before court on Thursday, 15 February 2018.

[36] It cannot be that simply for not opposing bail, the defendant made himself guilty of an infraction of the nature described by the plaintiff nor does this bear any relevance to whether or not the plaintiff's arrest and detention were lawful.

[37] In view of the submissions made on behalf of both the plaintiff and the defendant, I find that the suspicion entertained by Nkgodi was reasonable in the circumstances. I am therefore persuaded that the plaintiff's arrest and detention were lawful.

[38] Having found that the arrest and detention of the plaintiff from 13 February to 15 February 2018 were lawful, I make the following order:

Order

The plaintiff's claim is dismissed with costs.

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

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