



**IN THE HIGH COURT OF SOUTH AFRICA
[EAST LONDON CIRCUIT LOCAL DIVISION]**

CASE NO.423/18

In the matter between:

MONWABISI ROBIYANA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

TOKOTA J

Introduction:

[1] The plaintiff instituted an action against the defendant claiming payment of R600 000.00 for damages arising from the alleged unlawful arrest and detention. The parties agreed that liability be separated from quantum of damages, and an order to that effect in terms of Rule 33(4) of the Uniform Rules of Court was accordingly made. Therefore, at this stage, the Court has to determine the issue of liability only. The claim is resisted by the defendant.

Factual matrix:

[2] Avis Car Rental is conducting a business of hiring out its vehicles to the general public. The vehicles that are hired at its branch in East London airport are parked in front of the airport. Other vehicles are parked at the back yard. These are said to be vehicles with minor dents having been slightly damaged.

[3] Between 1 and 2 May 2017 it was discovered in the morning that thirty tyres were stolen from the vehicles that are kept at the back yard. The police were called and they responded. They visited the crime scene. Fingerprint experts lifted fingerprints from the vehicles whose tyres were stolen.

[4] Sergeant Myeki (Myeki) was allocated the docket as the investigating officer in the matter. He received the docket on 3 May 2017. Upon receipt of the docket he visited the crime scene where he interviewed the complainant. There was no clue about the suspects and the docket was archived.

[5] On 25 May 2017 the fingerprint expert compared the scene of crime prints, marked LCRC 33/5/2017 with the linked impression fingerprint image of suspect Monwabisi Robiyana and found the prints to be corresponding with his left middle finger. The expert came to the conclusion that both prints belonged to the same person.

[6] On 19 July 2017, Myeki got the docket back and started working on it. On 25 July 2017 he received a fingerprint link from the Local Criminal Record Centre, East London. The plaintiff's fingerprint was linked to one of the vehicles from which the tyres were stolen.

[7] On 4 August 2017 at about 3h15 am, Myeki together with his colleagues visited the house of the plaintiff. They found the plaintiff at his house. Myeki introduced himself and informed the plaintiff of the purpose of his visit. He enquired from the plaintiff if he had been to Avis, at any stage, and the plaintiff replied in the negative. The plaintiff informed Myeki that he had never been to Avis car rental and had never worked there. Myeki informed the plaintiff of the theft from Avis and that his fingerprint was linked to one of the vehicles from which the tyres were stolen. He asked him to explain how it happened that his fingerprint was found there and

warned him of his rights. In his warning statement the plaintiff is recorded as having said: *"I deny the allegations against me. I never went to Avis nor work (sic) or steal at Avis premises. I drive a taxi as my work. I do not do crime. That's all I wish to state."*

[8] Myeki was not satisfied with the response from the plaintiff and concluded that he must have been involved in the theft of the tyres. He asked him where the tyres were. The plaintiff denied any knowledge of tyres. Myeki informed him of his constitutional rights and arrested him. The plaintiff was arrested on 4 August 2017 and appeared in Court on the following week on Monday, 7 August 2017 on which day he was released on bail. The case against the plaintiff was subsequently withdrawn by the State on his third appearance.

[9] The evidence of the plaintiff was mainly the denial of the allegations against him. He testified that what was written in the warning statement was all that he said to Myeki. However, he testified further that Myeki mentioned the name of his friend Myataza and that reminded him of the fact that, at some stage, he accompanied Myataza who was hiring vehicles, to collect or drop the vehicles at Avis. Myataza was not called as a witness.

[10] The defence of the defendant was that Myeki arrested the plaintiff on reasonable grounds of suspicion of having committed an offence referred to in schedule 1 of the Criminal Procedure Act 51 of 1977 (the Act). Myeki was therefore entitled to arrest him without a warrant in terms of section 40(1)(b) of the Act.

Discussion:

[11] Section 40(1)(b) provides:

'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.'

The jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

(iv) the suspicion must rest on reasonable grounds.¹ Myeki is a peace officer; theft is a Schedule 1 offence.

[12] The sole enquiry in the matter is whether Myeki reasonably suspected the plaintiff of having committed theft at the time he arrested him at his house on 4 August 2017. As was said by Lord Devlin in ***Shaaban Bin Hussien and Others v Chong Fook Kam and Another***²:

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'

This passage was quoted with approval in ***Duncan v Minister of Law and Order***³ and the Full Bench of this Division.⁴ The suspicion must be reasonable and the test for such reasonableness is objective⁵: Myeki was required to act *'as an ordinary honest man would act and not merely act on wild suspicions but on suspicions which have a reasonable basis'*.⁶

[13] In considering whether Myeki's suspicion was reasonable, regard must be had to, *inter alia*, what was said by Jones J in ***Mabona and Another v Minister of Law and Order and Others***⁷ where the Learned Judge said:

'It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without

¹*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H.; *Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA) (2011 (1) SACR 315; [2011] 2 All SA 157; [2010] ZASCA 141) para.6

²[1969] 3 All ER 1626 (PC) at 1630

³*Duncan* Footnote 1 at 819I; *Minister of Law & Order v Kader* 1991 (1) SA 41 (A) ([1990] ZASCA 111) at 50H

⁴See also *Minister of Police v Pike* (CA235/2017) [2018] ZAECHGHC 100 (16 October 2018)

⁵*R v Van Heerden* 1958 (3) SA 150 (T) at 152E; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814E; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at G 579F-

⁶per Jones AJP in *Rosseau v Boshoff* 1945 CPD 135 at 137; *S v Purcell-Gilpin* 1971 (3) SA 548 (RA) at 553G-H

⁷1988 (2) SA 654 (SE) at 658F-H

checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

[14] Myeki's suspicion was based on the following:

- (a) He received a report from the Local Criminal Record Centre that the finger prints of the plaintiff were linked to the vehicle from which the tyres were stolen.
- (b) On 4 August 2017 he proceeded to the plaintiff's house and interviewed the plaintiff. The plaintiff denied that he had ever been at Avis, thus, raising questions as to how it came about that his finger prints happened to be there where the theft was committed.
- (c) The explanation did not account for the finger print found in the vehicle.

[15] Mr *Mafu*, appearing for the plaintiff, argued that Myeki should have taken further steps by conducting further investigations before effecting the arrest. He argued that even if he was entitled to arrest he had a discretion whether or not to arrest and he failed to exercise that discretion. Mr *Pretorius*, who appeared for the defendant, relied heavily on the unreported case of *Pike* referred to above and submitted that *Pike's* case is on all fours with the present matter.

[16] The submission by Mr *Mafu*, can only be based on the premise that the plaintiff informed Myeki about Myataza. Myeki denied that the plaintiff ever mentioned the name of Myataza. He said he was hearing the name for the first time in Court. There are certain features which militate against the credibility of the evidence of the plaintiff in this regard. In his written statement which he made to Myeki he never mentioned Myataza. He confirmed that the statement was correct. Moreover, Myataza was never called as a witness. He did not even specify as to when he accompanied Myataza to Avis either to collect or to drop the hired vehicles. He did not say what make of the vehicle(s) that were hired by Myataza. His version

falls to be rejected in this regard. On the other hand, Myeki's evidence was straight forward. He impressed me as an honest and credible witness.

[17] The decision to arrest must be based on the intention to bring the arrested person to justice. It has been held that the validity of an arrest is not affected by the fact that the arrestor, 'in addition to bringing the suspect before court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion.'⁸

[18] Once the jurisdictional facts for an arrest in terms of s 40(1)(b) are present, the discretion arises. The question of whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute. The learned Judge of Appeal Van Heerden JA said the following in *Duncan*⁹

"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 (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case."

[19] When exercising such discretion, the arresting officer must ask himself whether (a) the person he is about to arrest is guilty of the offence; (b) whether there are any reasonable grounds for that suspicion; and (c) must comply with principles laid down in *Shidiack's* case¹⁰ where it was said:

'Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide

⁸*Duncan* supra at 818B – C.

⁹ *Ibid* At 818H-J

¹⁰ *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651 – 652.

exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. . . . There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[20] The purpose of the arrest must be to bring the suspect to justice. Therefore, the arrested person must be taken to Court within the prescribed period of 48 hours for the Court to further deal with him. Once the arrested person has been taken to Court, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.¹¹

[21] In *casu* the plaintiff was arrested on Friday and taken to Court on Monday, which was the next available Court date. He was released on bail on the same day, which is an indication that the arresting officer did not object thereto.

[22] It has been held that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: but only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). 'Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime — and those listed in Schedule 1 are serious, not only because the legislature thought so — a peace officer could seldom be criticised for arresting a suspect for that purpose. It is sufficient to say that the mere serious nature of the offence which ordinarily are capable of attracting sentences of imprisonment may justify the arrest for the purpose of enabling a court to exercise its

¹¹*Sekhoto* note 1 para. 42; *c/f De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para.72

discretion as to whether he should be detained or released, and, if so, on what conditions, pending the trial.’¹²

[23] Once the jurisdictional facts have been established, it is for the plaintiff to prove that the discretion was exercised in an improper manner.¹³ In *casu* the plaintiff did not plead that the discretion was improperly exercised nor did he so contend. Mr *Mafu* merely submitted that Myeki did not exercise his discretion.

[24] In my view there were reasonable grounds upon which the suspicion was based. The plaintiff did not inform Myeki that he used to collect or drop cars at Avis on behalf of one Myataza at the time of his arrest. He flatly denied having been at Avis at any stage. The name of Myataza only came up during the trial. This must have been mentioned in order to explain away the presence of his finger print in one of the vehicles from which the tyres were stolen. Furthermore, Myataza was never called as a witness and when I asked Mr *Mafu*, during the debate, as to why Myataza was never called as a witness he could not provide an answer. That leaves us with a suspicion that he would not support the evidence of the plaintiff hence he was not called.

Conclusion:

[25] In all the circumstances I am of the opinion that the defendant has discharged the *onus* resting on him in that all the jurisdictional facts as envisaged in section 40(1)(b) have been met. Accordingly, the plaintiff’s claim cannot succeed.

[26] In the result I make the following order:

The plaintiff’s claim is dismissed with costs.

B R TOKOTA

JUDGE OF THE HIGH COURT

¹²*Sekhoto* footnote 1 *supra*, at para 44

¹³*Duncan* at 819B-E; *Sekhoto* *ibid* para.49

Appearances:

For the plaintiff: A Mafu

Instructed by Magqabi Seth Zitha Attorneys

For the Defendant: F T Pretorius

Instructed by State Attorney

Date of hearing: 5 July 2022.

Date delivered: 26 July 2022.