

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO.: 3098/12

In the matter between:


MAWETHU: SOBOPHA

Appellant

and

MINISTER OF POLICE

Respondent

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
13/8/2014	
DATE	SIGNATURE

JUDGMENT

FOULKES JONES AJ

1. On the 7th March 2011, the Appellant instituted action against the Respondent in the Johannesburg Magistrates Court. His claim as evidenced from his Particulars of Claim arose from the fact that on 12 October 2010 near Hillbrow he was arrested without a Warrant by members of the South African Police. He was detained in custody, taken the following day to Hillbrow Magistrates Court where he was released without having to appear in Court, the Public

Prosecutor declining to prosecute. Plaintiff contends his arrest and the detention were unlawful.

2. The Respondent opposed the action instituted against him. In essence he raised that the defence that the arrest and detention were not unlawful. The arrest, so contends the Respondent, was lawful in that no Warrant for the arrest was required. The Respondent was arrested for malicious injury to property, a Schedule 1 offence under the Criminal Procedure Act No. 51 of 1977. The Respondent thus contends that the detention was lawful within the terms of Section 50 of Act 51 of 1977. The Appellant's claim arose out of a broken window pane at the establishment of the Complainant.
3. Appellant's claims against Respondent are twofold, namely:
 - 3.1. For wrongful arrest and detention – R200 000.00. The appellant now limits this amount to R60 000.00; and
 - 3.2. For assault – R100 000.00. The Respondent limits this claim to R20 000.000. During argument before this Court the Appellant suggested the quantum should be between R5 000.00 and R10 000.00. The Appellant in his Particulars of Claim stated that as a result of the assault, he was injured and had to undergo medical treatment.
4. The Appellant contended that the issues to be determined on appeal were as

follows:

- 4.1. whether the arresting officer, Constable Thabalala entertained any suspicion that the Appellant had committed a Schedule 1 offence;
 - 4.2. if so, was his suspicion reasonable; and
 - 4.3. depending on the Court's finding in 4.1 above, whether the use of force in arresting the Appellant amounted to an assault and whether same was justified.
5. As regards the claim for unlawful arrest and detention, the evidence was that the Appellant was detained for about 20 hours.
 6. Section 40(1)(b) of the Criminal Procedure Act No. 51 of 1977 provides as follows:

“A Peace Officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody.”
 7. The issue is thus whether the arrest was justifiable. For this purpose the arresting officer must entertain the necessary suspicion, which suspicion must be held on reasonable grounds.
 8. The Respondent bears the onus of proving the arrest was lawful.

9. On the evidence before the Court it has not been shown that Tshabalala (the arresting officer) fostered any suspicion at all. He was ordered by one Govender to effect the arrest of the Appellant. He testified that he had to give effect to this order and did so. Before arresting the Appellant, he went to inspect the broken window at the establishment of the Complainant.
10. The written complaint made by complainant to the South African Police, laid no basis for a charge of malicious injury to her property. Whilst the window had been broken, her evidence was rather to the effect that the damage was caused accidentally.
11. In arresting the Appellant it appeared from the evidence of Tshabalala that he was following the instructions of Govender. The latter was not called to testify. This is a fatal flaw in the Respondent's case as from the evidence of Tshabalala he arrested the Appellant simply "*because there was a case opened against him*". He could not say whether the Appellant had intentionally broken the window. Had he not arrested the Appellant, he would have been "*held accountable as to why (he) did not effect an arrest*" in respect of the Appellant.
12. The arresting officer accordingly held no belief, let alone a reasonable belief that the Appellant had committed a Schedule 1 offence. It appears from his evidence that he had not given this issue much, if any, thought.

13. In consequence, the Court finds that the Respondent did not establish any justification for the arrest.

APPELLANT'S CLAIM FOR DAMAGES FOR ASSAULT

14. On this claim the onus is on the Appellant to establish the assault and his damages.
15. In his Particulars of Claim he states he was injured and required medical attention.
16. Tshabalala testified that force was used to handcuff the Appellant. Handcuffs are used to try and subdue an arrestee. The Appellant struggled with the handcuffs and arrived at the Police Station "*with swollen arms*". This notwithstanding, the Appellant did not complain of injuries on his arrival at the Police Station. It is clear from Respondent's own evidence that he initially resisted being handcuffed. When the handcuffs were placed around his wrists they were tight. The handcuffs were sore and made his arms numb. He sustained cuts and bruises. His arrest and the assault on him were embarrassing as he is well-known in Hillbrow.
17. There was insufficient evidence of any specific injuries suffered by the Appellant however in consequence of the assault and nor was there evidence that he received any medical treatment. The evidence therefore falls short on the assault charge.

18. I am satisfied that a proper case has been made for condonation.

The order of the magistrate is accordingly set aside and replaced with the following:

- (1) The Respondent is granted condonation for the late filing of his Heads of Argument.
- (2) The appeal is upheld in respect of the wrongful arrest and detention.
- (3) The Appellant is awarded R60 000.00 as damages for the wrongful arrest and detention.
- (4) The appeal in respect of Claim 2 for assault is dismissed.
- (5) The Respondent is ordered to pay the costs of the action and this appeal.



K I FOULKES JONES AJ

I agree



FRANCIS J

Counsel for Appellant : Attorney Biyana

Counsel for Respondent :Adv Zondo

Date of hearing : 12 August 2014

Date of judgment: 13 August 2014