REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:A3171/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12/08/2019

SIGNATURE DATE

In the matter between:

EDWARD NDLOVU 1st Appellant

KATLEKGO MACDONALD SERAKE 2nd Appellant

and

THE MINISTER OF POLICE Respondent

JUDGMENT

MALUNGANA AJ:

[1] The appellants instituted an action against the respondent claiming delictual damages arising out of the unlawful arrest and detention. The appellants were arrested by members of the South African Police on 18 July 2016 after being found in possession of the stolen motor vehicle. They were released from police detention after the prosecutor declined to prosecute on 20 July 2016. On 19 October 2016 appellants issued summons against the Minister of Police claiming damages for unlawful arrest and detention in the sum of R100 000 each. The magistrate found that the appellants failed to make out a case for their claims. This appeal is with leave of the court *a quo.*

[2] The facts are largely common cause, save for the lawfulness or otherwise of the arrest and the quantum of damages. The second appellant testified that he was arrested on his way from Westonaria to Randfontein. According to him the first appellant gave him a lift whilst hiking near the robots between Semunye and Westonaria. On the way the first appellant stopped the vehicle to look for something in the scrap yard, but before he could alight from the vehicle they were approached by the police. The police ordered them to come out of the vehicle. They were made to lie on the ground, searched and handcuffed. The appellants were put inside the police van, and taken away to the police station. At the police station they were told that they were being arrested for possession of a hi-jacked motor vehicle. The second appellant informed the police that he had nothing to do with the vehicle as he merely asked for a lift from the driver of the vehicle. This fact was also confirmed by the first appellant. Despite this explanation, the police officer arrested them and took them to the cells. He also testified about the dingy conditions in the police cells. He said the blankets were dirty, and there was no warm water to take the bath.

[3] The first appellant corroborated the testimony of the second appellant. He testified that he informed the police at the scene that he borrowed the vehicle from his uncle. His uncle was subsequently contacted and the documents relating to the purchase of the vehicle were brought to the police station.

[4] The appellants also led the evidence of Mr. B N Makamu, the first appellant's uncle. He testified that he was employed by Moloana Car Sales. They sell cars and also wash them. He bought the vehicle from a certain Mbangula for the sum of R20 000, 00. After he handed the seller the money he took a picture of him using a cellphone camera. Upon realising that the seller was not the owner of the vehicle he demanded that the affidavit be made relating to the sale and ownership of the vehicle. He brought the document to the police station after the arrest of the appellants. The police, however, ignored him, and only managed to hand over the papers to the police upon release of the appellants.

[5] On cross examination he was asked why he was not interested to meet the registered owner of the vehicle. His reply was that the seller informed him that the owner was too far.

[6] The particulars of claim delineate the cause of action as unlawful arrest and detention. It is common cause that the arrest was carried out without warrant. The respondent contends that the appellants were arrested on a known charge, 'in that there were in possession of hi-jacked or stolen motor vehicle.' The respondent relied on the provisions of s 40(1)(b) of Act 51 of 1977 which authorises a peace officer to effect an arrest without a warrant.

[7] The legislature having granted a peace officer the right to make arrest in circumstances set out in section 40 has created a situation where due compliance with such section by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. It is further a common cause *in casu* that the appellants were found in possession of the vehicle which was reported hijacked.

[8] The respondent led the evidence of the investigating officer, Thomas Mashego. He testified that he met the appellants on the 20th of July 2016 after he charged them the previous day with the offence of hijacking of the motor vehicle. According to the statement in the docket the complainant spotted her

vehicle in Randfontein, and informed the police about the vehicle. He further testified that the first appellant's uncle, Makamu, told him about how he acquired the vehicle in question and gave him documents relating to the transaction. He also met with the complainant to verify the documents showed to him by the first appellant's uncle. It emerged during cross examination that Mashego did not make a follow up regarding the captain who certified the Identity Document allegedly belonging to the owner of the vehicle, Thulisile. He further testified that the second appellant informed him that he was given a lift by the first appellant.

[9] The second witness for the respondent was Constable Lazarus Thuso. He testified that he was on duty with Constable Motsamai patrolling around the area of Randfontein. They were stopped by male and female persons, and indicated that they saw their vehicle which was hijacked. They took the number plate of the vehicle, and as they patrolled the area they saw the vehicle parked on the pavement. Constable Motsamai used the radio to enquire on the status of the vehicle after which the vehicle was confirmed, as hijacked. They approached the vehicle and ordered the occupants to lie down where after they were arrested. The Police informed the occupants that the vehicle was hijacked. They took the appellants to the police station. He called the owner, the complainant and informed him to come and identify the vehicle. It emerged during the cross examination that the driver, the first appellant, gave an explanation about how he came to possess the vehicle during the arrest. He also testified that the first appellant's uncle was sent back with the documents because he was finished with the arrest. It was put to him that the investigating officer could not follow up on the explanation because there was nothing written on the docket concerning the appellants' explanation.

[10] Constable Tumelo Motsamai, the last witness for the respondent also testified. His testimony was to the effect that they were stopped by a couple whist they were patrolling the area, who reported that their vehicle was hijacked. After they took the information regarding the vehicle they found the alleged vehicle parked on the side of the street. They searched the occupants and informed them of the reasons why they arrested them. The appellants

were arrogant and informed him during the arrest that they had papers for the car which they bought lawfully. Under cross examination he testified that he could not do anything with the information the appellants gave him because they were suspects of a hijacked motor vehicle. He also informed them that they will give the information to the Investigating Officer, the investigating officer who will be the one to take the information further, and do what is necessary because he, Motsamai, was not an investigating officer.

[11] It is well established that the purpose of arrest is to bring the suspect to court for trial. In *Tsose v Minister of Justice and others* 1951 (3) SA 10 (A) at 17F-H, Schreiner JA held that:

"An arrest is, of course, in general a harsher method of initiating a prosecution, than citation by way of summons. But if circumstances exist which make it lawful under a statutory provision to arrest the person as a means of bringing him to court, such arrest is not unlawful even if it was made because the arrestor believes that the arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest, so the worst motive will not render an otherwise legal arrest illegal. What I have said must not be understood as conveying approval of the use of arrest where there is no urgency, and the person to be charged has a fixed and known address. In such a case it is generally desirable that summons should be used. But there is no rule of law that require the milder method of bringing a person into court to be used whenever it will be equally effective."

[12] The above said, police are obliged to consider in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, a notice or summons to appear in court is obtained then it is constitutionally untenable to exercise the power of arrest. An arrest is a drastic interference with the rights of an individual to freedom of movement and to dignity ...an arrest should be only the last resort as a means of producing a person or suspect in court. See *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E).

[13] *"So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's detention must be objectively justified regardless ...even of whether or not he was aware of the wrongful nature of the detention."* See *Louw v Minister of Safety and Security* 2006 (2) SACR 178 at 185 (C).

[14] The jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the Act may be invoked as follows:

(1) The arrestor must be a peace officer;
(2) who entertains a reasonable suspicion;
(3) that the arrestee committed an offence referred to in Schedule 1 of the Act.

[15] The onus to establish the improper object of the arrestor will rest on the arrestee. See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-819B.

[16] The evidence of the appellants is that the police officers were informed of how the first appellant came to possess the vehicle. They were also informed of the fact that the second appellant was merely offered a lift by the first appellant to Randfontein. In addition the first appellant's uncle, Makamu also came to the police station to provide certain documents relating to the ownership and purchase of the vehicle in question.

[17] In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H, also quoted in the judgment of the court *a quo,* Jones J, in dealing with the requirement of reasonable suspicion, said the following:

"The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective (S v Nel and another 1980(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possession of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to be have been stolen? 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 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 information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after the 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 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."

[18] The onus of justifying the arrest and detention of the appellants lies upon the respondent[1]. In this regard the court *a quo's* reasoning is that the police officers acted within the scope and ambit of s 40, in that they satisfied themselves that the vehicle in which the appellants travelled was confirmed to have been hijacked, and there was no contrary information provided that the vehicle was sold to the appellants. I disagree with the learned magistrate's reasoning. The magistrate clearly erred in holding that there is no evidence that the uncle went to the police station with documentation. It is clear from the evidence that the police were provided with information by the appellants to the effect that the first appellant's uncle is the one that bought the vehicle from a third party. In addition the uncle, Makamu also brought documentary proof to the police in corroboration of the information of the appellants' explanation. In my view having regard to the backdrop and circumstances within which the arrests were made, such as the undisputed evidence of Makamu, which resulted in the prosecution declining to prosecute, the conduct of Constable Mashego and Thuso was unreasonable in effecting the arrest, consequently the arrest of the first appellant was unlawful.

[19] Regarding the arrest of the second appellant, there is evidence that shows that the police were informed that he was merely offered a lift by the first

---

[1] Zealand v Minister of Justice and Constitutional Development and another, 2008 (2) SACR 1 (CC) at paras 24 and 25

appellant whilst hiking to Randfontein. Constable Motsamai testified that the appellants will furnish the relevant information to the Investigating officer. There is also evidence that the police drove around with the appellants to Caltex garage after effecting the arrests. In my view the police had ample time to verify the information which they were given by the appellants. Instead, they chose the drastic route of arresting them. They would have even interviewed the uncle who came to the police station with documents. There is no evidence to suggest that the police were constrained to investigate the information obtained from the appellants on the day of the arrest. The attitude adopted by the police seems to be that they had nothing further to do with the case after arresting the appellants. Therefore the respondent failed to discharge the onus of proving that the arrest of the appellants on 18 July 2016 without warrant and the subsequent detention in the police cell were justified.

[20] The appellants were deprived of their liberty for almost two days. The conditions in which they were held were deplorable, blankets were filthy and unhygienic. Their situation was compounded by the fact that there was no warm water to bath. There is no question that they suffered. They suffered the humiliation of being arrested in full view of the public.

[21] The amount of damages to be awarded must be determined. The guiding principle in determining the appropriate award in cases of unlawful arrest has been set out by the Supreme Court of Appeal.

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much - needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular

case and to determine the quantum of damages on such facts." [2]

With that in mind I have considered previous awards in other cases of wrongful arrest and detention in which the plaintiffs suffered the same fate. The case in point is *Rudolf and Others v Minister of Safety and Security* 2009 (2) SACR 271 SCA. The appellants in *Rudolph* were incarcerated in similar conditions for four nights and three days. The cell was infested with cockroaches and insects with no access to drinking water. Taking into account the passage of time that has lapsed since the *Rudolph* case, an appropriate award in the present case in my view is R 100 000, 00 in respect of each appellant.

[22] In the result the following order will issue:

22.1. The appeal is upheld with costs.

22.2. The order by the trial court is set aside and substituted with the following-

22.2.1. The arrest and detention of the Plaintiffs is found to be unlawful;

22.2.2. The respondent is ordered to pay each of the Plaintiff's the sum of R100 000, 00 as damages;

22.2.3. Costs of suit.

P H MALUNGANA
Acting Judge of the
High Court of South Africa
Gauteng Local Division, Johannesburg

I agree

TSOKA J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

[2]Minister of Safety & Security v Tyulu 2009 (5) SA 85 (SCA) at para 26

APPEARANCES

Counsel for Appellants	**: Nemakanga Rasodi**
Instructed by	**: Nemakanga Attorneys**
Counsel for Respondent	**: Adv. X. Hilita**
Instructed by	**: The State Attorney**
Date of hearing	**: 13 May 2019**
Date of judgment	**: 12 August 2019**