


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3157/18

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|--|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. ✓ |
| 11/11/2019 DATE | |
|  SIGNATURE | |

In the matter between:

MINISTER OF POLICE

Appellant

and

GEORGE RANTHO MASHILWANE

Respondent

J U D G M E N T

CORAM: MABESELE J AND NOKO AJ:

MABESELE, J:

[1] This is an appeal against the whole judgement and order of the magistrate (Bezuidenhout JH). On 19 October 2018 the magistrate awarded

damages in favour of the respondent for unlawful arrest and detention by the appellant. This appeal is not opposed.

[2] The appeal is based on the findings of the court below that (i) the investigating officer did not exercise his discretion properly and applied his mind when he effected the arrest on the respondent and (ii) the officer formed a reasonable suspicion that the respondent committed an offence regardless of the fact that the complainant did not implicate him.

[3] It is common cause that the respondent was arrested and detained on a charge of theft of building materials worth R 60 000.00. The charges were later withdrawn against him due to insufficient evidence which was contained in the police docket.

[4] The investigating officer testified that upon receiving the docket he called the complainant and interviewed him about the alleged theft of his materials. It emerged during the interview that the storeroom wherein the materials were kept was not broken into in order for the materials to be removed. The investigating officer was informed by the complainant that the respondent had a spare key to the storeroom. The information was confirmed by another witness who told the investigating officer that he gave the spare key to the respondent. The eyewitness was also interviewed. Subsequent to the interviews, the respondent was called to the police station. On arrival, he was questioned about the alleged offence. Thereafter he was asked to report at the police station the following day. On his arrival, he was arrested and

subsequently asked by the investigating officer to follow him with his own vehicle to court where he was locked in the holding cells before he appeared in court.

[5] Based on the evidence of the investigating officer it was argued on behalf of the appellant that the investigating officer arrested the respondent on reasonable suspicion that he committed the offence of theft. Therefore the arrest and detention were lawful.

[6] Section 40(1) of the Criminal Procedure Act¹ states that:

a peace officer may without a warrant of arrest, arrest any person -

- a) who commits or attempts to commit any offence in his presence;
- b) whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.

[7] In *Duncan V Minister of Law and Order*² the jurisdictional facts for section 40(1) defence are stated as follows

- I. the arrestor must be a peace officer;
- II. the arrestor must entertain a suspicion;

¹ 51 of 1977

² 1986(2) SA 805(A) at 818 G_H

- III. the suspicion must be that the arrestee committed an offence referred to in Schedule 1;
- IV. the suspicion must rest on reasonable grounds

[8] In the matter between *Minister of Safety and Security V Sekhoto and Another*³ it was said that once the jurisdictional facts for the arrest, whether in terms of any paragraph of section 40(1) or in terms of section 43 are present, the discretion whether or not to arrest arises.

[9] The magistrate, in his judgement, stated three reasons which persuaded him to find in favour of the respondent. The first reason was that the fact that the prosecutor provisionally withdrew the charges at the first appearance was an indication that there was no sufficient evidence in the docket. Secondly the investigating officer did not exercise his discretion properly and applied his mind when he effected the arrest. Thirdly, the investigation officer formed a reasonable suspicion that the respondent committed an offence regardless the fact that the complainant did not implicate him.

[10] It is not in dispute that the investigating officer is the peace officer. After he had received the docket he interviewed the complainant about theft of his goods worth R60 000. The offence is referred to in schedule 1. It emerged during the interviews of the complainant and two other witnesses that the respondent was the only person who had the spare key to the storeroom wherein the goods were stolen. The original key was possessed by the

³ 2011(1) SACR 315(SCA) at para 28

complainant. Importantly, one of the witnesses who were interviewed was the eyewitness. Based on the statements of these witnesses, including the complainant, the investigating officer, rightly, entertained a suspicion, rested on reasonable grounds, that the respondent committed the offence referred to in Schedule 1.

[11] After the investigating officer had obtained information from the witnesses he called the respondent to the police station and interrogated him about the alleged offence. Thereafter the respondent was released and asked to come to the police station the following day. That, in my view, was to afford the investigating officer an opportunity to apply his mind on whether or not to arrest the respondent. On the following day the investigating officer arrested the respondent after he had applied his mind and exercised his discretion properly. Since the respondent was arrested for the offence referred to in Schedule 1 he was lawfully detained in the holding cells at court before he appeared in court.

[12] The fact that charges were withdrawn against the suspect does not follow that the arrest and detention of the suspect are unlawful. The charges against the suspect may be withdrawn for various reasons, such as disappearance of the star witness or insufficient evidence in the docket.

[13] In the present matter the magistrate correctly found that the charges against the respondent were withdrawn due to insufficient evidence in the docket (not because the arrest was unlawful). However, the magistrate

incorrectly considered this as the base for his conclusion that the arrest of the respondent was unlawful. The finding of the magistrate that the investigating officer incorrectly formed a reasonable suspicion because the complainant did not implicate the respondent is incorrect. The reason is that the respondent was arrested on the basis of the statements of the complainant and witnesses which pointed at the respondent as a suspect in that the respondent was the only person who had a spare key to the storeroom. In addition, the eyewitness informed the investigating officer about what transpired during theft of the goods. In a nutshell, the findings of the magistrate cannot stand.

[14] This brings me to the issue of costs. The respondent filed notice to abide by the decision of the court and made his intention clear that he would not oppose the appeal. For these reasons it will not be just to award costs of the appeal against him.

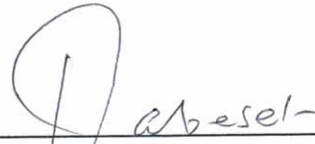
[15] In the result, the following order is made:

15.1. The appeal is upheld.

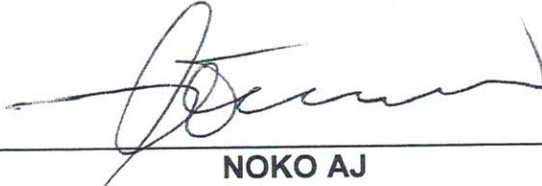
15.2. No order as to costs.

15.3. The order of the court below is set aside and replaced with the following:

‘The plaintiff’s claim is dismissed with costs’



M M MABESELE
JUDGE OF THE HIGH COURT
(GAUTENG LOCAL DIVISION)



NOKO AJ
ACTING JUDGE OF THE HIGH COURT
(GAUTENG LOCAL DIVISION)

Date of hearing : 9 September 2019
Date of judgment : 13 November 2019

APPEARANCES

For the Appellant : N.E Cingo
Instructed by : State Attorneys
For the Respondent : No appearance