**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: **A3039/19**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

27/08/2021

In the matter between:

**PULE DIKGWATLHE** First Appellant

**TUMELO MOGALE** Second Appellant

and

**THE MINISTER OF POLICE** Respondent

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**JUDGMENT**

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**GRENFELL AJ**

[1] **INTRODUCTION**

1.1. The appellants, as unsuccessful plaintiffs in a trial in the Magistrate's Court, sought damages from the Minister of Police, as a result of their arrest on 29 July 2011 and further detention for a total of 12 days. The appellants were held in custody after their first appearance in court on 1 August 2011. At their second court appearance on 10 August 2011 the charges against three suspects, including the two appellants, were withdrawn.

1.2. The criminal matter arose from the hijacking and motor vehicle theft of a blue Volkswagen Polo motor vehicle ("the vehicle") in Lenasia on the morning of 29 July 2011. The vehicle was fitted with a tracking device, and the scene played out in the aftermath of the hijacking, with the capture of a suspect Mr Bongani Nhleko ("Mr Nhleko") by certain Matrix employees, who were following the vehicle both on land and in the air with a hovering helicopter. Constable Sekgobela in uniform and driving a police van, was approached by one Mr Mienie ("Mr Mienie') a Matrix employee who had Mr Nhleko in his vehicle to hand over to the police. Mr Nhleko had the key to the stolen vehicle in his possession. The group travelled to the scene where the vehicle was parked, where Constable Sekgobela confirmed from the registration number that the vehicle was stolen. Mr Nhkelo then directed the group to a further location being the first appellants' home, where the appellants were found. What happened thereafter leading to the appellants arrest, is the nub of the first part of this case. Neither Mr Nhleko nor Mr Mienie testified at the trial, which failure was said by the appellants to be "fatal" in a determination of the appeal.

1.3. The trial in the court a quo, the Vereeniging Magistrate's Court, ran over a number of non-consecutive days before Magistrate Moletsane, who passed away before the matter could be finalised. The record uploaded to Caselines in the appeal, and relied upon in the Appellants' Heads of Argument by Ms Liphoto, who appeared for the appellants in the appeal, contained this record and references to the trial proceedings before Magistrate Moletsane, with the purpose of pointing out inconsistencies in the evidence. It was raised at the start of argument in the appeal with Ms Liphoto, that the prior trial record comprised inadmissible hearsay evidence and was not before the Magistrate, Ms Reyneke, who handed down Judgment, having heard the trial de novo. In response to the raising of the admissibility of previous evidence given by Constable Sekgobela on behalf of the Minister of Police before Magistrate Moletsane in this appeal, Ms Liphoto disavowed any reliance thereon and submitted that she would "leave it".

1.4. An appeal court is enjoined to decide the appeal on admissible evidence only.[1] If inadmissible evidence has been received, as being admitted by the trial court without objection, it is the duty of the appeal court to reject it when giving judgment.[2] The above statement is true of both the situations of where there has been an objection and no objection to the evidence in the court a quo.[3]

[1] Langham and another NNO v Milne NO 1961(1) SA 811 (N) at 817A-F
[2] Phipson 8th Edition P673
[3] Whitthuhn v Road Accident Fund Case No A5046/2015 Judgment per Van der Linde J [23] 14 September 2017

1.5. Thus, this appeal court, in determining the appeal is confined to the record of trial proceedings before Magistrate Reyneke and her judgment which is being appealed against.

1.6. At the start of the appeal hearing, which was heard virtually on 2 August 2021, condonation was duly sought and granted for the late filing of practice notes and the late uploading of heads of argument to the Caselines platform by the parties in the appeal.

1.7. The appeal is concerned with two aspects, the first being whether the appellants were unlawfully arrested on 29 July 2011 and secondly, whether after the first appearance in court following the arrest on 1 August 2011 their continued detention for 7 additional days (12 days in total) was unlawful.

1.8. The appellants, during the course of the trial in the court a quo before Magistrate Reyneke, abandoned their case against the Minister of Justice (and Constitutional Development), who had originally been cited as a second defendant. This abandonment was unequivocally indicated by their legal representative, Mr Hlapolosa, the attorney who represented the appellants in both trials in the court a quo and the abandonment was recorded in the Magistrate's Judgment. This aspect was not contested on appeal by the appellants.

1.9. The appellants' case was thus confined to the conduct of the employees of the Minister of Police, both in respect of the arrest and further detention after the first appearance by the appellants in court.

## [2] JUDGMENT IN THE COURT A QUO AND GROUNDS OF APPEAL

2.1. There was no dispute between the parties as to the test to be applied in considering whether the arrests were lawful. Both parties accept that theft is an offence referred to in schedule 1 of the Criminal Procedure Act 51 of 1977, as amended, and the jurisdictional facts for the invocation of a defence based on Section 40 (1) (b) include, inter alia, the arrestor must entertain a suspicion and that the suspicion must rest on reasonable grounds.[4]

2.2. The court a quo, mindful that the onus of proof in respect of the lawfulness of the arrest without a warrant was on the respondent, found that there had been established a reasonable suspicion, based on common cause facts, that the appellants had committed the crime of vehicle theft, which was objectively sufficient[5] to inform the view of Constable Sekgobela who arrested the appellants at Mr Dikgwatlhe's house in Lawley or at the scene where the stolen vehicle was retrieved, on the day of the hijacking.

2.3. In applying the dictum in Mabona v Minister of Law and Order[6], the Magistrate took note that the suspicion must be on solid grounds and not flighty or arbitrary. This test was contended for too in the heads of argument for the respondent.

2.4. Having noted that a reasonable suspicion to be entertained by the arresting officer is not the same as a prima facie case in court, the Magistrate in her reasoning in the Judgment, set out five common cause facts, which in her view

[4] Minister of Safety and Security v Sekhoto and another 2011(1) SACR 315 (SCA) at [6] ; Duncan v Minister of Law and Order 1986 (1) SA 805 (A) per Harms DP at 818 G-H
[5] Manga v Minister of Police Unreported Case No 16783/2011 [2015]SAGP JHC (1915)
[6] 1988(2) SA 654SE at 658F-H

objectively justified a reasonable suspicion on the part on Constable Sekgobela in arresting the appellants.[7] These comprised: that a helicopter tracked the Polo; that the Polo was located and that the key that was found in Bongani's (Mr Nhleko's) possession fitted on (sic) this stolen vehicle; Mr Dikgwatle (first appellant) admitted that a Polo vehicle, earlier in the day, was at his yard; three persons including the plaintiffs (appellants) were found at the house of Mr Dikgwatle (first appellant) and Bongani (Mr Nhleko) pointed the plaintiffs (appellants) out and indicated they were involved in the theft.

2.5. On appeal, Ms Liphoto for the appellants, confined her submissions in critiquing the reasons given by the Magistrate for finding that a reasonable suspicion existed, to considerations that everything said to Constable Sekgobela by Mr Mienie or Mr Nhleko was hearsay and should not be considered, as neither witness was called to testify.

2.6. This submission fails to appreciate that it was Constable Sekgobela who was required to form the suspicion. This he could only do from facts at his disposal or told to him prior to the arrest. What he also knew at that stage, and as set out in the Judgment, was that a vehicle had been hijacked by more than one male person, he had met Mr Mienie with Mr Nhleko and they travelled to the location of the vehicle, where the description matched that of the hijacked vehicle and Mr Nhleko had the key to open the vehicle. It was Mr Nhleko who led Constable Sekgobela to the house in which the appellants were found. That

[7] Judgment court a quo paragraph 44.

evidence is not hearsay. No corroboration of the arresting officer was required to discharge the onus that he had a reasonable suspicion.

2.7. The record does not substantiate the third common cause fact listed by the Magistrate, namely that Mr Dikgwatle (the first appellant), admitted that a Polo vehicle was earlier in the day at his yard. This was his evidence only after the arrest at the time of testifying in the trial. I do not consider this error by the Magistrate to be material or a misdirection of fact.

2.8. Bearing in mind, the benefits that the trial court has in seeing and listening to the witnesses[8], there is nothing to suggest that the Magistrate misdirected herself on the facts. Various factors relied upon by the respondent in the trial, were found by the Magistrate to be unsupportive of the objective criteria required to form the reasonable suspicion, in particular the hovering helicopter.

2.9. The Magistrate did not consider Constable Sekgobela to be an entirely satisfactory witness and founded her factual findings on common cause facts, not necessarily as summarised by her, but dealt with in the course of the judgment. Whilst there are many justifiable criticisms of the evidence of Constable Sekgobela and his statement contained more omissions than facts, said by him to be due to inexperience in the police force, they are not destructive of the conclusion reached by the Magistrate.

2.10. In addition, the matter does not turn on mutually destructive versions between the appellants and Constable Sekgobela, but rather on a conspectus of

[8] R v Dhlumayo and Another 1948(2) SA 677 (A)

common cause facts, an objective reasonable suspicion had been established as a defence to justify an arrest of the appellants.

2.11. A dispute which loomed large in the evidence of the appellants at the trial and in argument on their behalf, was that it was the Matrix employee Mr Mienie who arrested the appellants at the house of one of them and not Constable Sekgobela.

2.12. This point is a non-starter for the appellants, because, as pointedly submitted by Ms Mtsweni, who appeared for the respondent, if the appellants were not arrested by the police, then why did they sue The Minister of Police for damages for unlawful arrest and not confine themselves to a claim against Matrix and their employees? Further if they had not been arrested by the police, the appellants would not have appeared in court.

2.13. It may be that the point could have been made on the appellants behalf, that having already been taken into custody by the Matrix employee, who facilitated the travelling from the house at which the appellants were found, to the location where the hijacked vehicle was found, Constable Sekgobela did not form his own reasonable suspicion that the appellants had committed an offence, but just relied on the judgment of Mr Mienie. This however was not the case of the appellants, either in the pleadings, in the trial evidence or on appeal.

2.14. It must have been perfectly obvious to the appellants that Mr Nhleko had led Mr Mienie and the police to the house where they were found, and yet they chose to remain silent when arrested, which, on the Magistrate’s finding, probably occurred at the house, not where the vehicle was revisited by the group.

2.15. Much was made in submissions for the appellants at the hearing of the appeal, about the fact that Constable Sekgobela did not ask the appellants their names or establish from Mr Nhleko the names of his co-perpetrators in the hi-jacking. I do not agree that this is significant. Many instances occur when an arrest takes place based on conduct and information rather than identity at the stage of arrest. To do so, does not detract from having a reasonable suspicion that a crime has been committed. Hypothetically, if a suspect refuses to speak or disclose his name, it cannot be realistically suggested that no arrest can take place absent a name, once a reasonable suspicion exists in the mind of the arresting officer.

2.16. I am accordingly of the view that the Magistrate was correct in finding that the onus had been discharged by the Respondent to establish an objective reasonable suspicion by Constable Sekgobela that the appellants had committed an offence justifying their arrest without a warrant.

[3] **THE DETENTION AFTER THE FIRST COURT APPEARANCE**

3.1. Having concluded that there was a reasonable suspicion to arrest the appellants the Magistrate concluded her Judgment by dismissing their claims with costs.

3.2. This however was premature and not the end of the inquiry. The omission was caused by a simplistic identification of the issues in dispute, as being: the identity of the arrestor, justification of the arrests and quantum of damages.

3.3. In order to consider the second argument made on behalf of the appellants, raised in the heads of argument and argument for the appellants on appeal, namely that they should have been released at the first court appearance on 1 August 2011, when a statement made by Mr Nhleko identified his co-accused and was alleged to have stated that the appellants and a third suspect had nothing to do with the hijacking.

3.4. On this aspect, although ignored by the Magistrate and not dealt with in the heads of argument for the appellants, the onus to prove a continued unlawful detention is on the plaintiff or appellants, as recently reaffirmed by the Supreme Court of Appeal.[9]

3.5. This onus arises whether or not the initial arrest was lawful or unlawful.[10]

3.6. An examination of the pleadings and the status of documents used at the trial is required in order to address whether this issue was raised in the pleadings of the appellants, which were amended and whether, if properly raised, the appellants have discharged the onus of proving that their continued detention was unlawful.

3.7. Regardless of those two facets, it is beyond dispute that it is only the conduct of the police that falls to be considered, as any claim against the prosecutor or magistrate would fall within the ambit of constitutional responsibilities of

[9] Mahlangu and another v Minister of Police [2020] ZASCA 44 (21 April 2020) per Koen AJA [23]
[10] Mahlangu supra at [25]

employees of the Minister of Justice, who was originally joined as a defendant but against whom the claim of the appellants was abandoned at the trial.

3.8. In paragraph 5 of the appellants' particulars of claim, as amended, they raised the issue of their continued unlawful detention by pleading in paragraph 5.1:

> "As a result of the conduct by the members of the South African Police Services as well as the conduct of the Prosecutor amongst others – 5.1.1 In not releasing and withdrawing charges against the Plaintiffs; 5.1.2 In denying bail hearing or adjudication; 5.1.3 In negligently and or intentionally proceeding with the prosecution of charges of car theft even though they had reasons and information to withdraw the charges and or release Plaintiffs at an earlier stage alternatively prior to the Court appearance."

The respondent denied these paragraphs in its amended plea and put the appellants as plaintiffs to the proof thereof.

3.9. From the pleading of the appellants, it is evident that they relied upon the conduct of the South African Police Services, the prosecutor "amongst others" to found their cause of action for unlawful detention. This is at odds with the abandonment of the action against the Minister of Justice. Amongst others is too vague to found any cause of action, so like in De Klerk's case[11] in the Constitutional Court, the appellants bore the onus of proof on a balance of probability to establish that the police conduct led to them being unlawfully detained for a further period following their court appearance.

3.10. Constable Sekgobela as the arresting officer had nothing further to do with the case after booking the appellants and Mr Nhleko and another in at the police

[11] De Klerk v Minister of Police [2019] ZACC 32,

station on 29 July 2011. He was not the investigating officer and played no further part in an identity parade which was held on Saturday 30 July 2011 and the taking of statements from other suspects and the court appearances. In these circumstances, putting a statement made by Mr Nhleko to Constable Sekgobela in cross examination was a futile exercise.

3.11. Thus it is the evidence of the appellants that should be scrutinised to establish whether the onus had been discharged. Neither appellant was able to give an account of what the police should have done differently to ensure their earlier release. They merely stated that they appeared in court and the matter was postponed.

3.12. The question of a failure to consider bail for the appellants as pleaded, was an aspect that would have called into question the conduct of the magistrate and prosecutor on the first court appearance on Monday 1 August 2011. These competencies fall constitutionally under the responsibilities of the Minister of Justice, against whom the appellants, for reasons best known to them, abandoned their action.

3.13. The scenario is thus as described by Chief Justice Mogoeng, in De Klerk in his minority judgment at [165][12]: "The Minister of Police should not be made to bear the constitutional burden of the Judiciary, simply because Mr De Klerk failed to sue the latter for the period of detention beyond the two hours for which the Police are exclusively responsible. Nothing stopped him from doing so. It was his own lawyers' ineptitude that is responsible for this failure. It is therefore not the responsibility of a court to bend over backwards to mercifully accommodate him at the expense of constitutional imperatives or sound legal principles."

[12] De Klerk supra ft 11

3.14. The majority decision in De Klerk penned by Justice Theron[13], decided the matter on the basis of legal causation and in a concurring judgment by Justice Cameron[14] the matter was characterised as being about considerations of the harm complained of, being the further detention in custody after the applicant's appearance in court. The underlying right is protected in section 12(1) (a) of the Constitution: not to be deprived of freedom arbitrarily or without just cause. In the particular facts of De Klerk's case, the Constitutional Court held that the knowledge of the investigating officer, that the accused would be sent to a remand court and imprisoned without bail being considered, was the factor that led the majority decision to hold the Minister of Police liable.

3.15. In this matter, what occurred in the interaction, if any, between the investigating officer and the prosecutor on 1 August 2011, when the appellants had their first court appearance is unknown. No transcript of the criminal proceedings was discovered or alluded to by the appellants, which would assist to shed light on what documentation the prosecutor had or did not have in his possession as at the date of the first appearance.

3.16. It was contended on behalf of the appellants on appeal, that the statement made by Mr Nhleko indicating that he hijacked the vehicle with one Senzo, was obtained prior to the first court appearance of the appellants. This contentious statement, is one of the documents made available to the appellants' attorney in May 2015, in reply to a pre-trial questionnaire in the court below.

[13] De Klerk supra
[14] De Klerk supra Justice Cameron para [122]

3.17. The fact that the statement was made and made available to the appellants' attorney by the respondent, does not prove the contents of the statement as being true and correct. There was no agreement between the parties in the trial in the court a quo that documents in the discovered bundles were true as to their content. There is not even the usual agreement that the documents are what they purport to be unless expressly challenged. Accordingly the content of Mr Nhleko's statement cannot be taken as true.

3.18. Even assuming in favour of the appellants that the statement by Mr Nhleko is true, in its terms, it does not exclude the appellants as possible suspects in a car theft, rather the contents merely indicate the identity of the person who accompanied Mr Nhleko when the vehicle was hi-jacked, namely one Senzo. To name a co-perpetrator in a hi-jacking does not exclude the appellants as suspects to car theft at a later stage, it being a continuous offence.

3.19. In either event, no evidence was adduced by the appellants that the police, through the actions or omissions of the investigating officer or otherwise, deliberately or negligently kept the statement of Mr Nhleko from the prosecutor on the date of the appellants first court appearance. Perhaps the prosecutor read the statement of Mr Nhleko and did not believe it exonerated the appellants or was not credible. As an appeal court, we simply don't know.

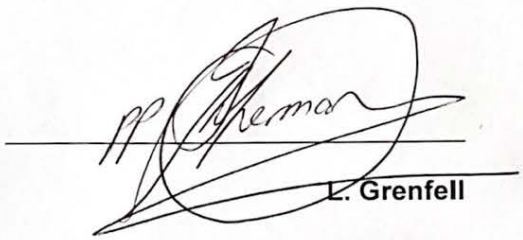
3.20. The consequence of this failure to place evidence before the trial court as to the ongoing police conduct that caused the appellants to remain in custody until 10 August 2011 when the charges were withdrawn, is that the appellants

have failed to discharge the onus of proof on a balance of probabilities that their continued detention was unlawful.

[4] Thus on the second aspect too, the appeal must be dismissed.

[5] **ORDER**

The appeal is dismissed with costs.



**L. Grenfell**

**Acting Judge of the High Court**

**Gauteng Local Division, Johannesburg**

I agree

**I. Opperman**

**Judge of the High Court**

**Gauteng Local Division, Johannesburg**

Appearances:

| | | |
|---|---|---|
| For the Appellants | : | Adv L Liphoto |
| Instructed by | : | T T Hlapolosa Attorneys. |
| For the respondents: | | Adv NM Mtsweni |
| Instructed by | : | The State Attorney |

| | | |
|---|---|---|
| Date of hearing | : | 2 August 2021 by video-conference |
| Date of judgment | : | 27 August 2021 - deemed date by email and uploading onto CaseLines |