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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 35306/2016
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
18/05/23

In the matter between:

MKHULULI NCUBE

PLAINTIFF

and

THE MINISTER OF POLICE

1ST DEFENDANT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

2ND DEFENDANT

Neutral citation: Mkhululi Ncube vs The Minister of Police and Another (Case No: 35306/2016) [2023] ZAGPJHC 515 (18 MAY 2023)

JUDGMENT

MAHALELO, J

Introduction

[1] The plaintiff issued summons against the Minister of Police and the National Director of Prosecutions, claiming damages for unlawful arrest and detention, malicious prosecution, loss of earnings and legal costs. The particulars of claim alleges that on 17 June 2016, the plaintiff was wrongfully and unlawfully arrested without a warrant, detained and maliciously prosecuted by the defendants. He alleges that he enlisted the services of attorneys to represent him at court, therefore he incurred damages for legal fees and his unlawful arrest and detention caused him to suffer loss of earnings. On 5 August 2016, the charge was withdrawn against the plaintiff after his legal representative made representations to the prosecutor.

[2] The defendants admit to the arrest without a warrant and detention but deny all the allegations of unlawfulness and wrongfulness.

[3] The issue for determination in this case is whether or not the plaintiff was wrongfully and unlawfully arrested and detained and maliciously prosecuted.

Defendants' Evidence

[4] It is trite that in an action for damages for unlawful arrest and detention, once the arrest and detention has been admitted or proved, the defendant bears the onus to prove the existence of grounds justifying the arrest and detention.¹ For that reason, the defendants began adducing evidence and called witnesses. Mpho Molokomme testified that on 12 May 2016, she was in her room at [...], Regents Park. She was watching TV when she heard footsteps in the premises. When she opened the door, she saw two male persons and she asked them what they wanted. One of them pointed a screwdriver at her and told her to go back to her room. She was instructed to go under the bed. While under the bed, she heard the two men removing items from the room. She asked them why they were taking her belongings. They threatened to assault her. She remained under the bed and after a short while, it became quiet. She came out from under the bed and she noticed that her Plasma TV and tablet phone were missing. She immediately went out of the room and screamed for help. She quickly went down from the second floor to the ground floor using the gutters on the balcony. She then ran towards the gate and

¹ *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A).

saw two unknown ladies standing in front of the gate. One of the ladies, who was later identified as Itumeleng Ramaquele, made a report to her regarding the two men whom she had just seen loading a Plasma TV and something that looked like a laptop in a white bakkie. She also mentioned to her that another man was waiting in the car, and after loading, they immediately drove off. Ms Molokomme testified that she could not identify the two males because she was scared.

[5] Sergeant Mthalane testified that on 12 May 2016, whilst he was on duty, he received a call which concerned a house robbery in Regents Park. He went to the scene and upon arrival, he interviewed possible witnesses. Itumeleng Ramaquele was one of them. He took a statement from her regarding the incident, and Itumeleng informed him of the registration number of the motor vehicle that was involved in the commission of that crime. Itumeleng further informed him that she could point out the driver of the said motor vehicle as he had parked next to them and remained in the motor vehicle the whole time. She also mentioned how the driver was clad.

[6] Mthalane further testified that he continued with investigations in the case and circulated the motor vehicle as wanted. He found out on the police system that the owner of the said motor vehicle was Josia Motowa. During cross-examination, he testified that he contacted Josia Motowa, who revealed to him that he had sold the motor vehicle to Langton Maphungai. He obtained a statement from Maphungai wherein Maphungai confirmed that he was the owner and that him and the plaintiff drove the said vehicle most of the time. Regarding the question of bail, Mthalane testified that he opposed bail on the plaintiff's first appearance as he had to confirm the plaintiff's status in the country. According to Mthalane, it was not necessary for an ID parade to be held because the plaintiff was pointed out by Itumeleng Ramaquele on 17 June 2016 before he was arrested.

[7] Mthalane testified that on 17 June 2016, whilst at court, he received a call from Warrant Officer Selepe who made enquiries concerning the motor vehicle in question. Selepe also informed him that he was in the company of Itumeleng Ramaquele and that she had identified the said motor vehicle as having been involved in the commission of the crime at Regents Park on 12 May 2016. After Selepe gave him the registration number of the motor vehicle, he confirmed that the motor vehicle

had been circulated as a wanted car because it was allegedly involved in the commission of a crime.

[8] Itumeleng Ramaqele testified that on 12 May 2016, she was with Agnes, standing together conversing at the gate of [...], Regents Park when she noticed a motor vehicle stopping next to them and faced their direction. It was parked two to three meters away from the gate of the flats. Two males alighted and opened the gate of the flats. One male person, who was the driver thereof, remained behind. As she was talking to Agnes, she kept on looking at the driver of the bakkie. She saw him and noticed that he was wearing a navy track top with a hoodie, and he had a black cap on his head.

[9] After about 20-30 minutes, she noticed the two males who earlier alighted from the same motor vehicle coming back carrying a TV and an item that looked like a laptop. They ran fast towards the motor vehicle and loaded the items and the car drove off towards the western direction. It took a left turn and it disappeared from her sight. She however managed to take the registration number thereof, which was VYK 5[...]. Although she could not give the police any specific facial features of the driver of the motor vehicle, she informed them that she was able to see his face. She further informed them of what he was wearing and that she could be able to point him out. She made a statement to the police, and informed them of the registration number of the said motor vehicle.

[10] On 17 June 2016, she was on foot from the Glen shopping centre and she saw the same motor vehicle park next to Spar. She waited for approximately 5 minutes looking at the driver because he was sleeping on the driver's seat. Looking at his face, she was able to identify him as the same driver of the motor vehicle which was involved in the house robbery at Regents Park on 12 May 2016. He was still wearing the same clothes.

[11] She then called Sergeant Mthlane, the investigating officer of the case, to inform him about the motor vehicle and the driver. He directed her to call Moffatview police station as he was at court. As she was about to call the police station, a police car appeared, and she stopped it. She informed the police that she had just seen a motor vehicle which was involved in the commission of the crime at Regents Park

flats. She gave them its registration number. Warrant Officer Selepe, who was one of the two police officers, then contacted the investigating officer to confirm that there was a case of house robbery opened which involved the said registration number. Selepe also called up the vehicle on the police station system and the registration number appeared as that of a wanted motor vehicle. Thereafter, she went with Warrant Officer Selepe to where the bakkie was parked. She pointed out the plaintiff who was then sleeping in the bakkie. Selepe explained the plaintiff's rights and thereafter arrested the plaintiff. They all went to the police station where she made her further statement.

[12] Warrant Officer Selepe testified that he was patrolling with his colleague in a marked police vehicle on 17 June 2016 when they were stopped by Itumeleng Rameqela who reported to them that she saw a motor vehicle that was involved in the commission of the house robbery at Regents Park flats. She informed him that it was a white bakkie with registration number VYK 5[...]and that the driver was the same person who drove it on the day of the commission of the crime and he was still wearing the same clothes. Itumeleng Rameqela gave Warrant Officer Selepe the case number and he called Sergeant Mthlane to confirm about the case. Mthlane was still at court. Selepe called the police station and found out that the very same bakkie was being circulated on the police system as having been used in the commission of a crime.

[13] Warrant Officer Selepe, together with his colleague and Itumeleng, approached the plaintiff who was still in the bakkie. Itumeleng pointed out the plaintiff to them. They introduced themselves to him and explained the reason for approaching him. They informed him that he was under arrest for house robbery. They also explained to him his rights. The plaintiff mentioned that he knew nothing about the crime.

[14] The plaintiff was then taken to Moffatview police station. He was given a copy of his notice of rights. He was detained in a waiting cell until 18h00, whereafter he was taken to Johannesburg Central Police station.

Plaintiff's Evidence

[15] The plaintiff testified that on 17 June 2016, at around 12h25, he had gone to buy food at Spar along Main Street Rosetenville, driving in a white bakkie with registration number VYF 6[...]. He was sitting in the motor vehicle when he was approached by two police officers and a lady. The police searched the motor vehicle and asked him who the owner was. He told them that it belonged to his friend Langton Maphungai who was a mechanic. He mentioned to the police that he had hired the car from Langton as he used to, for R500-00 a day, but that on that day he did not pay as he was arrested. The police searched the motor vehicle and informed him that the car was involved in the commission of a crime and that he had been pointed out by the lady.

[16] He denied any knowledge of the crime but he was told to come with to the police station. At the police station, the police read to him his rights for which he signed, and he was detained. He informed the police that he would make his statement in court. He further told them that he could point out other people who had also previously hired the motor vehicle from Maphungai.

[17] Regarding what he was wearing when he was arrested, the plaintiff testified that he wore a grey and blue track top without a hoodie. He further said that he had a cap on his head though he could not remember its colour. He testified that he was legally represented on the second appearance in court. He was informed of his rights to apply for bail and that the police were still investigating his status in the country. He testified for the first time during cross examination, that on the day of the commission of the alleged crime, he was attending a funeral. The plaintiff further testified about the bad conditions of the prison cells where he was detained.

Legal Principles

[18] Section 40(1)(b) of the Criminal Procedure Act 51 of 1955 (“the Act”) authorises a peace officer to arrest, without a warrant of arrest, any person, “*whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody*”. In *Duncan v Minister of Law and Order*,² Van Heerden JA set out the jurisdictional facts which must exist before

² 1986 (2) SA 805 (A).

the power conferred by s 40(1)(b) of the Act may be invoked. At 818G-H, it was stated as follows:

“The so-called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds.”

[19] If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection and arrest the suspect.

[20] Section 12(1)(a) of the Constitution guarantees everyone the right to freedom and security of the person, “*which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause*”. The courts have held that an arrest under the circumstances set out in s 40(1)(b) could not amount to deprivation of freedom which is arbitrary or without just cause. However, bearing in mind that the section authorises drastic and severe intrusion into the freedoms and security of persons, the courts have explained that the test to determine whether the reasonable suspicion was within the meaning of s 40(1)(b) was whether a reasonable person in the defendant’s position and possessed of the same information, would have considered that there were sufficient grounds for suspecting that the plaintiff has committed the offence.³

[21] The discretion whether or not to arrest arises once the jurisdictional facts for an arrest are present.⁴ In *Sekhoto*⁵, it was held that: “... *the decision to arrest must be based on the intention to bring the arrested person to justice*”. In *Minister of Law-and-Order v Hurley and Another*,⁶ it was held that the question whether a peace officer reasonably suspected or had reasonable grounds for suspecting that “*the person whom he arrested without warrant had committed an offence is objectively*

³ S v Nel and Another 1980 (4) SA 28 (E) at 33H.

⁴ Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA) at para 28.

⁵ At para 30.

⁶ 1986 (3) SA 568 (A) at 579F.

justiciable". Therefore, the test is not whether an arresting officer believes that he has reasonable grounds to suspect, but whether objectively, he has reasonable grounds for his suspicion. In *Sekhoto*,⁷ Harms DP held that:

"This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached."

[22] In *Mabona and Another v Minister of Law and Order and Others*,⁸ Jones J stated as follows:

'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'.

Analysis of Evidence

[23] It is established from the evidence of Warrant Officer Selepe that when he effected the arrest of the plaintiff, he had first confirmed with the investigating officer that indeed there was a case of house robbery involving the alleged motor vehicle which the plaintiff was found driving. There where the motor vehicle was found, Itumeleng Ramagela pointed the motor vehicle to him and pointed the plaintiff as the same person who drove the same motor vehicle which loaded the robbed items at [...]flats on 12 May 2016. Warrant Officer Selepe's evidence of a case having been opened was corroborated by the evidence of Sergeant Mthlane in this regard. Both Warrant officer Selepe and Itumeleng Ramagela were honest witnesses, they stood unshaken under cross examination. The plaintiff did not tell the arresting officer where he was during the commission of the alleged offence.

⁷ At para 39.

⁸ 1988 (2) SA 654 (SE) at 658G-H.

[24] It is accepted by this Court, on the basis of *Malatjie*⁹ and *Biyela*,¹⁰ that as a general principle, there is no onus upon the police to carry out a thorough investigation in each and every case before an arresting officer exercises his or her discretion whether or not to effect an arrest without a warrant in terms of s 40(1)(b) of the Act. The jurisdictional requirement is that a reasonable suspicion must exist. The defendant proved on a balance of probabilities that the arrest was lawful and in accordance with the requirements of s 40(1)(b) of the Act. The evidence in the possession of the arresting officer that there was a case opened involving the same car, and the statement by the eyewitness who saw the plaintiff driving the motor vehicle on 12 May 2016, constitutes, in my view, sufficient and reasonable grounds to arrest and keep the plaintiff in detention. The plaintiff conceded to this during cross examination. The defendant proved on a balance of probabilities that the arrest was lawful and in accordance with the requirements of s 40(1)(b) of the Act.

[25] As for the detention, the plaintiff contended that his detention was unlawful because the police failed to follow up on the leads provided by him in his warning statement where he stated: “... *I will like to state that owner of the vehicle Mr Langton Mupungai is hiring the vehicle to many people. I am not the only one who is driving this vehicle. I can even point the people who always driving the vehicle as he hired it for R600 or R400 respectively per day.*” It was submitted that the police were not supposed to just sit back when they had one witness who stated that the plaintiff drove the vehicle on the day of the alleged crime. The investigating officer was supposed to follow up on all leads, including the leads which the suspect provided to get the true culprits. The plaintiff referred to the *dicta* in *Mahlangu and Another v Minister of Police*,¹¹ where the following is quoted:

“And in *Tyokwana* the Court reasoned:

‘The duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the

⁹ *Malatjie and Others v Minister of Police* (16853/2020) [2022] ZAGPPHC 380 (6 June 2022).

¹⁰ *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA).

¹¹ 2021 (2) SACR 595 (CC) at para 41.

relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.”

[26] In *Mahlangu* above, it was held that it is only when a causal link is established between the arresting officer’s conduct and the subsequent harm suffered by the plaintiff, that the defendant is said to be liable for detention after the first appearance.

[27] Justification for the detention after an arrest until the first appearance in court continues to rest on the police.¹² So, for example, if shortly after an arrest, it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.¹³

[28] The plaintiff’s contention against the police is that it is accepted that a basis existed for the arrest but that a most cursory investigation by the police immediately thereafter i.e the holding of an ID parade and the investigation regarding the people who used to drive the motor vehicle in question, would have resulted in them becoming aware of his innocence, and that this ought to have led to his release.

[29] No case was made out that the Magistrate’s order to detain the plaintiff after his first appearance was informed by the defendant’s action. It is trite that an accused standing trial for allegedly having committed Schedule 6 offences carries a reverse onus and must satisfy a court that exceptional circumstances exist to permit bail. Sgt Mthalane was also an impressive witness. According to his evidence, he conducted investigations regarding the ownership of the motor vehicle in question and obtained a statement from Maphungai, which informed him that the plaintiff and Maphungai were the people who mostly drove the motor vehicle. Mthalane testified that it was not necessary for an ID parade to be held because Itumeleng Ramagela had already pointed the plaintiff to Warrant Officer Selepe before the arrest. Regarding the question of bail, he said that he still had to investigate the plaintiff’s status in the country.

[30] It is instructive to point out that on the facts in the possession of the State at the time when the plaintiff was arrested and detained, it is clear that there was a

¹² *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A).

¹³ *Duncan* above.

prima facie case against him. The fact that the legal representative made representations to the prosecution does not negate the strength of the evidence which the State had from the date of his arrest until the date when the case was withdrawn against him. For this reason, withdrawal of a charge against an accused person arising from representations to the prosecution does not necessary lead to the conclusion that the arrest and detention was wrongful and unlawful.

[31] In the result, I find the arrest to have been lawfully effected in terms of s 40(1)(b) of the Act and the detention to be lawful. There is no basis to conclude that the discretion to arrest was wrongfully exercised. The plaintiff's claim on all heads of damages stands to fail.

Order

1. The plaintiff's claim is dismissed with costs.

M B MAHALELO J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION

This judgment was delivered electronically by circulation to the parties' legal representatives by e-mail and uploading onto CaseLines. The date and time of hand down is at 10h00.

APPEARANCES:

For the plaintiff: Adv JM van Rooyen

Instructed by: N Ndebele Attorneys Inc

For the Defendants: State Attorney, Johannesburg

Instructed by: Adv M G Makhoebe