

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

CASE NUMBER: 06680/2015

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES.
DATE: 06 June 2023

In the matter between:

ZAHEER HOOSAIN

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Neutral citation: *Zaheer Hoosain v The Minister of Police* (Case No. 06680/2015)
[2023] ZAGPJHC 652 (06 June 2023)

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. In this matter, the plaintiff claims R400 000 for his unlawful arrest and detention. He was detained from 10h30 for a night at the Lenasia Police station on 18 November 2014 and released the next day at 13h00.
2. Advocate Mamitja appeared for the plaintiff and submitted that the arresting officer, on the day did not hold any reasonable suspicion or have any probable cause for the arrest and detention. The plaintiff denied charges of assault with intention to do grievous bodily harm and the robbery of a cell phone. Counsel submitted that her client was arrested without a warrant and it was not justified in terms of s40 of the Criminal Procedure Act 51 of 1977. Alternatively, it was submitted that the police had no intention to take him to court upon arrest, the police knew he would not be prosecuted.
3. Advocate L Mulaudzi appeared for the defendant when he submitted that the arresting officer acted on a complainant statement, after the complainant was robbed of his cell phone and forced out of the plaintiff's moving vehicle. Counsel agreed that the defendant had the duty to begin. The defendant called Sergeant M Nkosi to testify on its behalf. Sergeant

Nkosi, is now retired he was stationed at the Lenasia station for 37 years and testified through a video link.

THE DEFENDANT'S VERSION

4. The witness testified that he read a docket which included a statement¹ from the complainant, who stated that he was assaulted and robbed of his cell phone whilst travelling in a vehicle with two men whom he described as a "coloured man and a black man". The statement included the vehicle's registration number.
5. He looked up the registration number on the police tracking system and traced the vehicle to the plaintiff.

CIRCUMSTANCES OF THE ARREST.

6. He visited the plaintiff at his home on 18 November 2014 at 10h30 am , together with three other officers.
7. He testified that he identified himself and informed the plaintiff of the reasons for his visit.

¹ Caselines 011-74

8. The evidence is that the plaintiff matched the description of a coloured male. He also identified the vehicle on the plaintiff's premises.
9. The further evidence is that the plaintiff informed him that he was aware of the incident and admitted that he was in the car. He stated that he knew all that happened on that day.
10. The witness could not confirm if the plaintiff was driving, although in the warning statement he stated that he was driving.
11. Sargent Nkosi was satisfied that he was at the correct home and informed the plaintiff that he was under arrest for assault with intent to do grievous bodily harm and robbery.
12. After having informed the plaintiff of his rights he and the other officers took him to the Lenasia police station, where they booked him in and handed him over to the officer in charge of cells.
13. The plaintiff was in custody from 10h30 on 18 November 2014 and he was released the next day at 13h00, as his case was not placed on the court roll. The police had not traced the other witnesses by the date of the plaintiff's appearance in court.

14. The witness further testified that in 2015, he completed and submitted a statement to the control prosecutor that he could not trace the complainant.² He confirmed that this docket is closed.

THE PLAINTIFF'S VERSION

15. The plaintiff admitted that the vehicle belonged to him and stated that on the date that the incident took place, he was driving his motor vehicle.
16. He stopped on two separate occasions to give two males a lift.
17. They both sat at the back of his VW golf, whilst he drove them to an agreed destination point.
18. His evidence is that his radio was switched on and although he heard some sounds from the back seat, they were muffled, and he did not pay much attention to the two persons on his back seat.
19. A short while thereafter he realised that one of the occupants had fallen out of or jumped out of the vehicle.

² Caselines 011-63

20. He stopped his vehicle a short distance from that point to determine what had happened.
21. Soon thereafter he noticed the emergency services vehicle approach his car. He was asked why an occupant had fallen out, he replied he was not aware of what was going on at the back and could not assist them further.
22. He allowed the paramedics to take down his vehicle registration number.
23. He denied any knowledge of an assault or of the theft of a cell phone.
24. He argued that the police had no reason to arrest him, they did so simply because they traced the vehicle to him and he has features of a coloured person.
25. He testified that he is the only driver of his vehicle.
26. He could not identify the other occupants on the back seat, he had merely picked them up as hitch hikers. He usually gives hikers a lift.

ARGUMENT

27. Advocate Mamitja submitted that the arresting officer had no reasonable grounds to arrest the plaintiff.

28. Counsel argued that the arresting officer relied on simply "matching" the registration number of the vehicle and the description of the plaintiff as appeared in his docket.
29. The arresting officer failed to demonstrate that he held any reasonable grounds for his suspicion, the arrest and detention was arbitrary.
30. Counsel reminded the court that the complainant was not before court and that the plaintiff cannot test any of the evidence presented by Sergeant Nkosi on behalf of the defendant.
31. The plaintiff's evidence must be accepted, it was argued, that he could not have known, what was going on in the back seat of his vehicle when he was focused on driving the vehicle.
32. It was submitted that, when the plaintiff realised something was amiss, he stopped his vehicle to investigate who had either jumped out or was pushed out and why.
33. It was submitted that the arresting officer the arresting officer failed to satisfy the jurisdictional requirements for the defence other than that he was a peace officer.

34. Counsel referred the court to the judgment in **JE MAHLANGU AND ANOTHER v MINISTER OF POLICE**³, where the SCA, in confirming the decision in WOJL, stated,

“ once it is clear that the decision is not justified by acceptable reason and is without just cause in terms of section 12 (1) (a) of the Constitution Act, the individual's right not to be deprived of her freedom is established. This would render that individual's detention unlawful for the purposes of a delictual claim.”

35. Counsel argued that Nkosi was a poor witness , who could not recall any of the events to even hold a reasonable suspicion, he contradicted himself and was wholly reliant on the statement of the complainant in the docket.
36. It was further argued that Nkosi had no idea as to where the complaint was and it was his evidence that he was forced to close the docket for this very reason.
37. Nkosi could not have even applied any discretion, as is required by law, before he arrested and detained the plaintiff, he was still looking for the complainant, at the time he arrested the plaintiff.

³ [2021] ZACC 10

38. The court must bear in mind that the plaintiff did not run off, his place of residence was known and he denied having committed an offence, nor has the state proved that he ever did.
39. Counsel submitted it is clear the plaintiff was arrested for no reason.
40. Mr Mulaudzi argued that the police must be permitted to do their job.
41. He argued that Nkosi, did not simply act on a hunch. He read the docket, worked on tracing the registration number to an address and an owner.
42. He went along with other officers, he followed procedures as was stated in his evidence in chief, he was an officer for many years, he understood the importance of confirming who he arrested and why.
43. Counsel, submitted that it cannot be argued that he had failed to apply his mind upon arresting the plaintiff.

THE LAW

44. Section 40(1) (b) provides for an arrest without a warrant, if he reasonably suspects a person of having committed an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977.
45. The defendant must prove:

- 45.1. the person who arrested the plaintiff was a peace officer
- 45.2. the peace officer held a suspicion
- 45.3. that suspicion must be that the person arrested committed an offence referred to in Schedule 1
- 45.4. that the suspicion held was on reasonable grounds.

JUDGMENT

- 46. The defendant failed to identify or establish any offense which the plaintiff may have committed.
- 47. Without this, there can be no reason to arrest the plaintiff. Sergeant Nkosi's evidence was that he could not find the complainant.
- 48. He was of the view that the arrest was necessary, "whilst he went out looking for the complainant and the other occupant of the back seat."
- 49. In **KHAMBULE v MINISTER OF LAW AND ORDER**⁴, the court stated there must be reasonable grounds to arrest an individual. Where the

⁴ 1993(1) SACR 434 TPD

arrestor holds an initial suspicion, he or she must take steps to confirm facts to hold a reasonable suspicion to justify an arrest.

50. I agree with counsel for the plaintiff, that he was not a flight risk, the officers knew where he lived, they did not at the time have all the facts on hand, as they were still trying to locate the other two persons in the vehicle.
51. The police did not have to arrest the plaintiff and deprive him of his liberty on that day.
52. In my view, Sergeant Nkosi, failed to apply the necessary discretion, when he arrested the plaintiff, the arrest was arbitrary. I agree with Advocate Mamitja, the officer arrested the plaintiff only due to his vehicle being traced to him and based only on his admission that he was in the vehicle at the time. There is no evidence that the plaintiff committed an offence in schedule 1 to justify his arrest without a warrant in terms of s40(1)(a) of the Criminal Procedure Act of 1977.
53. Advocate Mulaudzi's submissions that it is improbable that the plaintiff who was driving a small VW golf, did not see anything that was going on in the back seat of his car, is noted. However, the defendant could not rely on the complainant's statement, as the complainant was not called to testify.

54. In terms of the decision in **MHLANGU**, supra, a claim in delict is competent.
55. The plaintiff, testified the conditions in the cell were poor, with the toilet smelly and the blankets dirty and smelly. He could not eat the food as it was not halal, to suit his religious requirements. He had to use a piece of paper in his jacket pocket as toilet paper, as none was provided.
56. He was also afraid of being assaulted by others who arrived in the cell overnight and a fight broke out that night.
57. In **MINSITER OF SAFETY AND SECURITY v TYULU**⁵, the Supreme Court of Appeals stated:

"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 to ensure that the damages awarded 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 the right to personal liberty is viewed in our law. I readily concede that it is impossible to determine an award for 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 an approach if slavishly followed could prove to be treacherous. The correct approach is to have regard to all the facts of a particular case and to determine the quantum and such facts. (Minister of Safety and Security v Seymour 2006 (6) SA

⁵ 2009 (5) SA 85 SCA par 26 at 93 D-F

320 SCA at 325 para 17; Rudolph and Others v Minister of Safety and Security 2009 (5) SA 94 (SCA) para 26-29"

58. There is no evidence of any bad behaviour on the part of the arresting officers, the plaintiff was however handcuffed and the was detained for over 27 hours. He was not allowed to make a call and complained that the arrest had affected his self-esteem.
59. It is noted that the plaintiff is a family man, he was arrested at his home, however of grave concern to this court is that fact that the arresting officer, of 37 years training, arrested him, with no clue as to whereabouts of the complainant. Obviously, no prosecution in court was likely on the limited information available to him.
60. How did he propose to arrest and take the plaintiff to court, when he could not even locate the complainant. He knew he could not have succeeded in any prosecution without the complainant on whose statement he relied on.
61. Having considered the various factors, and considered comparative cases I am of the view that R50 000 is fair compensation for the period of the arrest. In **ACCOM AND OTHERS v MINISTER OF POLICE**⁶ where the

⁶ [CA 89/2021] 2 Dec 2021


person was detained for under 24 hours, the court awarded R40 000, as fair compensation.

62. Whilst the court is very alert to the seriousness of the deprivation of the individual's liberty, the court must balance the interests of both parties.
63. I agree that the police have a serious job to do, and must be allowed to carry out their duties, however the police must appreciate that the power they exercise must be rationally connected to the purpose of that power. This is critical in any democratic society where the rights to liberty are paramount and as entrenched in our Constitution.
64. The costs must follow the cause and the amount of the award cannot inform the scale of the costs. A court must also consider the nature of the right that is to be protected, this matter had to do with an individual's liberty. I am of the view costs on a high court scale is appropriate.
65. The rights protected are fundamental and too often abused, and the way that the power is wielded, often is without consequences for the arrestor.

Accordingly, I make the following order:

1. The defendant is liable to pay the sum of R50 000.

2. Interest thereon at the prescribed rate of interest set, from date of judgement to date of payment.
3. Costs on the High Court scale.

A handwritten signature in black ink, appearing to be 'MAHOMED AJ', written over a horizontal line.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 6 June 2023

Date of hearing: 23 May 2023

Date of Judgment: 6 June 2023

Appearances

For Plaintiff: Adv Mamitja
Instructed by: Madelaine Gowrie Attorneys
Email: admin@mgowrieattorneys.co.za

For defendant: Advocate Mulaudzi
Instructed by: State Attorney