

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PRETORIA)

8/11/2012

CASE NO: 30608/2011

- (1) REPORTABLE: YES / ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3) REVISED.

8/11/2012
DATE

E.M. Masingi
SIGNATURE

In the matter between:

LUCKY MODISE

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

CONSTABLE E MASINGI

SECOND DEFENDANT

CONSTABLE CLIFF MOKOTOLA

THIRD DEFENDANT

J U D G M E N T

KUBUSHI, J

INTRODUCTION

- [1] This is a damages claim. The plaintiff is claiming damages in the sum of R1 600 000 against the defendants for unlawful arrest and detention and for malicious prosecution.
- [2] The parties agreed that the defendants would bear the *onus* to prove the lawfulness of the arrest and would therefore be the first to lead evidence.
- [3] The defendants called two witnesses to give evidence: Constable Eldrick Masingi (Masingi), the police officer who arrested the plaintiff and Constable Lesiba Cliff Mokoatlo (Mokoatlo) the investigating officer in the criminal case. The plaintiff testified for himself and did not call any other witness.
- [4] The plaintiff alleged in his particulars of claim that on or about the 2 October 2010 at or near Sunnyside police station the 2nd and 3rd Defendants unlawfully arrested him without a warrant. They then proceeded to set the law in motion by laying a false charge of robbery against him. As a result of the false charge

he was arrested and held in custody at the Sunnyside police station until he was prosecuted for robbery and duly acquitted on 1 December 2010. Whilst in police custody he appeared in court on the 11 and 26 October 2010. According to him the conduct of the said police members was malicious in that:

- 4.1 When he was arrested he was at the police station to seek help after being robbed and assaulted;
- 4.2 While waiting at the police station to be attended the assailants came to the police station and accused him of robbing them;
- 4.3 The police disregarded his version and instead arrested him of the alleged robbery.

And as a result of his unlawful arrest and detention he suffered damages to his self- esteem and his freedom to movement was deprived.

- [5] He alleged further that at all material times the 2nd and 3rd defendants were acting within the course and scope of their employment with the 1st defendant.
- [6] The defendants are defending the matter. In their plea they admitted that the plaintiff was arrested without a warrant and pleaded that the arrest was lawful in terms of section 40 (1) (b) of the Criminal Procedure Act (the Act), in that Detective Constable Masingi, the arresting officer, formed a reasonable suspicion that the plaintiff had committed a schedule 1 offence because the plaintiff was pointed out by the complainant and his friends as the person who robbed the complainant.
- [7] The defendants also pleaded specifically that the plaintiff appeared in court on the 4 October 2010 and was further detained at the instance of the court. They also admitted that the plaintiff did appear in court on the 1 December 2010 and he was acquitted.

THE ISSUE TO BE DECIDED

- [8] Section 40 (1) (b) of the Act empowers a peace officer to arrest without a warrant any person who he or she reasonably suspects of having committed an offence referred to in Schedule 1. Before this power can be invoked, i.e. have the suspect arrested, the following jurisdictional facts must exist, namely, that: (i) the arrestor must be a peace officer; (ii) the arrestor must have entertained a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must have rested on reasonable grounds. See **DUNCAN v MINISTER OF LAW AND ORDER** 1986 (2) SA 805 (AD) at 818G – J and **MINISTER OF SAFETY AND SECURITY v SEKHOTO** 2011 (5) SA 367 (SCA) at 373B – C.
- [9] In this instance, the following jurisdictional factors existed at the time of arrest, namely, that: the plaintiff was arrested by a peace officer, Detective Constable Masingi; he was arrested for the offence of armed robbery that forms part of the offences in Schedule 1 of the Act; and the arresting officer entertained a

suspicion in that the complainant informed him that the plaintiff committed the offence.

- [10] As a result, the only essential fact to be considered to justify the lawfulness of the arrest was whether Detective Constable Masingi's suspicion to arrest the plaintiff was based on reasonable grounds, and this is the issue that this court must determine. See **DUNCAN v MINISTER OF LAW & ORDER** 1986 (2) SA 805 (A) at 818G-H, and **MINISTER OF SAFETY & SECURITY v SEKHOTO & ANOTHER** 2011 (1) SACR 315 (SCA) para [6]).

THE EVIDENCE

- [11] Masingi testified that he arrested the plaintiff, Lucky Modise, on the 2 October 2010 at the Sunnyside police station after being pointed out to him by the complainant and his friends as one of the persons who have robbed the complainant. The plaintiff came to the Service Client Centre at the Police Station where Masingi was stationed that day. The plaintiff requested Masingi to call an ambulance for him because he was bleeding on the

head. Masingi did not precisely see where the plaintiff was bleeding, he just saw the blood. He asked the plaintiff what was causing the bleeding and the plaintiff informed him that people he did not know assaulted him at a park. Before the plaintiff could finish talking, three men walked into the service centre and came directly to where he was working. One of them introduced himself as Bonventure. Bonventure pointed out the plaintiff as the person he was, together with his two friends, chasing after because the plaintiff was one of the people who had robbed him of a cell phone and a watch and threatened to stab him with a knife at Arcacia Park. Masingi asked the plaintiff if he knew the three people and he denied knowing them. The two people who came with Bonventure also confirmed that the plaintiff was the person they were chasing after. The plaintiff eventually admitted that Bonventure was talking the truth and he offered to return the cellphone and watch. He informed Masingi that his friend who was in Soshanguvhe took the watch and cellphone. Masingi then arrested the plaintiff on a charge of robbery with aggravating circumstances. He read him his rights and detained him. He

did not open a docket for the plaintiff because the plaintiff did not lay a charge against Bonventure.

- [12] Mokoatlo testified that on the 2 October 2010 he was on duty in the crime office receiving dockets. He received a docket of common robbery. The docket had a suspect, Mr Modise, the plaintiff in this instance. He read the docket and asked the people working in the cells to call the plaintiff for him. When the plaintiff came Mokoatlo introduced himself to the plaintiff and informed him that he, Mokoatlo, was going to charge the plaintiff of robbery. The plaintiff had a bandage on his head and he told Mokoatlo that the community assaulted him. The plaintiff refused to make a statement and opted to give it in court. Mokoatlo then charged the plaintiff and prepared him for appearance in court on Monday. Mokoatlo charged the plaintiff of armed robbery based on the statements of the complainant and his two witnesses and the arresting officer which were in the docket.

[13] The plaintiff's evidence is that on the day in question he was from a shebeen at Esselen Street and was on his way to a taxi rank in Prinsloo Street to catch a taxi home. He was drunk. He met three persons who were also drunk. One of them said he knew him. He denied that that person knew him. An argument, which resulted into a fight, ensued. The three surrounded him and one of them hit him with a bottle of liquor behind the right ear and he fell down. He saw blood. He stood up and ran away. During the trial he was shown photographs, which he said, depicted him and showed the scar behind the ear where he was hit by the bottle. He denied that he was injured on the head. He ran to the police station to seek help. At the police station he informed the police what happened and they called paramedics for him. The paramedics came within 5 minutes and attended to his injuries. His assailants entered the charge office whilst he was still sitting in the charge office being attended to by the paramedics. They went directly to the counter and talked to the same police officer who had attended to him earlier. They then pointed at him and accused him of robbing them of a cellphone and watch. He refuted the

allegations and told the police that these were the same people who assaulted him but he was nevertheless charged. Whilst being charged Masingi searched him and found his phone. Bonventure took the cellphone and smashed it on the ground saying it was not the phone he took from him. He denied the version of Masingi that he met his assailants at Arcacia Park and that he agreed that he robbed the complainant and promised to give him back the stolen items.

- [14] His further testimony was that, he was arrested on Saturday, charged on Sunday and went to court the next Monday. The cells were bad and the blankets were infested with lice. He was in pain as a result of the injuries and did not get any pain tablets. Whilst at the service center he saw Bonventure shaking hands with a police captain and some of the senior officers there. They spoke in a language that he did not understand.

THE LAW APPLICABLE

[15] The test to be applied in determining whether a peace officer “reasonably suspected” a person of having committed an offence within the ambit of section 40 (1) (b) is objectively justifiable. The question is not whether a peace officer believed that he or she had reason to suspect, but whether, on an objective approach, he or she in fact had reasonable grounds for his or her suspicion. See **DUNCAN v MINISTER OF LAW AND ORDER** above at 814D – E and **MINISTER OF LAW AND ORDER v HURLEY AND ANOTHER** 1986 (3) SA 568 (AD) at 579F.

[16] The mere nature of offences, which would ordinarily attract sentences of long years of imprisonment, clearly justifies the arrest of a suspect for the purpose of bringing him or her before a court to enable such a court to exercise its discretion as to whether the suspect should be detained or released. And in cases of serious crimes – and those listed in Schedule 1 are serious, a peace officer could seldom be criticized for arresting

a suspect for that purpose. See **MINISTER OF SAFETY & SECURITY v SEKHOTO** above at para [44].

APPLICATION OF LAW TO FACTS

[17] The following factors are common cause: that at the time of his arrest the plaintiff was in the service centre of the Sunnyside police station; that the complainant, Bonventure, in the company of his friends, came into the police station service centre where they found the plaintiff; Bonventure and his two witnesses in the presence of Masingi and the plaintiff, pointed the plaintiff out as the person who had robbed Bonventure of his cell phone and watch and threatened to stab him with a knife; that Bonventure laid a complaint of robbery against the plaintiff; that on the basis of this complaint Masingi arrested the plaintiff; and that the plaintiff was arrested on Saturday 2 October 2010 and taken to court on Monday 4 October 2010.

[18] The aforesaid factors, in my view, when objectively seen, would justify a suspicion that the plaintiff was involved in a robbery, which in turn justified the arrest. The plaintiff was suspected of

having committed a crime of robbery with aggravating circumstances which is a serious offence and Masingi's decision to arrest him can thus not be criticized.

[19] Having considered the entire evidence that was led during the trial, in particular the common cause factors in paragraph [17] of this judgment, I find that the defendants have discharged the *onus* of showing that Masingi reasonably suspected the plaintiff of involvement in the robbery; and that the nature of the offence itself justified the arrest.

[20] There is no evidence before this court to show that Masingi, in any way, acted unreasonably. The fact that he did not charge Bonventure as well, as argued by the plaintiff's counsel, does not have any bearing on the plaintiff's arrest. The evidence is that the plaintiff did not lay a complaint against Bonventure which evidence is undisputed. Even though he could have laid a complainant, that complaint would not influence the complaint by Bonventure. The plaintiff's counsel contended also that

Masingi should not have relied on the statements of the complainant's witnesses as they were riddled with contradictions. This to me was not a determining factor. The complaint by Bonventure alone was enough for Masingi to arrest the plaintiff. Counsel's submission further that Masingi should have either investigated the matter or taken more information from the complainant before arresting the plaintiff has no foundation. Masingi being stationed in the service centre that day could not have investigated the matter as he explained it was not his duty to do so. His explanation, which I accept was that the investigating officer would investigate the matter further and by so doing get more information from the complainant. Masingi, in my view, was correct to act as he did.

[21] In the premises, I am satisfied that all the jurisdictional facts contemplated in section 40(1)(b) of the Act have been satisfied and that the arrest of the plaintiff was lawful in the circumstances. This claim can as such not succeed.

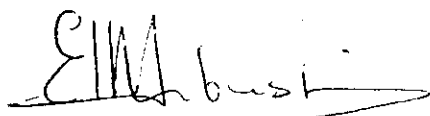
[22] The resultant detention of the plaintiff, including the court ordered detention when the plaintiff appeared in court on 4 October 2010 and was remanded in custody until 1 December 2010 when he was acquitted was accordingly lawful. It is the evidence of the plaintiff that he was arrested on Saturday and was taken to court on the Monday preceding that Saturday of his arrest.

[23] In the circumstances it can, also, not be said that the prosecution of the plaintiff on the charge of robbery was malicious and/or false. Mokoatlo charged the plaintiff on the basis of the statements in the docket of the arresting officer, the complainant and the complainant's two witnesses. Mokoatlo was cross-examined at length about these statements and the plaintiff's counsel in his address submitted also that Mokoatlo should not have relied on these statements because they were riddled with contradictions. It must however be remembered that the plaintiff refused to make a statement to Mokoatlo opting to make his statement in court. Mokoatlo had no other

information at that time except the aforesaid statements and his reliance on them cannot in view be faulted. To my mind the circumstances of the case fully justified the charge. This claim also falls to be dismissed.

[24] Consequently, the plaintiff's claims in respect of the arrest, detention and malicious prosecution must fail and I, therefore, make the following order:

24.1 The plaintiff's claim is dismissed with costs.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE	: 13 AUGUST 2012
DATE OF JUDGMENT	: 08 NOVEMEBR 2012
PLAINTIFF'S ATTORNEY	: MKETSU & ASSOCIATES INC
PLAINTIFF'S COUNSEL	: ADV P. NONYANE
DEFENDANT'S ATTORNEY	: THE STATE ATTORNEYS
DEFENDANT'S COUNSEL	: ADV D.M. KEKANA