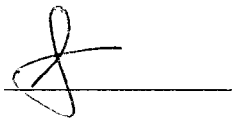
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

9/5/2014 

DATE SIGNATURE

CASE NO: 41312/2011

9/5/14

In the matter between:

JOSHUA RABOSHABA **PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY **1st DEFENDANT**

CONSTABLE VAN DER BERG **2nd DEFENDANT**

JUDGMENT

MALI AJ:

[1] The plaintiff in this action seeks damages in the amount of R300.000.00 against the defendant arising out his arrest on 13 April 2010 in Boschkop Police Station, his release on bail after ten (10) days and ultimately the resultant withdrawal of the plaintiff's case on 7 December 2010.

[2] The plaintiff alleges that his arrest for the charge of armed robbery was unlawful if regard had to the requirements of section 40(1) (b) of the Criminal Procedure Act 51 of 1977 ("CPA"), in that the second defendant failed to exercise his discretion to the effect that there was a reasonable suspicion that the plaintiff committed the offence.

[3] The defendant denies that the arrest was unlawful and avers that the plaintiff was arrested pursuant to the second defendant having had exercised a reasonable suspicion, in that the plaintiff was positively identified as the person who committed the offence.

[4] The duty to begin was argued by the parties and I ruled that the duty to begin was upon the defendant. The case proceeded on merits and quantum.

[5] The issues that arise for consideration are the following:

(i) Whether on the facts, Constable van der Bergh (the second defendant) had

formed a reasonable suspicion that the plaintiff had committed an offence falling under Schedule 1 of the Act.

(ii) Whether he applied his mind properly in exercising his discretion to arrest the plaintiff.

(iii) If not, then the quantum of plaintiff's damages occasioned by the arrest and detention.

(iv) Liability for costs.

COMMON CAUSE FACTS

[6] The plaintiff was arrested on the 13 April 2010, at Boschkop Police Station whilst on duty as he was and is still a member of the South African Police Service ("SAPS"). He was arrested by the second defendant, acting within the course and scope of his employment.

[7] Pursuant to the plaintiff's arrest, he was detained at Kameeldrift Police Station cells from 13 April 2010 until 15 April 2010. Thereafter the plaintiff was detained at Pretoria Central Prison from 15 April 2010 until 23 April 2010 upon his release on bail. The matter was remanded several times pending the decision of the Director of Public Prosecutions ("DPP") and the charges were withdrawn on 7 December 2010 as the DPP declined to prosecute.

THE EVIDENCE

[8] On behalf of the defendant, Constable Gerhadus van der Bergh ("Constable van der Bergh") testified that he was a constable in the SAPS and has been a SAPS member for twelve (12) years. On 13 April 2010 he was performing duties at Mamelodi Trio Task Team, when he was informed by the Commanding officer, Lieutenant General Sesweke ("General") that there was an allegation of armed robbery against the plaintiff. The General informed him that there was a sworn statement made by the complainant in the case of armed robbery wherein the complainant had positively identified the plaintiff 100%.

[9] Constable van der Bergh then telephonically contacted the complainant, Mr Spath to verify whether he was sure about the plaintiff's identification. He testified that Mr Spath confirmed the plaintiff's identity and that he was prepared to testify in court.

[10] He further testified that Mr Spath identified the plaintiff as the suspect in the armed robbery which occurred on 6 August 2009 and he further confirmed the plaintiff's identity on 18 March 2010 when the plaintiff assisted him to certify documents at the police station. He also established from the statements that the plaintiff visited Mr Spath's home on 11 April 2011 uninvited in a suspicious manner and that according to him confirmed that indeed the plaintiff was the suspect. He also testified that he thereafter examined the statements which were taken at the time of the alleged robbery and had established a link between the suspect and the

case of robbery. The link was based on the description of the plaintiff. He then formed a reasonable suspicion that the plaintiff was the suspect.

[11] He then proceeded to the General to discuss his findings, the General then informed him that the plaintiff must be arrested and further investigation conducted upon. He further testified that he established that there were sufficient grounds to arrest the suspect based on Mr Spath's statements. Under cross examination he conceded that the only ground he relied upon was the alleged positive identification of the plaintiff according to Mr Spath's sworn statement and the telephonic confirmation by Mr Spath the complainant. According to him, Mr Spath had positively identified the plaintiff as *"lank and stemmig, hy het goed Afrikaans gepraat"*. Under cross examination it also transpired that the sworn statement relied upon by Constable van der Bergh was deposed to at 13h20 on 13 April 2010, however the decision to arrest the plaintiff was already made as early as 10h00, a fact conceded upon by the second defendant. In essence it is reasonable to say that when the decision to arrest the plaintiff was made there was no valid statement to rely upon.

[12] In a nutshell the defendants alleged that an offence of armed robbery was committed and that the second defendant, who was a peace officer as defined in the Act, had fully satisfied himself that the plaintiff was the perpetrator of the said offence. It is thus alleged the second defendant was as a result justified in arresting the plaintiff.

Mr Spath was not called as a witness although he was in court during the trial proceedings.

[13] The plaintiff's version of the events leading to his arrest was that, on 13 April 2010 at about 22h: 00; he was on duty at Boschkop Police station when his superior, the Station Commander, Mr Tekisho called him to his office. At the station commander's office the plaintiff found a number of policemen including Constable van der Bergh.

[14] The station commander then informed him that the policemen were there to arrest him in connection with armed robbery against one Mr Spath. The station commander read him his constitutional rights and thereafter he was arrested. Constable van der Bergh then arrested the plaintiff and placed him on handcuffs. The plaintiff was then escorted out of the police station to the police van. On the way to the police van the plaintiff was photographed by the newspaper photographer whilst on handcuffs and the article about his arrest with his photograph was published in various newspapers. The plaintiff stated that he was shocked and embarrassed by his arrest.

[15] The plaintiff further testified that he requested the second defendant to take him home to change from police uniform to his civilian clothing. He was transported at the back of a police van and driven home for a change of clothing. When he got at the gate of his home he requested the other policeman to dial his cell phone for

him; in order to call his wife to bring clothes as he was in handcuffs. His wife was shocked to see him under arrest. His wife then brought him clothes and he undressed and dressed outside his yard in the open as he was under arrest and not in a position to get inside the house. The plaintiff stated that he was also humiliated by this situation. The plaintiff was later taken to Kameeldrift Police station where he was detained.

[16] The plaintiff was detained for two days at the police station until he was charged. On the third day the plaintiff appeared in court where he applied for bail and same was refused. During the plaintiff's first appearance he was handcuffed and was seen by other policemen who knew him. He described the whole experience as shocking, humiliating and embarrassing. After 10 (ten) days the plaintiff was granted bail. On 7 December 2010 the charges were eventually withdrawn against the plaintiff. Subsequent to his release on bail he reported for work, and he described the whole experience of meeting his colleagues unsavoury and embarrassing. Some of his colleagues sympathised with him; a painful situation which aggravated his feelings of indignity. The plaintiff was then suspended with full pay and then later called to a disciplinary hearing, however he was finally reinstated.

[17] The plaintiff also testified that on 6 August 2009 the alleged day of the armed robbery he was working at the police station as a shift commander and that he never robbed Mr Spath. On 6 August 2009 as part of his duties, he attended to the

complaint from the Boschkop area and patrolled the same area. He confirmed meeting Mr Spath for the first time when he came to the police station on 18 March 2010; when he assisted him to certify his documents. The plaintiff denied that he went to Mr Spath's home on 11 April 2010.

[18] The plaintiff also stated that during the period of his suspension his two little daughters who were 5 (five) and 3(three) years old respectively then asked him why he was no longer going to work. He told them the truth and he stated that also caused him a lot of pain and degradation as a father and family man. The plaintiff further stated that he spent R14, 000.00 on legal fees.

[19] The totality of the plaintiff's evidence was that at the time he was arrested there was no sufficient evidence that he committed armed robbery. He stated that the only reason which led to his arrest is the alleged positive identification by Mr Spath who described the suspect as:

"lank and stewig, hy het goed Afrikaans gepraat" The English translation is *"tall, strong built and good Afrikaans speaking"*. The plaintiff further stated there was no sufficient identification by the second defendant except for him acting on the description provided by the complainant.

THE LAW

[20] Section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 provides that, " a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1".

The jurisdictional requirements for a lawful arrest are stated as follows:

(i) the arrestor must be a peace officer;

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect committed an offence referred to in schedule 1;

(iv) the suspicion must rest on reasonable grounds.

The test to be applied is an objective test. In **Duncan v Minister of Law and Order**[1] the abovementioned jurisdictional facts were emphasised. See also **Nkambule v Minister of Law and Order**[2].

[21] For the purposes of this judgment it would be appropriate to mention the first three jurisdictional facts were indeed common cause between the parties. The fourth jurisdictional fact is what the plaintiff has placed under attack. To decide what a *reasonable suspicion* is, there must be evidence that the arresting officer formed a suspicion which is objectively sustainable. [3]

[22] In addition thereto, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee

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[1] 1986 (2) SA 805 (A): dictum at 818H-J applied
[2] 1993 (1) SACR 434 (T) AT 436 A-B
[3] Mvu v Minister of Safety and Security & Another 2009 (2) SACR (GSJ) at [9]

has committed a schedule 1 offence. In the decision of **Mabona and Another v Minister of Law and Order and Others**[4] Jones J, said the following:

> *'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. (my emphasis) It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient 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.'*

[4] 1988 (2) SA 654 (SE): dictum at 658E-G applied

[23] In **Mvu v Minister of Safety and Security and another**[5], Wills J held:

> *"the test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion. Furthermore, not only must the arrestor prove that he had reasonable grounds for believing that the arrestee has committed an offence listed in the Schedule but also that he had reasonable grounds for believing that the arrestee had the mental element for committing the offence".*

[24] The peculiar circumstances of a particular case the arresting officer is presented with will therefore determine whether such suspicion would be reasonable or not. The test as to whether the suspicion of the person effecting the arrest is reasonable must be approached objectively.[6]

[25] The question then to be answered; is what was the reasonable suspicion entertained by Constable van der Bergh on the day in question? He responded to an instruction by his superior that there was a sworn statement by only one person positively who had identified the plaintiff as a suspect in an armed robbery in an incident which involved five people. Nothing was placed before me as to why was the identification parade not held nor why were the other four victims of the armed robbery not questioned about the plaintiff's identity. It was my observation that the plaintiff is not tall and neither strong built, having regard to his identity a thorough

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[5] 2009(6) SA 82

[6] See in this regard R v Van Heerden 1958 (3) SA 150 (T) at 152E

identification was required. Any man who is tall, strong built and good Afrikaans speaking could have been a suspect.

[26] A peace officer who relies on section 40(1) (b) has to prove all the jurisdictional facts in that section. Once these facts are present the discretion whether or not to arrest then arises. The decision to arrest must be based on the intention to bring the arrested person to justice and the discretion so exercised must be to arrest in good faith, rationally and not arbitrarily. It then follows, once the jurisdictional requirement of a reasonable suspicion is proved by the defendant, the arrest is brought within the ambit of the enabling legislation and thus justified. In this matter it is alleged that his suspicion was improperly formed, and has been successfully proven.

[27] The evidence placed before me is to the effect that the decision to arrest the plaintiff was made arbitrarily and/ or premised on irrational reasoning; more particularly that the timing of the sworn statement relied upon is questionable. Constable van der Bergh on his own testimony was told by General Sesweke to arrest the plaintiff. He was the investigating officer, therefore a peace officer required by law to have formulated his own reasonable suspicion. It therefore follows that the defendant failed to satisfy that his suspicion was reasonable to effect the arrest of the plaintiff. The reasonable man would have analysed and assessed the quality of the information at his disposal critically, and he would not have accepted it lightly or without checking it where it can be checked. In *casu* it

was not impossible to check as other witnesses were involved in the alleged case of armed robbery. Whilst I acknowledge that people's memory spans differ, but I cannot ignore the time lapse of approximately 7 (seven) months between the commission of crime and the period of identification. In *casu* a thorough identification and/or further corroboration was required. Furthermore it is trite in cases involving the identity of a suspect to hold an identification parade.

[28] I am not persuaded that Constable van der Bergh had a reasonable basis at all to arrest and detain the plaintiff as he failed to properly apply his mind that his suspicion was reasonable based on the facts before him. His conduct fell far too short of that expected of a police officer in his position with the limited information he had at his disposal. To exacerbate matters was the preconceived decision based on his superior's instruction to arrest the plaintiff without having examined the much relied upon sworn statement at all.

QUANTUM

[29] The plaintiff was arrested during the course of his duty, being a police officer himself. The arrest occurred in the presence of his colleagues and was published in newspapers. He was detained in police custody for 10 (ten) days pending bail application. He was forced to undress and dress in open view outside his home, where he would have been seen by his neighbours a humiliating and degrading experience. He was paraded in handcuffs in front of his wife and kids. He was

later suspended and hauled before the disciplinary inquiry involving his superiors and his colleagues being a policeman of long service with a respectable rank. During the period of his suspension he was obliged to inform his little ones of his predicament an undoubtedly traumatising situation.

[30] In **Thandani v Minister of Law and Order**[7] van Rensburg J observed:

> "*In considering quantum ; sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Court to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual*".

[31] **Visser and Potgieter, Law of Damages 2nd edition at page 475** outline some of the factors to be taken into account in the awarding of damages to include:-

> "*The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants, the duration and the nature (e.g. solitary confinement) of the deprivation of liberty; the status , age and health of the plaintiff; the extent of publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in*

[7] 1991 (1) SA 702 (E) at 707B

previous comparable cases; the fact that in addition to physical freedom, other personality interests such a honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the action injuriarum also has a punitive function".

[32] In **Minister of Safety and Security v Tyulu**[8] Bosielo AJA (as he then was) commented:

"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 that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the award they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our law.....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 can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts".

[8] 209(5) SA 85 (SCA) AT 93 d-f

[33] In an unreported decision of the **Eastern Cape High Court, per Jones J in Olgar v Minister of Safety and Security [ECD 18 December 2008 (case 608/07) at para 16]**, the following was stated:

> *"In modern South Africa a just award of damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."*

[34] It is fair to consider all relevant factors in the circumstances of this case. The plaintiff was 50(fifty) years old when he was arrested. He is a lieutenant officer of more than 30(thirty) years of experience in the South African Police Service. He experienced excruciating humiliation of being arrested at his work place in the presence of his colleagues and in full view of the media which captured and published his arrest with his photograph. Thereafter he suffered the further humiliation of changing clothes in the open, possibly being seen by his neighbours and in the presence of other policemen in his company. He was seen by his wife and kids in handcuffs and transported at the back of the police van a very degrading experience particularly for a policeman who is supposed to uphold the

unlawfully deprived of his liberty for ten 10(ten) days and described the indignity of his detention and court appearances when he had to face his colleagues as the worst experience of his life.

[35] In **Seria v Minister of Safety and Security and others**[9] Meer J stated:

"*there is no fixed formula for the assessment of damages for non-patrimonial loss. It is recognised that a court has the power to estimate an amount ex aequo et bono and consequently enjoys a wide discretion with, fairness as the dominant norm*" He then awarded a plaintiff the sum of R50 000 for approximately twenty (20) hours detention. In **Mbotya v Minister of Police**[10], Mageza AJ awarded plaintiff the sum of R55.000.00 for unlawful arrest and detention of a period of two days.

[36] In **Mvu v Minister of Safety and Security and another**[11] Willis J, following the caution in the Supreme Court Appeal matter of **The Minister of Safety and Security vs Seymour**[12] acknowledged the conservative approach of our Courts and awarded damages in the sum of R30. 000.00 for a day's detention. In *casu* the plaintiff was detained for 10(ten) days. It is common cause that the value of the above mentioned amounts has increased. It is trite law that all awards are influenced by the final determination of the specific facts of each case.

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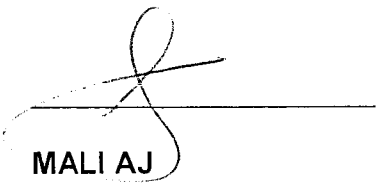
[9] 9165/2004 [2004]
[10] (1122/10)[2012] ZAECPEHC 43
[11] 2009(6) 82
[12] (2006) ZASCA 71

[37] In the premises I therefore make the following order:

The first defendant is to pay the plaintiff:

1. The sum of R275. 000.00
2. Interest on the aforesaid sum, at 15.5% from date of judgment to date of payment;
3. Costs of suit.



MALI AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing:	25 February 2014
Date of Judgment:	3 May 2014
Counsel for Plaintiff:	Adv.: D Mtsweni
Instructing Attorney for Plaintiff:	Ehlers Fakude Incorporated
Counsel for Defendant:	Adv. Baloyi
Instructing Attorney for Defendant:	State Attorney Pretoria