

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

**CASE NO: A437/12**

<b>DELETE</b>	<b>WHICHEVER</b>	<b>IS</b>	<b>NOT</b>
<b>APPLICABLE</b>			
(1)	REPORTABLE:	YES/NO	
(2)	OF INTEREST TO OTHER JUDGES:	YES/NO	
(3)	REVISED		
	DATE:	8 July 2014	
	SIGNATURE:	Jansen	

17/7/2014

In the matter between:

**NEVERMIND MACHAVE**

First Appellant

**EVA NKUNA**

Second Appellant

**and**

**MINISTER OF SAFETY AND SECURITY**

Respondent

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**JUDGMENT**

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**JANSEN J**

[1] The appellants appeal against the judgment of the magistrate for the district of Mhala held at Thulamahashe, dated 16 March, 2012.

[2] The claims against the respondent were set out as follows in the particulars of claim: —

*“On or about the 27<sup>th</sup> April at or near Yutha members of the South African Police Services, Mhala wrongfully performed the following unlawful acts:*

*4.1 Arrested plaintiff and kept him in custody until charges were withdrawn on Monday the 30<sup>th</sup> April 2007.*

*4.2 Assaulted plaintiff on the date of his arrest.*

*4.3 Damaged plaintiff's property.”*

- [3] Separate trials were instituted for the two appellants (and other parties who did not appeal). The trials of the appellants were consolidated by agreement between the parties. It was also agreed at a pre-trial conference that liability and quantum would be separated.
- [4] The appellants' claims based on assault and unlawful arrest and detention were dismissed, and there was no mention of any damage to property in the judgment of the magistrate, clearly due to the scant evidence led in this regard.
- [5] It should be mentioned that the first appellant's name is incorrectly spelt, in accordance with the testimony led at the trial. The correct spelling of his

surname is **Machabe** and the first appellant will, accordingly, be correctly referred to in this judgment.

**The alleged unlawful arrest and detention of the appellants:**

- [6] The onus of proving that an arrest was lawful rests on the respondent. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E–F it was held that: —

*“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”*

- [7] The respondent, hence, commenced leading evidence in the court *a quo*.
- [8] The respondent initially led the evidence of only one witness, namely Warrant Officer Ngobeni. His evidence was to the effect that on 27 April 2007 he was informed by the station commander that a case had been opened at Utah to the effect that a certain woman was accused of being a wizard (witch). He left in a convoy of four vehicles, only to find that a funeral was taking place. They informed the elders of the family, where the funeral was taking place, that in accordance with their tradition, they would respect the funeral rites. However, at the same time, four youngsters commenced hitting an iron pole which signalled a call for rioting, and which

resulted in people descending *en masse* on the scene. The police arrested the said four youngsters and put them in a police van, but a mob started marching in the direction of the person who was allegedly a wizard. Clearly the four youngsters were committing an offence in calling people to come and toyi-toyi.

[9] The mob blocked the street in an attempt to stop the police from reaching the alleged wizard. They then started throwing stones at the police. The police had no rubber bullets and fired warning shots in the air. The police had to force their way through the mob to reach the alleged wizard's house. The four police motor vehicles were only ordinary police motor vehicles and not armoured vehicles. The police called for back-up, as the situation was becoming volatile and daylight was fading. There were only 12 policemen on the scene at that time.

[10] The four police vehicles switched on their lights to shine into all four directions of the compass. The alleged wizard and her family members were hiding behind the police vehicles. Reinforcements arrived but the first police motor vehicle which arrived was damaged by the stones flung at it by the mob. Another four or five police vehicles arrived. The mob built a fire to indicate that they would not retreat. The police vehicles therefore drove side-by-side in a platoon formation. The alleged wizard and her family were

placed in a police motor vehicle for safety. Ultimately, there were more than one hundred police officers who proceeded to march next to and between the police vehicles. The windscreens of five motor vehicles were broken by members of the mob and some police officers suffered minor injuries. The properties of the residents were also damaged by the angry mob.

- [11] To state that the situation was volatile is an understatement. Clearly, due to the fracas, it was impossible for the state to lead evidence as to which police officer arrested whom. There was such pandemonium and mayhem that to do so would be to demand the impossible.
- [12] The entire mob crisis on 27 April 2007 continued from about 16h00 until 22h00. The criticism against the evidence of Warrant Officer Ngobeni was that he could not vouch for what the approximately hundred other police officers did. That is correct. But to expect that Warrant Officer Ngobeni should be able to identify each police officer who arrested a member of the mob would be wholly unrealistic. Fact remains, Warrant Officer Ngobeni gave the policemen their instructions.
- [13] About 60 to 70 members of the mob were arrested. What Warrant Officer Ngobeni could testify was that the people who were blocking the street and

running around and refusing to disperse, were arrested in accordance with his instructions. One of the witnesses, one Ms Emma Nkuna, alleged that she was arrested whilst sleeping in her bed with her husband. This version cannot reasonably be true. First and foremost, the admitted noise level would have kept her awake. She lived in the same street as the alleged witch and would have been either naked or in a nightdress if she were indeed arrested whilst sleeping. Why the police would break into her house and arrest her whilst sleeping is also inherently improbable. Warrant Officer Ngobeni testified that nobody in a nightdress was arrested. Ms Eva Nkuna, the second appellant, alleged that she was arrested at the funeral or night vigil. Once again, this version is inherently improbable. The police sought to control the mob, not to arrest peaceful attendees at the funeral.

[14] Mr Nevermind Machabe, the first appellant, also testified that he was arrested at the funeral or night vigil. On Warrant Officer Ngobeni's evidence, the people who attended the funeral (or night vigil) wore certain shirts and formal clothing which rendered them identifiable. Over and above this, they were not blockading the street or running around, nor were they carrying stones or sticks or other dangerous objects.

[15] The second witness called by the respondent was Ms Nelly Mthabini. She knew the second appellant very well – in fact, for her entire life. The same

applies for the first appellant. She was called a witch by a certain Mr Holideni after her sister's child started vomiting blood and she had spent a week with her sister's family. She went home only to find that Mr Holideni and two others came to her house with sticks, sjamboks and stones and were joined by various other people who were dancing outside her house calling her a wizard/witch, instructing her to leave her house. As a result, she laid a charge with the police, which resulted in their arrival at her house and they asked her where her sister lived. Her sister's child had died in the interim. She testified that a mob descended on her home, even entering the yard. The police fortuitously arrived at the right time and most of the people ran away. Yet there were still people who stayed behind throwing stones at her house. Some of the mob scattered after the police fired warning shots but many of them proceeded to enter the yard of her house. She testified that the second appellant was also present at her house. Thereafter she testified that she did not see her because there were so many people. She also testified that she did not see the first appellant but could say with certainty that she saw Ms Emma Nkuna. According to the witness at that stage it was becoming dark. The police placed her in their van to protect her and for her safety. She testified that it became completely dark and that nobody could see anything, save for the light from the headlamps of the police vehicles. Under cross-examination Ms Nelly Mthabini testified that she saw both Ms Eva Nkuna and Ms Emma Nkuna running into Ms Emma Nkuna's yard,

when she was in the police van. On a proper reading of the evidence, her denial about not seeing Ms Eva Nkuna, after initially saying that she did and then again stating that she had seen her, depended on the time to which she believed reference was being made. She was adamant that when the police van drove past Ms Emma Nkuna's house she saw Ms Eva Nkuna as well and saw both her and Ms Emma Nkuna being arrested. In fact, both were placed in the police van in which Ms Nelly Mthabini was being transported. She reiterated the mayhem, the number of people in the mob and the number of police officers. She further made it clear that Ms Eva Nkuna and Ms Emma Nkuna were clearly part of the mob's activities and associated themselves therewith.

[16] The next witness was Mr Ephraim Benyana Mthabini, who is the brother of the previous witness (Ms Nelly Mthabini). He testified that he also knew both appellants, from their birth, as he was 43 years old when the trial took place and had always resided in Utah. He confirmed that he saw the second appellant forming part of the mob and also saw when she was arrested. He also saw Ms Emma Nkuna being arrested. He also confirmed seeing the first appellant in his sister's yard and later when he was arrested.

[17] The respondent closed its case thereafter. The appellants (and other plaintiffs who are not parties to this appeal) then led their evidence. It is



unnecessary to traverse their evidence in detail. Their evidence was exculpatory regarding the mob activities, but all of them attested to the fact that they were assaulted by the police at the time of their arrest and when in detention. The first witness, Ms Emelinah Ndubane saw the policeman assault Ms Promise Ndlovu by kicking her and hitting her with their fists. Ms Ndubane testified that the police even arrested all the children in the house, and that the children were also assaulted. She testified that the police assaulted them with electrical cables and sjamboks. She also testified that each person who was arrested and driven to the police station, was hit with a sjambok when alighting from the police van. She further testified that they were taken to an area outside the police cells and that they were too afraid to ask for medical treatment. She also testified that water was poured over them, after having been told to lie on the floor for about an hour. Whilst lying on the mud floor they were once again assaulted with a sjambok – the exact amount of times the witness could not remember. She stated that they were kept there the entire weekend as the 27<sup>th</sup> of April 2007 was a Friday. Later they were placed in police cells which did not have a roof and it was raining heavily. The children were, however, released and allowed to go home. She testified that both appellants also arrived there in different police vans/motor vehicles. Her testimony was to the effect that both appellants were assaulted in the same manner that she had been. The witness said they were screaming and crying due to the pain.

- [18] The testimony was that they at least received food and visits from the police officers over the weekend but that these police officers were extremely rude and disrespectful towards them and they were allowed no visitors.
- [19] Furthermore, when they were taken to the magistrate's court on the Monday, bail was refused and they were remanded back into custody and only obtained bail late that Monday afternoon as somebody had arranged an attorney. Each detainee paid R2 000.00 for obtaining bail.
- [20] The next witness, Ms Selani Sithole, who lives opposite Ms Emma Nkuna, in the same street as the alleged witch, testified that the police pushed her and grabbed the children by their hair and threw them through a window. She testified that she was pushed down the stairs of her house and fell. She further testified that the police arrested her and her one year old child. She reiterated that the police assaulted them when they got out of the police van with a sjambok and poured with water which caused itching, and that they were further sprayed with water whilst being assaulted and were taken to an open place. She also testified that it was raining. The children were taken to another room. On the 27<sup>th</sup> of April 2007 their names were taken down and on the 30<sup>th</sup> of April 2007 their fingerprints were taken. Thereafter they were locked inside the police cells until the 30<sup>th</sup> of April 2007.

[21] Ms Eva Nkuna, the second appellant, then testified and stated that she was arrested at the night vigil, taken from the tent, hit with a sjambok and pushed by the police and broke her left toe. She testified that when she alighted from the police van, she, too, was assaulted and then had to lie down, and was assaulted with a sjambok. She further testified that she was sprayed with water and had to lie down for about an hour. She confirmed that they were taken to an open place, in that the roof was open with only iron bars, as the other witnesses had testified. She confirmed that it had rained and that they were all wet and even their blankets were wet. They stayed there until the morning. The next day they were taken to police cells with a roof, where they stayed until the Monday when they were taken to court and bail later arranged for them. She testified that she was beaten on her back repeatedly and it was still swollen after seven days later when she was able to go the Tintswalo Hospital. However, on her medical records (dated July 2007) it was noted that only "old marks" were observed. She testified, as did some of the other witnesses, that when she tried to attend the clinic at Gordenburg (name of clinic as transcribed and spelt in the Record), she was told that the police had told the clinic not to assist her.

[22] The next witness was Ms Emma Nkuna. She stated that she and her husband were asleep when the police entered her house and assaulted the

two of them and their children aged eleven and five years. They also assaulted her sister's child aged 17 years. She also testified that they were driven to the police cells and as they alighted from the police van, the police assaulted her. She was ordered to lie down and water was poured over her. Then she was assaulted again as she was lying on the ground for about an hour. She also testified that she had to spend the night in an area with an open roof and that it was raining. She was very ambivalent about the rioting taking place right in front of her house and stated: "*It might be happened but I did not try to see it*". She, in fact, denied any rioting taking place which clearly could not be true. However, during cross-examination, she was forced to admit that a riot took place right in front of her house.

[23] Ms Promise Ndlovu's evidence was to the effect that she went to the vigil at about at 20h00 only to find it had not yet started and hence she went to Ms Emma Nkuna's house. She testified that she was assaulted with cables and was slapped so hard by the police that she still has difficulty hearing.

[24] The first appellant, Mr Nevermind Machabe then testified. He insisted that he was at the night vigil, and that the police commenced assaulting him there. He stated that he was taken by police van to the police station where he was assaulted with open hands and with sjamboks. He similarly stated that he was also assaulted when alighting from the police van and that he

was again assaulted with a sjambok, open hands, water poured on him and being ordered to lie down on the ground. He similarly stated that he ended up in an enclosure without a roof and that it was raining. He further stated that due to being assaulted he has lost most of his hearing. He also received a head injury. Allegedly he saw no rioting. According to him he was not inside the vigil tent but was outside it.

- [25] The respondent called several witnesses to rebut the appellants' case, which evidence need not be analysed for purposes of this judgment.

**Was the arrest and the detention of the two appellants lawful:**

- [26] Arrest by a peace officer is governed by section 40(1) of the Criminal Procedure Act 51 of 1977, and in this case it is section 40(1)(a) and section 40(1)(b) which provide that a peace officer may arrest any person without a warrant who commits or attempts to commit an offence in his presence.
- [27] Section 40(1)(b) provides that an officer may arrest a person whom he reasonably suspects of having committed an offence referred to in schedule 1 other than the offence of escaping from lawful custody. The discretion to arrest must be exercised in good faith, rationally and not

arbitrarily.<sup>1</sup> It is further trite that a reasonable suspicion of an arresting officer must be exercised objectively.<sup>2</sup> Merely a suspicion is required - not a certainty. This was held in *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SEC).

[28] The onus of proof in respect of justification of the arrest rests on the respondent. “*Reasonable suspicion*” in section 40 may tend to indicate some subjective test to be applied; however, that is not so; the test as to whether “*reasonable suspicion*” could have existed and did exist, is to be determined by an objective standard, namely that of the reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer.<sup>3</sup>

[29] From the evidence set out above it is clear that Warrant Officer Ngobeni faced a very volatile and dangerous situation which lasted for almost six hours and required about a hundred police officers to try and contain the volatile situation. An allegation of witchcraft and a mob descending on the alleged witch’s house is potentially a very dangerous situation.

[30] One can only be left to wonder, given the circumstances sketched by Warrant Officer Ngobeni, what would have happened if the police had not

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<sup>1</sup> *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 SCA.

<sup>2</sup> *R v Van Heerden* 1958(3) SA 150 (T).

<sup>3</sup> *Duncan v Minister of Law and Order* 1986 (2) pp 811–812 I–A.

arrived. In such circumstances, given the long period of time that the police had to monitor the situation, namely six hours, the toyi-toying, the throwing of stones and the large mob, the presence of the police including Warrant Officer Ngobeni was indispensable to avert a tragedy. Clearly, Warrant Officer Ngobeni had exercised his discretion properly and had a reasonable suspicion to suspect that the mob was committing an offence referred to in schedule 1 of the Criminal Procedure Act 51 of 1977.

[31] To expect a police officer to go further, in such circumstances, and to expect him to prove that each and every person who was milling around, was arrested on a reasonable suspicion by each police officer, would be to require the impossible. Warrant Officer Ngobeni did what the situation required.

[32] It is important to bear in mind that an arrest can take place even when the arrester realised that at the time of the arrest he/she did not have sufficient proof for a conviction.<sup>4</sup>

[33] However, the assault on the appellants was uncalled for, as was the inhumane treatment received by them from the police officers during their detention. There was no reason whatsoever to assault them when arresting them, and also again upon their arrival at the police station when exiting

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<sup>4</sup> *Songono v Minister of Law and Order* 1996 (4) SA 384 (SEC).

from the police vans. The situation did not call for the further humiliation and assaults when exiting the police van, the instructions to lie down, to pour water over them, and yet again assaulting them with a sjambok and leaving them in an open roof area whilst it was raining.


- [34] Clearly it was necessary to detain the appellants until the Monday when they were brought before court. The magistrate clearly misdirected himself in holding that the appellants were not assaulted. On the evidence, everybody, even the children, were assaulted. This was completely uncalled for as was the severity of the assaults. All the witnesses effectively gave the same version as to how they were degraded, humiliated and assaulted – all of which aspects will have a direct bearing on the quantum to be awarded.
- [35] I find that Warrant Officer Ngobeni was a reliable witness and that his evidence carries weight as does the evidence of witnesses regarding the assault and treatment which they received from the police. They corroborated each other on all the material facts pertaining to the assaults.
- [36] The appeal is thus dismissed in respect of the alleged wrongful arrest and detention, and upheld regarding the unlawful assault by members of the police.

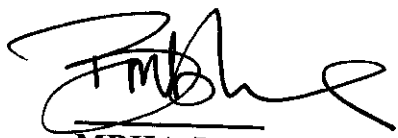


[37] I find that the appellants were substantially successful in their appeal in that the facts pertaining to the unlawful arrest and detention and the unlawful assaults are intertwined.

[38] In the result, the following order is made: —

1. The appeal in respect of the unlawful arrest and detention of the appellants, is dismissed.
2. The appeal in respect of the unlawful and wrongful assault of Nevermind Machabe and Eva Nkuna, is upheld.
3. The respondent is liable for the appellants' costs including the costs of this appeal.

  
JANSEN J

  
MBHA J: I agree

Counsel for the appellants  
**Advocate GJ Scheepers**  
Instructed by **EE Sethole Attorneys**

Counsel for the respondent  
**Advocate GC Muller SC**  
Instructed by: **The State Attorney**