REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

14/3/2016

CASE NO: 15827/13

14/3/2016

In the matter between:

MOKOENA JASTINOS MODIKWE **PLAINTIFF**

and

THE MINISTER OF POLICE **DEFENDANT**

JUDGMENT

FOURIE CP, AJ

[1] The Plaintiff claims for damages in an amount of R1,3 million together with interest and costs, for his wrongful arrest, without a warrant and his wrongful detention. The Plaintiff also claimed damages in an amount of R20 000.00 as a result of the wrongful assault on him. This claim was however at the commencement of the trial abandoned.

[2] Also at the commencement of the trial, the Plaintiff sought the following amendments to his particulars of claim, which amendments the Defendant did not oppose. Such amendments were allowed as follows:

(a) In paragraph 4 thereof:

Deleting the date of the arrest "Sunday, 21 March 2010" and substituting it with the date "19 March 2010";

(b) In paragraph 8 thereof:

Deleting the date of him being granted bail "30th of March 2010" and substituting it with the date "2nd of June 2010";

and

(c) Deleting the amount of bail granted of "R1 200.00" and substituting it with the amount of "R1 000.00".

[3] The Defendant in its amended plea admits that the Plaintiff was arrested without a warrant, but invoked the provisions of Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 (the "Act"), which permits a peace officer to arrest without warrant any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 to the Act. The Defendant also pleads that the Plaintiff's further detention, presumably after his first appearance on 23 March 2010, was lawful as it was in terms of a court order. The Defendant furthermore denies that the Plaintiff was arrested by one Inspector Leeto, as alleged by the Plaintiff and pleads that the Plaintiff was arrested by one Detective Sergeant Joseph Matsheke ("Matsheke"), who acted within the course and scope of his employment with the Defendant, but denied that his action was wrongful / unlawful and that the Defendant is liable to compensate the Plaintiff, claiming that the Plaintiff was a reasonable suspect of having committed a Schedule 1 offence, namely that of robbery.

[4] The Defendant accepted the duty to begin and called only one witness, namely Matsheke, the investigating and arresting officer and thereafter closed his case. The Plaintiff then closed his case without leading any evidence.

[5] One Naphtale Maluleka (the "complainant"), in a statement made on 20 October 2009 alleges that earlier that evening his motor vehicle, a 1979 Toyota Corolla, white in colour, with silver wheelcaps and with registration number DFN 286 N, was hijacked by a male and a female, whom he gave a lift from Pretoria. He gave them a lift because they said where they were going to was close to where he stays. As they reached the place, they told him to stop. The male then assaulted him with a heavy object and the

female sprayed him in the face. They pushed him out of the vehicle. He managed to take the "mobaliser", which I assume should be the "immobiliser", but the car keys remained and they drove off with his vehicle. He was helped by passersby who took him to the police, where he made the statement and was then taken to hospital.

[6] Matsheke visited the complainant in hospital and interviewed him there. He noticed that the complainant sustained a head injury. In Matsheke's statement dated 21 October 2009, he *inter alia* states that the suspects are unknown to the complainant.

[7] Matsheke then received word that a suspect vehicle was impounded as a result of information received from a member of the public ("the source"). He inspected the vehicle and was able to establish that the vehicle was indeed the hijacked vehicle of the complainant. The vehicle was found in the vicinity of where the hijacking took place.

[8] The source whom he then met with is one Mpho Ngobeni, a mechanic, who appeared scared and did not want to meet with the police as he was afraid of being killed. The source informed him that he was contacted by the Plaintiff and one Joeman to assist them with a mechanical fault on a vehicle. The vehicle would not start and he noticed blood stains in the vehicle. As a result he became suspicious and contacted the police. The source only made a statement on 26 March 2010, after the Plaintiff was arrested. Matsheke explained that the source was reluctant to make a statement before an arrest was made. The evidence of Matsheke is uncontested.

[9] In his statement the source confirms that he was approached by Joeman and Mokopa to accompany and assist them. Matsheke testified that Mokopa is the nickname of the Plaintiff, which nickname is widely known in the community. The source further alleges in his statement that it was a Corolla vehicle, which vehicle failed

to start. He saw blood on the driver's seat and driver's door and also a tissue with blood on the mat. Joeman and Makopa threatened to cut the vehicle into pieces and to sell the parts. He became suspicious and scared and after he called the police, the said vehicle was towed away by the police.

[10] The Plaintiff was arrested by Matsheke during the early hours of the morning on 19 March 2009, some months after the incident, at his grandfather's place. Inspector Leeto, together with several other police officers, were also present when the arrest was made.

[11] The Plaintiff was charged with hijacking and appeared in court on Tuesday, 23 March 2010. On 23 March 2010 the matter was postponed to 30 March 2010 for the Plaintiff to apply for bail. On 30 March 2010 the matter was further postponed until 2 June 2010, in order to afford the Plaintiff the opportunity to obtain legal assistance. The Plaintiff on 2 June 2010 applied for bail and bail was granted in the amount of R1 000.00. He never paid the bail and was further detained until 29 September 2010, when the case against him was withdrawn and he was released.

[12] During argument by counsel for the Plaintiff, it was pointed out to him that on the evidence the arrest was made by Matsheke and not by Inspector Leeto, as alleged in the particulars of claim and whether on that alone, the Plaintiff's claim should not fail. Counsel for the Plaintiff immediately moved for an amendment to have the name of Inspector Leeto substituted with "Detective Sergeant Matsheke". The Defendant opposed this and the Plaintiff was ordered to bring a substantive application for such amendment, which substantive application the Defendant opposed. I am prepared to exercise my discretion to allow the amendment, as I am of the view that there is no prejudice to be suffered by the Defendant. The name of "Inspector Leeto" is

accordingly deleted in paragraph 4 of the particulars of claim and substituted with "Detective Sergeant Matsheke".

[13] It is common cause that:

(a) The Plaintiff was arrested by a peace officer;

(b) He was arrested on suspicion of committing a Schedule 1 offence, namely robbery / hijacking;

(c) The Plaintiff was detained at Temba police station from 19 March 2010 and he appeared in court on 23 March 2010.

[14] The substantial issues in dispute are whether the Plaintiff's arrest and detention was unlawful and if so, what damages should be awarded. The arrest without a warrant if *prima facie* unlawful. The onus was accordingly on the Defendant to justify the arrest and then on the Plaintiff to prove the wrongfulness / unlawfulness thereof as pleaded and to prove the quantum of his damages.[1]

[15] The jurisdictional facts for a Section 40(1)(b) defence are:

(a) The arrestor must be a peace officer;

(b) The arrestor must entertain a suspicion;

(c) The suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and

(d) The suspicion must rest on reasonable grounds.[2]

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[1] Minister of Safety and Security vs Linda 2014 (2) SACR 464 (GD), a full bench appeal of this Division, at 466F.

[2] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H and Linda, supra at 469 I-J.

[16] Matsheke testified that he had reasonable grounds for the suspicion that the Plaintiff was guilty of a Schedule 1 offence, as the hijacked vehicle was recovered and on the information received from the source, the hijacked vehicle was in the possession of the Plaintiff and Joeman, as well as the fact that the Plaintiff and Joeman are "used" to hijacking vehicles. The Plaintiff submits that Matsheke did not entertain a reasonable suspicion that the Plaintiff committed the Schedule 1 offence of robbery / hijacking, in that he had the following conflicting information available, namely:

(a) A sworn statement by the complainant to the effect that he was hijacked by a male and female person; and

(b) An oral statement, exclusively based on conjecture, by the source, to the effect that the crime was perpetrated by two male persons.

[17] The Plaintiff further submits that the statement by the complainant is to be preferred over the statement by the source and to be regarded the more reliable source. To find that Matsheke indeed had reasonable grounds for his suspicion, is tantamount to a finding that the Plaintiff, to the exclusion of Joeman and the unidentified male alluded to by the complainant, accompanied the female accomplice. There is no actual basis for such a finding and accordingly cannot serve as a ground, let alone reasonable ground, for Matsheke's suspicion. Furthermore, the aforesaid finding necessarily excludes Joeman as a possible suspect, and militates against Matsheke's own evidence. In the alternative, if this court is inclined to find that on an objective approach Matsheke indeed had reasonable grounds for his suspicion, then it is submitted that on Matsheke's own evidence it was unnecessary to arrest the Plaintiff, simply because he was not a flight risk.

[18] In *Linda, (supra)* [3] it is said:

"The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a court. A suspicion can be reasonable despite there being insufficient evidence for a prima facie case. In Shabaan Bin Hussein and Others v Chong Fook Kam and another the Privy Council said:

> *'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie prove is the end.'*

A measure of uncertainty and confusion regarding the requirements of a defence under s 40(1)(b) crept into our law as a result of the decision of Bertelsmann J in Louw and Another v Minister of Safety and Security and Others, holding that the Bill of Rights obliged an arresting officer acting under s 40(1)(b) to use arrest as a last resort after considering less drastic options of bringing the suspect before court. The decision added a gloss to the section, in form of an additional jurisdictional fact, based on an interpretation of the requirements of the Bill of Rights. Other judges disagreed that the provisions read with the Bill of Rights implied a fifth jurisdictional fact. In Charles v Minister of Safety and Security, Goldblatt J criticised the judgment of Bertelsmann J, saying:

> *'I do not agree with the conclusion reached by Bertelsmann J, despite his full and careful reasons therefor and I am of the view that it is clearly wrong.*

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[3] *At 470 A to 471 B and the case law referred to therein.*

...

The Legislature having granted a peace officer the right to make an arrest in the circumstances set out in s40 has created a situation where due compliance with such section by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. In my view, the court has no right to impose further conditions on such persons. To do so would open a Pandora's box where the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further where peace officers would be called upon to make value judgments every time they effect an arrest in terms of s40.'

Various courts aligned with one or other of the differing points of view. The difference of opinion was ultimately resolved by the Supreme Court of Appeal (SCA) in Minister of Safety and Security v Sekhoto and Another. The SCA was in no doubt that there was no cause, interpretative or otherwise, for reading into s40(1)(b) a fifth jurisdictional fact requiring arrest to be the last resort. That is not to say that a precipitate arrest will be immune from challenge. Once the jurisdictional facts for an arrest in terms of s 40 (1) (b) are present, the discretion whether or not to arrest arises. No doubt the discretion must be properly exercised. But the grounds on which the discretion can be questioned are narrowly circumscribed. The questions formulated for determining the legality of an arrest without a warrant are therefore (a) did the arresting officer suspect that the person arrested was guilty of the offence; (b) were there reasonable grounds for that suspicion; and (c) did the officer exercise his discretion to make the arrest properly?"

[19] I am not persuaded by the Plaintiff's submissions that Matsheke did not have reasonable grounds for his suspicion. I agree with the submissions made by the

Defendant that Matsheke was not required to verify before the arrest was made, as to who between the Plaintiff and Joeman was involved in the hijacking of the vehicle. As part of further investigation, Matsheke may have eliminated the Plaintiff or Joeman, depending on whether Joeman was also arrested. In any event, one of them could for example have been an accessory after the fact. The test is not whether the suspect is guilty of the offence of car hijacking, instead the test is simply whether the information that Matsheke had objectively considered, established reasonable grounds to suspect. Furthermore, a fifth jurisdictional fact requiring arrest to be the last resort has been resolved by the Supreme Court of Appeal (SCA) in *Sekhoto (supra).*

[20] The Plaintiff did not plead a failure to exercise the discretion properly, and in *Sekhoto (supra)*[4] *it was* held that the case could be disposed of on a simple basis, namely that the exercise of the peace officer's discretion was never an issue between the parties. The Plaintiff who had to raise it in either the summons or in a replication, failed to do so. The issue was also not ventilated during the hearing.

[21] In *Sekhoto (supra)* the SCA nevertheless took the opportunity to discuss the requirements for a proper exercise of the discretion to arrest, once the jurisdictional facts are fulfilled and *inter alia* says:

> *"This would mean that peace officers are entitled to exercise their discretion as they deem 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.*

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[4] *At 175 G-H*

A number of choices may be opened 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 and so long as the discretion is exercised within this range, the standard is not breached."[5]

[22] I am satisfied that the arresting officer, Matsheke, suspected that the Plaintiff arrested was guilty of a Schedule 1 offence and that he had reasonable grounds for that suspicion. The further question for determining the legality of an arrest without a warrant, namely the proper exercise of the peace officer's discretion, was never an issue between the parties. In the result I am satisfied that the Plaintiff justified the arrest and that the Plaintiff failed to prove the unlawfulness thereof, as pleaded.

[23] I now turn to the detention of the Plaintiff. In *Sekhoto (supra)*[6] the SCA says:

"While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done, the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect is then within the discretion of the court.

The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging – and in some cases stringent – statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes save to mention that the Act requires a judicial evaluation to determine whether

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[5] At 171 D

[6] At 171 G to 172 H.

it is in the interest of justice to grant bail, that in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before a court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by die peace officer is not how best to bring the suspect to trial; the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on the question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to

say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial."

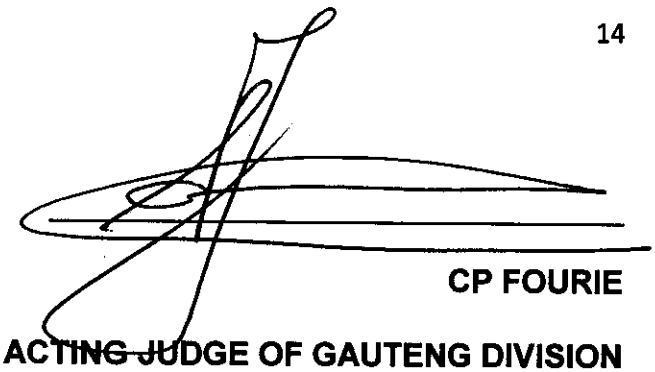
[24] The Plaintiff was brought before a court as soon as reasonably possible, seeing that the date preceding his first appearance was a public holiday. Once this has been done, the authority to detain that is inherent in the power to arrest, has been exhausted. The authority to detain the suspect further is then within the discretion of the court. There is no evidence to suggest that the further postponements were occasioned by the police and/or that the investigating officer misrepresented the strength of the state's case. In this regard it needs to be borne in mind that the Plaintiff was indeed granted bail of 2 June 2010.

[25] I am therefore also satisfied that the unlawfulness of the detention was not proved. Even if the detention had been unlawful, such detention of the Plaintiff would not have been sufficiently linked to the arrest. It is also in my view significant that the Minister for Justice and Constitutional Development is not a party to these proceedings.

[26] Having concluded that the unlawfulness of the arrest and detention had not been proved, it is not necessary to discuss the quantum of damages claimed.

[27] In the result, I make the following order:

1. The Plaintiff's claim is dismissed;
2. The Plaintiff is ordered to pay the Defendant's costs of the action.



CP FOURIE

ACTING JUDGE OF GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

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DATE OF HEARING: 18, 19 and 24 February 2016.

DATE OF JUDGMENT: 14 March 2016.