IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A861/2014

Date: 30/8/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between:

MATSOBANE NELSON LATAKGOMO

APPELLANT

And

MINISTER OF SAFETY AND SECURITY

RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This appeal is against the whole judgment and order delivered by

Maumela J on 28 September 2011. The court *a quo* did not grant leave to appeal, but leave to appeal was granted by the Supreme Court of Appeal on 16 October 2014 to the full court of this division. An application for condonation for the heads of argument of the respondent being filed out of time was unopposed and was granted. It is based on a claim that was originally launched for unlawful arrest by the appellant.

(2) It is common cause between the parties that on 5 November 2007 the appellant was arrested by Constable Moodley, acting within the course and scope of his employment as a member of the South African Police Services, the respondent. The appellant was taken to Brixton Police Station where he was detained overnight, after which he appeared in court on 6 November 2007 and was released at approximately 13h00.

(3) The appellant instituted an action for damages against the respondent, claiming unlawful arrest as the cause of action. The appellant alleges that he was unlawfully arrested and detained without a warrant of arrest on a charge of shoplifting. The arrest and duration of detention are both common cause. His evidence in relation to the condition of the cell at the police station is not in dispute.

(4) Due to these facts the respondent bears the onus to establish the lawfulness of both the arrest and the detention on a balance of

probabilities.

(5) Section 40(1) of the **Criminal Procedure Act**[1] ("the CPA") provides:

> *"A peace officer may without warrant arrest any person-*
>
> *(a) who commits or attempts to commit any offence in his presence;*
>
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"*

(6) If all the jurisdictional requirements of subsection 40(1)(b) are present, the policeman will be empowered to arrest a suspect without a warrant of arrest.

(7) The main question in the present instance is whether the suspicion, on which Constable Moodley arrested the appellant, was reasonable. His evidence in this regard is crucial.

FACTUAL BACKGROUND:

(8) On 5 November 2007 Constable Moodley received a message which caused him to proceed to Pick n Pay Store in Milpark, Johannesburg. The manager of the store reported to him that certain of his employees

[1] Act 51 of 1977

had allegedly committed the crime of theft over the week-end at the store. Subsequently Mr Bhamjee showed him a video of the alleged crime taking place. He informed Constable Moodley that some of the employees had been arrested over the weekend. It later transpired that they were all subsequently released.

(9) The appellant and a certain Simon were called to the manager's office, where both Mr Bhamjee and Constable Moodley were present. The appellant was accused of stealing two packets of chicken and was shown the video footage. The appellant immediately indicated that he had paid for the chicken and produced a Pick n Pay till slip to prove it. He furthermore produced an FNB approval slip to show that he had used an FNB card to pay for the chicken portions.

(10) According to Constable Moodley this fortified his suspicion that the chicken portions had been stolen. He concluded that the appellant had committed theft, an offence listed under schedule 1 of the **CPA**[2]. The appellant and Simon were arrested at 09h00 and detained overnight at the Brixton police station. The next morning the appellant appeared in court and the prosecutor decided not to prosecute him and he was released at 13h00 at court.

(11) The video recording was ruled to be inadmissible by the court as the

[2] *Supra*

appellant and his legal team had no prior knowledge that it would be used at trial. Furthermore no evidence was presented in regards to the authenticity of the video tape.

(12) Mr Bhamjee, the owner of the store's evidence, was that he did not see the appellant tampering with the packets of chicken portions that he had bought and had proof of payment of. There is no indication that these two packets of chicken portions were tampered with and no investigation was launched to ascertain whether it contained more chicken than it was supposed to contain. Mr Bhamjee conceded that the appellant was not one of the culprits he had observed in the cold room stealing from him. The appellant lived close to the store. This investigation to ascertain whether the appellant's packets of chicken portions had been tampered with could have been done with ease. No explanation is given as to why it was not done. The further evidence by both Mr Bhamjee and Constable Moodley was that they did not bother to examine the till slip produced by the appellant and indicated to the appellant that he should show it to the magistrate.

(13) Constable Moodley did not form his own opinion and reasonable suspicion, but relied upon what was conveyed to him by Mr Bhamjee and on what he had witnessed on the inadmissible content of the video footage. He did no further investigation and refused to consider the till slip and proof of payment with a FNB card, as a reasonable person in

his position should have done. The argument that the appellant had paid for the chicken at the till where a co-perpetrator was on duty has to fall away. The evidence was that she could not assist him, due to the fact that he was paying by card and he had to go to another teller. Furthermore the packets of chicken portions were inspected and approved by the security guard at the exit.

LEGAL POSITION:

(14) In **Olivier v Minister of Safety and Security and Another**[3], Horn J held:

> *"Personal liberty weighs heavily with the courts. A balance has to be found between the right to individual liberty on the one hand and the avoidance of unnecessary restriction of the authority of the police in the exercise of their duties on the other hand.* ***There is no doubt that when these factors are evenly balanced, the scales in a democratic constitutional society would fall on the side of individual liberty****."* (Court emphasis)

(15) Section 12(1)(a) and (b) of the **Constitution**[4] of South Africa provides:

> *"Everyone has the right to freedom and security of the person, which includes the right-*
>
> *(a) not to be deprived of freedom arbitrarily or without just*

[3] 2008(2) SACR 387 (WLD) at page 393 f - g
[4] Act 108 of 1996

cause;

(b) not to be detained without trial…"

(16) It is trite that the test is objective when considering whether a police officer had a reasonable suspicion in the circumstances of the case. The court has to decide whether Constable Moodley could have "reasonably suspected" the appellant of having committed theft. If the court finds for the respondent on this issue, then the court has to decide whether the respondent can affect a warrantless arrest where there exist no circumstances preventing him to obtain a warrant before arresting the appellant.

(17) In **Mabona and Another v Minister of Law and Order and Others**[5], Jones J held:

> *"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and 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 his information a reasonable man would bear in***

[5] 1988(2) SA 654 (SE) at 658 E-J

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, ie 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*. 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 sufficiently 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."* (Court emphasis)

(18) In **Minister of Safety and Security V Seymour**[6], Nugent JA held"

"I do not think that the courts in earlier cases placed less value on personal liberty than ought to be placed on it today*. Indeed, what was said in May shows the contrary. Nor do I think there is any basis for concluding that awards that were made at that time reflect a more tolerant judicial view of incursions upon personal liberty. It was precisely because*

[6] 2006(6) SA 320 (SCA) at paragraph 14

personal liberty has always been judicially valued that the incursions that were made upon it by the Legislature and the Executive at that time were so odious. The real import of the Constitution has not been to enhance the inherent value of liberty, which has been constant, albeit that it was systematically undermined, but rather to ensure that those incursions upon it will not recur. To the extent that the learned Judge placed a jurisprudential premium on personal liberty that was absent before now, in my view, it was misdirected." (Court emphasis)

(19) Section 39(2) of the **Constitution**[7] provides:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

(20) This court takes into consideration that the suspicion Constable Moodley formed was based solely on Mr Bhamjee's report. According to this report the appellant was not observed taking part in the theft by Mr Bhamjee, either in the cold room or on the video. Furthermore the appellant had a valid proof of payment, which Constable Moodley did not follow-up in any way. There was no indication that the proof of

[7] *Supra*

payment produced immediately by the appellant, was not genuine. The production of the till slip should immediately have alerted Constable Moodley to thoroughly investigate the allegation against the plaintiff before taking the drastic step of arresting the appellant without a warrant.

(21) There was nothing in the statement by Mr Bhamjee which could have caused Constable Moodley to have a reasonable suspicion that the appellant had committed the crime of theft. There is no evidence at all that links the appellant to the syndicate which had purportedly committed the crime of theft. The arresting officer did not evaluate the evidence, nor did he investigate the allegations against the appellant. Had he considered the till slip and the FNB card payment proof, he would not have come to the same conclusion, but he chose to ignore it. Constable Moodley did not try and corroborate the allegations by Mr Bhamjee, although it was clear that Mr Bhamjee's statement was speculative and did not contain any concrete allegations against the appellant.

(22) In these circumstances we find, that due to the lack of evidence at the time of the arrest, Constable Moodley could not have had a reasonable suspicion that the appellant had committed the crime of theft.

(23) We must agree with the sentiment expressed in **Gellman v Minister**

of Safety and Security[8] where the court said:

"An arrest is not a substitute for good police work."

In this instance Constable Moodley made no attempt to corroborate the complaint and to ascertain whether the plaintiff was one of the perpetrators identified by Mr Bhamjee. It would have been very easy for him to inspect and compare the till slip, the FNB card statement and the chicken portions bought. He failed in all respects and I find that the plaintiff had shown on a balance of probabilities that Constable Moodley could not have had a reasonable suspicion that the plaintiff had committed the crime of theft.

(24) It is abundantly clear that in the prevailing circumstances at the time it was not necessary to arrest the plaintiff. Constable Moodley failed to take into consideration the provisions of Standing Order G341 which provides:

"Securing the attendance of an accused at the trial by other means than arrest

(1) There are various methods by which an accused's attendance at a trial may be secured. ***Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort****.*

(2) It is impossible to lay down hard and false rules regarding

[8] 2008(1) SACR 446 WLD at paragraph 83

the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether the suspect must be arrested or rather be dealt with as provided for in subparagraph (3)." (Court emphasis)

(25) Members of the police must implement these provisions and realize that arrest is only a means to secure the defendant's presence at court. It is not meant to be a punishment in itself.

(26) The guidelines for an arrest set out in the **Gellman case**[9] should be considered before an arrest is made, namely the police official should consider whether there are reasonable grounds to suspect that the person to be arrested has committed an offence referred to in Schedule 1, by analysing the evidence at his/her disposal critically; while there may be circumstances in which an official can form a reasonable suspicion based only on a witness statement, those circumstances would be rare and it would be preferable for the official to find corroborative evidence before making an arrest; after the official has determined that there are reasonable grounds for suspecting that the commission of a Schedule 1 offence has been commited, he must exercise his discretion to determine whether there are circumstances

[9] *Supra*

which militate in favour of effecting a warrantless arrest.

(27) The court has to agree with counsel for the plaintiff where it is stated that *"when a police officer exercises a discretion in violation of a standing order, that might in itself be an indication that the discretion was not properly exercised and that the warrantless arrest was unlawful"*.

(28) Before infringing upon the constitutional rights of a person the police officer has to weigh up the facts such as whether the accused is a danger to society, may abscond, and has no defence to the allegations against him. In this case there was no such evidence. Constable Moodley acted as an agent for Mr Bhamjee, after having been informed by Mr Bhamjee as to the actions of the plaintiff. The respondent failed to discharge the onus to prove the jurisdictional facts as required in terms of section 140(1)(b) of the **CPA**[10]. Therefor he could not have had a reasonable suspicion that the appellant was guilty of shoplifting and the appeal has to be upheld.

QUANTUM:

(29) The appellant claimed R150 000 for the unlawful arrest and detention. At the time of his arrest the appellant was the head of security at the

[10] *Supra*

store. He was arrested whilst on duty in full view of the personnel and customers of the store. There can be no doubt that this caused the appellant embarrassment and stress as he had to endure the indignity of being arrested at his place of employment, in front of the other employees. He was placed in a police cell where he was kept overnight in dire circumstances. He was only released the next day at 13h00 after the prosecutor decided not to prosecute him.

(30) In **Minister of Safety and Security v Seymour**[11] Nugent JA said the following:

> *"**Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss**. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."* (Court emphasis)

(31) The award of damages in this instance is discretionary. We have been referred to previous awards, but realize the amounts in these awards are mere guidelines, although we have considered the amounts

[11] *Supra* at paragraph 20

awarded in similar matters.

(32) In all the circumstances we consider an award of R80 000 to be fair to both the appellant and respondent.

(33) We find that the appellant was wrongfully arrested and detained and is entitled to damages of R80 000.

(34) The following order is made:

1. The appeal is upheld;
2. The respondent to pay the costs of the appeal;
3. The order of the court *a quo* is set aside and the following order is substituted:
   - 3.1 The respondent is ordered to pay the appellant damages in an amount of R80 000;
   - 3.2 The amount of R80 000 is to bear interest at the rate of 9% per annum from the date of this order to date of payment;
   - 3.3 The respondent is to pay the appellant's costs incurred in the action.

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Judge C Pretorius

I agree.

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Judge P M Mabuse

I agree.

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Judge M J Teffo

Case number	: A861/2014
Matter heard on	: 10 August 2016
For the Appellant	: Adv R J De Beer
Instructed by	: Arthur Moore Incorporated
For the Respondent	: Adv K M Mokotedi
Instructed by	: State Attorney
Date of Judgment	: 30 August 2016