




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<div style="display: flex; justify-content: space-between;"> <div> <p>28/3/2018</p> <p>DATE</p> </div> <div>  <p>SIGNATURE</p> </div> </div>	

28/3/18

CASE NUMBER: 37321/2015

In the matter between:

RONALD MACHONGWE

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

SARDIWALLA J:

INTRODUCTION

[1] Crisply formulated, the gravamen with which this case is concerned is whether the defendant has discharged the burden of proving that the plaintiff's arrest was lawful. If the defendant has not fulfilled that burden of proof, the corollary to that question is the issue of quantum – what just and equitable compensation must be awarded to the plaintiff.

PARTIES

[2] The plaintiff is Ronald Machongwe, an adult male who has instituted these proceedings in which he claims that he was unlawfully arrested by police officers who were under the employment of the defendant.

[3] The defendant is the Minister of Police, in his capacity as the head of the South African Police Service under which the police officers who arrested the plaintiff work.

BACKGROUND

[4] Before contending with the legal issues, it is wise to first trace the genesis of this dispute. In doing so, only the salient facts necessary for the resolution of the legal dispute will be traversed.

[5] The plaintiff alleges that on 2 April 2015, close to Sunnyside, Pretoria he was driving in order to go secure a business deal with a potential client. He was stopped by police officers who wanted to check his license disc but they realised that the license disc was in order.

[6] From here until the point where the plaintiff is arrested, there is a dispute regarding what precisely took place however, there is no dispute regarding the applicants' arrest. This dispute moreover, is not crucial to the determination of the legal issues.

[7] According to the plaintiff's version, the police officers saw money in his car and demanded that he give them a bribe in order for them to let him go. He declined to offer them the bribe and they immediately noticed that he had been recording them. Upon realising this they took his phone and deleted the recording.

[8] It is at this point that the plaintiff says that he was then arrested and the police manufactured a charge for possession of dagga and he was taken to Sunnyside Police Station.

[9] According to the defendant's version, police officers stopped the vehicle driven by the plaintiff and asked to conduct a search inside the car and on the plaintiff. During the search,

the police officers found a bag of dagga inside the pocket of the plaintiff. The defendant claims that it is upon such a discovery that the plaintiff was arrested.

[10] The defendant continues to allege that the plaintiff was taken to Pretoria Central where the dagga was weighed because there was no machine to weigh dagga at Sunnyside Police Station. The dagga was weighed and a certificate of the weight of the dagga was issued with the weight of the dagga being 0,15 gram. The dagga was booked with the South African Police Service 13 official under reference number SAPS 13 No 145/04/2015 and sealed in the presence of the Plaintiff.

[11] On the plaintiff's appearance in the Magistrates' Court the matter was abandoned (declared a nulle prosequi) as a consequence of the defendant failing to produce the certificate of the weight of dagga which was not in the docket.

[12] The plaintiff now approaches this court in order to seek damages against the defendant for an amount of R500 000.

THE LAW

[13] Section 12 (1) of the South African constitution enshrines the rights of everyone to freedom and security of the person. It states that:

1. 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 cause;
 - b. not to be detained without trial;
 - c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way."

[14] It is said that Section 12(1) guarantees both substantive and procedural protection.¹ The substantive component requires the state to have good reasons for depriving someone of their freedom and the procedural component requires the deprivation to take place in accordance with fair procedures

[15] In the decision of *Pather v Minister of Police*² in which the leading judgment of *Minister of Safety and Security v Sekhoto and Another*³ was cited, it was stated that in cases where it is claimed that an arrest is unlawful that the essential element to be proven is lawfulness.

[16] In *Minister of Law and Order and Others v Hurley and Another*⁴ regarding the onus it was said:

“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”

[17] This position in our law is even more entrenched as a result of the supremacy of the Constitution especially the Bill of Rights in which section 12(1) finds its positionality and section 1 in which we find the founding values. Section 1 states that the Republic of South Africa is founded on the Supremacy of the Constitution and the rule of law. Moreover, South Africa is founded on accountability, responsiveness and openness.

[18] From this stems the principle that:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with [the rule of law].”⁵

¹ Iain Currie & Johan de Waal in *The Bill of Rights Handbook* fifth Ed (Juta and Company Ltd, Cape Town 2005).para 12.1 p 292.

² *Pather v Minister of Police* [2016] ZAGPPHC 215 at para 35.

³ 2011 (1) SACR 315 (SCA) [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA.

⁴ [1986] ZASCA 53; [1986] 2 All SA 428 (A).

⁵ *President of the Republic of South Africa and Others v South African Dental Association and Another* [2015] ZACC 2; 2015 (4) BCLR 388 (CC).

[19] The power of police officers is given in order to: prevent, combat and investigate crime, to maintain public order... and to uphold the law.⁶ Moreover, to ensure the safety and security of all persons and property in the national territory; to uphold and safeguard the fundamental rights of every person as guaranteed by chapter 2 of the South African Constitution.⁷ This is the reason the powers are given and this is why the defendant bears the onus of showing that the arrest was lawful, failing which, the action will be arbitrary and therefore unlawful.

[20] The following are crucial in proving the lawfulness of an arrest in terms of section 40(1) of the Criminal Procedure Act:

- “1. the arrestor must be a peace officer;
- 2. the arrestor must entertain a suspicion;
- 3. the suspicion must be that the suspect (the arrestee) committed an offence

Referred to in Schedule 1;

- 4. The suspicion must rest on reasonable ground
- 5. the person must be reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;”

[21] In this case the key issue in dispute is whether the plaintiff was in possession of dagga or not.

⁶ Constitution of the Republic of South Africa 1996, section 205(3).

⁷ South African Police Service Act, 68 of 1995.

PLAINTIFF'S CASE

[22] The plaintiff's case is simply that there was no dagga in his possession and that the police officers manufactured the charge.

DEFENDANT'S CASE

[23] The defendant's contention is that the plaintiff is unreliable, no bribe was ever requested from the plaintiff, that the plaintiff's chronology of events does not make sense and that the plaintiff was found in possession of dagga.

ANALYSIS

[24] The defendant in this case need only show that the dagga does exist and was found in the plaintiff's possession and then explain why the matter was not prosecuted – was it abandoned because of prosecutorial discretion or because the investigation is continuing. The defendant simply does not provide an explanation. Instead, the defendant chooses to attack the credibility of the plaintiff and the plaintiff's version of events as if the plaintiff bears the onus in this case.

[25] It must be emphasised that in this a case of unlawful arrest, it is the defendant, the one who has arrested or caused the arrest to have been effected bears the onus. The submissions by the defendant, unfortunately, do not take the onus inquiry any further.

[26] It is for this reason that the defendant has failed to discharge the onus of showing the court that the arrest was lawful. The defendant does not produce the confiscated dagga or even the certificate of weight of the dagga. The defendant does not explain why if the dagga exists, the matter was nonetheless declared a *nulle prosequi*.

CONCLUSION ON THE MERITS

[27] The plaintiff's claim that the arrest was unlawful succeeds and the defendant's claim that the arrest was lawful fails.

QUANTUM

[28] For an enriching discussion of the vexed issue of quantum see *Mathe v Minister of Police*⁸ from para 16 – 30. Essentially, Courts are cautioned not to engage quantum as if they are attempting to enrich the plaintiff. However, they must consider the certain factors: the role of the police service in our society; the manner in which the arrest was effected; the conditions in which the plaintiff was detained; the period of the detention; the impact of the detention on the plaintiff, his life, health, family or work; whether there has been an apology; and the rights of the plaintiff that have been violated.

[29] Cognisant of the authorities in *Mathe* and guided by the awards given in those cases it is just and equitable to grant the plaintiff damages for R250 000. The manner in which the defendant has pursued this litigation, up to this point not admitting or giving a satisfactory explanation for the arrest. Many people in the plaintiff's position would have not been able to amass the financial muscle to litigate against the might of the state.

[30] The way in which the plaintiff describes his treatment from which it is abundantly clear that there was absolutely no reason for the police to arrest him except for malicious permutations. The betrayal of the police officers' oath, the law and the Constitution, is atrocious.

[31] Deprivation of the plaintiff's sacred liberty in an arbitrary manner and for is deserving of this award.

⁸ [2017] ZAGPJHC 133; 2017 (2) SACR 211 (GJ); [2017] 4 All SA 130 (GJ).

ORDER

[32] In the result the following order is made: Judgment is granted against the defendant for:

1. Payment of the sum of R250 000;
2. Interest at the rate of 9% per annum from 14 days after date of service of the summons until date of payment;
3. Costs of suit.



C M SARDIWALLA

JUDG OF THE GAUTENG DIVISION, PRETORIA

APPEARANCES

Date of Hearing	:	26 February 2018
Date of Judgment	:	28 March 2018
Counsel for the Plaintiff	:	ADV JSC NKOSI
Applicant's Attorneys	:	MWIM ATTORNEYS
Counsel for the Respondent	:	ADV T.T TSHIVHASE
Respondent's Attorneys	:	THE STATE ATTORNEY