IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
CASE NO: 68946/15

(1) REPORTABLE: NO
(2) Of INTEREST TO OTHER JUDGES: NO
(3) DATE DELIVERED: 14/12/2018
(4) SIGNATURE: .....

In the matter between:

NTSINDISO HAMILTON MPANZA Plaintiff

and

THE MINISTER OF POLICE First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

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JUDGMENT

MAKHUVELE J

Introduction

[1] The plaintiff is a 34 year old male residing at Bronkhorstpruit, Gauteng Province. He instituted an action against the defendants and claimed payment of an amount of R560 000(Four hundred and ninety rand) plus interest for damages that he alleges to have suffered as a result of his arrest, detention and malicious prosecution which according to him was unlawful.

[2] I was advised at the commencement of the trial that the parties had agreed to separate merits from quantum. I issued an order in this regard. I

was also advised that the claim against the second defendant had been withdrawn.

The Pleadings

[3] In his particulars of claim, Mpanza alleged, amongst other things that he was arrested by members of the first defendant (the Police) without a warrant on or about the morning of 09 April 2014 , at or near number 4 Alwyn Street, Riamar Park, Bronkhorstpruit, Gauteng Province.

[4] He further alleged that he was detained and deprived of his freedom from 09 April 2014 to on or about 14 April 2014 when he was released on bail.

[5] The defendants filed a plea dated 26 November 2015. Save for admitting their identity as cited, the plea is a bare denial of all allegations in the particulars of claim and the plaintiff was put to the proof thereof.

[6] The defendants only admitted the arrest and detention as alleged in their response to pre-trial questions and the amended plea. In the amended plea dated 09 October 2018, it was pleaded that the arrest without a warrant was lawful and was effected in terms of section 40(1) (b) of the Criminal Procedure Act No.51 of 1977 as amended (the Act) and that the arresting officer, identified as Constable Mariri, complied with the jurisdictional factors, namely that; he was a peace officer, he entertained a suspicion based on reasonable grounds that the plaintiff committed an offence mentioned in schedule 1 of the Act.

[7] The defendants relied on the approach made to Constable Mariri by the complainant known as Mr Mpho Nkalane who alleged that the plaintiff and another male person had broken into his home and robbed him of his belongings on 05 April 2014. This, according to the amended plea constituted a "*probable or reasonable cause* "[1] to effect an arrest.

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[1] Paragraph 5 of the Amended Plea

[8] The further detention was justified on the basis that the *"investigations had to continue"*. It was also contended in the plea that the *"National Director of Public Prosecutions did not enrol the matter as the plaintiff was not linked to the case, as a result there was no prosecution"*[2].

Issues for decision and Onus of proof

[9] The only issue for decision before me was the lawfulness of the arrest and detention. I was also requested to determine the period of the unlawful detention should I find in favour of the plaintiff.

[10] The parties had agreed in the pre-trial conference that the defendant (the Police) bore the onus of proof and had a duty to begin to lead evidence.

The trial bundles

[11] The documents referred to during the trial were bound in bundles marked as A,B1,B2, C (including E) and D ; being Pleadings; General Notices, Complete Case Docket and Defendant's amended plea; respectively.

Evidence led

<u>The defendant</u>

[12] Two witnesses testified on behalf of the defendant, namely, **Constables Thothi Lucas Mariri** and **Selina Chiloane.**

[13] The essence of their evidence is captured in the amended plea as indicated above. The material additions related to who summoned them to the complainant's house and the physical state of the plaintiff when they arrested him.

[14] According to the Constables, they were on patrol duty when they received a message through the police communication system to the effect that a complainant, who they subsequently identified as Mr Mpho Nkalane

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2 Paragraph 6 of the Amended Plea

had apprehended suspects who robbed him of his cash, jewellery and laptop whilst he was asleep in his house some few days earlier.

[15] Mr Nkalane explained to the Constables that he obtained the identities of the suspects, who were known to him as they reside in the same area through his informer after he launched his own investigations. His informer had identified a shoe that was left behind in the scene as belonging to one Morwaa. The complainant confronted this Morwaa and he admitted that he was responsible for the robbery at his house. He told the complainant that he was with the plaintiff and one Samkelo when he robbed his house. He then broke loose and fled.

[16] Mr Nkalane then went home and requested one Mr Molefe to accompany him to the home of the plaintiff and Samkelo. The two stayed together. The home was searched. They found torches belonging to Kusile Mine but they could not explain how they got hold of them as they were not employed there. According to Nkalane, the torches were used during the robbery at his house. He then took the two young men to his house. His companion (Mr Molefe) is the one who called the police.

[17] According to Constable Mariri, he arrested the plaintiff and the other man known as Samkelo because the complainant handed them over to him and his colleague and he had already opened a police docket after his house was burgled.

[18] The plaintiff and his co-suspects reported to the two Constables that they had been assaulted by Mr Nkalane. They appeared injured as they were swollen.

[19] Constables Mariri introduced himself to them and showed his appointment card. He read them their rights and that he was arresting them for house robbery. They took the plaintiff and his co-suspect to the police station. An ambulance was summoned to take them to the hospital. The ambulance came but they refused to go to the hospital.

[20] Constable Mariri admitted that he did not have a warrant of arrest because according to him it is issued by a court. He is entitled to effect an arrest without a warrant if a crime is being committed. He further testified that he had no powers to warn suspects to appear in court. It is only an investigation officer who has such powers.

[21] He does not know where Mr Nkalane is.

[22] **Under cross-examination,** he denied that Mr Nkalane called the police. He clarified his written statement in this regard where he indicated that the latter approached them. He meant that Nkalane came to his gate and opened for them to come in.

[23] He denied the plaintiff's version that his aunt called the police and requested them to go and rescue him and Samkelo as they were under attack.

[24] He admitted that he did not search the plaintiff on his arrival and that he did not attend to search his house. He also did not interview Morwaa and did not verify the allegations made by Mr Nkalane. His job is to arrest once he receive a complaint. The investigation officer will do the investigations later. He effect arrests on the version of the complainant. In this case the complainant assured him that he had already opened a criminal a docket. This was enough to arrest. He did not verify with the investigation officer whilst still at Mr Nkalane's house. He was going to inform him when he arrive at the police station.

[25] He admitted that he did not have objective facts, other than the version of the complainant. The complainant pointed out the suspects and he was compelled to arrest.

[26] **Constable Chiloane** repeated the evidence of Constable Mariri and confirmed that they found nothing to link the plaintiff and his co-suspect to the crime. She only read Mr Nkalane's statement when she consulted with the legal representatives in preparation for the trial. The statement is dated 10

April 2014. This is actually after their visit and arrest of the plaintiff. It does not identify the alleged robbers.

[27] This concluded he case for the defendant.

Plaintiff

[28] The first witness for the plaintiff was his sister, **Ms Nokwazi Ignatia Ngomane**. She is also the aunt of Samkelo Mngadi (the plaintiff's co-suspect.

[29] On the day in question she received a call from Samkelo to the effect that Mr Nkalane and some other people came to their house and took the plaintiff away as they alleged that some properties were stolen and he was responsible.

[30] She called the police station and pleaded with the police to go and verify what was happening. She gave them the home address of Mr Nkalane. She called again and was told that indeed the police had gone to Mr Nkalane's house and later on she was told that the young men had arrived at the police station and were under arrest.

[31] She went to see the plaintiff and Samkelo at the police station on Sunday, four days after their arrest. They had not yet been taken to court despite the assurances given when she called that they were going to court on Friday.

[32] No relevant questions were put to her during cross examination except that the plaintiff appeared in court on 14 April 2014.

[33] **The plaintiff also testified** and stated that on the day in question, at about 18:00 or 19:00 Mr Nkalane came to his house accompanied by at least twelve (12) other men. They were looking for items that Mr Nkalane alleged were missing from his house which included a plasma television set and money. The plaintiff was alleged to have these items.

[34] They searched his house but did not find anything. They took him away, but before they reached Mr Nkalane's house they went back to fetch Samkelo. On the way they were beaten and asked questions about the alleged stolen property. When they reached Mr Nkalane's house, the other men left and the two remained with him. Mr Nkalane pointed a firearm at them. He tied their hands and feet and flushed them with water from a hose-pipe. He also used it to beat them.

[35] The police arrived. Mr Nkalane continued to beat them in their presence. They restrained him, got them up on their feet and put them in the police van with their hands still tied up. They were searched by Nkalane before the police arrived and nothing was found on them

[36] The police did not tell them where they were taking them to, but they eventually ended up at Bronkhorstpruit police station cells. They were not told what they were there for and they were not charged. He confirmed his signature on a document dated 09 April 2014 but denied that he was informed what he was signing for. He denied that he was advised about his rights as the document alleged.

They appeared in court on 14 April 2014.

[37] **Under cross examination** he testified that he did not know that Samkelo had called his sister as he was the first to be taken away. He did not know that the police went to Mr Nkalane's house at his sister's request.

[38] He denied a suggestion that Mr Nkalane informed the police that he took his belongings and that this was the reason he was arrested. He was emphatic that the police did not talk to them before taking them away.

[39] He re-iterated that Mr Nkalane also assaulted them in the presence of the police and not just before their arrival as claimed by Constable Mariri.

[40] He confirmed that he laid charges of assault against Mr.Nkalane but the matter was not finalized as he passed away about a year ago.

[41] The case against him and Samkelo was dropped as there was no connection between them and the crime.

[42] He also confirmed that no one had approached them about the alleged charges laid by Mr Nkalane before they were taken to his house and subsequently detained by the police.

[43] The last witness for the plaintiff was **Samkelo Mngadi**. He confirmed the material aspects of both the plaintiff and Ms Ngomane's evidence.

Submissions

The defendant

[44] Counsel for the both parties prepared and handed up written submissions. I am grateful for the assistance.

[45] Counsel for the defendant maintained that the arresting officer had the requisite suspicion and relied on the case of Minister of Law and Order v Kader , 1991 (1) SA 41(A) at 50H where it was stated that *"it is a state of conjecture or surmise when proof is lacking..Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."*

He also relied on the case of Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA, at para [28] for a submission that the discretion to arrest arises once all jurisdictional factors are present.

[46] Counsel for the defendant also submitted that the plaintiff was brought to court within a reasonable period of time because 48 hours expired outside court hours.

He cited the case of Mashilo and Another v Prinsloo 2013 (2) SACR 648 (SCA) as authority for the submission that Section 50(d) (i) of the Criminal Procedure Act was intended to extend the 48 hours within which an arrested person could be detained.

The plaintiff

[47] It was submitted on behalf of the plaintiff that a police officer was not obliged to arrest as he had a discretion, to be exercised by weighing and considering the prevailing circumstances (MR v Minister of Safety and Security 2016 (2) SACR 540 CC at 42 et seq))

[48] He also submitted that the arresting officer must have exercised his own suspicion, and not rely on someone else's. (Ralekwa v Minister of Safety and Security 2004 (1) SACR 131 AT 11-14.

[49] He also referred to various authorities where it was held that a reasonable man must analyse the quality of information at his disposal critically and that reliance should not be placed at flimsy evidence from the complainant.

[50] Counsel for the plaintiff offered a different interpretation from that of the defendant on the application of section 50 of the Criminal Procedure Act in as far as the 48 hour period within which an arrested person should be brought before court. His view is that the relevant section does not entitle police officers to detain an arrested person the entire 48 hours without bringing him to court. Furthermore, the defendant should lead evidence why the arrested person was not taken to court before the expiry of 48 hours.

Application of the legal principles to the facts

Criminal procedure Act, Act 51 of 1977, as amended

[51] Section 40(1) reads as follows:

> *(1) A peace office may without a 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.

[52] The enquiry does not end by simply looking up the offences listed in Schedule 1. The question is whether the arrest should be clothed with the legality of this section. There must be an investigation into the essentials relevant to the offence[3]. On their own version, the two police constables did not even read the complainant's statement or contact the investigation officer to verify the charges that were allegedly laid by Mr Nkalana .

[53] The arresting officer must consider whether the offence is a Schedule 1. In the matter of **Mhaga v Minister of Safety and Security**[4], the arrest was declared unlawful because the arresting officer did not know that child kidnapping was Schedule 1 offence. In the matter before me the two constables do not even know about the discretion they have . They maintained that they are obliged to arrest once a complainant makes a report to them.

[54] The jurisdictional factors[5] that the arrestor must establish to enjoy the protection of section 40(1) (b) are that he is a peace officer, must entertain a suspicion that the arrestee committed an offence referred to in Schedule 1 of the Act and the suspicion must rest on reasonable grounds.

[55] The only jurisdictional factor present in the matter before me is that the arresting officer was a peace officer.

Detention

[56] In the matter of **Hofmeyr v Minister of Justice and Another**, King J, as he then was, held that even where an arrest is lawful, a police officer is required to apply his mind to the suspect's detention and the circumstances relating thereto. Failure to do so renders the detention unlawful.[6]

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3 Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 836 G to 837B
4 (2001) 2 ALLSA 534 9Tk)
5 Duncan v Minister of Law and order 1986(2) SA 805 (A) at 818G-H
6 1992 (3) SA 108 (C),

The Appellate Division of the Supreme Court upheld this decision.[7]

[57] Section 59(1) (a) of the Criminal Procedure Act provides as follows:

> *"An accused person who is in custody in respect of an offence other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such a offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such an official."*

[58] Constable Mariri testified that the powers to release an arrested person rested on an investigation officer, but he never took steps to ensure that the plaintiff's fate is brought to the attention of any authorised person. In fact, he simply left the plaintiff at the police station and did not make a follow-up with the investigation officer on the truthfulness of the information that was provided by the complainant.

[59] Section 50(3) makes provision for release of an accused person on bail, or on warning or on written notice to appear in court.

[60] The plaintiff and his co-suspect were arrested on Wednesday, 09 April 2014. They were only taken to court on Monday, 14 April 2014. In its plea, the defendant justified this by stating that investigations were continuing. No evidence was led as to the nature of the investigations that were done between Wednesday and Friday. In fact, there is no evidence that any investigations were done.

[61] Defendant's counsel argued that the 48 hours fell on a weekend and courts are not operational. He also sought to rely on the case of Mashilo as authority that the 48 hours is extended over a weekend.

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[7] Minister of Justice v Hofmeyr 1993(3) SA 131 (A) at 1571,(confirmed on appeal ; Minister of Justice v Hofmeyr (240/91) [1993] ZASCA 40)

[62] The defendant appear to believe that they can wait 48 hours before bringing an arrested person before a court and then claim the extension that would kick in if the next hour falls on a weekend.

This is a wrong interpretation of the Mashilo judgment. It is clear from a reading of the judgment that the extension refers to operational challenges that may hamper co-ordination of a court appearance. Evidence in this regard must be led that indeed there were challenges. Furthermore, the judgment refers to the Constitutional right of an arrested person (section 35) to be brought before a court of law expeditiously.

Operational parameters concerning the discretion to arrest

[63] The Constables' statements that their job is to arrest whenever they receive a complaint cannot be correct. In any event, their evidence demonstrated their ignorance of the law and reckless disregard of their duties as police officers.

[64] In the matter of **Minister of Safety and Security v Antus Van Niekerk**[8], the Constitutional Court refused to entertain the request to lay down criteria applicable to arrests for purposes of clarifying the legal position decreed by the Constitution.

The court indicated that internal regulation should be encouraged and did find that there was extensive internal regulation concerning arrests.[9]

Conclusion: Has the defendant discharged its onus?

[65] On the question of onus, the Supreme Court of Appeal, per Mhlanta JA had this to say in the matter of the **City of Johannesburg metropolitan Council v Patrick Ngobeni**[10] :

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[8] Case CCT 74/06, decided on 08 June 2007, per Sachs J.
[9] At paragraph 18. The court was referred to Standing order (G) 341, issued under Consolidation Notice 15/1999 and titled "Arrest and the Treatment of an Arrested Persons until Such Person is handed over to the Community Service Center Commander"

[10] Supra

"[50] It is trite that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Cainer,[11] Coetzee J applied the principle set out in National Employers' General Insurance Association v Gany **1931 AD 187** as follows:

> 'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version . . . .'

[51] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in National Employers' General v Jagers,[12] as follows:

> 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'"

[66] In the matter before me, the defendant has admitted that the plaintiff was arrested without a warrant and detained from Wednesday 09 April 2014 until he appeared in court on Monday, 14 April 2014. This is all that the plaintiff

was required to plead and prove. The onus[11] is then on the defendant to justify the lawfulness of the arrest, assault and deprivation of freedom.

[67] The defendant's witnesses did not know that they had a discretion. It is therefore out of question to even examine how that discretion was exercised. They believed that they were obliged to arrest once a complainant make allegations. They did not have any suspicion, let alone one based on reasonable grounds.

[68] Accordingly, the defendant has failed to discharge the onus to justify that the arrest was lawful.

[69] On the evidence before me, the police had no reason not to take the plaintiff to court before the expiry of 48 hours (at about 16:00 on Friday, 11 April 2014). They waited until Monday, 14 April 2014, simply because they could do so. This defeats the whole purpose of arresting a suspect, which is to bring them before a court of law as soon as possible. Accordingly, my finding in this regard is that the period of unlawful detention is from the date and time of arrest up to and including the date of appearance in court on Monday, 14 April 2014.

Order;

[70] Consequently, I make the following order;

[70.1] The arrest and detention of the plaintiff on 09 April 2014 is declared unlawful,

[70.2] The subsequent detention of the plaintiff from 11 April to 14 April 2014 is declared unlawful.

[70.3] The plaintiff is entitled to recover his damages from the first defendant arising from his arrest and detention from 09 April 2014 to 14 April 2014.

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[11] See: Minister of Order v Hurley 1986(3) SA 568 (A) AT 589 E-F

[70.4] The first defendant is ordered to pay costs.

TAN MAKHUVELE J

Judge of the High Court

APPEARANCES

Plaintiff:	**Adv. D Thumbathi**
Instructed by:	Gildenhuys Malatji Inc.
	PRETORIA
	Ref: GER/S Maelane/TPK/01748548
Defendant:	**Adv. MN Leballo**
Instructed by:	The State Attorney
	PRETORIA
	Ref: 6017/2015/Z17/W Motsepe
Heard on:	*15/10/2018*
Judgment delivered on:	*14/12/2018*