

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

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

CASE NO: 77105/2016

In the matter between:

BAME PEARL ITUMELENG

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

RAULINGA J,

- [1] The Plaintiff instituted an action for damages for unlawful arrest and detention against the Minister of Police ('the Defendant').
- [2] The matter proceeded on merits only calling the Court to determine whether or not the Plaintiff's arrest and detention was lawful. The Defendant bears the onus to prove that the arrest and detention was lawful.
- [3] The Defendant's only witness was Constable Tebogo Maje, who was on duty when the matter was reported to the Community Service Centre (CSC) at Kuruma Police Station.
- [4] Constable Maje was in the company of four other police officers when the complaint, Mr Sekgopi, reported a case of housebreaking and theft of a

television set, laptop and a cellphone. As a consequence, he and Sergeant Eiman, Constable Schoeman, Constable Metswe and Constable Maibelo in the company of the complainant, proceeded to the Mapotong Village where the stolen property was alleged to be. The information of the whereabouts of the stolen property was provided by the complainant.

- [5] The complainant identified Olebile and Orapeleng as the suspects who allegedly stole his television set.
- [6] The two suspects admitted that they stole the television after they were requested by the Plaintiff to get a television for her as hers was stolen and that she was driving a Red VW Golf GTI with registration number [...] at the time when she approached them. Constable Maje then proceeded to the Plaintiffs home together with the other four police officers, the complainant as well as the two suspects.
- [7] After the Plaintiff had opened the door for them, they entered and questioned her about the alleged stolen TV. The Plaintiff denied knowledge of the alleged stolen TV and instead said that the TV in her house belonged to her friend, who had loaned it to her after her television was stolen.
- [8] Constable Maje went to the police vehicle and fetched Orapeleng, one of the suspects and brought him into the house. Orapeleng pointed out the Plaintiff as the person to whom he and his accomplice, Olebile, had sold the TV. After she was pointed out, the Plaintiff suddenly changed her stance, and informed the police that the TV was at Mpumelelo's place.
- [9] Constable Maje testified that after the Plaintiff indicated that she would take them where the TV was, he immediately formed a reasonable suspicion that she was a suspect of a case of receiving stolen property knowing it to be stolen. This suspicion he formed after receiving information from the two suspects on how the TV was stolen and handed to the Plaintiff.
- [10] He then proceeded to Mpumelelo's place in the company of the Plaintiff who pointed out the place to him. Initially Mpumelelo denied knowledge of the television. It was only after he was taken to the police station that he did turn around and indicated that the stolen television was at his place and that he had swapped his television with the Plaintiff. The television was found at

Mpumelelo's place in an outside room. This was after a thorough search was done in the main house to no avail.

- [11] Under cross-examination, Constable Maje testified that he interviewed one Ntaoleng who indicated to him that he was requested by the two suspects to transport the television, which he did. Ntaoleng did not know that the television was stolen.
- [12] He also testified that according to the information he received from the two suspects, the Plaintiff requested them to get a television for her. The suspects later stole the television and sold it to her, which she later exchanged with Mpumelelo.
- [13] The Plaintiff called the complainant as her witness. His evidence materially corroborates the evidence of Constable Maje. He testified that he and the police went to the two suspects who confirmed that they stole the television and sold it to the Plaintiff. He further testified that the television found at the Plaintiff's place was not his, as his was a Sansui, which was the one retrieved from Mpumelelo's place. He also testified that one of the suspects was brought into the Plaintiff's house and pointed the Plaintiff as the person they sold the television to.
- [14] The Plaintiff testified that on 12 January 2016 at about 06h00, four police officers visited her home. Sergeant Eiman and Constable Schoeman were known to her in a previous encounter when they attended to a complaint when her house was broken into. The said police officers were in the company of the complainant, Mr Sekgopi when they entered her house.
- [15] When questioned about a television which was in her house, she indicated that the television belonged to a friend, one Mpumelelo. The complainant told the police that the said television does not belong to him. She testified that female police officers insisted that she had stolen the television since her vehicle was seen picking up the television the previous night. When she denied the allegations, the female police officers then stepped aside with her and told her that they would not arrest her if she tells them where the stolen TV was.
- [16] In the process Constable Maje brought one of the suspects, Orapeleng, who pointed her out as the person who bought the television from them and that she was the driver of a red Golf GTI with registration number [...]. She then

remembered that Mpumelelo and one Lucky went to the township to organise a television for Mpumelelo the day before. She volunteered the information so that they would let her go. She, together with the police officers, proceeded to Mpumelelo's place as directed by herself. She then regurgitated the events that took place at Mpumelelo's place and the Police Station, leading to the recovery of the television at Mpumelelo's place.

[17] Under cross-examination she agreed that Constable Maje was informed by the suspects that she was the one who bought the television. She denied knowledge of the suspects, although one of them pointed her out. She admitted that she is the owner of a red Golf GTI with registration number [...].

[18] The jurisdictional facts for section 40(1) (b) defence are as follows:

"(i) *the arrester must be a peace officer;*

(ii) *the arrester must entertain a suspicion;*

(iii) *the suspicion must be that the suspect (arrestee) committed an offence referred in schedule 1" and*

"(iv) *the suspicion must rest on reasonable ground"*¹

[19] The arresting officer Constable Maje is a peace officer as defined in section 1 of the Act. This is not disputed by the Plaintiff and it is common cause.

[20] The arresting officer entertained a suspicion after he was informed by the suspects that the Plaintiff is the one who bought the stolen television from them after she had requested them to obtain a television for her.

[21] The arresting officer had a suspicion that the Plaintiff committed an offence referred to in Schedule 1 to wit: receiving of stolen property knowing it to be stolen.

[22] Although the Plaintiff testified that she directed the police officers to Mpumelelo's place because she was threatened with arrest, the truth of the matter is that she opted to mention that the television was at Mpumelelo's place after Orapeleng pointed her out as the person who bought the television from them. This was when she realised that there was no place to hide.

[23] Constable Maje in forming a reasonable suspicion before arresting the Plaintiff, he must have exercised a discretion. In *Shidiack v Union*

¹ *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 367 (SCA) para 6 at 373

Government² the following principles were formulated by Innes ACJ when dealing with discretion:

"Now it is settled law that where a matter left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense of the word would be; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own. There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion even if it considered the decision inequitable for wrong."

[24] In the *Sekhoto* judgment referred to above, Harms DP stated the following:

"This would mean that peace officers are entitled to exercise their discretion as they see 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 optional by the Court. A number of choices may be open 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."

[25] In *Minister of Safety and Security and Another v Linda*³ the Court said the following:

"The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves

² 1912 AD 642 at 651-652

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.

And in *Shabaan Bin Hussein and others b Chong Fook Kam and Another*⁴, 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 a prima facie proof is the end."

- [26] *In casu*, Constable Maje did not rush to effect arrest on the Plaintiff, he investigated the matter thoroughly, by interviewing the two suspects who provided information to him regarding the events leading to the theft of the television. He also interviewed the complainant and one Ntaoleng who transported the television. The matter did not end there, when he visited the Plaintiff's house, he was accompanied by other police officers and the two suspects. He only arrested the Plaintiff after Orapeleng had pointed the Plaintiff out and after she admitted to the whereabouts of the television. Mpumelelo also pointed out the television which was hidden away in an outside room at his house. All these led to the truth that she bought the stolen television which was later exchanged for the television found in her house.
- [27] In my view Constable Maje exercised a sound discretion which led to the exercise of a reasonable suspicion.
- [28] Moreover, the Plaintiffs evidence is not credible in that she contradicted herself in a material respect. She contradicted herself by testifying that her house was not searched even though on page 9 of Bundle A she indicated that the police officers unlawfully and without consent searched her premises for the television. She also testified that she did not give them permission to enter her premises even though she has opened the gate as well as the door of her

³ 2014 (2) SACR 464 at para 21

⁴ 1961(3) A1 ER 1626 (PC) (1970) AC 942 at 1630

house for them without being forced to do so.

[29] In the premises her claim for damages against the Defendant must fail.

[30] The following order is made:

30.1 The Plaintiffs claim for damages is dismissed.

30.2 There is no order as to costs.

TJ RAULINGA
JUDGE OF THE GAUTENG HIGH
COURT DIVISION

Heard on: 10-12 October 2018

Delivered: 8 August 2019

APPEARANCES

For the Plaintiff: Adv. G Edwards

Instructed by: Geldenhuys Malatji Inc.

For the Defendants: Adv. T.T. Tshivhase

Instructed by: State Attorney, Pretoria