




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: *N/A* 
- (4) Date of hearing: 19 March 2021

CASE NO: 2671/2018

In the matter between:

TSHEPO INNOCENT RAMASILA

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

NYATHI AJ

INTRODUCTION

[1] The plaintiff has instituted action claiming damages from the Minister of Police in respect of unlawful arrest, detention and assault which took place on the 21st of August 2017 at Bolobedu Police Station in Limpopo Province. By the agreement of the parties, merits and quantum are separated and I am called upon to determine the issue of liability on merits.

[2] The defendant resists all the claims and assumed the duty to begin and justify the arrest and detention as lawful and disprove the arrest. the defendant contends that the plaintiff's arrest without a warrant and his detention were lawful in that he committed a Schedule 1 offence, i.e., malicious damage to property and that the arresting officer reasonably exercised his discretion in arresting the plaintiff. The defendant consequently relied on section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA") to justify the lawfulness of the arrest.

[3] The relevant parts of section 40 of the CPA provides as follows: "Arrest by peace officer without warrant (1) A peace officer may without a warrant arrest any person ... whom he reasonably suspects of having committed an offence referred to in schedule 1 ..."

[4] The defendant called only one witness, Sergeant Mapudi Moses Rakoma, the arresting officer. He was investigating a case of Malicious Injury to Property wherein a Toyota Tazz motor vehicle belonging to a complainant had been set alight. He went to a local taxi rank having in his possession a list of names of the potential suspects. When he did not find them, he left a note for them at the rank with the instruction that they must report at the

police station. The suspects among whom was the plaintiff duly complied and arrived at the police station sometime later.

[5] It was at that time when the plaintiff was arrested and detained in the police cells. He was confronted with the accusations that he had been one of the perpetrators who had torched the complainant's motor vehicle. When he denied any involvement, he was slapped across the face by one of the police officers in attendance.

[6] The plaintiff knew the complainant in the case very well in that they were working together in the Maxi-taxi business.

[7] Sergeant Rakoma testified that he had relied on the complainant's statement to effect the arrest on the plaintiff. The complainant alleged that he had seen the perpetrators setting his car on fire from a vantage point where he had hidden after coming under attack.

[8] It is worth noting at this point that the complainant's statement had not been discovered as part of the trial bundle and so did not form part of the evidence before me. This much was conceded by Mr Maloma, counsel for the defendant.

[9] The plaintiff's version is common cause with the defence version save for the circumstances around the alleged assault. The plaintiff avers that when confronted by the officers about his alleged involvement in the crime, he had told Sergeant Rakoma that he had been in hospital at the time and was as a result not involved. Rakoma did not believe him and accused him of lying and slapped him across the face.

[10] Under cross-examination by counsel for the applicant Mr JSC Nkosi, Sergeant Rakoma denied the assault. He testified that the plaintiff was released on bail of R1000 after 2 hours and that the case was ultimately withdrawn. He was not able to explain circumstances under which he as a peace officer could arrest a suspect without a warrant. And reiterated that he only arrested the plaintiff on the strength of the allegations made by the complainant.

[11] The plaintiff testified about his visit to hospital and how he later got a letter at the taxi rank which made him to go to the police station. He confirmed that he got arrested, slapped across the face, and got detained in circumstances already alluded to above. He attended court in respect of the criminal matter until it was withdrawn after about 4 court appearances.

THE LAW REGARDING UNLAWFUL ARREST

[12] In *Motsei v Minister of Police; In re: Phefadu v Minister of Police*¹ the court remarked on the provisions of section 40 and schedule 1 as follows:

"The liberty of an individual is constitutionally enshrined in the right of freedom and security section 12 of the Constitution of the Republic of South Africa Act 108 of 1996. This point was restated by Bertelsman J in Louw v Minister of Safety and Security 2006(2) SACR 178(T) 186a-187e that an arrest is a drastic measure invading a personal liberty and

¹ [2014] ZAGPPHC 567 (23 May 2014)

it must be justifiable according to the demands of the Bill of Rights..."

" [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned." The Constitution does not espouse a dispensation of arbitrary deprivation of freedom of movement and security. The court authoritatively cited the case of *Mhaga v Minister of Safety and Security* 2001(2) All SA 534 (TK), where the court held that in a case where a police officer had arrested and detained a person, once the arrest and detention is admitted, the onus of proving the lawfulness thereof rests on the State."

[13] Section 40 (1) (b) provides that a peace officer **may** without a warrant arrest any person suspected of having committed an offence referred to in schedule 1. In *Duncan v Minister of Law and Order*² The courts have established that there are *four* jurisdictional facts that must exist before such power can lawfully be exercised, namely:

- (a) the arrestor must be a peace officer;
- (b) the peace officer must entertain a suspicion;

² 1986 (2) SA 805 (A) at 818 F-H

- (c) it must be a suspicion that the arrestee has committed a schedule 1 offence;
- (d) the suspicion must rest on reasonable grounds;

ANALYSIS AND CONCLUSION.

[14] Section 40 (1) of the CPA states that a peace officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary grammatical use, the word "may" suggest that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary³.

[15] In this case the plaintiff and the other arrestees went to the police station of their own accord. They obviously did not have any inclination to flee the law to warrant incarceration when they presented themselves.

³ Raduvha v Minister of Safety and Security and Another 2016 (2) SACR 540 (CC)

[16] The "suspicion" which Sergeant Rakoma entertained in his decision to arrest was founded solely on the complainant's A1 statement which was not used as evidence. This clearly is not reasonable and indicates that the arrestor did not exercise the requisite discretion. To compound matters, the case was not proceeded with in court.

[17] In *Gellman v Minister of Safety and Security*⁴ it was held that if no exigent circumstances exist, the arresting officers should preferably seek corroborative evidence before making an arrest. An arrest is not a substitute for good police work. In the current case there is not a shred of corroborative material that was relied upon to effect the arrest and detention complained of.

[18] In the circumstances I find that, even if there were reasonable grounds for suspecting the plaintiff of committing a Schedule 1 offence, Sergeant Rakoma did not exercise his discretion properly when he chose to arrest the plaintiff without a warrant. There was no exigency that existed to warrant an arrest then and there at the police station. He could have asked the plaintiff to attend court on a given date or took his time to procure a summons and serve same to the plaintiff.

⁴ 2008 (1) SACR 446 (W)

[19] I therefore conclude that the arrest, detention, and assault of the plaintiff was unlawful.

The plaintiff's claim succeeds on the merits and the defendant is ordered to pay the plaintiff's costs.



J.S. NYATHI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 19 April 2021

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