



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

CASE NO:43633/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>.....</p> <p>DATE</p>	<p>.....</p> <p>SIGNATURE</p>

In the matter between:

**MARVIN ITUMELENG NGOBENI**

PLAINTIFF

and

**THE MINISTER OF POLICE**

DEFENDANT

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**JUDGMENT**

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**RAULINGA J**

1. The plaintiff instituted a delictual claim against the defendant for damages, following his arrest without a warrant and detention from 23 to 24 November 2017, at Eeresterust Police Station.
2. The plaintiff was released on bail on 24 November 2017, and the charge against him was withdrawn on 13 December 2017.
3. The defendant pleaded that the plaintiff was arrested for having assaulted Mr Winslou Elrico Isaacs, stabbing him on the head with a bottle, causing grievous bodily harm to the complainant, and inflicted a dangerous wound.
4. The plaintiff admits that he was arrested, but denies that he assaulted the complainant, Mr Winslou Elrico Isaacs, by stabbing him in the head with a tikilai bottle, causing him grievous bodily harm, and inflicting a dangerous wound. He also pleads that at the time the complainant was assaulted and the altercation ensued, he was at home. Furthermore, the plaintiff pleads that, the man who had assaulted the complainant, Mr Ashley Harold Hamburg, does not deny having done so and was even willing to testify at the criminal trial that he has been the one who assaulted the complainant.
5. At the outset of the trial, the defendant's counsel submitted to the Court that the arrest of the plaintiff was effected in terms of section

40(1)(b) of the criminal procedure Act, 51 of 1977. This is not denied by the plaintiff.

6. Prior to the commencement of the trial, at the pre-trial conference held on 9 February 2021, the parties agreed to separate issues in terms of rule 33(4). Therefore, the Court only dealt with the issue of merits.
7. There is no need for the Court to regurgitate the evidence already on record, suffice to refer to the relevant evidence, where necessary, of the issues pertaining to jurisdictional requirements and credibility of witnesses.
8. Warrant officer Ramoshaba, the only witness called by the defendant, was the arresting officer at the time of the arrest. She testified that on 23 November 2017, she arrested and detained the plaintiff on the strength of a statement in which Mr Winslou alleged that the plaintiff stabbed him with a tikilai bottle. She admitted that she tried to look for the complainant and the witnesses, but she could not trace them. As a consequence, she relied on the statement to effect the plaintiff's arrest. She also testified that the arrest and detention was the only option. Warrant Officer Ramoshaba admitted that she didn't conduct any further investigation before arresting the plaintiff.

9. Among others, the plaintiff testified that he never stabbed the complainant with a bottle. It was his friend, Mr Humburg, who assaulted the complainant. (Mr Humburg was an acquaintance of his.)
10. When called to testify, Mr Humburg said that he was not friends with the plaintiff. He saw him for the first time on the day of the incident. He denied that he knew about the charges against the plaintiff.
11. This matter can be decided only on the presence or absence of certain jurisdictional facts.
12. The legal position regarding justification of a warrantless arrest in terms of section 40(1)(b) of the CPA is stated as follows in **Duncan v Minister of Law and Order**<sup>1</sup>:

*“The so-called jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the present Act may be invoked, are as follows:*

- (1) The arrestor must be a peace officer;
- (2) He/she must entertain a suspicion;
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence); and

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<sup>1</sup> 1986(2) SA 805(A) at 818G-H.

(4) That the suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect”.

13. It is common cause that W/O Ramoshaba was a peace officer. In my view, this is the only jurisdictional fact that was present when she arrested the plaintiff without a warrant.

14. I agree with counsel for the plaintiff that the reading of Schedule 1 of the CPA; makes no mention of assault grievous bodily harm as one of the offences with which the plaintiff was arrested, charged and incarcerated.

15. The Supreme Court of Appeal in **De Klerk v Minister of Police**<sup>2</sup> said the following:

*“[9] It is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of ‘assault when a dangerous wound is inflicted’. Therefore, one of the jurisdictional facts is absent. It cannot be said that Ms Ndala entertained a reasonable suspicion that the listed offence had been committed. It is trite that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 and that the*

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<sup>2</sup> [329/17] [2018] ZASCA 45 (28 March 2018).

*suspicion must rest on reasonable grounds. (See **Duncan v Minister of Law and Order 1986 SA (2) 805 (AD) at 818 G-J**). The learned Judge in Duncan stated further that 'if the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; i.e. he (or she) may arrest the suspect. In other words, he (she) then has a discretion as to whether or not to exercise that power. No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.'*

16. In order to exercise a discretion properly, a reasonable man will therefore analyse and assess the quality of the information at his or her disposal critically and he/she will not accept it lightly or without checking 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 the arrest- **Mabona and Another V Minister of Law and Order and Others**<sup>3</sup>.

17. In *casu*, W/O Ramoshaba relied on the statement by the complainant, when she made the decision to arrest. In my view, this was insufficient. The arresting officer failed to investigate the circumstances of the assault itself. She also failed to confirm the evidence of the complainant

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<sup>3</sup> 1988 (2) SA 654 (SE) at E-H.

through the evidence or statements of the witnesses on the day of the incident. The arresting officer failed to determine as to whether the offence is listed in Schedule 1. Given the fact that the plaintiff lives just across the street to the police station, the arrest without a warrant in the circumstances was not lawfully permissible. While I sympathise with her for the fact that she had been looking for the plaintiff several times without success, she failed to establish the jurisdictional facts, in particular whether the offence was a Schedule 1 offence. The suspicion didn't rest on reasonable grounds. As a consequence, the majority of the jurisdictional facts were not met.

18. An arrest is, in general a harsher method of initiating prosecution, than citation by way of warning or summons. Arrest, and detention, usually amount to the violation of the accused rights. This may be avoided by releasing the suspects on warning, particularly where he lives in the neighbourhood of the police station.

19. In his evidence at the trial, the plaintiff contradicted the contents of a statement he submitted to the police on the day of his arrest. I don't think this discrepancy can tarnish the whole case of the plaintiff- see in this regard **S V Mafaladiso**<sup>4</sup>.

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<sup>4</sup> 2003 (1) SACR 583 (SCA) 593e- 594 a-h.

20. The defendant also denies the contradiction between the testimony of the plaintiff and his witness, Mr Humburg. I don't think that these contradictions are of a nature that can cause a fatal destruction to the case of the plaintiff. I must mention though that, the plaintiff was a bad witness. From his demeanour one may deduce that he was at times groping in the dark. However, that does not affect his credibility in toto- see **S V Mkohle Nestadt**<sup>5</sup>.

21. In the result, the plaintiff's claim succeeds with costs.

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**JUDGE T. J RAULINGA**

**JUDGE OF THE HIGH COURT**

### **Appearances**

Plaintiff's Counsel	: Adv. T. Snyders
Plaintiff's Attorneys	: Gildenhuys Malatji Attorneys
Defendant's Counsel	: Adv B. J Nodada
Defendant's Attorney	: State Attorney
Date of hearing	: 11-12 March 2021
Date of judgment	: 02 July 2021

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<sup>5</sup> 1990 (1) SACR 95 (A).