



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 21903/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 27 JANUARY 2022

SIGNATURE

In the matter between:

TSHIFIWA SAMUEL MUDAU

Plaintiff

and

MINISTER OF POLICE

Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

In this action the plaintiff claimed damages pursuant to an alleged unlawful arrest and detention by members of the South African Police Service. The arrest was on the basis of suspicion of intimidation and conspiracy to commit murder. It was done without a warrant and the period of detention was for four days. After separation of issues, the matter proceeded in respect of the issue of merits only.

[2] Plaintiff's pleaded cause of action

The plaintiff has formulated his case simply as follows:

“On the 9th of September 2016 and at Pretoria, the plaintiff was arrested without a warrant by unknown members of the South African Police Service. Thereafter the plaintiff was detained at Olievenhoutbosch Police Station for four days at the instance of the aforesaid policemen and various other policemen whose names are unknown to the plaintiff”.

[3] The pleaded defence

3.1 Two special pleas of non-compliance with the provisions of section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 have since been abandoned and were not proceeded with.

3.2 The plea on the merits went as follows:

“3 On the 9th September 2016, Constable Mhlongo arrested the plaintiff without a warrant.

3.3 *Constable Mhlongo was justified in arresting the plaintiff by virtue of the provisions of section 40 (1)(b) by virtue of the following:*

3.3.1 *That on the 9th September 2016 at Olivenhoutbosch Police Station, Constable Mhlongo was the arresting officer as defined in Act 51 of 1977.*

3.3.2 *That on the same day, Constable Mhlongo arrested the plaintiff who he reasonable suspected to have committed an offence contemplated in Schedule 1 of Act 51 of 1977, to wit conspiracy to commit murder.*

3.3.3 *The arrest and detention were therefore lawful”.*

[4] The applicable law

- 4.1 It is trite that the liberty of a person is a constitutionally entrenched right. Section 12 of the Constitution expressly provides that “*everyone has the right of freedom and security of the person, which includes the right ... not to be deprived of freedom arbitrarily or without just cause*”.
- 4.2 It follows that a deprivation of freedom without a warrant or a statutorily prescribed reason would be “without just cause” and therefore unlawful.
- 4.3 Section 40(1)(b) of the Criminal Procedure Act 51 of 19477 (the CPA), being the statutory justification relied on by the defendant, provides as follows: “*A peace officer may without a warrant arrest any person ... (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 ...*”. Conspiracy to murder is such an offence.
- 4.4 In *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC), the court held that “*the constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances*”. With reference to the various preceeding judgments to which the parties in that matter referred

to it was held that “*the lawfulness of an arrest is highly fact-specific*” (at paragraphs 17 -19).

- 4.5 In the more recent case of *De Klerk v Minister of Police* 2021 (4) SA 585 (CC), a plaintiff who seeks compensation for unlawful arrest and detention must satisfy the following requirements (summed up at paragraph 14 of the majority judgment):

- “(a) *the plaintiff must establish that [his/her] liberty has been interfered with;*
- (b) *the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, the plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrong to do so;*
- (c) *The deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not and*
- (d) *the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought”.*

- 4.6 It has been confirmed that “*the issue as to whether the plaintiff’s detention was consistent with the principle of legality and his right to freedom and security*” is a constitutional matter. See *De Klerk v Minister of Police* (above) at paragraph 11 and *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) at paragraph 22.

4.7 The present case primarily turned on the issue of wrongfulness and whether the justification provided for in the above quoted section of the CPA has been present, as all the other facts relating to the actual arrest, the subsequent detention and whether the arresting and detaining officers had been acting within their course and scope of their duties as police officers, were all common cause.

[5] The case for the defendant:

- 5.1 Two policemen testified on behalf of the defendant. They were the two members of the South African Police Service who had effected the arrest of the plaintiff. They were both stationed at Olivenhoutbosch police station.
- 5.2 Sergeant Mohlongo testified that he had been a member of the South African Police service since the commencement of his training in 2009. He confirmed that he had been in uniform and on duty since 06h00 on the day in question, being 9 September 2016. A complainant had called the police call number (10111) pursuant to which sergeant Mohlongo and his partner had been dispatched to the Spur restaurant at the Grey Owl Mall. When the two policemen arrived at the restaurant, they were approached by the complainant, a Mr Shah Alam, who requested police assistance. The complainant told Sergeant Mohlongo that he had been driven by his driver, Mr Adam Maake, in his vehicle since 05h30 that day. Based on a report from the driver that the plaintiff had “issues” with the driver’s boss, they had picked up the plaintiff in Musina. The “issue” was reportedly that “someone” had paid the plaintiff to kill the complainant. The complainant explained that the plaintiff was picked up under false pretenses and did not at the time know what the intended target of the contract killing looked like, but merely knew his name. The plaintiff had allegedly also told the driver that he wanted to meet the target of the contract killing, being the

complainant, face to face “*to tell him someone had paid him (the Plaintiff) to kill him (the complainant)*” (in the words of sergeant Mohlongo). When the complainant and his driver arrived at the Grey Owl Mall, they were met in the Spur by a private investigator who had been employed by the complainant after he had been receiving threatening messages that he and his family would be killed unless he paid the sender of the message a sum of money, the amount of which was not mentioned in court. Apart from the employment of the private investigator, the complainant had also laid a charge of intimidation at the Musina Police Station. One of the threatening cellphone messages was shown to Sergeant Mohlongo. Sergeant Mohlongo then asked the driver whether he knew anything about the complaint related by the complainant. The driver confirmed every detail thereof. After having received this report, the two policemen proceeded to the Spur restaurant on foot where the complainant pointed out the plaintiff. It was at this stage that the complainant stated that he feared for his life as a result of the arranged contract killing. When the two policemen approached the plaintiff, sergeant Mohlongo confronted him with the allegation that he was contracted to kill the complainant. The plaintiff denied this, claiming to know nothing about anything of the sort. Sergeant Mohlongo then asked how did it come about that the plaintiff had travelled to Pretoria with the complainant and his driver to which the plaintiff responded that he had been invited to do so by the complainants’ driver. Sergeant Mohlongo then asked the complainant whether he knew the plaintiff and the answer was in the negative. Sergeant Mohlongo asked the complainant about the private investigator’s role, apart from the fact that he had apparently detained the plaintiff until the arrival of the police officers. The answer was that the private investigator had apparently been hired by the complainant to assist in the intimidation case since no-one in Musina knew of or could find a suspect therein. Sergeant Mohlongo testified that he and his partner at that time held “a strong belief” that the plaintiff was involved in a conspiracy

to murder the complainant and feared, now that the plaintiff had found out the identity of the target as a result of the occurrences mentioned above, that the complainant's life might be in danger. The sergeant's view was that if he did not effect an arrest and allow someone who had been accused of being a contract killer and who gave an implausible explanation of being in the intended victim's presence, to remain at large while the complainant returned to Musina "anything could happen on the way". Based on this he formed the opinion that a schedule 1 offence, being a conspiracy to murder, might still be under way. The plaintiff was then informed of his rights and the police's suspicions and was then promptly searched and arrested.

- 5.3 Cross-examination elicited that there were in fact two private investigators present in the Spur restaurant, that no fire-arm or weapon was found on the plaintiff's person, but only a wallet and cellphone, which had been booked into Olivenhoutbosch police station prior to the plaintiff's transfer to the Weidabrug police station. At different times during his cross-examination, sergeant Mohlongo repeated that he believed the plaintiff to have been involved in a conspiracy to murder the complainant and, if left unapprehended, he could complete his mission now that he had identified the complainant. Sergeant Mohlongo was also referred to a statement made by himself contained in the docket. He confirmed the statement and the correctness thereof. It read virtually the same as his evidence in chief but with added detail regarding vehicle identities, registration numbers and cellphone numbers of relevant persons. It also included the case reference of the intimidation complaint laid in Musina, which particulars the private investigator had supplied.
- 5.4 After the arrest, the matter was handed over to an investigating officer, one sergeant Manyua. Before any further investigation could take place, however, at the plaintiff's first scheduled appearance the following

Monday, the state prosecutor determined as follows (as per his or her notes in the docket): *“The accused was arrested is supposed to be a witness, he did not have the intention to kill the person. How could he inform the person if he want to kill him?”*. It is not known what informed this note or the determination, but pursuant to it the case against the plaintiff was withdrawn. It is not clear whether the plaintiff indeed appeared in court. When this was put to sergeant Mohlongo he replied that the plaintiff had not denied any intention to him nor had he disclosed any intended warning, he had simply pleaded agnostic to the whole business and gave an implausible reasons for him having travelled to Pretoria. When pushed, sergeant Mohlongo speculated that the alleged intention to warn the complainant might have been a ploy to get close to him. this was however never disclosed to the sergeant and he had to weigh up the complainant’s fear and his version, with some corroboration from his driver, against a bald or doubtful denial by the plaintiff. In re-examination, the complainant was described as a short skinny man while the plaintiff was a tall, well-built man. I interpose to state that his imposing physique also accorded with the court’s observation of him.

- 5.5 Sergeant Mavhunga also testified. He had two years seniority on sergeant Mohlongo. He confirmed that, while the two of them had been on patrol, they received the “10111 complaint” from radio control which caused them to proceed to the Grey Owl Mall. His version accords with that of Sergeant Mohlongo as to what transpired there. He, however, had interviewed the driver while Sergeant Mohlongo had interviewed the complainant. After the two policemen had compared notes, they approached and confronted the complainant. The plaintiff denied any knowledge of a plot to kill the complainant and did not allege that he had come to warn the complainant as may have been suggested. Sergeant Mavhungu determined that, in the absence hereof, the only reason why a person accused of having been hired

to kill someone would travel from Musina to Pretoria, seeking to identify or meet up with the intended target, would be to put the plan into operation. In describing the physical differences between the plaintiff and the complainant, he described the former as “a giant” compared to the skinny complainant.

- 5.6 Sergeant Mavhungu was confronted with the plaintiff's version as contained in a subsequent letter of demand by his attorneys. The relevant part read: *“Our client instructed us that on 7 September 2016 he was telephonically called by one Adam telling him that his employer wants to see him. Adam's employers Shalom (Shah Alam) was looking for our client's friend Jommal Abedin. On the 9th September 2016 one Adam called again telling our client that his boss says they can use his motor vehicle to go and look for our client's friend. The same day Adam came with a young asian male driving a vehicle. Our client joined them and they drove to Musina Town and they were later accompanied by three Bangladeshi nationals, two of them known to our client. They drove with a Golf-R until they reached Polokwane and Shalom insisted that they should proceed to Pretoria as he wanted to fetch his other vehicle there. They indeed drove to Pretoria and entered a certain restaurant wherein Shalom wanted to drink cappuccino. Whilst still there our client was approached by one of two white males who were seated there, who grabbed him and told him not to move. Our client was surprised and asked them what is the problem and he was told that he will soon know. Shalom sat there not saying anything until one of the white males persons called the police. The member of the South African Police Services indeed came and our client was taken to Olievenhoutbosch police station. The police came to the scene with a marked police vehicle and were dressed in police uniform At the police station our client was informed that he had conspired with another person to kill Sahlom and he got surprised as he had done nothing wrong ...”*.

Sergeant Mavhungu stated that such a version was never given to them by the plaintiff. He repeated, in response to various questions put to him in cross-examination that, had the plaintiff given a version, be that of an intention to warn the complainant or not, he might have viewed the matter differently but, given the reports made by the complainant and his driver, he was so sufficiently convinced that the plaintiff was part of an ongoing conspiracy to kill the complainant, that he had to be arrested.

[6] The plaintiff's evidence:

- 6.1 The plaintiff testified that he knew the complainant's driver as someone who used to visit his grandmother, who is a traditional healer. According to him, the driver had called on 9 September 2016 and arranged to pick up the plaintiff to take him to the driver's boss who wanted to know the whereabouts of one Joubal, who used to be an employee of the driver's boss. The plaintiff was duly picked up by the driver by car. In the car was an unknown young "Asian man". They went into Musina town and picked up two other "Indian men". The plaintiff was asked to sit in the front passenger seat. They drove to Polokwane where the plaintiff asked the driver to arrange to speak to his boss. The driver said they had to be go Pretoria first which they did, dropping the other gentlemen on the way. They never talked much on the way until they got to the Grey Owl Mall where the driver stopped and said, lets go in and talk. There the plaintiff was accosted by two white gentlemen who wanted to know where Joubal was. The plaintiff told them that all he knew was that Joubal had also occasionally visited his grandmother's place. He was also asked about the whereabouts of a Mr Sakie, who he did not know. Thereafter the police was phoned and sergeant Mohlongo and sergeant Mavhunga arrived.
- 6.2 About what happened between the plaintiff and the policemen before he got arrested, the detail was somewhat unclear. The plaintiff said that the

police told him that they had received a call that he was trying to “kill this Bangladeshi guy”. He then gave them “his side of the story” (without elaborating what that was). The police then said that it did not make sense and they asked him to step outside. The plaintiff testified that he then knew “this story is not going to go well”. He then said: “its fine, take me to the police station”.

- 6.3 Upon further probing by his counsel as to whether the police had put it to the plaintiff that he had approached the driver in order to tell his boss to pay Joubal money, the plaintiff responded that he had answered that the driver had approached him to tell “them” where Joubal was.
- 6.4 The plaintiff denied that he had been told why he was being arrested, that he had been advised of his rights and said that he was actually only arrested at the “reception” at the police station, at the instance of the two white men who had been at Spur.
- 6.5 The plaintiff was referred to a Notice of Rights document signed by him and it was not clear from his evidence whether this had been handed to him at the Spur or at the police station. It is a formal document in a standard form whereby a suspect is informed of his Constitutional rights.
- 6.6 The plaintiff was also referred to a completed statement of “Interview with a Suspect”, completed by a constable Mtimbani on the next day 10 September 2016. The plaintiff remembered this document and that he had indicated therein that he will make a statement in court. He however testified that the police officer who conducted this interview told him that his case does not make sense and once he was “out”, he should get someone to help him.

6.7 As part of his evidence in chief, the plaintiff testified that he was aware of a workplace “misunderstanding” between Journal and the driver’s boss. He also knew that Journal had approached “people from Uganda” who had tried to blackmail Journal “through the boss”. He had been in telephonic communication with Journal. The plaintiff had not been paid anything by Journal and he had not discussed anything of the sort with the driver. Journal had however “approached” the plaintiff to talk to “them” on his behalf.

6.8 In cross-examination, when asked why none of these various versions or reasons for accompanying the driver to Pretoria were related to the interviewing policeman at the station, the plaintiff responded: “*Sometimes things slip your mind*”.

[7] Evaluation

7.1 It is clear that there is much more to this matter than that which had been related in court, particularly in relation to the involvement of the plaintiff with the complainants’ ex-employee Journal (or Joubal). At one stage, the plaintiff said he had heard from the driver that the complainant was even Journal’s brother in law.

7.2 What is also clear, is that the plaintiff’s version is riddled with inconsistencies and obfuscation. For example: at one stage the plaintiff said he was asked to accompany the driver to explain to the driver’s boss the whereabouts of Journal and at another stage the plaintiff said he was asked by Journal to speak to “them” (the driver and his boss) on Journal’s behalf. The plaintiff never furnished an explanation as to what this would have been about. From the plaintiff’s evidence, it is also not clear who would be blackmailing whom. When questioned about any knowledge of a planned murder, the plaintiff’s version was even more astounding. He

said that he had heard about a message to the effect that “*if you don’t pay us money, we’re going to tell Journal’s boss that he hired them to kill Shalom*”. When one tries to make sense of this version of the message, it is not clear whether this was a reference to the message on the complainant’s phone, which he had shown to the arresting officers and which clearly said something else, or not.

7.3 Irrespective of the haze of obscurity which has been drawn across the true facts, particularly by the plaintiff, one must assess, on the evidence disclosed to the arresting officers, whether their conduct, objectively viewed, fell within the ambit of section 40(1)(b) of the CPA. The evidence confronting the two officers in question was this:

- A complainant had stated a fear for his life from a suspected contract killer.
- The purported contract killer was lured by car to Pretoria.
- The complainant’s employee, the driver of the car, confirmed the identity of the suspected contract killer and that he had been told about the contract killing by this suspect.
- The suspected contract killer was a huge man and his intended victim a small “skinny” person.
- After the occurrences at the Grey Owl Mall, the suspected contract killer had no doubt about the identity of the intended victim, of which, according to all accounts, he previously only knew by name.
- The threats on the life of the complainant (and his family) were confirmed by a cellphone message shown to the police.

- The suspected contract killer could give no plausible explanation to the police for him having travelled from Musina to Pretoria, when confronted with the above allegations.

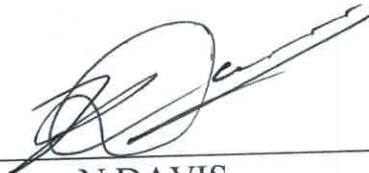
- 7.4 In respect of whether a plausible explanation had been given to the police or not, I am prepared to accept the evidence of the two policemen. They gave clear and unequivocal corroborating evidence while the plaintiff's version(s) were both insufficient in cogency and so unclear that they could not be afforded credibility over those of the arresting officers. In fact, his refusal to even give an explanatory statement to the later interviewing officer, lends further credence to the allegation that he had similarly refused to give such an explanation prior to his arrest. There is no evidence on why or based on what disclosures or discussions the prosecutor made the later decision to withdraw the case without further investigation.
- 7.5 It is not certain whether the plaintiff had been involved in the intimidation of the complainant although he clearly knew something about it. However, even based on the plaintiff's own convoluted explanation of knowledge of the case pending in Musina, the arresting officer had insufficient grounds to arrest the plaintiff on a charge of intimidation. This makes little difference however, as I find based on the evidence set out by the officers and in particular that summarised in paragraph 7.3 above, that their suspicion that the crime of conspiracy to murder, being an offence as contemplated in schedule 1 of the CPA, had been committed (and might very well still have been ongoing) at the time of the arrest, was reasonable.
- 7.6 I conclude therefore, that the plea of justification has sufficiently been proven. It follows that the arrest and subsequent detention had not been unlawful. Once the merits of the matter had been disposed of in this fashion, it is the end of the matter.

[8] Costs

I find no reason to deviate from the customary rule that costs should follow the event.

[9] Order

The plaintiff's claim is dismissed with costs.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 October 2021

Judgment delivered: 27 January 2022

APPEARANCES:

For the Plaintiff:

Attorney for the Applicant:

Adv N Swart

Erwee Attorney, c/o Dyason Inc, Pretoria

For the Respondent:

Attorneys for the Respondent:

Adv A Gxogxa

State Attorneys, Pretoria