
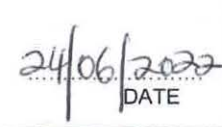




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 76665/17

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

In the matter between:

LUCKY PETER KEKANA

Plaintiff

v

MINISTER OF POLICE

First Defendant

CONSTABLE LEKALAKALA

Second Defendant

JUDGMENT

MOSOPA J

1. In this trial matter, the issues for determination are the lawfulness of the arrest of the plaintiff by the second defendant and the subsequent detention and the alleged assault of the plaintiff by the second defendant.
2. A separation of merits and quantum was ordered in terms of Rule 33(4) of the Uniform Rules of Court. The parties agreed in a pre-trial conference that the

plaintiff bears the duty to begin and the defendant bears the onus to prove the lawfulness of the arrest of the plaintiff. Both the arrest and detention of the plaintiff were admitted by the defendant, and the defendant pleaded that when the second defendant effected the arrest on the plaintiff, he acted in terms of the provisions of section 40(1)(e) of the Criminal Procedure Act 51 of 1997 (the "CPA"), and as such the arrest was lawful.

3. By agreement between the parties, the date of arrest of the plaintiff was amended to read 14 July 2017.

Evidence of the Plaintiff

4. The plaintiff, his mother (Betty Mabunda), his girlfriend (Joyce Maphuta), Thabiso Phillip Phetla (a police officer who conducted the preliminary investigation in the matter) and Moses Modingwa (a gardener in the employ of the plaintiff) all testified in the plaintiff's case.
5. The plaintiff, who was not present at his parental home, was phoned by his mother and a neighbor (whose full and further particulars were not given and who was also not called as a witness for the plaintiff), who informed him that he must come to the house as police officers were looking for him.
6. When he arrived there, the police officers, some of whom were in police uniform and others in civilian clothing, approached him and pointed firearms at him. They asked whether his name was "Lucky" and they pulled him out of his vehicle and started to assault him. At that stage, he was driving his brother's vehicle, as his own vehicle was with a mechanic for repairs.
7. Money which he had withdrawn from an automatic teller machine ("ATM") shortly before he arrived at the house was taken from him by the police, along with his identity document. Two twenty liter containers filled with water were brought in and he was wrapped in a blanket and doused with water. He was then kicked in his ribs and his hand was stomped on. They continued doing

that for some time, and occasionally they would open up the blanket and spray pepper spray at him.

8. As they were assaulting him, they told him that they were looking for a firearm and a stolen vehicle, but he told them that he did not have a firearm or a stolen vehicle. He was then put into a police vehicle and driven to his girlfriend's house, as the police told him that they were looking for the vehicle that they used in the commission of robberies. The second defendant was at that stage seated in the front passenger seat of the vehicle and turned to the back where the plaintiff was seated on the back seat of the vehicle. The second defendant pulled him by the "hoodie" he was wearing, to the extent that he suffocated him. He then directed the police to his girlfriend's house.
9. His girlfriend's child opened the gate for them when they arrived there, and he was further assaulted by the police there. He was taken to the bathroom, where the bathtub was filled with water and his head was pushed into the bathtub. His head was also banged against the wall of the bathtub. He was taken to the tap outside the house, which was opened, while his face was held under the tap. When he tried to move out from underneath the tap, the police officers stepped on the handcuffs around his wrists and he was injured by this.
10. They removed him from under the tap and took him to a drum filled with water, and his face was put into the drum. His girlfriend's vehicle was also circulated by the police. They then took him to the police van and that was when he saw Sello (a person who was also arrested) and he asked him what was happening. Sello was not called as a witness in this matter. Sello told the plaintiff that the police came to his place of residence and took away his vehicle and they asked him who his friend was, and that was when he told them that the plaintiff is his friend. He was eventually taken to Temba Police Station, where he was detained. The police officer who was in charge of the holding cells refused to detain him, as he had injuries, and insisted that the second defendant attend to detaining the plaintiff himself.

11. The following day, on 15 July 2017, he was booked out of the holding cells by the police and taken to Jubilee Police Station for medical treatment. The injuries he sustained were on his ribs, right eye and face, and he was bleeding from his mouth, his wrists were swollen and his ankle bones were dislodged and he was walking with a limp.
12. On Monday, 17 July 2017, he was taken to Temba Magistrate's Court but he did not appear before the magistrate and he was eventually released from the court cells. After he was released, he opened an assault case against the police but he was advised by his friend, Nelly, to withdraw the case, as the police officer he reported said that they will plant evidence against him and arrange that he be killed. He then reinstated the case at a later stage.
13. In cross-examination, he testified that the police never informed him of the reason for his arrest, and that when he was asked about the alleged suspected stolen vehicle, he did not give any explanation but told the second defendant that he will explain that to the court, hence the fact that he was arrested.
14. Ms Betty Mabunda confirmed that a group of police officers arrived at her place of residence, enquiring about the plaintiff. When the plaintiff arrived there, she was seated in her lounge and could see the police pulling the plaintiff out of his vehicle and saw them assaulting him with a certain object. They then entered her home, after assaulting him there, took him into her bedroom and further assaulted him. They took his money and his identity book, and they took a blanket and wrapped him in it and poured water on him and sprayed him. He was at that stage handcuffed and he was assaulted for hours.
15. As they were taking him to the police vehicle parked outside the yard, they continued to assault him. When she asked why they were assaulting the plaintiff, she too was threatened with assault. She could see that the plaintiff was injured.

16. Ms Joyce Maphuta, the girlfriend of the plaintiff, confirmed that the plaintiff arrived at her place in the company of the police. They asked her if she knows the plaintiff, and also about the firearm that he always carries, but she told them that she only knows that the plaintiff sells merchandise. In her bedroom, there were two female police officers, as well as a male officer, Sithole, who she was able to identify through his police name tag. They also wanted to assault her but one of the officers intervened and said that she was pregnant. She saw the police assaulting the plaintiff inside her bathroom, but she could not observe them for a long time, as the police took her to the garage where her vehicle was parked. The plaintiff was taken to the tap and his face was held under the running water. He was screaming at that stage and she took it that he was also assaulted. She also saw when the plaintiff's head was put into the drum filled with water.
17. She could see that the plaintiff's face was swollen and one could not recognize him, and he could not speak for a long period of time and she could see that he was in pain.
18. Mr Thabiso Phillip Phetla conducted the preliminary investigation into the assault matter before the docket was transferred to the Independent Police Investigative Directorate ("IPID"). He obtained the withdrawal statement from the plaintiff, withdrawing the assault charge against the police. The plaintiff informed him that the suspects in the assault case were threatening him and his family, that they would injure him and kill them. He further said he discussed the issue of threats with his mother and they agreed that he should withdraw the assault case. When the docket was transferred to IPID, the medical examination report (J88) was not included in the docket.
19. Mr Moses Modingwa was working in the plaintiff's garden when the police arrived there. The police produced firearms and they went to the shack which was in the yard and broke down the door of the shack. From the shack, the police came directly to where he was and assaulted him on his buttocks with the gardening spade he was using. They asked him to show them where the

plaintiff's parental home was, and when they arrived there, the plaintiff also arrived.

20. The police assaulted the plaintiff with open hands, fists and they stomped all over his body. There were many police officers present and he cannot tell what role each police officer played in the incident. He never witnessed the plaintiff being assaulted with a metal object. He could also not observe the assault which took place inside the house.

21. After the close of the plaintiff's case, absolution from the instance was applied for by the defendant, which application was refused. Reasons for this judgment will also form part of the refusal of the application for absolution from the instance.

Evidence for the Defendant

22. Mr David Sefako Lekalakala, the second defendant, was on duty on 14 July 2017, in the Hammanskraal area, when they followed up information about a stolen white Toyota Corolla. They were informed that the vehicle was in Lephengville and they found the vehicle parked behind a shack. They knocked twice at the door of the shack and that is when they heard a male voice responding and they asked that person to open the door for them.

23. They introduced themselves to the person as police officers and asked for permission, which was granted, to inspect the vehicle behind the shack, and that person accompanied them to where the vehicle was parked. The person informed the police that his name was Sello, and that the vehicle does not belong to him but rather to the plaintiff, and thereafter the vehicle was circulated.

24. The circulation results directed them to a case which was opened in Soweto, and they sought the assistance of the Soweto police, who located the address provided and the white Toyota Corolla bearing the same registration number as the vehicle found in Sello's yard. The owner of the vehicle in Soweto was

an old man, who informed the police that his vehicle was stolen and later recovered. At that stage, the vehicle was on bricks, with no wheels. He explained that he does not use the vehicle anymore, but he kept receiving traffic fines related to the vehicle from the Pretoria.

25. They asked Sello for the registration documents as the vehicle was parked at his place, but he did not have them. Sello then took the police to the plaintiff's place and after they did not find him there, he told them he will take them to a place he thought they might find the plaintiff. The place where Sello took the police was the plaintiff's parental home. Sello then phoned the plaintiff to come there and he arrived there shortly after the police did. On the front passenger seat of the Polo vehicle the plaintiff was driving when he arrived there, was a reflector jacket with the words "Metro Police" written on it. The police introduced themselves as police officers to the plaintiff and requested that he get out of vehicle.
26. The plaintiff refused to alight from the vehicle and there was a scuffle between the police and the plaintiff when he was removed from the vehicle. He was appraised of his constitutional rights and when Mr Lekalakala wanted to handcuff him and he grabbed him with his one hand and they eventually fell to the ground, which is when he was finally able to handcuff the plaintiff. He then requested the registration documents of the Toyota Corolla, since Sello said it was the plaintiff's vehicle, to which the plaintiff responded by saying that he will never say a thing about vehicle registration documents and that he will speak for himself at court. The vehicle he was driving was circulated but they found no case reported in respect of it. The plaintiff was then arrested, to appear in court.
27. The suspicion he entertained that the vehicle might be stolen was because neither the plaintiff nor Sello had any vehicle registration documents and the Soweto police confirmed that a vehicle with the same registration number was stolen and recovered by the Soweto police, and that this vehicle was cloned. The plaintiff was arrested and detained as they did not understand the reason

why he had the vehicle and it was their duty as police officers to protect people's property.

28. At the police cells, the officer who was posted at the cells inspected the plaintiff for any injuries and also asked him whether he was injured or assaulted, and seeing as he did not appear to have any injuries, he was detained in the cells. He denied that the police assaulted the plaintiff. He also denied that the plaintiff was assaulted after he was taken to his girlfriend's place. He was not injured when he was detained.
29. Ms Kedibone Masemola, a senior investigator at IPID, was assigned the assault docket registered by the plaintiff. The first person to work on the docket was Mr Phetla from the Temba Police Station. When she received the docket, it only had the complainant's statement (A1) and the complainant's withdrawal statement (A2). As the case was withdrawn, no further investigation was conducted on the docket.
30. In 2020, her office received a letter from Makhefola Attorneys (the plaintiff's attorneys), requesting the contents of the docket, which was provided, and the attorney then requested that the withdrawn case be reinstated. The attorneys also provided the statement by the plaintiff that he wished to proceed with the case. She also obtained statements from the plaintiff's girlfriend and mother in February 2021. Those statements were also discovered by the plaintiff's attorneys.
31. In cross-examination, she testified that she requested that the plaintiff's attorneys and the plaintiff provide her with the J88 medical report, but none were provided to her. She even arranged that the plaintiff accompany her to the hospital so as to go and request the J88, but they could not go there.
32. Responding to the court's questions, she testified that she inspected the cell register and found that the police officer posted at the cells made the entry for the detention of the plaintiff and Mr Lekalakala signed as the police officer presenting the plaintiff for detention. She further testified that when she enquired about the docket for the suspected possession of a stolen vehicle

which was registered against the plaintiff, she was told that it was lost and could not be traced. After the evidence of Ms Masemola, the evidence of the defendant was concluded.

Legal Principle

33. Central to the determination of this trial matter is the provisions of the Criminal Procedure Act 51 of 1977 ("CPA"), the Constitution of the Republic of South Africa, 1996 and the common law.

34. It is trite that every arrest is unlawful as it infringes on the individual's right to freedom, as enshrined in the Bill of Rights. Section 7 of the Constitution provides;

"[7] Rights – (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

35. Section 12 of the Constitution provides;

"[12] Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily and without just cause;

(b) not to be detained without trial..."

36. In justifying the arrest of the plaintiff, the defendants rely on the provisions of section 40(1)(e) for the arrest of the plaintiff, which provides;

"[40](1) – A peace officer may without warrant arrest any person –

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably

suspects of having committed an offence in respect of such thing.”

37. The jurisdictional requirements for a section 40(1)(e) defense are;

- 37.1 The arrestor must be a peace officer;
- 37.2 The suspect must be found in possession of property;
- 37.3 The arrestor must entertain a suspicion that the property has been stolen and illegally obtained
- 37.4 The arrestor must entertain a suspicion that the person found in possession of the property, has committed an offence in respect of the property; and
- 37.5 The arrestor's suspicion must rest on reasonable grounds.

It is trite that once the jurisdictional facts for an arrest in terms of any one of the subsections of section 40(1) are present, a discretion arises (see ***Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)*** at para 28).

38. It is trite that the question whether the suspicion of the peace officer effecting the arrest is reasonable must be approached objectively (see ***R v Van Heerden 1958 (3) SA 150 (T)***). As a result, the circumstances giving rise to the suspicion in terms of section 40(1)(e) must be such as would ordinarily move a reasonable person to form a suspicion that the property has been stolen or acquired by dishonest means and that the arrestee has committed the offence in connection with the property.

39. With regard to the onus to prove the lawfulness of an arrest, the Constitutional Court in the matter of ***Mahlangu and Another v Minister of Police 2021 (7) BCLR 698 (CC)*** at para 32, stated;

“It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once

this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference.”

Assault

40. The plaintiff testified that he was assaulted by the second defendant and the police officers in his company on two different occasions. On the first occasion, he was assaulted at his parental home, where a crowbar was used, his head was covered with a blanket and doused in water and a certain substance was sprayed to make him suffocate. On the second occasion, he was assaulted at his girlfriend's home, and his head was shoved into the bathtub filled with water and banged against the wall of the bathtub. He was taken outside and again his head was shoved in a drum filled with water and his face was held under the tap. In addition, he was assaulted with fists, open hands and kicked with booted feet.
41. The first assault was witnessed by the plaintiff's mother (Betty Mabunda)- and Mr Moses Modingwa, both of whom testified in this matter. The second assault was witnessed by his girlfriend (Joyce Maphuta). As a result of the assault he suffered, he sustained injuries to his ribs, he was bleeding from his mouth, eye, his face was swollen, injuries to his wrists by the handcuffs, a dislocated ankle and he was walking with a limp.
42. The officer at the cells refused to admit him to be detained at the cells as he was visibly injured. The following day of his detention, he was booked out of the cells for medical attention at Jubilee Hospital. The plaintiff registered a police docket of assault with intent to cause grievous bodily harm against the police officers who assaulted him and on 19 July 2017 (approximately two (2) days after the docket was registered), he withdrew the docket.
43. Mr Lekalakala concedes that there was a struggle between himself and the plaintiff at the time he was effecting the arrest, as the plaintiff did not want to alight from the vehicle. He also confirmed that as a result of the struggle, they

both fell to the ground. He denied assaulting the plaintiff in the manner in which the plaintiff explained the assault.

44. Constable Lekalakala maintained that he used minimum force when arresting the plaintiff, as he was resisting arrest. He relied on the provisions of section 49(2) of the CPA to justify his conduct, which provides;

"[49] –[2] If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing..."

45. It is important to look at the reasons for the withdrawal of the complaint by the plaintiff. The plaintiff testified that he was informed by a gentleman known as "Nelly" (which we were told has since passed away), that he must withdraw the complaint because the police will plant evidence against him and also order a "hit" (that he be killed) if he does not withdraw the complaint. Whereas, his withdrawal statement briefly stated that;

"I have spoken with my parents about these matter and it was solved."
(sic)

46. In the affidavit by the plaintiff's attorneys, in which they sought to reinstate the previously withdraw compliant, it is averred that it is the plaintiff's co-accused (in the suspected stolen property charge, Sello), who informed him about the police's plan to kill him and his family. The person by the name of Nelly is not mentioned. Further, that the affidavit does not mention that Mr Modingwa was one of the people who witnessed the assault.

47. The clinical records of the plaintiff do not corroborate the injuries the plaintiff said he sustained. The fact that the plaintiff had a broken ankle is not stated

and the injuries to his ribs is also not stated; instead, “NAD” is stated, which means *“nothing abnormal detected”*.

48. Most importantly, there is undisputed evidence by the Senior Investigator from IPID, Ms Kedibone Masemola, that she inspected the cell register and she noted that it was written that the plaintiff was admitted to the cells to be detained, without any injuries. From her observation, the person who made the entry was the officer who was in charge of the cells, as his handwriting appears on all the entries made in the register. Mr Lekalakala only signed as the person who was presenting the plaintiff for detention, as opposed to the plaintiff's testimony that the officer in charge of the cells refused to admit him as he had injuries.

Arrest and Detention

49. At the time of the arrest the police were following on the information they received about the stolen Toyota Corolla which was found parked at Sello's premises. The police officers also made a further enquiry about the vehicle whilst at the place where they arrested Sello, which led them to a police docket opened at Soweto Police Station. A similar vehicle bearing the same registration plates, made and cloned, was found by the Soweto police at the premises of an elderly person. That vehicle was stolen and recovered by the police.

50. When the police questioned Sello about the vehicle parked at his premises, he informed the police officers that the vehicle belongs to the plaintiff. Sello could not produce any vehicle registration documents. The arrest of Sello led the police to the parental home of the plaintiff, where the plaintiff was questioned by the police about the vehicle and the vehicle registration documents. The plaintiff told the police,

“He will never say a thing about the vehicle and he will speak for himself at court.” (sic)

As a result of what he told the police, the second defendant, after explaining his constitutional rights to the plaintiff, placed him under arrest and detained him.

51. Prior to the arrest of both Sello and the plaintiff, the second defendant only had information about the vehicle at Sello's premises, but nothing on the plaintiff. It was thus the information he received from Sello regarding the ownership of the vehicle which led to the arrest of the plaintiff.

52. The evidence that a stolen vehicle or suspected stolen vehicle was found at Sello's place is undisputed. It is common cause that neither Sello nor the plaintiff had the vehicle registration documents. The person who effected the arrest is a police officer. It is because of the information he received from the police officers from Soweto about the existence of the same vehicle as the one found at Sello's place, he entertained the suspicion that the vehicle was stolen, in addition to the fact that the plaintiff failed to give the police an explanation about the vehicle.

53. It is based on the lack of explanation and the fact that Sello said that the vehicle belonged to the plaintiff, that led the second defendant to entertain the suspicion that the plaintiff committed an offence referred to in Schedule I of the CPA. The plaintiff refused to be arrested by the police, despite the fact that they introduced themselves as police officers, informing him of the reason for their arrest and most importantly, after he was apprised of his constitutional rights, and as such it is my considered view that when the second defendant arrested the plaintiff, the suspicion he entertained rested on reasonable grounds.

CONCLUSION

54. Taking into consideration all the evidence tendered on behalf of the plaintiff and against him, I found that there is no evidence, objectively, that the plaintiff was assaulted at the time of his arrest. The fact that the plaintiff was assaulted with a crowbar is not corroborated by Mr Modingwa who was not far

from where the alleged assault took place and also not corroborated by the hospital clinical records. The plaintiff's mother, who was away from where the alleged assault took place, seated in her living room, says that the plaintiff was assaulted with a certain object. It is based on such discrepancies that I do not find in favour of the plaintiff, in relation to a delictual claim for assault.

55. The police officers were justified when arresting the plaintiff without a warrant in terms of section 40(1)(e) of the CPA. The information about the suspected stolen vehicle was confirmed to be correct as both Sello and the plaintiff could not produce the vehicle registration documents and the plaintiff's failure to give an explanation in respect of the vehicle found at Sello's place.

56. I have given the fact that the plaintiff was not found in physical possession of the vehicle, due thought. Sello's evidence is that the vehicle was at his place at the behest of the plaintiff. I see no reason why Sello should lie about that, considering the fact that he was about to be arrested, also the failure of the plaintiff to provide the police officer with a reasonable explanation as to why he was in possession of the vehicle.

57. Section 36 of the General Law Amendment Act 62 of 1955, provides;

"36. Any person who is found in possession of any goods, other than stock or produce as defined in section thirteen of the Stock Theft Act, 1923 (Act No. 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

The plaintiff had an election to give an explanation of the alleged stolen vehicle, or suffer the consequences, and opted for the latter. His right to remain silent has not been infringed upon by any statutory provision in conflict with the Constitution (see **Osman and Another v Attorney-General 1998 (4) SA 1224 (CC)**).

ORDER

58. In the circumstances, I make the following order;

1. The plaintiff's claim against the defendant for a delictual claim of assault, arrest and detention is hereby dismissed.

A handwritten signature in black ink, appearing to read 'Mosopa', is written over a horizontal line.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the plaintiff: Adv. WN Sidzumo
Instructed by: Makhafola and Vester Incorporated.

For the defendant: Mr. J Mulaudzi
Instructed by: The State Attorney, Pretoria

Date of hearing: 25 April 2022
Date of judgment: Electronically transmitted