

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE Number: **66113/2019**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED: YES  
15/08/2022

In the matters between: -

**SHABANGU SIMPHIWE MAX**

**PLAINTIFF**

**AND**

**THE MINISTER OF POLICE**

**RESPONDENT**

**JUDGMENT**

**This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on August 2022.**

## BAQWA J

### Introduction:

[1] This is an action based on the *actio injuriarum* for damages suffered when members of the defendant set in motion events which resulted in the plaintiff suffering damages arising out on unlawful arrest, detention and other acts related thereto.

[2] The undisputed facts are that the plaintiff was arrested on 12 October 2018 as a suspect in an armed robbery case. The said arrest was effected by Sgt Phele of Silverton Police Station and all the other members involved were stationed at that Police Station.

[3] It is also not disputed that the plaintiff was detained at Silverton Police Station upon his arrest from 12 October 2018 to 15 October 2018 when he made his appearance in Court. Sgt Phele was the investigating officer in the armed robbery case committed on 15 April 2018.

### The law

[4] To succeed with his claim under the *action iniuriarum* the plaintiff needs to

- 4.1 Establish that his liberty was interfered with;
- 4.2 Establish that the interference occurred intentionally;
- 4.3 Show that the deprivation was unlawful (with the *onus* falling on the defendant to show why it was not); and
- 4.4 Establish that the conduct of the defendant must have caused both legally and factually, the harm for which compensation is being sought *De Klerk v Minister of Police*<sup>1</sup>.

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<sup>1</sup> *De Klerk v Minister of Police* [2019] ZACC 32 para 14

[5] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (“The Act”) reads as follows:

*“1. A police officer may without a warrant arrest any person*

*(a) .....*

*(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody;”*

[6] To rely on the defence in terms of Section 40(1)(b) the following jurisdictional points have to be present at the time of arrest:

6.1 The arrestor must be a peace officer;

6.2 He must entertain a suspicion;

6.3 It must be a suspicion that the arrestee committed an offence listed in Schedule 1; and

6.4 That suspicion must rest on reasonable grounds, *Duncan v Minister of Law and Order*<sup>2</sup>.

[7] It is only when all the jurisdictional facts are present that an arresting officer can exercise a discretion to arrest the suspect. If at the time of arrest any of the jurisdictional facts were not present, the subsequent arrest would be unlawful.

[8] What this Court has to determine is whether the arresting officer’s suspicion rested on reasonable grounds having regard to the prevailing circumstances and information available.

[9] In *Duncan v Minister of Law and Order (supra at 814)*<sup>3</sup> the Court held that the test for compliance with Section 40(1)(b) is not whether the arresting officer believes that he has a reason to suspect, but whether on an objective approach he in fact has

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<sup>2</sup> *Duncan v Minister of Law and Order (supra at 814)*.

<sup>3</sup> *Duncan v Minister of Law and Order (supra at 814)*.

reasonable grounds for his suspicion. In other words, the test whether or not the suspicion was reasonable or not is an objective one. *Olivier v Minister of Safety and Security*<sup>4</sup>.

[10] The question the Court has to resolve is whether any reasonable person, faced with the same set of facts as the arresting officer, would form a suspicion that a person has committed a schedule 1 offence. *Mdlalose v Minister of Police*<sup>5</sup>.

[11] In *Mabona and another v Minister of Law and Order*<sup>6</sup> the test of reasonableness was dealt with as follows:

*“.... The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it 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 an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion.”*

[12] In *Mdlalose*<sup>7</sup>(**footnote 5 supra at para 49**) the Court pointed out that the police official sometimes has to effect an arrest under urgent circumstances, in these instances they have to strike while the iron is hot. Prompt action becomes necessary when an opportunity to catch the suspect who has committed a serious crime may be lost and police might be blamed for not taking action when such information was available.

### **The onus of proof**

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<sup>4</sup> *Olivier v Minister of Safety and Security* 2009(3) SA 134 (W) at 440 F-G.

<sup>5</sup> *Mdlalose v Minister of Police* 2016(4 All SA 950 (WCC).

<sup>6</sup> *Mabona and another v Minister of Law and Order* 1988(2) SA 654 (SE) at 658 E-H

<sup>7</sup> *Mdlalose v Minister of Police* 2016(4 All SA 950 (WCC).

[13] The defendant admitted the arrest and as a result *bore the onus of proof* regarding the lawfulness thereof and the subsequent detention of the plaintiff at the police station.

[14] The defendant denied responsibility for the further detention of the plaintiff after he had appeared in Court and in that regard the *onus* shifted to the plaintiff to prove that such further detention was caused by the defendant. Equally, the *onus* was on the plaintiff to prove the other patrimonial claims. Since the primary claim was the one of unlawful arrest and detention, the right to begin leading evidence was on the defendant.

### **The defendant's testimony**

[15] The background and facts of this case are contained in the evidence which was led by the parties herein. The defendant tendered the evidence of the three witnesses whilst the plaintiff called two witnesses.

[16] The main witness for the defendant, Detective Sgt Phele who was also the arresting officer was as follows. He was allocated a police docket in April 2018 relating to an armed robbery case. The complainant in the case was Erick Chakauya with Foke Lameck and David Katerere as witnesses.

[17] From their statements contained in the docket it appeared that Lameck Foke was the driver of a taxi that transported Professor Katerere and Professor Chakauya from O.R Tambo airport on 15 April 2018 to their residence at Unit [....] M[....] Villa, Equestra. They arrived at the gate around 20h35.

[18] While waiting for the gate to open unknown African males approached them with their faces covered in balaclavas. They were armed with a firearm. One of them approached the driver, pointed him with a firearm and switched off the engine of the vehicle. They then robbed them of laptops, money and cell phones. The complaints managed to identify the vehicle the suspects were using as a Mercedes Benz, gold in colour, with registration number [...].

[19] Lameck's statement mentioned that one of the assailants spoke in the isiZulu language.

[20] Phele and his colleagues thereafter interviewed complainant and witnesses who confirmed the incident and the description of the getaway motor vehicle as a gold Mercedes Benz with registration number [....].

[21] Phele then tracked vehicle through the vehicle registration system which identified the vehicle as a Mercedes Benz owned by A.M Shabangu of [....] D[....] Street, Sandringham, Johannesburg with mobile number [....].

[22] He proceeded to the address indicated in the print out and upon failing to find him there, traced him through his cell phone number and met with him. He admitted having owned a white Mercedes Benz twenty years before but other than that denied owning a vehicle at that time.

[23] Nothing further transpired regarding the case after the Shabangu meeting but Phele and his colleagues kept a look-out for the vehicle involved in the robbery.

[24] The matter seemed to have reached a dead end when on 12 October 2018 along Love Drive, Nelmaphius, Pretoria. There was a surprise development, Phele was driving along that road with colleagues. Sgt Mathothe as driver and Sgt Mpelane as a passenger. They were in an unmarked white VW Polo vehicle.

[25] Sgt Mathothe spotted a gold Mercedes Benz with registration number [....] driving in the opposite direction and alerted Phele who checked his pocket book and confirmed that it was the one they were looking for. They made a U turn and followed the Mercedes Benz. They signalled the Mercedes Benz to stop by flashing their lights but were unsuccessful. The drove until they were parallel to it. Sgt Mpelane and Phele showed their police appointment card and the driver to stop.

[26] The Mercedes pulled slightly off the roadway and stopped. The Polo also stopped and Phele alighted and proceeded towards the driver whilst the Polo moved towards the front of the Mercedes. Phele showed his appointment card to the driver and firstly told him in Sepedi that they had stopped him because a vehicle identical

to the one he was driving had been used in a robbery in April 2018. When that did not seem to register with the driver Phele repeated it in English. Upon mention of the robbery, the driver of the Mercedes drove off at high speed.

[27] To Phele the actions of the plaintiff compounded his suspicion when he noted that the driver was not only speaking isiZulu but also that he was driving a gold Mercedes Benz with registration number [...] which matched all identification marks given by the complainant in the robbery matter.

[28] Phele totally discounted the version that was put to him under cross-examination that the plaintiff fled the scene because he believed he was being hijacked. Phele explained that objectively viewed there was nothing that could have caused panic in the plaintiff's mind. Moreover, they were in a busy part of town with people, car washes and spaza shops. He had the option to call the police or dash into a nearby carwash yet he fled from these places of safety whilst he thought he was in danger. His actions seem to have been in conflict with what was in his mind.

[29] The next witness Sgt Mathote, Phele's colleague and fellow detective by and large corroborated the version given by Phele save for explaining that he did not observe what happened when Phele confronted the plaintiff after the latter came to a stop. He gave the same sequence of events when they happened to notice the plaintiff driving the opposite direction in Love Drive.

[30] It was Sgt Mathote who controlled matters at the scene of the accident until he was joined by uniformed members of the SAPS. He gave an instruction that they should keep the plaintiff until Phele arrived.

[31] Under cross-examination Mathothe did not deviate from the version given by Phele, namely, that when he saw the Mercedes Benz he recognised it as fitting the vehicle linked to the robbery case and that they wanted the driver to explain how he obtained the car and who the driver of it was on 15 April 2018.

[32] Mathothe refuted the suggestion that the plaintiff could realistically assume that he was in a hijack situation. They had not acted in a threatening manner prior to the plaintiff fleeing the scene.

[33] The next witness called was constable Madibogo. He was part of the Uniform Branch at the Silverton Police Station when he and his crew receive a back-up call from Sgt Mathothe. They drove towards Hans Strydom/ Solomon Mahlangu intersection where they found the Mercedes Benz which had been pursued involved in an accident. The white police polo was also in an accident nearby.

[34] Sgt Mathothe was injured during the accident and Madibogo found him seated near where the plaintiff was lying next to the damaged Mercedes Benz. Sgt Mathothe instructed Madibogo to take the plaintiff to the police van and wait the arrival of Sgt Phele.

[35] Sgt Mathothe and Sgt Mpelane were taken to hospital by ambulance and when Sgt Phele arrived Madibogo took him to the plaintiff who was at the back of the police van whilst he continued to direct traffic.

[36] Later, Sgt Phele instructed Madibogo to take the wrecked Mercedes Benz to the police pound where it was booked into the SAP13 record book.

### **The Plaintiff Case**

[37] The plaintiff tendered the evidence of two witness. He testified that on 12 October 2018 he went to Mamelodi Hospital to obtain a quotation for window cleaning at the hospital. He used his cell phone GPRS to travel from Fourways to the hospital as he was not familiar with the directions. It transpired that he could not have access to the interior of the hospital to take measurements and photographs. He then left on his way back to his workplace. The GPRS took him to Love Drive, Nelmapius where he observed in his rear view mirror, a white VW Polo flashing headlights towards him, but he ignored it and drove on.

[38] The VW Polo drove as if to overtake him but stayed parallel to his vehicle. There were three African males in the vehicle and the front seat passenger was talking to him.

[39] He slowed down to try and understand what their intentions were and as he did so, he observed the person who was a back seat passenger making a movement as



if to exit the Polo. He thought he was about to be hijacked. He sped off resulting in a high speed chase.

[40] According to the plaintiff he was trying to reach a safe place like a garage. In doing so, he admits to have been driving recklessly.

[41] He then heard a loud bang after which he ducked and sped towards an intersection which was full of traffic. He lost control of his vehicle, hit a traffic light and came to a standstill in an open field close to the intersection.

[42] Plaintiff was not injured, he got out of his vehicle and tried to get assistance and as he did so, noticed that members of the public were looting his vehicle. He ran back to it and managed to salvage his cell phone and as he did so he was pointed with a firearm. The person who pointed him was bleeding from his hand and he ordered the plaintiff to get on the ground.

[43] The person with the gun asked why the plaintiff did not stop and he replied saying he thought he was being hijacked. The plaintiff identified the person with a gun as Sgt Phele. He was thereafter taken into a police van and as he sat there, he noticed that the white VW Polo had also been in an accident.

[44] The plaintiff was taken to Silverton Police Station where he was charged for armed robbery. He attended court on Monday 15 October 2018 where the case was postponed for seven days to verify his address.

[45] On 22 October 2018 on his second appearance, the case was struck off the court roll.

### **Analysis**

[46] As alluded to above, police are authorised by law to arrest a person suspected of having committed a schedule 1 offence. At that stage however, the arresting

officer is not called upon to determine the guilt or otherwise of arrestee. *Scheepers vs. Minister of Safety and Security*.<sup>8</sup>

[47] In order to establish a defence the defendant must establish the existence of the jurisdictional facts in terms of section 40(1) (b), namely that the arresting officer is a peace officer who entertained a suspicion that the suspect committed a Schedule 1 Offence and that the suspicion rests on reasonable grounds.

[48] It is not in dispute that prior to the arrest of the plaintiff the arresting officer, Sgt Phele was investigating a robbery case that occurred on 15 April 2018 under case no 270/4/2018 and that he was in possession statements of the complainant and witnesses who had identified the make, colour and registration number of the vehicle involved in the commission of the crime, namely a Mercedes Benz, gold in colour with registration number [....].

[49] Sgt Phele had checked the vehicle in the motor vehicle registration system and data therein corresponded with the description given to him. The registered owner was traced but upon being questioned he denied knowledge thereof. He also possessed information to the effect that at least one of the perpetrators spoke the isiZulu language.

[50] Sgt Mphele was in possession of that information when they did patrol duty with Sgt Mathothe and Sgt Mpelane on 12 October 2018 and spotted the vehicle in question.

[51] They tried to stop the vehicle and it did come to a stop. Upon talking to the driver it turned out that he was Zulu speaking. The vehicle fitted the given description and the driver also fitted the language description.

[52] Upon enquiring from the plaintiff regarding the vehicle and its connection with the robbery, the driver sped off resulting in a high speed chase.

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<sup>8</sup> (991/2016)[2017] ZASCA 103 (6 September) Para 10.

[53] During the chase the plaintiff was involved in an accident at a robot intersection. The white VW Polo was also involved in an accident at the same intersection and Sgt Phele was injured.

[54] The plaintiff testified that he was driving recklessly until he reached intersection of Hans Strydom and Pretorius Street where he tried to cross against a red robot and landed in the veld.

[55] The Plaintiff was not a credible witness. When questions by the court about whether he had stopped in Love Street or not and referred to the suspect's statement, he eventually admitted that he did stop. This was a total contradiction of what had been conveyed to the Court by his counsel. His admission in this regard was a corroboration of the version that was given by the state witnesses. He also admitted that his vehicle matched in all respects- the vehicle implicated in the robbery.

[56] The main issue to be considered is whether there existed reasonable grounds to suspect that the plaintiff had committed the crime of armed robbery.

[57] When taking into account the plaintiff's admission regarding his vehicle's details and information which Sgt Phele was in possession of regarding the colour, make and registration number of the car, the only conclusion that can be reached is that the jurisdictional facts required in Section 40 (1) (b) of the Act are satisfied and that the suspicion entertained by Sgt Phele was reasonable in the circumstances. The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer had reasonable grounds for the suspicion (*Magagula Supra*).

[58] The fact that the plaintiff failed to offer a reasonable explanation of how he came to be in possession of the vehicle in question and whether or not it was involved in a robbery when confronted by the police rendered him a *prime* suspect for the robbery. What compounded the situation was his attempted escape from the police. His subsequent arrest and charge was both reasonable and justifiable in the circumstances in terms of section 40 (1) (b) of the Criminal Procedure Act. There were reasonable grounds for his arrest in connection with a robbery charge under Silverton case no 270/4/2018.

## **Conclusion**

[59] The plaintiff failed to prove unlawful arrest and detention in that the plaintiff was in police custody for three days. Subsequent detention after his appearance in court could not be blamed on the defendant in the absence of evidence that the detention was factually and legally due to unlawful acts of the defendant. It is common cause that the police did not oppose plaintiff's application for bail.

[60] The plaintiff conceded that for four months preceding the accident he did not receive a salary from his employer. The plaintiff failed to prove two months' loss of income and his claim in this regard ought to be dismissed.

[61] Regarding future medical expenses, no hospital records were provided as evidence that the plaintiff suffered from any ailment because of the arrest and detention nor were there any actuarial calculations provided to substantiate the claim. The claim ought to be dismissed.

[62] An amount of R300 000.00 was claimed for psychological and emotional harm. There were no clinical reports or evidence of any compensable degree- of psychological harm was presented. The claim must be dismissed.

[63] Regarding loss of a motor vehicle, it was plaintiff's evidence that he drove his vehicle recklessly and the loss cannot therefore be attributed to defendant.

[64] The wreckage of the vehicle was taken to the police pound as required by law and if the plaintiff is interested therein, he ought to follow the procedure prescribed in section 31 of the CPA.

[65] In light of the above I make the following order:

The plaintiff's claims are dismissed with costs.

**SELBY BAQWA**

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION,  
PRETORIA

Date of hearing: 19 April 2022

Date of judgment: August 2022

**Appearance**

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