

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1017/2013

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

FUNKY GABRIEL PHOSHOKO

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] On 13th November 2012 the plaintiff was arrested by the members of the South African Police Services (SAPS) on suspicion of murder of one George Makwasena. The plaintiff was detained in the cells at Musina SAPS from the date of his arrest until he was released on bail. The plaintiff made his first appearance in Musina magistrate court on 15th November 2012 wherein he was remanded in custody. The plaintiff was ultimately released on bail on 21st November 2012. The charges against the plaintiff were provisionally withdrawn on 10th January 2013. To date the charges have not been reinstated against the plaintiff.

[2] The plaintiff has instituted an action against the defendant for alleged unlawful arrest and detention. According to the plaintiff's particulars of claim, the members of

the SAPS who have arrested him were acting within the course and scope of their employment. The plaintiff in his particulars of claim, is claiming that the defendant is liable for the entire period of his detention. The defendant had defended the plaintiff's action. In its plea, the defendant had conceded that the plaintiff was arrested by members of the SAPS on 13th November 2012. The defendant denied that the arrest was unlawful, but pleaded that the arresting officers were peace officers, and had acted in terms of section 40 (1) (b) of the *Criminal Procedure Act*¹ (the Act), as they reasonably believed that the plaintiff had committed a Schedule 1 offence, which was murder.

[3] The parties have agreed during their pre-trial meeting that merits and quantum should be decided separately in terms of Rule 33 (4) of the Uniform Rules of Court (the Rules). This court is therefore called upon to determine the issue of liability only. Since the defendant is relying on section 40 (1) (b) the Act, the duty to begin rest on the defendant.

[4] The defendant's only witness to testify was Paul Ramukhadi. He testified that on 13th November 2012 he was employed by the SAPS and was Lt-colonel. He was stationed in Thohoyandou under the organised crime unit (Hawks). He has gone on retirement on 30th April 2022. At the time of his retirement he was colonel by rank.

[5] On 13th November 2012 he was on duty in Thohoyandou when he responded to information that there was a crime of murder that was committed in Musina. He arranged a team to go to the crime scene. On arrival at the crime scene he found that one George Makwasena (deceased) had been shot dead and had died on the scene of crime. They started their preliminary investigations by interviewing witnesses who were near the crime scene, they went to the taxi rank to interview witnesses, and also interviewed the witnesses in the vicinity of Musina.

[6] The deceased was shot on the street next to his homestead. The reason why they interviewed the witnesses at the taxi rank was because the deceased was in the taxi industry, and during that period there was feud in the taxi industry around Musina. At about 17h00 to 18h00 whilst he was busy taking statements of witnesses,

¹ Act 51 of 1977

one of his colleagues told him that there was a man who was at Musina SAPS and he was waiting for him (witness). Whilst still busy taking statements from witnesses, he got information that the plaintiff knows about the crime. However, the evidence that he had collected so far did not directly link the plaintiff as the person who might have killed the deceased, but that the people who had killed the deceased had run into the plaintiff's car and left the scene in the plaintiff's car.

[7] He also got information from the deceased wife and niece that a day before the incident, the plaintiff and the deceased were at court for cases that they have opened against each other. On the day the plaintiff and the deceased were at court, the plaintiff had withdrawn his case against the deceased but was not happy with the withdrawal, and he told the deceased that he will deal with him his own way, and that the deceased interpreted it to mean that the plaintiff will kill him. He also got information that in the morning of the incident, the deceased went to the taxi rank, and on arrival at the taxi rank, the plaintiff blocked his way. The deceased had to use the back entrance in order to enter into the taxi rank.

[8] On arrival at the taxi rank, the deceased had talked to his driver and after that he left. When the deceased left the taxi rank, his driver was driving behind him. As they were driving, the plaintiff's car came from behind and overtook the deceased and the deceased's driver. The deceased and his driver parted ways, and as the driver of the deceased was approaching Musina town, he got a call that the deceased had been shot and killed.

[9] He found the plaintiff waiting for him at Musina SAPS and arrested him around 20h00. He arrested the plaintiff based on the circumstantial evidence, and he also wanted the plaintiff to explain about the scene of the crime. Once a person is arrested, he appears in court and police officers have no say on his further detention.

[10] The witness was cross examined and he conceded that constable Ravele in his police statement has stated that one Knowledge Gatsi had informed him that he saw the deceased been shot from a distance. The witness further conceded that Knowledge Gatsi in his police statement has stated that he saw two guys who shot the deceased, and after shooting the deceased the two guys left the scene on foot

running towards the railway line and thereafter they disappeared. The witness further conceded that according to the statement of Gatsi, he was able to identify one of the killers. When the witness was asked why he had ignored the statement of Gatsi, he stated that he did not ignore it, but had taken a follow up statement in order to clarify the first statement. Under re-examination the witness stated that the statement of Gatsi was not helpful in identifying the suspects. That concluded the evidence of the defendant and it closed its case.

[11] The plaintiff took the witness stand and testified under oath. He testified that in the morning of the 13th November 2012 he was driving his Toyota Hilux bakkie from Polokwane to Musina. He went to Polokwane to fetch the diff for his combi which was operating at Beitbridge Border Post. As he was about 500 metres to arrive at the border, he met the deceased who was driving his black BMW vehicle on N1 road. When he met the deceased he flickered him the lights of his vehicle, and the deceased flickered back. The deceased was driving towards Nancefield township, and it was around 7h20 to 7h25.

[12] On arrival at the taxi rank at the border, he found that his driver was going to load passengers. He told his driver that he will deliver the diff at one Sam the mechanic, and that after offloading the passengers his driver must take the vehicle to the mechanic so that he can fit that diff. From there he went to the garage bought a red bull drink, and after that went to the taxi rank to inform the que marshals that his vehicle will be out for repairs that day, and will be back as soon as it has been fixed.

[13] Whilst the plaintiff was still at the taxi rank, he got a call that the deceased had been shot and killed by the boys who sell illicit cigarettes. He had never blocked the deceased vehicle, but had met him on the N1 road. That day he and the deceased were never together at the taxi rank. After offloading the diff at the mechanic, he went to his house. Whilst at his house, at about 8h45 he got a call from captain Ramovha requesting him to meet him at the police station. He went to the police station and waited for about one and half hours, as captain Ramovha was not there. He then phoned the same number that captain Ramovha had used to phone him, and the captain told him to wait and that they will come to the station.

[14] After an hour one police officer Notsikelelo arrived at the station, and told the plaintiff that it was alleged that he had committed a crime at Nancefield township. He told the police officer that he was never in the township, and his vehicle was fitted with a tracker, and that they can check his movements. The said police officer told the plaintiff that the people who are going to interview him are still in the township, and he must wait for them. Later about five police officers arrived at the police station and they questioned him about his movements after coming back from the border. The said police officers told him that his double cab bakkie was seen at the scene of crime where someone was shot. He denied that he was at the scene, and also told them that he was driving a single cab and not a double cab. He showed the police officers his vehicle and they also took the pictures of his vehicle. He also gave the police officers the phone numbers the company of his car tracker so that they can check his movements. The other police officers left him in the office, and he do not know whether they went to check his movements with the car tracker.

[21] At about 21h00 captain Ramovha arrived and told the plaintiff that they were going to charge him for murder. He asked the police officers the registration numbers of the vehicle that was at the scene of crime, but they could not give him that. He was then put under arrest and detained. His warning statement was taken the following day. He denied that he had told the deceased that he will deal with him. He denied that he had killed the deceased, and also denied playing any role in the killing of the deceased.

[22] The plaintiff was cross examined and he conceded that after his arrest he appeared in court, and was remanded in custody. He also conceded that he was released on bail after a week, and that the charges against him were provisionally withdrawn on 21st January 2013. He conceded that in his warning statement it is not stated that he had informed the police officers about checking the movements of his car with the company of his car tracker, but insisted that he had told them. That concluded the evidence of the plaintiff and he closed his case. Both counsel have addressed the court on the merits of the case.

[23] It is not in dispute that on 13th November 2012 the plaintiff was arrested and detained by the members of the SAPS on suspicion of having murdered the

deceased. The defendant is justifying the actions of the arresting officer by stating that the arresting officer had acted in terms of section 40 (1) (b) of the Act. Generally, an arrest and detention is prima facie unlawful and wrongful, and it is for the defendant to prove the lawfulness of the arrest and detention once these are admitted. (See *Lombo v African National Congress*²).

[24] In terms of section 40 (1) (b) of the Act, a peace officer may without a warrant arrest any person whom he suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. It is trite that the jurisdictional facts must exist before section 40 (1) (b) can be invoked. Those jurisdictional factors are that the arrestor must be a peace officer, he must entertain a suspicion, it must be a suspicion that the arrestee had committed an offence referred to in Schedule 1 of the Act, and the suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the powers conferred by the subsection, i.e, he/she may arrest the suspect. (See *Duncan v Minister of Law and Order*³).

[25] On what may be regarded as reasonable suspicion, there must be evidence for the arresting officer to form a reasonable suspicion which is objectively sustainable. (See *Minister of Law and Order v Hurley and Another*⁴). This will entail the arresting officer investigating the circumstances of the particular offence which is alleged to have been committed before it can be said that there is reasonable suspicion that an offence has been committed.

[26] The basis upon which the arresting officer had formed the alleged reasonable suspicion, was on the information that he got from the deceased niece Tsepo Richard Makwasena and other witnesses who told the arresting officer about what allegedly transpired at court the previous day between the deceased and the plaintiff. The arresting officer also relied on the information from the deceased's brother who according to his written police statement he was told that on the date of the incident the deceased was at the taxi rank where the plaintiff had blocked the deceased road. The deceased's brother has further stated in his police statement that he was

² 2002 (5) SA 668 (SCA) at para 32

³ 1986 (2) SA 805 (A) at 818G-I

⁴ 1986 (3) SA 568 (A) at 579E-580E

informed that the suspects who had shot the deceased got away from the scene in the plaintiff's car.

[27] According to the written statement of Richard to the police, he was in the house when he heard the gun shots. He went out to the street to check what was happening and he saw a person jumping over the fence from the side of the deceased's house holding a small bag. On the street he saw the plaintiff's grey Toyota single cab, and also Mr Mudluli's white Inyathi taxi with tinted windows which were parked. After the shooting the two vehicles drove away from the scene at a high speed. When he went to scene he found that the deceased had been shot and killed.

[28] However, this was not the only available information provided to the arresting officer. Knowledge Gatsi whom can be referred as an eye witness had given the information to the arresting officer that he saw the two people that have shot the deceased, and he was about 30 metres from the scene and was also able to identify one of the suspects. This eye witness had also given the description of the clothes that the suspects were wearing and the direction in which they went. The witnesses whom the arresting officer had relied on them to form a reasonable suspicion, they all did not see the actual shooting but only heard gun shots. The arresting officer on his own testimony had stated that he arrested the plaintiff based on circumstantial evidence. He therefore opted to ignore direct evidence of Gatsi and to rely on circumstantial evidence of witnesses who already knew the feud between the deceased and the defendant. As these witnesses have stated that defendant had threatened to kill the deceased the previous day, logic will tell that in matters of this nature their first suspect will be the plaintiff.

[29] In *Biyela v Minister of Police*⁵ Musi AJA said:

“[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the

⁵ [2022] ZASCA 36 (01 April 2022) at paras 35 and 36

determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.”

[30] In my view, there was no basis for the arresting officer to have ignored the information provided by Gatsi who had given the arresting officer direct evidence and also the description of the alleged suspects. The arresting officer overlooked the more credible evidence and opted for circumstantial evidence. The arresting officer did not take into consideration all the prevailing circumstances before he formed a reasonable suspicion to arrest the plaintiff, and in my view, was not based on reasonable grounds. Therefore, the arrest and detention of the plaintiff was unlawful.

[31] The next question to be determined is for which period is the defendant liable for the unlawful detention of the plaintiff. Counsel for the plaintiff has submitted that the defendant is liable for entire period up to date of been released on bail. Counsel for the defendant had submitted that in case the plaintiff succeeds with his claim, the period to be considered should be from the date of detention up to the time of first appearance in court, as further detention was sanctioned by the court.

[32] In *De Klerk v Minister of Police*⁶ Theron J said:

“[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a magistrate does

⁶ [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR (CC); 2021 (4) SA 585 (CC) (25 August 2019) at paras 62 and 63

not necessarily render subsequent detention unlawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable test and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.”

[33] It is therefore not automatic that the Minister of Police will be held liable for post-appearance detention, it must be shown that the magistrate who had remanded the matter did not break the causation. Once an arrested person is handed to the court official, the arresting officer does no longer have control on how the judiciary handles the matter further. It must therefore be shown that the remand was a result of the unlawful conduct of the police officers, or what role did the police officers play in the matter being remanded. No evidence was placed before court of the conduct of the police after handing over the plaintiff to the court officials. No evidence was presented whether the investigating officer had opposed bail when the plaintiff made his first appearance in court, or had requested seven days to verify some other issues. It is not for this court to embark in a process conjecturing evidence in order to hold the defendant liable where there is no factual basis in evidence, or insufficient evidence has been placed before court. In my view, no sufficient evidence has been placed before court to enable it to determine whether the defendant should be held liable for the detention of the plaintiff post-appearance in court.

[34] In the result I make the following order:

34.1 The plaintiff succeeds in his claim for unlawful arrest and detention against the defendant from date of arrest up to the date of his first appearance in court with costs.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	: P Phasha
Instructed by	: Phokoane Phasha attorneys
Counsel for the defendant	: Adv MS Monene
Instructed by	: Office of the State Attorney, Polokwane
Date heard	: 14th June 2022
Electronically circulated on	: 27th June 2022