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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 04646/2015

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

4/8/2017.....
DATE

.....
SIGNATURE

In the matter between:

GXOTWA SIPHIWE BENNET

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MIA, AJ

- [1] The plaintiff claimed the sum of R350 000 for an unlawful arrest. He was arrested on 28 April 2014 at his home [...] Street, Mofolo North and released on 30 April 2014. The defendant denied the arrest and detention and put the plaintiff to proof thereof.
- [2] The plaintiff averred that officers in the employ of the defendant caused false charges to be laid against him of armed robbery which led to his

arrest without a warrant when the complainant pointed him out as the suspect in the armed robbery.

- [3] At the commencement of the trial the parties agreed that the defendant had to begin as the burden of proof rested on the defendant to prove that the arrest was lawful.

- [4] The first state witness Constable Khazamula Chauke (Chauke) testified that he was a police officer based at Moroka Police Station for 9 years. He was accompanied by his colleague Captain Mawelewele (Mawelewele) when they received a call from the complainant, John Motaung (Motaung). Motaung was the complainant in a criminal case reported at Moroka Police Station under case number 654/04/2014. Motaung informed Chauke and Mawelewele that he had knowledge of the whereabouts of the suspect in his case and was in possession of a point out note.

- [5] He informed the police officers he was at Cheapline garage. The police officers proceeded to the garage where they found Motaung. Motaung informed them he could show them where the suspect in his case was and handed the point out note to them. The point out note reflected the case number and the nature of the charge reported namely, armed robbery. Mawelewele enquired from Motaung whether he had indeed been robbed and to this Motaung replied positively. The police officers accompanied by Motaung proceeded to the place directed by Motaung, where the suspect was reported to be.

- [6] Upon arrival at [...] Street, Mofolo North, a woman opened the door. Chauke and Mawelewele introduced themselves and informed the plaintiff that Motaung had laid a charge against him. Motaung pointed out the plaintiff as the person who robbed him. The plaintiff's girlfriend was present as well but Motaung did not say anything about her to Chauke at that stage. Chauke read the plaintiff his rights and then

explained they would be taking him to Moroka police station. They proceeded to Moroka police station where they detained him until his release.

- [7] Chauke confirmed that he and Mawelewele relied on the point out note to accompany Motaung to effect the arrest. It follows that their suspicion was formed after perusing the form and after Mawelewele questioned Motaung about whether the robbery occurred. When the police officers arrived at the plaintiff's address Motaung pointed out the plaintiff and again stated that the plaintiff had robbed him. These facts indicate that Chauke and Mawelewele relied on the point out note and Motaung's identification and confirmation that the plaintiff had robbed him to conclude that an offence had been committed when they arrested the plaintiff. Chauke confirmed that he did not act on the point out statement on p. 40 in Bundle E as it was only completed after the arrest. He acted upon the point out note appearing at p10 in Bundle E. He confirmed that they believed they were pursuing a charge of armed robbery where the complainant's belongings were taken by force.
- [8] The point out note instructs members of the SAPS to assist the bearer of the note to arrest the suspect if pointed out by the bearer. The police officer is then required to call the investigating officer. The note informs the bearer that the investigation is suspended until new information is supplied to enable the investigating officer to follow up on the investigation. Chauke and Mawelewele were following up on the information supplied by Motaung. They both testified that they believed they were required to act on the point out note and a failure to do so would amount to a dereliction of their duties.
- [9] Chauke did not have sight of the docket before effecting the arrest and did not know the plaintiff before the arrest. He testified that he effected the arrest because he acted on the pointing out note and believed it would have been a dereliction of his duty not to effect the arrest. He

testified that he believed he would have been subjected to disciplinary proceedings and been dismissed as a police officer if he did not effect the arrest of a suspect in a serious offence, namely robbery. The complainant had furnished the case number and the charge and had pointed out the offender to them in a charge of armed robbery. Motaung confirmed the identity of the plaintiff and that the plaintiff had robbed him.

[10] Further questioning by the defence indicated that at the time of the arrest, Chauke was not fully aware of the details of the docket and was not aware that the complainant had reported that he was robbed at gunpoint, he was only aware that it was an armed robbery. He was also not aware that the complainant had initially reported that the suspect was unknown to him. It later transpired that the plaintiff and Motaung had met as they were in love with the same woman and the plaintiff has requested Motaung to stop pursuing the woman. Chauke was not aware that the State declined to prosecute the matter due to insufficient evidence of the robbery. The State based its decision on information that Motaung said he did not know the suspect who robbed him whilst it later transpired there were statements and affidavits indicating that Motaung and the plaintiff had previous contact and Motaung was the ex- boyfriend of the plaintiff's girlfriend. The State was in possession of a protection order the ex- girlfriend sought against Motaung.

[11] The second witness called to prove the lawfulness of the arrest was Mawelewele. Mawelewele is also a police officer who has been in the South African Police Service for 31 years. Mawelewele corroborated the evidence of Chauke regarding the arrest. He received a phone call on the sector phone from Motaung. Motaung indicated he laid charges of armed robbery and was in a position to point out where the suspect was. He questioned Motaung about the robbery, namely whether he had in fact been robbed. Motaung confirmed this and that the suspect was in Mofolo North. Mawelewele corroborated the version of Chauke

that they arrived at the address, that Motaung pointed the plaintiff out indicating that the plaintiff robbed him. They introduced themselves as police officers. Chauke explained his rights and informed the plaintiff he was under arrest. They conveyed the plaintiff to Moroka police station where he was detained in the cells. His constitutional rights were read to him and a copy was given to him.

[12] Mawelewele testified regarding the conditions in the cells. He recalled that they were normal and in fair condition. There were clean blankets, the food was good, the utensils were clean, and the toilet was clean. Mawelewele was referred to p.1 of Bundle E. He confirmed that the complainant was JM Motaung. He testified that he had no authority to give police bail to the plaintiff after the arrest in view of the seriousness of the offence. The matter was to go to court for the determination of bail.

[13] When questioned regarding the purpose of the arrest Mawelewele responded that he believed it was to bring the suspect to court. When asked about the aspects to consider when arresting a person he indicated that the arrestor had to consider whether a crime had been committed or not and to consider the information available or at the arrestor's disposal. He testified that he based his arrest on information that the suspect committed armed robbery, as informed by Motaung, and the information contained on the point out note. He believed the suspect was unknown to Motaung as indicated in the point out note, but he believed that Motaung could point the suspect out. He was not aware of any statement which indicated that the suspect was known to Motaung. Mawelewele explained that he questioned Motaung about the point out note. When it was put to him that he should have commenced a preliminary investigation before effecting the arrest he deferred this investigation to the investigating officer to investigate further aspects of the offence and indicated he was satisfied he had information to effect an arrest based on the seriousness of the offence.

- [14] When challenged about having valid grounds to arrest the plaintiff, Mawelewele expressed the view that the point out note afforded valid grounds to effect an arrest. He was asked whether he liaised with the investigating officer and he explained that the investigating officer was not on duty. He agreed that the point out note required him to liaise with the investigating officer but after the arrest was effected. The defence called no further witnesses.
- [15] The plaintiff testified that on 28 April 2014 at about 19h00, the police arrived at his place, with Motaung. His girlfriend Kediemetse Oliphant opened the door. The complainant, Motaung, pointed him out. The police arrested him and took him to Moroka police station. He was detained until his release on 30 April 2014 without appearing in court. His girlfriend was arrested later the same day, when she followed him to the police station to serve a protection order on Motaung. Upon her arrival at Moroka police station and while serving the protection order, Motaung informed Chauke that she was also a suspect. She was arrested immediately even though she had been left behind when the police arrested the plaintiff at his place of residence when she opened the door.
- [16] The plaintiff testified that his girlfriend was arrested based on the same allegations in Moroka case number 654/04/14 that she and the plaintiff robbed the plaintiff of his cell phone using a firearm.
- [17] The plaintiff described the conditions in the cells as appalling. The sponge he slept on was full of dust. There were no blankets for him. He had to ask a police officer Constable Baloyi for assistance. This officer took him to the blanket room to fetch a blanket. The cells had a terrible odour and smelt like urine. The water was cold, the windows were broken, and the blankets were dirty and smelt bad. The food was of a poor quality. He said he received three slices of dry bread in the morning and nothing for lunch. At 16h00 they received pap and meat. They were not taken to court the next day which was a Tuesday. He

testified that his health was affected as a result. He could not explain how the conditions in the cell affected his health and no expert evidence was led to prove how his health had deteriorated and how his period of imprisonment had caused a subsequent deterioration in his health. No medical or other reports were tendered supporting his statements regarding a deterioration in his health either.

[18] The plaintiff testified that he believed the reason he was arrested was because the complainant was proposing love to his girlfriend, who was Motaung's ex-girlfriend. Motaung sought to eliminate him as a competitor in the affections of Kediemetse Oliphant. This had led to the false charge of robbery being laid against him. He testified further that Ms Oliphant had instituted a civil claim against the defendant which was settled for R120 000.00 but despite her claim being on the same merits for armed robbery under the same case number Moroka case no 654/04/14 her case was settled and his case was not settled. He expressed dissatisfaction at this position.

[19] The plaintiff in his particulars of claim averred that :

"3. On or about 28th of April 2014 at or about 19h00 and at near house number [...] Street, Mofolo North, officers in the employ of the Defendant wrongfully and maliciously set the law in motion by laying a false charge of armed robbery with Moroka SAPS.

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5. As a result of the members' aforesaid conduct, the Plaintiff was unlawfully arrested without a warrant of arrest on the 28th of April 2014 at 19h00 by members of the South African Police on a charge of armed robbery. "

[20] In considering whether the plaintiff's arrest was unlawful the evidence is considered in light of sections 39 and 40(1)(b) of the Criminal Procedure Act 51 of 1977 per *Minister of Safety and Security and another v Swart* 2012(2) SCA 226 where the Court per Bosiello JA held:

"[19] It is well established that the onus rests on the arresting officer to prove the lawfulness of the arrest. This is so because, as Rabie CJ stated in

Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589E – F:

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.'

[20] It is furthermore trite that the reasonableness of the suspicion of any arresting officer acting under s 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a sch 1 offence. (*Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ) (2009 (6) SA 82).)

[21] In order to succeed in their defence the defendant is required to establish certain facts to justify the arrest. In *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) the jurisdictional facts for a s 40(1)(b) defence set out at 818H – J are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. See also *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA). Once the aforementioned jurisdictional facts are present the discretion whether or not to arrest arises. The police officer is not obliged to effect an arrest. This was made clear in relation to section 43 in *Groenewald v Minister of Justice* 1973 (3) SA 877 (A).

[22] Once the jurisdictional requirements are met the police officer may exercise a discretion to arrest the person. In *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA) Harms DP notes at paragraph [29]

“[29] As far as s 40(1)(b) is concerned, Van Heerden JA said the following in *Duncan* (at 818H – J):

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed....."

- [23] The exercise of the discretion would be improper if the police officer exercised the discretion for an unintended purpose. If the police effected the arrest out of malice, to punish a detainee or to deprive the detainee of his freedom or to influence the arrestee's conduct or another's conduct, this would amount to an improper exercise of the discretion. At paragraph [32] of *Minister of Safety and Security v Sekhoto and another*, (above) Harms DP refers to three questions to be posed:

"the three *Castorina* questions formulated for determining the legality of an arrest without a warrant by Woolf LJ:30 (a) did the arresting officer suspect that the person arrested was guilty of the offence; (b) were there reasonable grounds for that suspicion; and (c) did the officer exercise his discretion to make the arrest in accordance with *Wednesbury* principles?"

Harms DP notes that two of the three questions are akin to three of the four jurisdictional facts to be proved by the defence. Of relevance is whether the discretion was exercised in accordance with the *Wednesbury* principles', which is a reference to the judgment of Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) ([1947] 2 All ER 680).

- [24] Harms DP goes on to explain that the *Wednesbury* principles are no different from those formulated by Innes ACJ in *Shidiack v Union Government* 1912 AD 642 where the court there stated:

"Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the

ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. . . . There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

- [25] Harms DP noted however that the above *dictum* of Innes ACJ predates the Bill of Rights and explained that it thus required reconsideration. The Bill of Rights required that the exercise of discretion must also be objectively rational¹. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) Chaskalson P said the following:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action. "

- [26] Once the jurisdictional requirements are met the discretion exercised in the power to arrest must meet the requirement that it is rationally related to the purpose for which the power was given. This calls for an objective enquiry.

¹ This was held by Chaskalson P. in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

- [27] In the present matter the police officers were responding to the call of Motaung, the complainant, who had a point out note. Motaung reported he had seen the suspect in his case, an armed robbery matter. They responded to the call and proceeded to Motaung. Both police officers testified that they relied on the authority of the point out note and Motaung's pointing out of the plaintiff and confirmation that this person had robbed him. The person pointed out was a suspect in an armed robbery reported at Moroka police station under case no 654/04/14. The question is whether the arrest was objectively justified and reasonable under the circumstances.
- [28] In considering the conduct of Chauke and Mawelewele in light of the jurisdictional requirements it is clear that both police officers were peace officers. They testified that based on the information contained in the point out note they entertained a suspicion that the plaintiff committed a serious offence. The offence of robbery is contained in schedule one. Armed robbery being a schedule six offence is more serious an offence. However the basic requirement being the element of robbery required of schedule one is met. This suspicion was based on the point out note based on a case opened at Moroka police station and the complainant confirming that he had been robbed by the plaintiff. Having regard to the point out note that there was a charge of robbery and Motaung pointing out the plaintiff and confirming the plaintiff had robbed him, it was not unreasonable for the police officers to arrest the plaintiff. Mawelewele asked Motaung if he was sure that the complainant was indeed the person who robbed him and he confirmed that it was indeed him. It was thus reasonable for the police officers to form the objective view that the complainant was the suspect in a serious criminal offence and that he posed a danger and was to be arrested.
- [29] Mr Sethunya appearing for the plaintiff argued that Section 40 (1) (b) of the Criminal Procedure Act provides that an arrest may be justified, only if the jurisdictional factors have been alleged and proved. He

argued further that where an offence does not form part of Schedule 1 the arrest and detention must be regarded as unlawful. In this regard he relied on the decision of Kgoele J, a decision of the North West High Court in *Jan Willem Frederick Kleynhans v Minister of Police and Constable Gift Joseph Merafe Case No 1517/12*(reported on SAFLII). The matter before the North West High Court emanated from an arrest of a student alleged to have been involved in a “hit and run” collision. The student was arrested during the initial investigation and subsequently sued the Minister of Police and the arresting officer. The court expressed reservations about the arrest as the matter was still being investigated and there appeared to be no need to effect an arrest to secure the student’s attendance at court where there were other means of securing attendance and whilst the matter was being investigated. The above matter is distinguishable from the matter *in casu* in view of the seriousness of the charge *in casu*, namely robbery as well as the facts that were at the police officers disposal.

[30] Mr Sethunya argued in the alternative that the police acted on an unreasonable suspicion. This test he submitted was an objective test. He referred to the test set out in *Lindile Mbotya v Minister of Police* (unreported) and *Minister of Police v Gadisi*(unreported). I have already addressed the question of reasonableness and on the facts *in casu* found it was objectively reasonable for the police officers to act as they did. The submissions with regard to there being no reasonable suspicion as they deferred further investigation to the investigating officer do not sustain the argument that there was no reasonable suspicion.

[31] In *Minister of Safety and Security v Sekhoto and another*,(above) Harms DP at para [42] states:

“While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible;

and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.”

[32] Once the plaintiff was brought to court it became evident it seems to the prosecutor that there were no grounds to detain him which resulted in his release. The state had no authority to detain the plaintiff and had no grounds on which to request a court to detain the plaintiff further.

[33] Mr Sethunya argued that the decision of Baqwa J, which the defence relied on in argument was distinguishable from the present matter, on the basis that the plaintiff was arrested for rape which he argued is a schedule 1 offence unlike the present matter which is a schedule 6 offence. Further he argued when the complainant gave her statement she said she did not know the assailant but could identify him if she saw him again, whilst in this matter the suspect was unknown to the complainant. In *Papa Kgapola v Minister of Police*(unreported), the investigating officer and complainant testified whilst in the present matter both the investigating officer and complainant did not testify despite the investigating officer being available. Mr Sethunya argued that the court should draw an adverse inference from the defendant’s failure to call the investigating officer. He relied on the unreported decision *Meshack Malinga v Minister of Police* (unreported). I have indicated earlier that robbery falls under schedule 1. Thus I regard armed robbery as affording the police the necessary jurisdiction to act.

[34] He argued further that the decision of *Papa Kgapola v Minister of Police*(unreported) was not correctly decided by Baqwa J. Mr Sethunya argued that the Court did not give due consideration to the origin and legal status of the point out note and accepted that the arrestor could consider the point out note separately before the arrest and then investigate. This resulted in an arrest being made on the point out note alone without the docket. This position he submitted was

in direct conflict with legislation and the test for justification. What was required was an investigation of the plaintiff, Papa Kgapola namely, a preliminary investigation to consider whether the arrest was necessary.

[35] The plaintiff, Mr Kgapola was released after the DNA result proved negative. He argued an investigation before the arrest would have spared Mr Kgapola the loss of freedom as a result of the incarceration and spared him the violation of his right to freedom, dignity and security. He argued the end result proved how the point out note can be abused and be elevated to the status of a warrant of arrest as occurred *in casu*. This does not take into account the further pointing out by Motaung and the confirmation that he had been robbed by the plaintiff. I am satisfied that the jurisdictional requirements were met *in casu*. The plaintiff has legal remedies against Motaung if there indeed was no incident between him and Motaung should he elect to utilise same.

[36] The facts which presented before Baqwa J are similar only in respect of the point out note. The use of the point out note by police officers assists in the fight against crime. Police officers are required to exercise their discretion as functionaries. This discretion must meet the criteria that it be rational and related to the purpose for they exercise such discretion objectively. The point out note contains information which directs their attention or enables them to formulate a decision. This does not mean that they do not exercise a discretion or that the 'point out note' replaced their decision making as suggested by Mr Sethunya. The charge of armed robbery on which the plaintiff was arrested is a serious charge.

[37] A negative inference cannot be drawn from the investigating officer or complainant not being called as suggested. This is especially so where the complainant has not been joined in the present action. The defendant bore the burden of proof to show that the arrest was lawful. It has done so satisfactorily. The onus thus shifts to the plaintiff.

[38] The plaintiff failed to prove that the defendant caused the charge to be laid and set the law into motion. There is no evidence that indicates Motaung was employed by the defendant at the time. The police officers appeared to be acting to support the security of the complainant who appeared to be a member of the public. There was evidence that the plaintiff's girlfriend had sought a protection order against Motaung. The evidence suggests that the plaintiff at some point approached Motaung and requested that he leave the plaintiff and Ms. Oliphant alone. Mr Sethunya consistently submitted that the issues were the same. This is not the basis on which the plaintiff can prove its case. It also ignores that the facts presented to the State were possibly that Ms Oliphant was the plaintiff and known to Motaung. She could not have been the unknown suspect referred to by Motaung. The serving of the protection order ought to have alerted the police to Motaung's possible nefarious motive in requesting Oliphant's arrest. The facts are clearly distinguishable. This possibly accounts for the different approach by the State rather than suggestions of professional bias.

[39] Having considered all the facts and the submissions made by counsel in the matter I am of the view that the police acted reasonably in the circumstances in terms of section 39 and section 40 of the Criminal Procedure Act 51 of 1977.

ORDER

[40] In view of the above the following order is made:

1. The plaintiffs claim is dismissed with costs.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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Appearances:

On behalf of the applicant	:	Adv. M.J. Sethunya
Instructed by	:	T.S. Thantsha Attorneys
On behalf of the respondent	:	Adv. H Kajee
Instructed by	:	The State Attorney
Date of hearing	:	24 – 26 May 2017
Date of judgment	:	24 August 2017