



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **Yes**

Date: 21/8/2020 Signature: _____

CASE NUMBER: 11530/2014

In the matter between:

MORENA SHADRACK LETSOENYO

PLAINTIFF

- and -

MINISTER OF POLICE

1ST DEFENDANT

MEMBERS OF SOUTH AFRICAN POLICE SERVICES

2ND DEFENDANT

JUDGMENT

BHOOLA A J :

Introduction

[1] The plaintiff has instituted a civil action against the defendants in which he claims damages arising out of his unlawful arrest and detention as well as assault by members of the first defendant.

[2] The claim is pleaded as follows in the plaintiff's particulars of claim.

"Claim A:

7. On or about 19 December 2011 and in or around 6788 Khutsong, extension 3, at Johannesburg, the plaintiff was wrongfully and unlawfully arrested by members of the first defendant, being police officers Mupitsi and the other officer whose full and further particulars are unknown to the plaintiff. As a result of the arrest and detention described above, the plaintiff suffered:

7.1 deprivations of liberty

7.2 discomfort and inconvenience, and

7.3 contumelia.

Claim B:

8. The plaintiff was forcefully taken out of the motor vehicle, whilst it was moving or in motion.

9. As a result of the said conduct of the members of the SAPS, plaintiff suffered:

9.1 sustainable severe injuries on the leg.

10. As a result of the assault described above, the plaintiff has suffered damages in the amount of R 300 000.00 for deprivation of liberty, discomfort and inconvenience, contumelia and soft tissue abrasions.

11. As a result of the assault described above, plaintiff suffered :

11.1 sustainable leg injuries;

11.2 as a result of the foregoing, plaintiff suffered damages in the sum of R 500.000.00, made up as follows and further/alternative relief;

11.3 pain and suffering;

11.4 loss of amenities."

[3] The defendants admit the arrest on 19 December 2011 by peace officers who were members of the South African Police Services ('SAPS'), but deny that it was unlawful. They plead that the plaintiff was reasonably suspected of having committed the offence of theft; that the arresting officers were peace officers as defined in the Criminal Procedure Act, 51 of 1977 ("the Act"); and that the peace officers were lawfully entitled to arrest the plaintiff without a warrant. They further deny that the plaintiff was pushed from a moving vehicle and plead that the plaintiff, in trying to escape from lawful custody, jumped from the moving vehicle and injured his leg. No facts pertaining to the second arrest (or re-arrest) on 22 December 2011 are pleaded by the plaintiff but this became common cause during the trial.

Common cause facts

[4] It is common between the parties that:

4.1 The members of the first defendant involved in the arrest were at all material times acting within their course and scope of employment with the first defendant.

4.2 The plaintiff was arrested at his residence at Khutsong extension 3, Johannesburg, on 19 December 2011 without a warrant of arrest.

4.3 The plaintiff was injured *en route* to the police station after his arrest. He was taken to Khutsong clinic for treatment and was thereafter transferred to the Carletonville Hospital where he was admitted for one night when his right foot was placed in a cast;

4.4 The plaintiff was again arrested on 22 December 2011 without a warrant of arrest and detained overnight at the Khutsong SAPS cells.

4.5 The arrest of the plaintiff was as a result of a case docket (case number: 233/12/2011), which was opened by the complainant at Khutsong SAPS on 19 December 2011 in which she alleged that plaintiff had stolen her cell phone.

4.6 The plaintiff's warning statement was obtained by Warrant Officer Van Eck ("Van Eck") at Khutsong police station on 22 December 2011.

4.7 The plaintiff appeared before the Khutsong Magistrate's Court on 23 December 2011 where he was released on warning by the court.

The issues

[5] The following are the issues to be determined by this court:

5.1 whether the arrest of the plaintiff on 19 December 2011 and his re-arrest and detention on 22 December 2011 were unlawful and wrongful;

5.2 whether the plaintiff was assaulted and pushed from a moving vehicle by the second defendants;

5.3 whether the plaintiff suffered damages as a result of being injured when he was pushed and/or suffered damages as a result of his unlawful arrest and/or detention, and if, so the quantum of damages for which the defendants are liable.

The plaintiff's evidence

[6] The plaintiff was the only witness to testify in support of his case. He testified that on 19 December 2011 at around 10:00 or 11:00 he was at his residence at 6788 extension 3 Khutsong with his wife and sister when two members of the SAPS, Sergeant Mapitsi ("Mapitsi") and Sergeant Phuduhudu ("Phuduhudu")¹ arrived at his place accompanied by another woman ("the complainant"). The door was open and Mapitsi started searching the shack, "*wanted to start assaulting him*", and asked if he knew the complainant. He denied knowing her and Mapitsi told him he was under arrest for theft of her cellphone. Mapitsi held the plaintiff by his pants and then pulled and pushed him into the police motor vehicle. He told Mapitsi that

¹ Both of them testified that they were Constables at the time and currently hold the rank of Sergeant. Sgt. Phuduhudu also testified that her surname changed from Motshidi after her marriage.

he refused to be arrested for something he did not do. In the police motor vehicle he was seated on the rear seat between Mapitsi and the rear right hand side door. His seat belt was not buckled and he was not handcuffed. There were three other occupants in the vehicle: Phuduhudu (who was the driver), Mapitsi and the complainant. He was told they were going to the police station but they drove around with him in the township. At one stage Mapitsi telephoned colleagues for back up and three police vehicles came to the scene. Mapitsi communicated with his colleagues and they then left. They dropped the complainant off leaving him alone with Mapitsi and Phuduhudu in the motor vehicle.

[7] Plaintiff testified further that Mapitsi started assaulting him saying to Phuduhudu that that he "*wants to show him...*". He instructed her to unlock the car doors and she complied. Mapitsi then reached over him to open the right hand side door and pushed him out while the vehicle was still in motion. He tried to use his hand to hold on but because of a previous injury he was unable to. He fell to the ground and "*noticed that the rear wheel of the vehicle was driving over him*". He injured his right ankle as a result. He fell onto the tarred road and while he was on the ground the vehicle made a U-turn and drove fast towards him in order to injure him. He managed to run away to avoid being hit. He noticed that his foot was swollen and bleeding. Mapitsi picked him up and put him in the back seat of the vehicle and he then went to sit in the front passenger seat, leaving the plaintiff alone at the back. Again he was not handcuffed nor was his seat belt fastened. They again drove around with him but he could not remember for how long. They later drove to the police station with him where an unknown male officer reprimanded them because he was injured and instructed them to take him to the medical clinic. Mapitsi responded by saying he does not care about him as he had tried to escape. Mapitsi then assisted him into the clinic, which is in the same premises. Mapitsi told the doctor he had been trying to escape. His foot was bandaged and he was transferred to the Carletonville hospital, where he was admitted for one night and his foot was placed in a cast. He was discharged the following day (20 December 2011) and he went home. He initially testified that on 21 December 2011 he went to the Carletonville Police station to open a case of assault against Mapitsi and to get a

J88 medical report form, but then on reflection changed this to 22 December, stating that he had been at home on 21 December.

[8] He testified that he was not assisted at the Carletonville Police station as the police officers there told him that they do not open cases against police officers. He asked to see the Station Commander and explained to him that he wanted to lay charges against the two police officers from Khutsong. The Station Commander left the room to make a call and he then saw Mapitsi and Phuduhudu arriving. Mapitsi addressed him with the following words : "*you black people are very fond of money, just tell me how much you want so I can give you money*". He told Mapitsi he did not want his money. He told the Station Commander that he refused to drive with them to Khutsong Police station as they "*will finish him off*". He was then taken to Khutsong Police Station in another police vehicle with four other police officers. He was then put in the cells. He asked why he was being placed in the cells because he was there to lay charges against the police, but they did not pay any attention to him. He was alone in the cell and although he was fed, he did not like the smell of the blankets. He was never informed of his rights. Van Eck came in to take his fingerprints and told him he was being charged for theft of a cellphone. Van Eck informed him that he could get free bail and he would recommend that he should be released on a warning. He was released on a warning when he appeared in court the next day (23 December 2011) and the matter was postponed to January. The Magistrate noted he was injured and could not remain in the cells.

[9] During cross-examination it was put to him by defendants' counsel that the police officers will testify that he told them he refused to be arrested and is not going back to prison for something he did not do as it will revoke his parole. He did not deny that he said this. He also did not deny that he stopped at the gate of the yard and refused to proceed into the motor vehicle. He admitted that although he did not know the complainant but he knew a woman who lived with her. He appeared to have difficulty explaining exactly where he was seated in the vehicle when it was put to him that he was sitting next to the door on the right hand side, and he became very agitated. He eventually conceded that he was sitting next to the door

and Mapitsi was sitting next to him and would have had to lean over him ("*pass through me*") to reach the door handle. He explained that Mapitsi was able to hold the door handle and push him out because he "*had two hands*", and used one hand to hold the door and the other to push him out.

[10] The plaintiff's statement made to the police when he laid a charge of common assault against Mapitsi was put to him. He was asked about his statement that Mapitsi was holding onto him by his t-shirt as he pushed him and his t-shirt got torn. In cross-examination he testified that he does not remember how his t-shirt got torn. He then said that it might have been torn when Mapitsi was assaulting him in the vehicle before he pushed him. His signed statement also recorded that he fell onto his back and made use of his elbows to balance. In cross-examination however, he said that he hit the back of his head when he fell. He could not explain why the doctor had not recorded the head injury in the medical reports save to state that the doctor informed him it was a minor injury. He could not explain why he had not informed the police when lodging his complaint that he had also sustained a head injury. This was the first time a head injury had been mentioned. He pretended not to understand when counsel put to him that his versions were contradictory.

[11] The Plaintiff confirmed in cross examination that when he fell he was unable to move, even when he noticed the police vehicle being driven towards him in order to hit him. He confirmed that Mapitsi picked him up from where he had fallen and put him back into the vehicle. He denied that he had been driven to the clinic and testified that he was taken to the police station, and that he had been driven to the barracks at the back of the police station, but admitted in cross-examination that the clinic and police station are in the same place. He was asked to clarify his evidence in chief that he had not been informed of his legal rights, and it was put to him that he was given a document regarding his constitutional rights on 22 December when he was detained by Van Eck which he refused to accept and sign. He denied this.

Defendants' evidence

[12] Mapitsi, who was the arresting officer, testified that he has 15 years of experience working at the SAPS. He was on duty at the Khutsong detective branch on 19 December 2011 when they were informed of an incident concerning theft of a cellphone. He went to the police station, obtained the docket and went with Phuduhudu to interview the complainant. The complainant told them that she knows where the suspect resides and they drove with her to the plaintiff's residence. Upon arrival they found the plaintiff's sister in the main house and she informed them that the plaintiff (known to the complainant as "Shenyana") was in the back yard. They heard a radio playing and when the plaintiff appeared he asked him to lower the volume. Mapitsi told him that the complainant had opened a case against him for theft of her cellphone and wanted her phone back. He denied that he took her cell phone. Mapitsi told him that he was under arrest for theft of the cellphone and requested him to accompany them. The plaintiff then walked with them to the gate of the yard, saying that he did not take the phone and he had just been visiting. He then held onto the gate and refused to walk to the police vehicle. He said he could not be arrested for something that he had not done and was on parole. Mapitsi and Phuduhudu tried to pull him away from the gate without success. They did not assault him but told him that because he is being contemptuous they have to call for back up. He called Van Eck but the plaintiff then calmed down and got inside the vehicle. They met the back up team as they drove and Mapitsi told them that the plaintiff was now co-operating.

[13] The plaintiff was seated with the complainant and her child in the back seat. They dropped the complainant along the way and he then moved to sit with the plaintiff at the back. The plaintiff was seated behind the driver on the right hand side and he sat on the left hand side. As they approached a speed bump Phuduhudu slowed down the vehicle, the plaintiff opened the door and tried to get out. He grabbed him and pulled him back, asking him if he is trying to escape. He grabbed him by his shirt but he broke loose and fell outside the vehicle. He then saw him running into a nearby ditch. They drove to the other side to block his way but could not see him. They parked the car and approached the ditch and Mapitsi saw him sitting and holding onto his foot saying it was injured. The plaintiff ran from the car

after he had fallen and the first time he complained of being injured was when they found him in the ditch. Mapitsi pulled him out and lifted him back into the vehicle. They drove to the clinic, which was on the same premises as the Khutsong police station. He denied that they first drove around the township with the injured plaintiff. He took the plaintiff into the clinic in a wheelchair. He denied that anyone else reprimanded them for not taking him to the clinic. A nurse enquired from the plaintiff what had happened and he said that he injured himself after jumping out of the car as he wanted to avoid arrest because he is under parole. He was treated there and then transferred to the Carletonville hospital by ambulance. The police officers informed their senior officer, Colonel Ferreira, of the plaintiff's injuries. Mapitsi confirmed that no police officers accompanied him in the ambulance to Carletonville nor was he under police guard at the Carletonville hospital.

[14] On 22 December 2011 Mapitsi received a call from Carletonville Police station informing him that "*his suspect*" was there. On arrival he found the plaintiff but the plaintiff refused to accompany him to the Khutsong Police Station. He testified that he told the plaintiff that there was still a case against him and he was "*going to be arrested*". The plaintiff drove with other members of the first defendant to Khutsong Police Station and when they arrived he detained the plaintiff and Van Eck read him his notice of rights and charged him. The plaintiff appeared in court the following day (23 December 2011) and was released on a warning when his case was postponed.

[15] Phuduhudu, who was on Mapitsi's crew on 19 December 2011, testified that she has 17 years of experience working at the SAPS. She confirmed that they went to the plaintiff's residence and that the complainant pointed the plaintiff out as the person who had stolen her cellphone. They informed the plaintiff that he was a suspect in a theft case. He denied having stolen the phone and Phuduhudu told him that he should explain that to the court. The plaintiff then reluctantly walked with them till the gate but then refused to proceed further. They tried to move him towards the vehicle but he became aggressive. She denied that Mapitsi assaulted him or that he had searched the plaintiff's shack. She confirmed that when Mapitsi

called for backup he calmed down and there was no need for them to use force as he voluntarily got into the police vehicle. Her evidence differed from Mapitsi in regard to the seating arrangements in that she testified that initially Mapitsi was sitting on the left at the back with the plaintiff in the middle and the complainant on the right holding her daughter. After the complainant got off the plaintiff was sitting on the right-hand side behind the driver and she could see him in her rear view mirror. When they dropped the complainant off she realized that the plaintiff was unsettled and told the complainant to be quick.

[16] As they were approaching a hump and she slowed down, she heard Mapitsi say "*hey what are you doing, are you trying to run away?*". No one had spoken in the car before that, and Mapitsi had not asked her to unlock the doors as the vehicle was an old Golf and not have a central locking system. She stopped the vehicle immediately and looked around but the plaintiff was already getting out of the vehicle with Mapitsi trying to hold onto him by his t-shirt. He pulled himself out and ran to a nearby ditch (which she initially testified was 2km away but in cross examination agreed with Mapitsi's estimate that it was about 5-7m from the road). She denied that Mapitsi assaulted the plaintiff in the vehicle or pushed him out of the moving vehicle, or that they drove towards him at high speed in order to injure him. There were bushes and a slope and they drove around to the other side of the slope when they saw people pointing towards the ditch. They walked to the ditch and found him lying there having injured his foot. Mapitsi helped him out of the ditch and back into the motor vehicle. In the vehicle he complained that he could not go to prison for something he did not do. They did not drive around with him but took him straight to the clinic at the multi-purpose centre, which also houses the police station. She confirmed that there was no other officer who instructed them to take him to the clinic from the police station. Mapitsi assisted the plaintiff to get inside the clinic from the car and the plaintiff was attended to. They told the nurse (Sister Fikile) attending to him that he had tried to escape and she recorded this in her statement. He was later transferred to Carletonville hospital by ambulance, and that was the last time she saw him. She denied that she accompanied Mapitsi on 22 December when he went to fetch the plaintiff from the Carletonville police station.

After the clinic they went to the police station and informed Colonel Ferreira of the incident as he was the officer on duty and would have recorded the incident.

[17] In cross-examination she was asked about the value of the cellphone and she said she did not know but did not dispute that the value was recorded in the complaint as R 800.00. She also confirmed that no warrant of arrest had been issued but that she and Mapitsi had exercised their discretion to effect an arrest, and that they had formed a reasonable suspicion based on the complainant's statement and her identification of him as the suspect. She explained that often when a complainant points out a suspect, he produces the stolen item but the plaintiff did not do so.

[18] In cross examination it was put to her, as was put to Mapitsi (and which he also admitted), that they failed to comply with the SAPS standing orders by, *inter alia*, failing to handcuff the plaintiff and making sure his seatbelt was fastened. She replied that they are allowed to use their own discretion when arresting a person, and since he was aggressive and resisting arrest they did not want to embarrass him or agitate him by handcuffing him. She thought it would be better if they heard his side of the story at the police station because they realised they were not going to "win him over" given that he was very aggressive. She confirmed that they did not read him rights prior to effecting the arrest, and that he was not detained at the police station that day because of his injury.

Was the arrest and detention unlawful?

[19] The onus rests on the first defendant to justify the arrest as lawful: *Minister of Law and Order & Others v Hurley & Others* 1986 (3) SA 568 (A). The defendants rely on section 40 (1) (b) of the Criminal Procedure Act No 51 of 1977 ("the Act") which provides that a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 (other than the offence of escaping from lawful custody). The defendants thus have

to prove the four jurisdictional facts set out in section 40 (1) (b) for a lawful arrest, and once these are shown to have been present the police officer exercises a discretion as to whether or not to arrest the offender: *Minister of Safety and Security v Sekhoto & Another* 2011 (5) SA 367 (SCA). The jurisdictional requirements are that:

1. The arresting officer was a peace officer;
2. The arresting officer entertained a suspicion;
3. The suspicion was that the suspect had committed a Schedule 1 offence: *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA).
4. The suspicion was based on reasonable grounds: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto & Another* 2011 (5) SA 367 (SCA).

[20] As to whether the discretion to arrest is exercised in good faith, rationally and not arbitrarily, the court held in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) [39] that: "*This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.*"

[21] The first issue to be considered is whether the arresting officers, Mapitsi and Phuduhudu, entertained a reasonable suspicion that the plaintiff had committed a Schedule 1 offence. Counsel for the plaintiff conceded that theft is listed in schedule 1 as an offence for which a peace officer may arrest a person without a warrant if such officer suspects that someone has committed such an offence. The defendant's witnesses testified that the plaintiff was arrested after having suspected

of having committed an offence of theft of a cellphone, and the plaintiff was identified by the complainant as the person who stole her cellphone. She made a statement to the police and took the two peace officers to the plaintiff's residence and pointed him out. Hence, the officers had reasonable grounds to suspect that the plaintiff had committed the offence and exercised their discretion to arrest him. This in my view renders the arrest lawful and justified despite the lack of a warrant of arrest.

[22] Plaintiff's counsel submitted that the plaintiff was arrested on 19 December 2011 and re-arrested on 22 December 2011 on the same facts and with no new evidence at hand. Furthermore, the arrest and detention of the plaintiff on 22 December 2011 was not intended at taking the plaintiff to court, was intended at harassing and threatening him, and further that it was intended at preventing him from opening a criminal case against Mapitsi for the assault on 19 December 2011. This version, however, was never put to the defendant's witnesses nor was malicious prosecution pleaded. It was clear from the evidence what the reason was for the arrest on 19 December and in my view that this remained valid on 22 December.

Was the plaintiff assaulted?

[23] The plaintiff testified that Mapitsi assaulted him. During cross-examination he testified that he was assaulted at his place of residence. This was contrary to the evidence of the defence witnesses as Phuduhudu was with Mapitsi and corroborated Mapitsi's testimony that he did not assault the plaintiff. The plaintiff further did not call the women who were in the house or in the shack as they could have witnessed any assault on him. Insofar as the plaintiff alleges that he sustained injuries as the result of assault when Mapitsi pushed him from a moving vehicle, during cross-examination the plaintiff failed to give a proper explanation as to how the police pushed him out of the moving vehicle, and became defensive and angry when the contradictions in his evidence were put to him, to such extent that the court had to intervene. He then proceeded to a lengthy explanation of issues that

were not relevant to the case, clearly in an effort to avoid further questions. It appears therefore on a balance of probabilities that Mapitsi did not assault the plaintiff, and that the ankle injury that he sustained was as the result of his own conduct when he was trying to escape from the vehicle. This is also consistent with his version that he was out on parole and did not want to face arrest.

[24] Plaintiff's counsel did not challenge the police witnesses on their evidence that he had been injured whilst escaping. Rather, he submitted that even if the plaintiff was not pushed as he asserted, the police officers had a legal duty to protect the plaintiff from any injuries and owed a duty of care towards him. Their failure to act accordingly encroached on his right to security and protection as contemplated by section 12(1)(c) of the Constitution and Standing Order G350 item 1 (b), 2(b) and 3. This submission is based on the evidence that Phuduhudu and Mapitsi did not handcuff the plaintiff, that they did not activate the door locks and child safety locks were not activated when they were transporting the plaintiff, and they did not ensure that his seat belt was fastened. Plaintiff's counsel submitted that this was a clear contravention of Standing Order 350 Item 3 (1)(a) which dictates that every person arrested for an offence must be placed in restraining measures until he or she is handed over to the community service center commander or until he or she is placed in a police cell. Insofar as this implies that the plaintiff tried to escape because he had not been restrained, it would seem to confirm the version of the police. In any event the breach of a duty of care was not pleaded and hence this submission must be disregarded.

Conclusion

[25] The reliability of the plaintiff's evidence as well as his credibility as a witness requires mention. He was not an impressive witness. His counsel stepped in to assist him by objecting during his cross-examination that the events occurred nine years ago and he could not recall the exact details any longer, but this does not detract from my observation that he contradicted himself on many occasions, was

evasive and was a difficult and aggressive witness. His version falls to be rejected on a balance of probabilities.

[26] In evaluating the evidence I find no factual or legal basis for the submission that the arrest was an abuse of authority, was irrational, constituted harassment and was not based on a reasonable suspicion or that there was an omission to comply with the duty of care (which in any event was not pleaded). I agree with the submission by defendants' counsel that in these circumstances the jurisdictional requirements had been met and the arresting officers, acting on a reasonable suspicion, properly exercised their discretion to effect the arrest of the plaintiff. Hence, the arrest and detention overnight must be found to have been lawful and the claim dismissed.

Order:

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

The plaintiff's claim is dismissed with costs.



U. BHOOLA
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing: Heard by videoconference on 27, 28 and 30 July 2020.

Date of judgment: Electronically handed down and sent to parties by email on 21 August 2020.

Appearances:

Plaintiff's counsel : Adv. B.M Khumalo
Instructed by: Mamathuntsha Inc, Johannesburg

Defendants' counsel: Adv. T. Mabuza
Instructed by: The State Attorney, Johannesburg