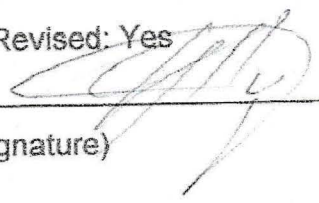




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42822/2018

- 1. Reportable: No
- 2. Of interest to other judges: No
- 3. Revised: Yes


(Signature)

Date: 13 May 2021

In the matter between:

BHENGU: ZABALUNGE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

ALLY AJ

INTRODUCTION AND BACKGROUND FACTS

[1] This is a delictual claim for damages arising from the arrest of the Plaintiff on 23 April 2018 by members of the Defendant.

[2] The incident which gave rise to the Defendant being arrested occurred on 27 January 2018 at House No 102 Nomzamo Park at Orlando East. In the incident a person by the name of Businessman Bonga was stabbed on the head with an Okapi knife and succumbed some time later on 19 April 2018.

[3] Plaintiff alleged that his arrest without a warrant and subsequent detention was unlawful and the Defendant pleaded that the Plaintiff was lawfully arrested in terms of Section 40(1) (b) of the Criminal Procedure Act 57 of 1977, as amended. As a result, Counsel for the Defendant accepted that they had the duty to begin and had admitted thereto in the Rule 37 Conference. Defendant further pleaded, in its amended plea, that the Plaintiff was lawfully detained in terms of Section 50 of the Criminal Procedure Act 57 of 1977, as amended.

[4] Sergeant Samuel Seloane who was a Corporal at the time of the incident was called to testify on behalf of the Defendant.

[5] Sergeant Seloane testified that he had been on duty when he was called to the front of the charge office where he met a lady, Nolufefe, who indicated to him that her brother had died after being stabbed on 27 January 2018.

[6] Sergeant Seloane enquired whether a case had been opened when the incident occurred and Nolufefe answered in the negative. Nolufefe indicated further that she wanted a case number to provide same to the administration at Chris Hani Baragwanath Hospital for the release of the body for burial.

[7] Sergeant Seloane testified that on hearing about the stabbing of the deceased in January 2018, he opened a case of murder. Nolufefe had indicated that there were eye witnesses where the stabbing incident had taken place. This place was at 102 Nomazamo Park.

[8] Sergeant Seloane testified that he, and his partner, Warrant Officer Mokgawa then proceeded to 102 Nomzamo Park with Nolufefe.

[9] At 102 Nomzamo Park, Nolufefe pointed out the owner of the place, colloquially known as the tavern. Sergeant Seloane described the owner of the tavern as a 58 year old lady and could not remember her name but had the name of the daughter which he stated was contained in his statement. This daughter's name is Thuliswa Mbovane.

[10] Sergeant Seloane testified that the owner of the Tavern who was later identified as Nomxolisi Mbovane, told him that she was present when the incident of the stabbing of the deceased took place. Of relevance to these proceedings, Nomxolisi Mbovane indicated that two gentlemen had an argument outside the tavern. She was unable to indicate what the argument was about. Plaintiff was the third gentleman. During the argument an Okapi fell to the ground. Nomxolisi Mbovane told Segeant Seloane that she tried to retrieve the knife but was unable to because the Plaintiff had picked it up and handed it to Cebisile who then used it to stab the deceased.

[11] Thulusile Mbovane, referred to at times as Thuliswa, when questioned at the tavern, repeated what her mother Nomxolisi Mbovane had stated. Thulusile also indicated that she knew the two suspects and knows where the Plaintiff stays but not Cebisile. Sergeant Seolane then requested Thulusile to take him to Plaintiff's residence but before leaving asked Nomxolisi Mbovane whether she could make a statement detailing what she had witnessed during the incident of the stabbing in January 2018. She indicated that she would do so the following day which was 24 April 2018. It is common cause that such a statement was deposed to by Nomxolisi Mbovane on 24 April 2018.

[12] Defendant called Constable Mpho Sono to testify. It appeared that the only reason for calling Constable Sono to testify was to indicate that she was responsible for taking down the statement of Nomxolisi Mbovane. Constable

Sono was not at the scene of the stabbing nor did she accompany Sergeant Seloane during the arrest of the Plaintiff.

[13] Defendant's case was closed after the testimony of Constable Mpho Sono.

[14] Plaintiff was called to testify as well as a certain Kholekile Magqagqana.

[15] The Plaintiff is approximately 36 years old and indicated that he is married with three children, twins who are 16 years old and the youngest who is nine years old. He lives with his wife and children at Orlando, Nomzamo Park. He works at Cosmo City operating a TLB, a motorised machine, used to load goods on trucks. He completed Grade 7.

[16] The Plaintiff testified that he was not involved in the stabbing of the deceased and was in fact in the tavern at the time of the stabbing. Mr Magqagqana corroborated this part of Plaintiff's evidence, namely, that he and the Plaintiff were in the tavern at the time of the stabbing of the deceased.

[17] Plaintiff's version of events, from the time he made contact with the South African Police Services [SAPS], differs markedly from that of the evidence of Sergeant Seloane.

[18] The Plaintiff testified that the SAPS came to his residence around 20H10 and the reason for saying this was that the children were watching the television programme, Generations. At this time he was drawing water for a bath as he had just come from work. His house is a shack and is separated inside by a curtain which separates the room from the kitchen.

[19] The Plaintiff testified that the police forced the door open. At this time he was in the room readying himself for a bath. The police who entered the shack were dressed in uniform and were accompanied by a lady. The children screamed and as he emerged from the room, he was pointed by this lady. He identified the lady as being Thuliswa Mbovane.

[20] He testified that when, entering, the people did not introduce themselves as police but they did indicate that he was being arrested for murder because he had killed someone. The name of the deceased was not mentioned.

[21] On exiting the shack, the Plaintiff noticed that there were two police vans and a polo motor vehicle. He was taken to the polo motor vehicle. He testified that he was not told why he was being taken to the polo motor vehicle but in the motor vehicle, he was told he was to take the police to Cebisile's house. On the way to Cebisile's house, he was assaulted in the polo motor vehicle. He stated that he was assaulted all the way to Cebisile's house and it was the police officer

in front of him that assaulted him. The issue of his assault is dealt with later in this judgment.

[22] He testified that they were not able to find Cebisile on that evening and he was taken to the police station where they arrived at around about 21H20.

[23] At the police station they produced his identity document and they took a statement. He was not given time to call his sister although he requested same. He stated that the details of the murder incident were never told him.

[24] The Plaintiff testified as to the inhumane conditions he experienced and was subjected to after having been placed in the cells.

[25] Plaintiff testified that he was not involved in the stabbing of the deceased nor did he provide the Okapi knife to Cebisile to stab the deceased. He also testified that at the time of the incident he was in the tavern and that Thuliswa, who pointed him out, was with him in the tavern during the stabbing of the deceased. He stated that Thuliswa heard from her mother about the incident and did not observe the incident herself.

[26] The Plaintiff then called Mr Kholekile Magqagqana to testify. Mr Magqagqana testified, in a nutshell, that he was with the Plaintiff during the

incident at 102 Nomzamo Park and that when the stabbing took place the Plaintiff as well as Thuliswa were in the tavern.

EVALUATION AND ANALYSIS OF THE EVIDENCE

[27] As stated above the evidence of Sergeant Seloane differed markedly from the Plaintiff regarding the circumstances of his arrest and can be regarded as diametrically opposite. In these circumstances the Court must then depend on the credibility of the witnesses to determine which evidence must be relied upon¹.

[28] I was impressed with the demeanour of Sergeant Seloane during his testimony. His testimony was clear as to the circumstances of the arrest and his engagement with the Plaintiff. The Plaintiff, on the other hand did not impress me. He only conceded to facts after been shown that his testimony could not be true when shown a document that he had signed. The testimony of importance in evaluating the Plaintiff's credibility, in my view, is the issue of his assault by police officers. This issue was never canvassed in the letter to Defendant nor in his initial pleading and subsequent amendment.

[28] Against the backdrop of the abovementioned testimony the test for justification of an arrest in circumstances under Section 40 (1) (b) has been clearly stated by our Courts²:

¹ Stellenbosch Famer's Winery & Ano v Martell Cie SA & Others 2002 SCA @ para 5

² Minister of Safety & Security v Sekhoto 2011 (5) SA 367 (SCA) at 373 para 6

“As was held in Duncan v Minister of Law and Order (1986 (2) SA 805 (a) at 818G-H), the jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain 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.”

[29] In the circumstances of this case the Defendant, in my view has proven the first jurisdictional fact, namely that the arrestor was a peace officer. It is the rest of the jurisdictional facts which need careful attention and evaluation.

[30] Sergeant Seloane on behalf of the Defendant testified that he was told by the owner of the tavern at Nomzamo street and the daughter of the owner, namely, Thuliswa Mbovane, that the Plaintiff was present at the scene of the stabbing and that the Plaintiff was the person that picked up the fallen Okapi knife and handed it to Cebisile who used it to stab the deceased. Sergeant Seloane further testified that Thuliswa informed him that she could identify the Plaintiff and was taken to the Plaintiff's shack where she pointed out the Plaintiff.

[31] It was after the pointing out of the Plaintiff by Thuliswa that the Plaintiff was arrested.

[32] The question to be posed is whether the information provided by Thuliswa and the owner of the tavern to Sergeant Seloane can be regarded as admissible

evidence where they have not testified. In my view, whilst the testimony of Sergeant Seloane regarding his engagement with the owner and Thuliswa at the tavern can be regarded as hearsay, and therefore inadmissible, the pointing out of the Plaintiff by Thuliswa at Plaintiff's residence cannot be said to be hearsay evidence as it happened in his presence and is corroborated by the Plaintiff in his testimony.

[33] The critical time as set out in the Sekhoko case is at the time of arrest and whether at such time, the arrestor had a reasonable suspicion that a crime set out in schedule 1 had been committed. Based on the analysis above regarding the pointing out of the Plaintiff at his residence, I am of the view that the Plaintiff was arrested in circumstances where it can be said that a reasonable suspicion arose that he had committed a Schedule 1 Offence, namely, murder.

[34] In the result and on a conspectus of the evidence placed before this Court, the Defendant has discharged the *onus* of justifying the arrest of the Plaintiff without a warrant in terms of Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended.

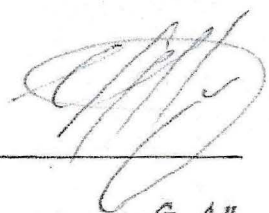
[35] Having come to the above conclusion, it follows in my view that the detention of the Plaintiff in the circumstances of this case was also lawful.

Costs

[36] Plaintiff's Counsel argued that the employment of two Counsel in this matter was warranted, *inter alia*, because constitutional issues were raised. In my view, the mere raising of a constitutional issue does not necessarily justify the employment of two Counsel as it would also depend on the complexity of the matter. To mind, this matter does not fall within the realm of complex matters.

[37] It is trite, furthermore that the Court has a discretion in matters of costs and such discretion must be exercised judiciously. In the result and exercising my discretion, I am of the view that costs should follow the result and that such costs should only include the employment of one Counsel.

[38] Accordingly the Plaintiff's claims for damages for Claim A, unlawful arrest and Claim B unlawful detention is dismissed with costs, such costs to include the employment of one Counsel.


A handwritten signature in dark ink, appearing to be 'G. Ally', is written over a horizontal line. The signature is stylized and cursive.

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 May 2021.

Date of Hearing: 5 August 2020

Date of Judgment: 13 May 2021

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