

9/12/2010  
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORHT GAUTENG HIGH COURT, PRETORIA)

|                                    |                                                                                                |
|------------------------------------|------------------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE |                                                                                                |
| (1) REPORTABLE                     | <del>YES</del> /NO                                                                             |
| (2) OF INTEREST TO OTHER JUDGES    | YES/ <del>NO</del>                                                                             |
| (3) REVISED                        | ✓                                                                                              |
| DATE: 9/12/2010                    | <br>SIGNATURE |

CASE NR: 40572/2005

DATE:

In the matter between:

ZACHARIA MAKGOTHOKGO

PLAINTIFF

vs

THE MINISTER OF SAFETY & SECURITY

DEFENDANT

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**JUDGMENT**

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**Ranchod J,**

[1] The Plaintiff claims damages from the Defendant for wrongful arrest and detention. It is common cause that Plaintiff was arrested on 17 April, 2003 and was released on bail on 29 May, 2003. The arrest took place at Middelwater, Sebhukubye, Sekgosese, Limpopo. Plaintiff was charged in connection with the killing of the late William Boy Seshoka who had been gunned down by one of three unknown men who had accosted him after he had closed his shop the night of 7 February, 2003. The deceased's wife was with him at the time. She had given a description of the person who shot her husband. Plaintiff was thereafter arrested. Charges against him in relation to the killing of the deceased were withdrawn on 12 September, 2005. It is to be

noted that the plaintiff's continued detention until his release on bail was as a result of him initially being refused bail.

[2] The issue to be decided is whether the arrest and detention of the plaintiff was unlawful.

[3] It is common cause or not in dispute that the police officers effecting the arrest of the plaintiff were acting in the course and scope of their employment with the defendant.

[4] The defendant called Captain Andrew Makgopa to testify. He said that on arrival at the scene of the incident, he found the deceased's wife who gave a description of the perpetrators. She told him that the person who shot at the deceased was short with a big stomach or belly. He was wearing jeans and a white t-shirt. He was dark in complexion and was almost her height. The other two were taller and slender than the one who shot at the deceased. All the three men were probably above 50 years of age. Thereafter he received about eight calls from informers who did not want to disclose their identity. However, three of them mentioned the name of the Plaintiff as the one who shot at the deceased. Eventually, one person by the name of Peter Mohale came forward and made a statement to the effect that he was in the vicinity of the "Korporasie" where deceased's shop was when the incident took place. Peter Mohale told Makgopa that the Plaintiff and the two other men passed him while he was standing with his girlfriend and that shortly thereafter they heard a gunshot and saw the three men running away from the side of

“Korporasie”. Peter Mohale knew the Plaintiff very well. He not only described plaintiff as did the deceased’s widow but he also gave plaintiff’s name as Zacharia Makgothokgo. Peter Mhohale’s statement is in dispute. I will refer to that aspect presently.

[5] Inspector Makgopa testified that on the strength of the information and the description given by the deceased’s wife and Peter Mohale, he arrested the Plaintiff to conduct further investigations. When the Plaintiff was arrested he is alleged to have implicated a certain school principal at the local school who was subsequently released because he was not positively identified at an identification parade that was held where the plaintiff was identified by the deceased’s widow.

[6] The next witness for the defence was the deceased’s widow Ms Makwela Elisa Ratshivhunga. She testified that the deceased had just locked their shop and they were proceeding toward their house which is situated in the same yard as the “koporasie”. There was enough light and visibility so good that one could see a five cent coin on the ground. She said three men emerged from the side of their house and were approaching them. She was able to identify the Plaintiff at the identification parade because she had seen him clearly on the day of the incident. She also identified him in court. She denied having seen or known the Plaintiff before this incident, which was disputed by Plaintiff when he testified.

[7] Both these witnesses made a good impression on the court, as being truthful insofar as the events of the night of the deceased's death is concerned. Mrs Ratshivhunga confirmed Captain Makgopa's evidence as to the description she gave of the person who shot her husband.

[8] Plaintiff himself testified in his own case. Plaintiff testified that he was a well-know businessman who ran several businesses. He was the chairperson of the local school's "school-governing-body" at the time. He gave an alibi to the effect that he was at home on the night of the incident busy preparing for his wife's stockvel the following day. He was arrested under the guise that one of his clients (plaintiff also practiced as an herbalist) who was in detention wanted to see him for the purpose of getting treatment. After his arrest, he was kicked and assaulted by the other detainees but he did not open a case against them.

[9] Mr Hendrik Lodewyk du Toit testified on behalf of the plaintiff. He was requested by the Plaintiff's attorney to examine the handwriting on two statements, exhibits "A" and "B", in order to establish whether they were written by one and the same person or not. He was to compare the disputed signature of Peter Mohale on exhibit "A" with the handwriting on exhibit "A" and "B" in order to establish whether they were all written by one and the same person or not. He said after the examination, comparison and evaluation of all the facts, he concluded that the disputed signature of Peter Mohale on exhibit "A" and the handwriting on exhibit "A" and "B", were in fact

created (beyond doubt) by one and the same author. The relevant signature is therefore classified as a forgery.

[10] Lodewyk testified that he does not regard himself as an expert but as a specialist. However in the expert notice he is referred to as an expert. During cross-examination and in answer to questions by the court, it transpired that he was selective in his examination of the exhibits. Of importance was that, his examination, comparison and the evaluation focused only those alphabets or letters on exhibit "A" and "B" which had strong unique handwriting characteristics with the signature of Peter Mohale on exhibit "A". Moreover, he conceded that there were other letters or alphabets on exhibit "A" and "B" which did not have strong unique handwriting characteristics with the signature of Peter Mohale. He also said that the word "beyond doubt" that he used in his report should not be understood in the context of the words "beyond doubt" used in a court of law, in other words that his use of the words had lesser force. He further stated that the examination and comparison procedures were restricted by the fact that only copies of the documents in disputes were available but insisted that he could still use the copies.

[11] That was the conclusion of the evidence in the case. I turn then to evaluate the evidence primarily regarding the arrest and detention of plaintiff. I should mention that evidence on the merits and on quantum of plaintiff's claim were led by plaintiff's legal representative in a somewhat mixed fashion. What I also should mention for present purposes is that plaintiff made a pathetic figure in the witness stand. He repeatedly contradicted himself under cross-examination regarding his earnings from his several businesses and

educational qualification and the marks he earned in high school. However, these aspects related to the quantum of his damages and in view of the conclusion I have arrived at on the merits of the claim I need not given them any further consideration.

[12] The important issue here is the reasonableness of the suspicion formed by Captain Makgoba which led him to arrest the Plaintiff. In this regard he testified that his and the plaintiff's families were related to each other. It was not suggested in any way that he had a motive to falsely implicate and therefore arrest the plaintiff.

[13] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act) authorises a peace officer to arrest, without warrant, any person whom he reasonably suspects of having committed on offence referred to in Schedule 1 of the Act. Schedule 1 includes the offences of murder and culpable homicide. Furthermore, what is required is a reasonable suspicion.

[14] It is trite that the Defendant bears the onus of proving, on a balance of probabilities, that the arrest and detention was lawful. The issue of the reasonableness of the suspicion is to be determined objectively. The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form a suspicion that the suspect has committed an offence referred to in Schedule 1. (*see R v Van Heerden 1958(3) SA 150(T) at 152*). In *Duncan v Minister of Law and Order 1984(3) SA 460(T) at 465 H-I* it was held that a reasonable suspicion connotes an

absence of certainty and adequate proof. Van Dijkhorst J referred to the English case of *Shaaban Bin Hussein and Others v Chong Fook Kam and Another* [1969] 3 All ER at 1630 where it was held:

*"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end".*

Van Dykhorst J then went on to say:

*"The grounds for suspicion are not limited to facts which can be proved in court. Surely the statement of a wife that her husband is a widely sought notorious bank robber and that his loot is hidden in the attic would give rise to a reasonable suspicion despite the fact that the wife cannot be called as a witness for the prosecution against him. ... A reasonable suspicion may be confirmed by an identification parade at which the arrested suspect is positively identified and a prima facie case may thus be born, or the hopes of the police may be dashed by a negative result and the suspect released (emphasis added)."*

[15] In this case before me that is almost exactly what happened. Even if I were to disregard Makgoba's evidence about the information provided by the informers as being hearsay and that of Peter Mohale's signature as being a forgery (as argued by Plaintiff's legal representative – and I make no finding on that) it seems to me that the information and description of the perpetrator provided by the deceased's widow was sufficient for him to form a reasonable suspicion. Makgoba's decision on those grounds alone were in my view

reasonable and justified. It is important to note that after he was arrested, plaintiff was also identified at an identification parade by the widow.

[16] I am therefore of the view that the arrest and detention of the plaintiff was lawful in the circumstances.

[17] I make the following order:

***"Plaintiff's claim is dismissed with costs."***

  
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N RANCHOD  
JUDGE OF THE NORTH GAUTENG HIGH COURT

**Representation for the applicant:**

Counsel: E Smit

Instructed by Attorneys: Messrs Smit & Maree Attorneys, Pretoria

**Representation for the respondent:**

Counsel: M.I. Thabede

Instructed by Attorneys: The State Attorney, Pretoria