

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 26/05/2023
SIGNATURE

CASE NO: 18144/21

In the matter of:

Thabo Gerald Komane

Plaintiff

And

Minister of Police

Defendant

JUDGMENT

MLOTSHWA AJ:

INTRODUCTION

1. This is a claim for unlawful arrest. The plaintiff alleges in his combined summons that on or about the 26th of April 2020, and at Mametlhake Police Station, in Mpumalanga Province, he was arrested without a warrant by members of the South African Police Service whose names and ranks are unknown to him.
2. The Plaintiff testified that he was detained until he was released on bail of R500.00 on 28 April 2020.
3. It is common cause or not disputed in this matter that:
 - 3.1 The Plaintiff was arrested on 26 April 2020 while he was at Mamethlake Police Station, in the Mpumalanga Province by Sergeant Masuga, a member of the South African Police Services stationed at Mamethlake Police Station in the Mpumalanga Province,
 - 3.2 When Sergeant Masuga effected the said arrest, he did so without a warrant,
 - 3.3 At all material times Sergeant Masuga was employed as a member of the South African Police Services and acted within the course and scope of his employment with the Minister of Police, the Defendant,
 - 3.4 Sergeant Masuga is a peace officer as defined in the Criminal Procedure Act, Act 51 of 1977 (the Act),
 - 3.5 The Plaintiff was charged with assault and malicious injury to property which is a Schedule 1 offence in terms of the Act,
 - 3.6 Pursuant to the arrest on 26 April 2020 the Plaintiff was detained in the police cells at Siyabuswa Police Station until his release on bail on 28 April 2020,
 - 3.7 The Defendant bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of the Act.

THE PLAINTIFF'S CASE

4. The summary of the facts that led to the Plaintiff's arrest are briefly as follows,
- (i) The Plaintiff had earlier attended to a scene of a motor vehicle accident in which two of his colleagues who are with him in the taxi industry were injured. He was driving a Toyota Quantum vehicle.
 - (ii) From the accident, he took his two colleagues to a clinic and to Mamethlake hospital. After the colleagues were medically attended to, he intended to drive the colleagues to their place of residence. But before he left the hospital, a lady who was with her daughter and the daughter's infant approached him and requested for a lift to a place called Marapyane. He agreed and gave the three people a lift.
 - (iii) As he was driving through a place called Nokaneng he saw people who belonged to another taxi association who had parked their taxi patrol Toyota Corrola motor vehicle at a junction called Gamatlare. He drove pass this patrol car.
 - (iv) As he was just a distance from the patrol car, he saw this same motor vehicle driving at a high speed behind him. They overtook his vehicle and signalled him to stop his vehicle. He stopped as requested.
 - (v) The patrol car parked in front of his motor vehicle. The occupants of the patrol car alighted from their car and walked towards his car. One of these people by the name of Banda had a pair of pliers in his hand. Banda went to the front right hand tyre of the Plaintiff's vehicle and pulled out the valve from the tyre.
 - (vi) At that stage, the Plaintiff also alighted from his motor vehicle to enquire from Banda what he was doing. As he was enquiring what Banda was doing, the rest of the people who were with Banda

attacked him and assaulted him with clenched fists. He retreated. The people started to pelt his vehicle with stones.

- (vii) One Tsepang, who was with Banda removed a jerk, amplifier and radio speakers from his vehicle and also smashed the windows of his motor vehicle.
- (viii) According to the Plaintiff he also picked up a stone and told these people that he was going to hit them with the stone if they came near him.
- (ix) According to the Plaintiff, he then got lift from a taxi which was driving pass the scene where he was struggling with his attackers. This car took him to Mamethlake Police Station.
- (x) At the police station he laid a charge of assault and malicious injury to property against his assailants and as the assailants were also in the charge office, he pointed them out to the police.
- (xi) The Plaintiff states that as he laid the charge against the assailant the police told him that the same assailants had also opened similar charges against him.
- (xii) At that stage the police said he and his assailants must go to the board room at the police Station to discuss and try to resolve the matter between themselves. The police officer who told them to go the board room is one Semenya and told them if they can not resolve the matter between themselves then they must all be arrested.
- (xiii) The Plaintiff testified that he refused to discuss the matter with his adversaries because according to him he did nothing wrong.
- (xiv) According to the Plaintiff, Semenya at that stage then called a police officer and instructed the police officer to open the case against him.

- (xv) A police officer by the surname of Masuga then attended to him and charged him.
 - (xvi) He and his assailants were then arrested. He was arrested for assault against the assailants, being Maringa and Banda and damaging their vehicle.
 - (xvii) Maringa and Banda were at the same time arrested for assaulting the Plaintiff and damaging his motor vehicle.
 - (xviii) They were all taken to Siyabuswa Police Station cells where they were detained until released on bail of R500.00 each on the 28 April 2020.
 - (xix) In other words, they all spent a day and two nights in the police cells.
 - (xx) After he was released on bail the criminal case against him was postponed several times. Eventually the criminal charges against him were withdrawn.
 - (xxi) He himself does not know why the criminal charges against him were withdrawn. He was represented by an attorney who was organised by his brother in the court.
5. The Plaintiff was cross examined by Advocate Musetha who appeared on behalf of the Minister of Police. He admitted that he did not have the permission to transport injured passengers as he was not operating an ambulance.
6. He testified that he did not know why Banda and the others stopped him as he has a taxi permit. His taxi association was involved with the taxi association to which Banda and the others belonged. There was an ongoing court case between the two taxi associations. According to him Banda's taxi association was eventually interdicted from interfering with his taxi association.

7. He admitted that he knew that the charges laid against him by the others were assault and malicious injury to property. But he denied that he assaulted any person or maliciously injured anyone's property.
8. He admitted that a case against him was opened by Banda and the others. He insisted that the police had no cause or reason to arrest and charge him as he had done nothing.
9. He agreed that if a case was opened against him, it's only the courts which can pronounce if he is guilty or not. He insisted further that the police did not have a reason to suspect that he committed a crime.

THE DEFENDANT'S CASE

10. Sergeant Hendrick Masuga testified that he is a member of the South African Police Service. He is stationed at Mamethlake Police Station which is in the Mpumalanga Province.
11. Masoga testified that he does ordinary police duties and usually do patrols to prevent crime. He does sometimes arrest people when he does his patrol duties when he sees them committing crime.
12. He testified that he knows a difference between arresting a person with a warrant of arrest and without a warrant of arrest.
13. On 26 April 2020, he reported for duties in the afternoon as he was on night duties on that date.
14. At the police charge office, he found members of two different taxi associations. He unfortunately cannot remember how many of them were there. One taxi association wanted to open a case that their motor vehicle was damaged at Ikaneng. The vehicle was a mini bus taxi.
15. Masuga testified that when he was busy opening the case as per the complaint, he was told that there is already a case opened against the complainant, in other words, that there was an earlier complaint against

the Plaintiff. The complaint was one of assault and malicious injury to property.

16. The person that he was attending to is the Plaintiff in this matter, Mr Komane. The case against the Plaintiff was opened by one Khazamula Maringa.
17. Masuga testified that he is not the one who attended to Maringa when Maringa laid a charge and deposed to a statement against the Plaintiff. He does not exactly know what Maringa's statement is but was informed by his colleague that Maringa laid a charge of assault and malicious injury to property against the Plaintiff.
18. Under cross-examination by Advocate Kekana who appeared on behalf of the Plaintiff Masuga admitted that he did not see the Plaintiff committing a crime and he arrested the Plaintiff on the say so of his colleague. He asserted that he arrested the Plaintiff because a case was opened against him though he did not read Maringa's statement.
19. Masuga admitted that he did not do any investigations before arresting the Plaintiff. He asserted that Semenya told him that the people were told to try and resolve the matter between themselves in the boardroom and that warrant officer Semenya told him that their commander, one Selwane told them to arrest all of them if they were not able to resolve the matter between themselves.
20. To a question by the court, Masuga testified that he did not see the statement of Maringa, the A1 statement nor did he see the docket. He further stated that he does not remember who told him that there was a docket opened against the Plaintiff.
21. The Plaintiff did not call any other person to testify as a witness and the Respondent called only Sergeant Masuga to testify on its behalf.
22. It is trite law that the standard of proof in civil matters is one on a balance of probabilities.

23. It is not disputed that the Plaintiff was arrested and kept at the police cells from 26 April 2020 until he was released on bail on 28 April 2020.
24. It is further not disputed that the Plaintiff laid charges of assault and malicious damage to his property being the Toyota Quantum at Mamethlake Police Station. It is also not disputed that Maringa and Banda laid the same charges against the Plaintiff at the same Police Station.
25. It is also not disputed that Maringa and Banda were also arrested, charged and detained in the police cells until the 28 April 2020 when they were also released on bail.
26. In other words, the parties laid counter charges against each other. The police gave the parties a chance to discuss the matter between themselves to try and resolve same. The parties could not resolve the matter between themselves. The parties were all at the police station. Under these circumstances the question is whether the police had to make a determination of who to arrest and who not to arrest or the police had to let the parties leave the police station, investigate the matter and then decide who to apply for a warrant of arrest against in order to arrest him/them.
27. In terms of section 40 (1) (b) of the Criminal Procedure Act, Act 51 of 1977 the police are allowed to arrest a person without a warrant if they have a reasonable suspicion that the person is suspected of having committed an offence under schedule 1.
28. The question is whether Sergeant Masuga had the reasonable suspicion of whether the Plaintiff had committed a schedule 1 offence. Or whether he could rely on the say so of his colleague that the Plaintiff is suspected of having committed a schedule 1 offence. Or put differently if he was wrong to comply with the instructions given to him by Semenya to arrest the Plaintiff? Or put differently, would Semenya have been wrong to arrest the Plaintiff based on the complaint against the Plaintiff laid by Banda and Maringa.

29. The question is whether the arrest and detention of the Plaintiff was wrongful.

30. As was held in **Duncan v Minister of Law and Order 1986(2)SA 805 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 a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

31. It is trite that the onus rests on the defendant to justify the arrest. As Rabie explained in **Minister of Law and Order v Hurley; 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 enquire 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."

32. The methods of securing the attendance of an accused in court for the purposes of trial are arrest, summons, written notice and indictment.

33. It is not disputed that the Plaintiff was arrested for assault and malicious injury to property which is a Schedule 1 offence. Schedule 1 offences are serious offences and a peace officer can hardly be criticized for arresting a suspect for the purpose of bringing the suspect to justice for such a serious offence.

34. If the jurisdictional requirements of section 40(1)(b) are satisfied, the peace officer may invoke the power conferred by the subsection to arrest the suspect. The decision to arrest must be based on the intention to bring the arrested person to justice. An arrest for any other motive would be unlawful. The other factor to be determined is whether the arrest of the Plaintiff was bona fide or involved some ulterior motive.

35. In **Minister of Law and Order v Dempsey 1988 (3) SA 19 (A) at 37B-39F**, it was stated that;

“Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it.

36. The plaintiff's counsel referred the court to the matter of **Nkambule v Minister of Law-and-Order 1993 (1) SACR 431 (T)** to show that Masuga was wrong in arresting the Plaintiff as he had not read the statement of Maringa before arresting the Plaintiff. The facts of the Nkabule matter are distinguishable from the facts of this matter. In that in the Nkambule matter the police officer arrested the plaintiff without reading the complainant's statement. The complainant's statement was full of faults as to the day and date of the theft of the complainant's cattle. The statement also differed materially with what the complainant told the police officer orally. Further according to the statement, it would not have been possible for the Plaintiff to have stolen the cattle as the date on which the Plaintiff sold the cattle at the auction was before the complainant's cattle were stolen/lost.
37. The facts of the Nkambule matter are therefore totally different and distinguishable to the facts of the present matter. In this matter, there is no allegation of any impropriety on the part of the officer who took the complainants' statements. The complaints' statements formed the basis of the complaint in the docket that was presented to court. There are no allegations that the complainants' statements were incorrectly taken or contained any misinformation. There is no allegation that if Masuga read the statement he would have changed his mind about arresting the Plaintiff.
38. What counsel for the Plaintiff asserted is that if Masuga investigated the allegations against the Plaintiff he would have found what the Plaintiff's version is of the events and based on same would not have arrested the Plaintiff. This statement is misplaced because in the first place it is not a duty of the arresting officer to investigate the veracity of the complaint against the arrestee. Secondly if the peace officer were to investigate and

verify the allegations against the arrestee, he would be assuming the duties of the investigating officer, the prosecutor and the court. The enabling legislation requires the peace officer to entertain a suspicion; the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and the suspicion must rest on reasonable grounds. That's all.

39. Liebenberg v Minister of Safety and Security 2009 ZAGPHC 88, at paragraph 25.4 the court stated the following:

“Similarly, it does not happen in practice, that a person who is alleged to have committed a more serious offence, for example, murder or attempted murder and who is found or located at the spot or immediately thereafter, that instead of arresting such a person either because he is a well-known person or because he is a prominent figure or because his place of residence is known, he is not immediately arrested and brought to court. Instead he or she is told to wait for the summons to be served on him after issue in terms of section 54: it could not have been the intention of the legislature. If this was to happen it would bring the administration of justice into a disrepute. Imagine a suspect in a murder case or attempted murder case who is not arrested at the scene or immediately thereafter. He is told to go home and wait for the summons and only to appear in court on summons after fourteen days. This would be seen as a mockery of justice by the ordinary members of our society and it would never have been intended by the legislature.”

40. I find that Masuga acted within the law to arrest the Plaintiff against whom a schedule 1 offence charge was laid by the complainants.

41. The complaint against the Plaintiff was laid by Banda and Maringa at the Mamethlake Police Station at 16h25 and was registered under CAS 187/04/2020. The Plaintiff laid a complaint against Banda and Maringa at 17h25 at the same Police Station and it was registered under CAS 192/04/2020. So clearly, when the Plaintiff was arrested together with Banda and Maringa, a complaint at the Police Station had been laid against him an hour earlier. So, what were the police supposed to do when there was a complaint registered at the Police Station and the suspect was at

the Police Station. According to the Plaintiff the police were supposed to arrest Banda and Maringa and leave him alone. Why would that be fair reasonable and fair, only the Plaintiff knows the answer.

42. The rights contained in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 are indeed subject to certain limitations, including the general limitation set out in section 36.

43. The basis upon which the Plaintiff was lawfully arrested and detained is set out above. I find that Masuga was justified to arrest and charge the plaintiff based on the instructions of Warrant Officer Semanya who advised him (Masuga) that the Plaintiff was a suspect of a schedule 1 offence. See **Thabang Phakula v Minister of Safety and Security**, (64450/2011) [2023] ZAGPPHC 277.

44. In **Liebenberg v Minister of Safety and Security 2009 ZAGPHC 88** it stated at paragraph 19.24 that:

“In general, the person affecting the arrest is also the person who must harbour the reasonable suspicion. But where a police official carries out the physical part of an arrest on the command of another police official under whom he serves, and who makes the requisite notification to him, it is actually the superior who carries out (the arrest) and who must have the reasonable suspicion.” See also **Minister of Justice v Ndala 1956 2 SA 777 (T) 780**.

45. Section 205 of the Constitution specifically mandates members of the SAPS to prevent, combat and investigate crime, to maintain public order, to protect and secure inhabitants of the Republic and their property and to uphold and enforce the law. See **Minister of Safety and Security v Mahole 2007 (2) SACR 92 SCA** and **K v Minister of Safety and Security [2005] ZACC 8; 2005 (6) SA 419 (CC)**. I find that, that was exactly what the police did when they arrested and charged the Plaintiff.

46. In the light of the above, I am not satisfied that Sergeant Masuga acted unlawfully in arresting, charging and detaining the Plaintiff. The Plaintiff was arrested on 26 April 2020. The 27 April 2020 was a public holiday, and

therefore the Plaintiff could not appear in court. He appeared in court on the first opportunity thereafter, that is on 28 April 2020 and was duly granted bail after his matter was placed on the court roll.

47.I therefore make the following order:

The Plaintiff's claim is dismissed with costs.



ACTING JUDGE OF THE HIGH COURT OF SOUTH

Appearances

ON BEHALF OF THE APPELLANT : ADVOCATE KEKANA

INSTRUCTED BY : SAVAGE JOOSTE AND ADAMS INC

ON BEHALF OF THE RESPONDENT: ADVOCATE MUSETHA

INSTRUCTED BY : THE STATEATTORNEY PRETORIA