IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: **327/2021**
Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

MOJALEFA GLEN ZIMU Plaintiff

and

MINISTER OF POLICE: REPUBLIC OF SOUTH AFRICA Defendant

JUDGMENT BY: REINDERS J

HEARD ON: 7 OCTOBER 2022

DELIVERED ON: 13 MARCH 2023

[1] On 20 June 2020 the plaintiff, Mr Mojalefa Glen Zimu, was arrested by members of the South African Police Service ("SAPS") without a warrant of arrest. The plaintiff instituted action proceedings against the Minister of Police (the defendant) claiming damages arising from his alleged unlawful arrest and detention.

[2] It is common cause that subsequent to his arrest plaintiff was detained at the Phuthaditjhaba Police Station until his first appearance in court on 22 June 2020 on charges of pointing of a firearm, malicious damage to property and assault with the intent to do grievous bodily harm. Hereafter he was detained at the Harrismith Correctional Centre until 29 June 2020 when he was released on bail.

[3] The defendant admits the arrest and subsequent detention of plaintiff, but disputes any unlawfulness thereof. More specifically, reliance is placed on s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) which stipulates that a peace officer may without a warrant arrest any person *"whom he reasonably suspects of having committed an offence referred to in Schedule 1 …"*

[4] I was called upon to adjudicate whether the arrest as mentioned and the subsequent detention of plaintiff was lawful and, in the event it being found that such was wrongful and unlawful, the liability of the defendant for the damages so suffered.

[5] To prove his case plaintiff testified and called two of his family members. The defendant presented the evidence of members of the SAPS, namely Detective Constable ML Mokoena (Constable Mokoena) and NO Makalima (Constable Makalima).

[6] Constable Mokoena testified that she was the investigation officer (IO) in the matter and was on duty on 20 June 2020 when she received note of a complaint that had been laid.

> 6.1 She was furnished with a police docket containing a sworn statement of the complainant Ms NR R [....] (" N [....]"), a "SAP5" (firearm licensing) and perjury form. She read the statement, the upshot thereof relating to an incident that occurred on 18 June 2020 at 21h00 during an electricity outage when complainant was allegedly assaulted by a group of five people inside her residence after her assailants had kicked down the kitchen door. This had followed upon a gunshot that was heard by her, her daughter M [....] R [....] (" M [....]") and neighbours (including one "Dikgang"). Although it was dark and she could not physically see any of these assailants she was able

to recognise the voice of an ex-boyfriend of M [....], called Mojalefa. She was assaulted with sticks, hit with stones against her forehead (causing her to bleed) and she noticed two of her assailants were armed with firearms. She and her child M [....] 1 were ordered to lay down on the floor and avoid eye contact with the assailants. The following morning, she noticed a brown-gold gun cartridge, picked it up with toilet paper and kept it with her until she went to the police station to report the incident.

6.2 According to Constable Mokoena, she met with the complainant and her daughter at the Community Centre (a police station) and interviewed them ("the interview"). The complainant relayed her version, and Constable Mokoena took a statement from M [....], who merely confirmed that an incident had taken place on said date, but having heard a gunshot she ran to the neighbour's house with her child. It was dark and she did not see the assailants or how many they were.

6.3 Constable Mokoena accepted during cross-examination that it was her duty to investigate and establish what exactly had happened before any arrests could be made. She did not deny the following: that she had accepted the complainant's version of recognising the plaintiff by his voice as the truth; there was no urgency to have the plaintiff arrested; despite complainant's affidavit on a firearm in possession of the plaintiff, she did not enter plaintiff's parental home to search for the firearm; and she did not see any injuries on complainant's face (with no J88 being completed to confirm the alleged injuries). No firearm was ever found. According to her, Constable Makalima effected the arrest on the plaintiff out of her own accord and not on any instruction from her. On a question whether both she and Constable Makalima decided to arrest the plaintiff, she responded that "such decision was made before" they had gone to the plaintiff. When prompted why she did not conduct any other interviews (for example any neighbours or Dikgang) she testified that there was no necessity to do so. Despite the mentioning in complainant's sworn affidavit of a shell casing, she did not request such casing and nothing to follow up was done in this regard. On the basis of complainant's voice recognition of the plaintiff, she decided to

> "serve" the complainant "by taking the accused person to court", and arresting him "was the only way to secure his attendance".

[7] Constable Makalima testified that on 20 June 2020 she was the detective on standby and reported for service at 10h00. She was informed that a case had been opened and "it was alleged that the perpetrator is known to the complainant." She was taken to the Community Centre where the complainant and her daughter were present. Constable Mokoena conducted an interview with and posed questions to the complainant and M [....]. M [....] indicated that she knows where plaintiff resides and indeed pointed same out when members of the SAPS accompanied her there. Upon knocking on the door the plaintiff was informed that he was being arrested on the strength of charges laid against him by the complainant, which charges (pointing of a firearm, malicious damage to property and assault with the intent to do grievous bodily harm) she "had seen on the docket" which she had taken with her to plaintiff's residence.

[8] During cross-examination Constable Mokoena testified that although she did not read the docket she was present during the interview. She could however only recall that Constable Mokoena asked N [....] "how does she know the plaintiff" with the reply that she "doesn't know him very well". What caused her to be suspicious was when she heard that during the week plaintiff had threatened M [....] (whom she referred to as "the victim") with violence. I will revert back to the evidence tendered by Constable Makalima.

[9] The defendant bore the onus of proving that the said arrests were lawful. In **Duncan v Minister of Law and Order**[1] it was held that:

> *"The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:*
>
> *(1) The arrestor must be a peace officer.*
> *(2) He must entertain a suspicion.*

[1] 1986 (2) SA 805 (A) at 818H

(3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
(4) That suspicion must rest on reasonable grounds."

[10] The Constitutional Court in **Zealand v Minister of Justice and Constitutional Development and Another**[2] by mouth of Langa, CJ held that:

"The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom… The respondent then bore the burden to justify the deprivation of liberty, whatever form it may have taken."

[11] Whether the arresting officer held a reasonable suspicion entails the following test as held in **Ingram v Minister of Justice**[3] :

"The words, 'reasonable suspicion' may tend to indicate some subjective test to be applied; however, that is not so; the test as to whether "reasonable suspicion" could have existed and did exist, it to be determined by an objection standard, namely that of the reasonable man with the knowledge and experience of a peace officer based on the facts and circumstances then known to the arresting officer."

[12] The crucial question to be asked was stated in ***Mabona and Another v Minister of Law and Order and Others***[4] as follows (at 658 E - G):

"Would a reasonable man in the second defendant's position and possessed with the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to be stolen? ***The reasonable man will therefore analyse and assess the information***

[2] 2008 (4) SA 458 (CC) at paragraph 24
[3] 1962 (3) SA 225 (W) at 229G - 230A. See Duncan *supra* at 811H - I
[4] 1988 (2) SA 654 (SE)

> ***at his disposal critically, and he will not accept lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which justify an arrest.*** *This is not to say the information at his disposal must be of sufficiently high quality and cogency to engender in him conviction that the suspect is in fact guilty.* ***The section requires suspicion and not certainty. However, the suspicion must be based on solid grounds."***

And further at 658 E - G:

> *"The test of whether a suspicion is reasonably entertained within the meaning of s40(1)(b) of the Criminal Procedure Act 51 of 1977 is* ***objective.****"*
> (My own emphases.)

[13] Moreover, the quality and source of the Arresting Officer's information is to be considered critically.[5]

[14] It is common cause that the plaintiff was arrested without a warrant. Despite any other versions tendered before me on the identity of the police officer who effected the arrest, it is the defendant's case that Constable Makalima was the arresting officer as testified by both herself and Constable Mokoena. Applying the aforementioned case law to the facts, Constable Makalima's conduct in my view fell short of a reasonable police officer in the circumstance armed with the information she had at the time. I say so for the following reasons:

> 14.1 According to Constable Makalima she (and ostensibly other colleagues) was informed by Constable Mokoena of "a suspect wanted for pointing of a firearm and malicious damage to property." She confirmed during cross-examination that she did not read the complainant's statement in the docket, but was present during the interviews that Constable Mokoena conducted with both the complainant and her daughter. What she could recall from the interviews were limited to two aspects: Firstly, when

[5] Mabona *supra* at 658 E - G

complainant was asked how the plaintiff was known to her, complainant answered that she “did not know the plaintiff very well’, but that her daughter knew where the plaintiff resided. Secondly, according to the complainant, the alleged perpetrator (whom she had allegedly identified by voice recognition as per a statement made to an unknown police officer and without any indication that the services of an interpreter was utilised) was an ex-boyfriend of the complainant’s daughter who had made threats of violence during the week preceding the alleged incident. The alleged threats were not mentioned by either complainant or M [....] 2, not captured under oath in the witness statement of M [....] 2, nor a supplementary witness statement on this issue by the complainant. This was the totality of the information that she was armed with when arresting the plaintiff. Her arresting statement sworn to shortly after the arrest, did not include any reasons as to why she had arrested the plaintiff, but merely that he was arrested. During her testimony she added that plaintiff refused to answer any of her questions upon her and her colleagues’ arrival at his parental residence, indicating that he wished to exercise his right to representation by a lawyer which prompted her to arrest him. According to Constable Makalima the offences which plaintiff were arrested for, was as a result of the interviews which led her to the conclusion that the violence was serious, ostensibly domestic violence (hence her reference to the complainant’s daughter Manthaba as “the victim” instead of the complainant). In my view, the suspicion harboured by Constable Makalima was rather that the plaintiff had committed domestic violence and that was why she arrested him. Put differently, the arrest of plaintiff for pointing of a firearm, malicious damage to property and assault with the intent to do grievous bodily harm, was not what she intended arresting plaintiff for. Neither the complainant nor her daughter testified. As was the case with Constable Mokoena, apart from the limited information at the interviews that she (Constable Mokoena) had, no other investigations were done by Constable Makalima to dissipate or confirm her suspicion. No evidence was presented by either of the two constables that there was an urgency to have the plaintiff arrested immediately. It took a maximum of three hours from the time that the docket was received by Constable Mokoena until the plaintiff was arrested. Information could have been further

> investigated and the arrest held over for later. The end results were that the state prosecutor elected not to proceed and charges against the plaintiff were withdrawn. I am of the considered view that Constable Makalima was not at liberty to have arrested the plaintiff under these circumstances, and accordingly the arrest was unlawful.
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> 14.2 In passing I might mention that, on the evidence of Constable Mokoena, should I have found that she was in fact the arresting officer (and tested against the applicable principles) I would likewise have found that she could not have objectively harboured a reasonable suspicion that the plaintiff had committed the offences. Despite my finding that the arrest was unlawful however, both constables in my view ought to be commended for their prompt response in taking their duty to serve the community, seriously. Violence against women is rife in our country- but that does not mean that members of the SAPS in effecting an arrest without a warrant, should not apply the imperatives imposed on them to act lawfully in doing so.

[15] It follows that I am satisfied that the plaintiff should be compensated for his unlawful arrest. The finding as aforementioned that the arrest by the defendant was unlawful however does not automatically lead to the inference that the detention of the plaintiff was also unlawful. In **MR v Minister of Safety and Security**[6] it was held at paragraph [39] that *"arrest and detention are separate legal processes. The fact that both result in someone being deprived of his or her liberty, does not make them one legal process."*

[16] The liability of the defendant for unlawful detention of the plaintiff should be determined by applying the principles of legal causation as comprehensively dealt with by the Constitutional Court in **De Klerk v Minister of Police**.[7]

> *"In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations.*

[6] 2016 (2) SACR 540 (CC)
[7] 2020 (1) SACR 1 (CC) at [63]

This may include a consideration of whether the post-appearance detention was lawful. It is these public-policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts — there is no general rule that can be applied dogmatically in order to determine liability."

[17] The first period of detention relates to plaintiff's detention from his arrest until his first court appearance, whilst the second entails the period post his court attendance until his release on bail. Counsel for plaintiff submitted that defendant should be held liable for the entire period of detention from 20 June 2020 to 29 June 2020. In support of his contention reliance was placed on the pleadings. As stated in paragraphs [1] and [2] herein above, the defendant admitted that plaintiff was arrested without a warrant on 20 June 2020, thereafter detained at Phuthaditjhaba Police Station until 22 June 2022 followed by his detention at the Harrismith Correctional Facilities until his release on 29 June 2020. The said averments were likewise admitted by defendant at a pre-trial conference held on 9 May 2022. As defendant is bound by its pleadings as well as his admissions in this regard during the pre-trial conference[8], so the argument went, the defendant is liable for compensation for plaintiff's detention from 20 June 2020 to 29 June 2020.

[18] It was submitted by counsel for defendant that defendant's plea should be read in conjunction with its plea in paragraph10.2 where it answered: "In amplification of the denial above, the Defendant pleads that the arrest and detention were lawful, and further the detention of the Plaintiff was in accordance with Section 50 (1) of (*sic)* Criminal Procedure Act No, 51 of 1988 and further detention of the Plaintiff was at the instance of the Court." Plaintiff pleaded in paragraph 6 of the particulars of claim that the arrest and detention were unlawful in that the members of the SAPS did not "…investigate the matter properly…; and/or there were no

[8] Saayman v Road Accident Fund 2011 (1) SA 106 (SCA)
MEC for Economic Affairs, Environment andTourism, Eastern Cape v Kruizenga 2010 (4) SA 122 (SCA) at 126F

grounds to suspect that the Plaintiff had committed and offence." Plaintiff pleaded a further three alternatives hereto. The amplification on which defendant relies in paragraph 10.2 of its plea, was pleaded in respect of the third alternative, namely paragraph 9 of the plaintiff's particulars of claim dealing with defendant's non-compliance with the SAPS Standing Orders (General) 341, in that their goal was not, amongst others, to prevent plaintiff from committing any further offences or protection of the plaintiff. The latter alternative was not the case presented before me by plaintiff and upon which I based my finding that the arrest was unlawful. Despite this however, it is not the end of the determination of the defendant's liability for the two periods of detention.

[19] The defendant's submissions in par [17] above, is in my view not dispositive of the question of the defendant's liability for the entire period of detention. Reliance on the pleadings as stated herein above for a finding that the detention of plaintiff after his first court appearance as well as the period until his release on bail are consequently and without any further adjudication of the evidence before court unlawful, is in my view misplaced. It would negate the causality test as enunciated in **De Klerk** (*supra*).

[20] In **Mahlangu v Minister of Police**[9] the Supreme Court of Appeal held (at [41]) as follows:

> "*Public-policy considerations … limit liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued the bail application to finality."*

[21] Constable Mokoena as IO testified that she completed the *pro forma* A6-form which was thereafter placed in the police docket and provided to the state prosecutor before the plaintiff's first court appearance following his arrest. During cross-examination she was confronted therewith although there was a mark in the provided for tick box that she is of the view that plaintiff can be released on bail, crossed out the reference that she was opposed to bail being granted. Constable Mokoena

[9] 2020 (2) SACR 136 (SCA)

explained that it had been mistakenly done and that she indeed had indeed not opposed to the granting of bail for the plaintiff as indicated on the form. It is evident from the rest of the A6-form that Constable Mokoena, amongst others, had indicated that plaintiff had a fixed address, is easy to trace, was co-operative with the police, post no danger to a person/community and will not interfere with witnesses. In my view the aforementioned is consistent with Constable Mokoena's testimony that she did not oppose bail. From the evidence before me on the notes made by the presiding magistrate, the postponement for consideration of the plaintiff's release on bail, was not at the instance of the defendant, but the decision of the presiding officer at the time.

[22] In reaching the conclusion as I did that the arrest of the plaintiff was unlawful, I considered all of the factors as indicated in paragraph [16] for a determination of the reasonableness of the suspicion held by Constable Makalima. The question thus is whether there is a causal link between the unlawful arrests and the detention of the plaintiff that followed as a result of the determined unlawful arrest. In my view in respect of the detention such causal link is evident as, had it not been for the unlawful arrest, the plaintiff would not have been deprived of his right to freedom for the time from his arrest until he appeared before the magistrate. The unlawful arrest of the plaintiff resulted therein that the plaintiff was unlawfully detained causing him to suffer damages. Accordingly, I am of the view that the plaintiff should be compensated for his unlawful detention by the defendant in respect of the period of detention from 20 June 2020 to 22 June 2020 only.

[23] The plaintiff claimed that he suffered general damages in the amount of R 400 000-00 for unlawful arrest and detention as a global figure for *contumelia*, loss of amenities, pain and suffering for the period of nine days. The claims for special damages for legal fees and emotional stress and psychological trauma were abandoned.

[24] Counsel for plaintiff supplied me with case law in respect of damages awarded by our courts for unlawful arrest and detention to serve as a helpful guide in making an award, and I considered same. The correct approach to be followed is to have regards to all the facts of a particular case and to determine the *quantum* of

damages thereon as was held in **Rudolph and Others v Minister of Safety and Security and Another**.[10]

[25] Plaintiff testified that the conditions in the holding cells where he was detained from his arrest until he appeared in court on 22 June 2022, were very unfavourable. He had to sleep on the floor with one blanket only and was detained with four to five people in the same cell. Moreover, the bathroom facilities were not in a working condition and the toilet did not flush. After his arrest and detention, he experienced bad dreams, feared police vehicles and became heavy hearted. It is trite that a determination for damages for *injuria*, especially as the kind of *injuria* in matters like these, cannot be determined with mathematical precision. Damages are not to punish the defendant, but are awarded to *"deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved…*"[11] Taking into account the living conditions in custody, the period of 2 days spent in custody and relevant previous rewards, I am of the view that an amount of R 30 000-00 would constitute a fair and appropriate compensation to the plaintiff.

[26] I am indebted to counsel for both the plaintiff and defendant for their concise and able heads of argument. There is no reason why costs should not follow the result. Mr De Klerk pressed on me to include the reasonable travelling and accommodation costs for attending the trial, in respect of counsel and the plaintiff. The plaintiff had travelling costs to Bloemfontein to attend the trial. He should not be out of pocket for having done so. I am however of the view that counsel's cost should best be left in the discretion of the Taxing Master.

[27] Wherefore the plaintiff's claims succeed as follows:

1. The defendant is ordered to pay an amount of R 30 000-00 (thirty-thousand-rand) to the plaintiff for unlawful arrest and detention.

2. Such payment to be effected before or on 1 May 2023.

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[10] 2009 (5) SA 94 (SCA) at paragraphs [26] - [29]
[11] Mahlangu and Another v Minister of Police 2021 (2) SACR 595 (CC) at paragraph [50]

3. Should payment not be effected in respect of orders 1 and 2 before or on 1 May 2023 the aforementioned amount will bear interest at the rate *a tempore morae* calculated from date of this order.

4. The defendant is ordered to pay the plaintiff's taxed party and party costs on a High Court scale, such costs to include the reasonable expenses of the plaintiff in attending to trial.

C REINDERS, J

On behalf of plaintiff: Adv MCC de Klerk
Instructed by:
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On behalf of plaintiff: Adv PS Mphuloane
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