

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **15 March 2024** Signature:



CASE NO: 33169/2015

In the matter between:

MASHELE, CHARLES THOMAS

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

Coram: Z Khan AJ

Heard: 13 March 2024, the trial was conducted in open court.

Delivered: 15 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 15 March 2024.

Summary: Criminal law and procedure – Criminal Procedure Act 51 of 1977 – sections 40(1)(b) – unlawful arrest and detention – whether the plaintiff's arrest and detention were lawful in terms of ss 40(1)(b) of the Criminal Procedure Act 51 of 1977 – detention not justified

ORDER

- (1) The plaintiff is awarded R100 000 and costs on the Magistrates Courts scale.

JUDGMENT

Z Khan AJ:

[1]. The Plaintiff was arrested on 19 July 2014 at approximately 23h00 and released on 22 July 2014. He was charged with vehicle hijacking and assault. This much was admitted by the Defendant and the parties agreed that the Defendant bore the onus of proving the lawfulness of the arrest and detention.

[2]. The Defendant called Constable Elwa as its sole witness. It is testified that on the evening of 19 July 2014, Elwa was a reservist on vehicle patrol with Sgt Mnisi when he received a call on an official mobile phone regarding an assault

and vehicle hijacking. Both members proceeded to the address where the complainant was to be found. Sgt Mnisi obtained a statement from the complainant, Mr PF Mashimbyi whilst Constable Elwa was in close proximity and overhearing the events being relayed to Mnisi. It would appear from the Complainant that there was an altercation during an alcohol drinking party and after certain events, the complainant was assaulted and his vehicle unlawfully taken by the Plaintiff and certain other persons. It was also reported to the police officers that a person present at the party telephoned the Plaintiff and asked him to return the vehicle and the Plaintiff refused. The Defendant did not call Mnisi or the person who made the telephone call to the Plaintiff or any of the other police officers whose names appear in the docket. There is the irresistible conclusion that this evidence was hurriedly put together after I refused an earlier application for postponement by the Defendant.

[3]. The Plaintiffs witness stated that the Complainant was able to point out the whereabouts of the Plaintiff and that the Complainant then accompanied the two police officers to the Plaintiffs whereabouts. Upon locating the Plaintiff, the Complainant pointed out the Plaintiff as the person who assaulted him and took his vehicle. The Plaintiff was then arrested by the witness for the Plaintiff, Elwa.

[4]. Cross examination placed must emphasis on discrepancies in the procedure adopted by the police officers, these included the arrest not being carried out by Mnisi who was the senior police officer as well as the person who took the witness statement, the failure to obtain a warrant of arrest, the failure to obtain a medical J88, the need to detain the Plaintiff when he could have been arrested and cautioned to present himself as well as the various discrepancies regarding the details of the police officer who signed the warning statement.

[5]. No doubt these are all considerations that pointed to the eventual nolle prosequi decision by the Prosecutor dealing with the matter. The Police in this

matter were unable to follow basic procedures such as signing off on statements or correctly completing official documents.

[6]. The Plaintiff in rebuttal testified that he (and other people) sought a lift home from the Complainant for an amount of R100. There was a dispute about payment and they then, did not procure a lift from the Complainant. As they were walking home, the Complainant attempted to run them over and the Plaintiffs brother was injured. Plaintiff attempted to approach the Complainant and the complainant left the with his vehicle. There is no explanation for the reason for this bizarre set of events.

[7]. Plaintiff says that they then proceeded to obtain alternative transportation home. Plaintiff was at home, when the Complainant and two police officers attended at his home. He denies that the Defendants witness was one of the Police Officers that attended at his home. The officers then requested the Plaintiff to accompany them to the police station to answer questions. He cooperated and was left in an office at the Police Station and later advised by an unknown police officer that he was being arrested. He was escorted to the cells and detained in squalid conditions including having to watch other cellmates use the toilet and having to sleep on the floor due to overcrowding.

[8]. As the Defendant had the onus of providing that the arrest and detention were lawful, the Defendant had to prove the requirement of a civil delict including that the detention was not unlawful. The matter therefore turns on whether the Defendant had reasonable cause to (a) arrest and (b) detain the Plaintiff.

[9]. The defendants deny liability for the claims of the Plaintiff. Their case is that the arrest and the detention were lawful in that the plaintiff was suspected – reasonably so – of having committed the hijacking and assault. The Complainant laid a written complaint and the Complainant pointed out the Plaintiff. There is no

credible evidence regarding whether the Plaintiff was given an opportunity to explain himself or to offer up a statement. It is not clear if the Plaintiff was advised that he was a suspect. He was merely arrested and detained once pointed out, this too remains in dispute.

[10]. The issues to be considered in this action are therefore whether, all things considered, the arrest of the plaintiff and his subsequent detention were lawful. Put another way, the issues to be decided in this matter is whether the arresting officers had reasonable grounds to arrest the plaintiff and whether they had reasonable grounds thereafter to detain him.

[11]. Before dealing with the facts in the matter, it may be apposite to traverse and consider firstly the applicable legislative framework and the applicable legal principles.

[12]. An arrest or detention is *prima facie* wrongful. Once the arrest and detention are admitted, as is the case *in casu*, the onus shifts onto the State to prove the lawfulness thereof and it is for the defendants to allege and prove the lawfulness of the arrest and detention. So, for example, it was held by the Supreme Court of Appeal as follows in *Zealand v Minister of Justice & Constitutional Development & Another*¹:

'This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.'

[13]. Section 40(1)(b) of the CPA confers the power on a police officer, without warrant, to arrest a person reasonably suspected of having committed a schedule 1 offence. Section 50(1)(a) requires that such arrested person be

¹ *Zealand v Minister of Justice & Constitutional Development & Another* 2008 (4) SA 458 (SCA) at para 25;

brought, as soon as possible, to a police station, and be there detained; and section 50(1)(b) provides that he or she, as soon as reasonably possible, be informed of his or her right to institute bail proceedings. The parties were in agreement that the assault and hijacking are not schedule 1 offences.

[14]. The question is whether the arresting police officer had reasonable grounds for suspecting that such a crime had been committed. This requires only that the arresting officer should have formed a suspicion that must rest on reasonable grounds. It is not necessary to establish as a fact that the crime had been committed². 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee³.

[15]. In cases such as *Duncan v Minister of Law and Order*⁴, *Minister of Law and Order v Kader*⁵, *Powell NO and Others v Van der Merwe NO and Others*⁶, the Supreme Court of Appeal has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':

'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.'

[16]. The question, whether the suspicion by the police officer effecting the arrest is reasonable must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. The information before the arresting officers must be such as

² *R v Jones* 1952 (1) SA 327 (E) at 332;

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I – 820B;

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I;

⁵ *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) ([1990] ZASCA 111) at 50H – I;

⁶ *Powell NO and Others v Van der Merwe NO and Others* 2005 (1) SACR 317 (SCA) (2005 (5) SA 62; 2005 (7) BCLR 675; [2005] 1 All SA 149) para 36;

to demonstrate an actual suspicion, founded upon reasonable grounds, that an offence had been committed by the person or persons to be arrested.

[17]. The police did not conduct any enquiries as to whether the complainant in fact, owned a vehicle. They did not receive statements from other persons present at the party. They did not attempt to obtain a warrant of arrest. There is a police docket as part of the discovered bundles but there are no witnesses to talk to the various statements and affidavits in the bundle. There was also no application to receive the documents on the basis of exceptions the hearsay rule. I am therefore precluded from considering whether the police did in fact have such reasonable suspicion. Again, a reflection on the preparation of this matter by the Defendant.

[19] I am therefore constrained to accept the Plaintiffs version against the Defendant, who bears the onus of proof. I am therefore required to accept that the Plaintiff was unlawfully arrested and detained.

[20] The Plaintiff seeks redress for his incarceration from 23h00 on 19 July 2014 to 22 July 2014, some 3 days. He advises that he was employed, which employment he retains, he has children and that he is literate and can read and write English. He describes terrible conditions in the police cells and his anxiety over his medication not being made available to him.

[21] The Plaintiff merely seeks compensation for his 3 days in detention. He does not tell the court of his income, the effect of the incarceration on his mental health, subsequent medical health arising from the event etc.

[22] I have had regard to relevant case law presented and for all of these reasons, I am of the view that the sum of R100 000 is a reasonable award having regard to the above circumstances.

Costs

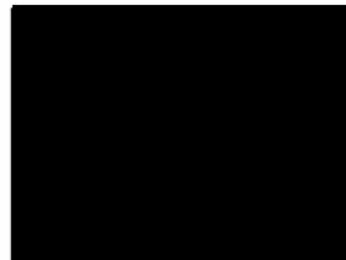
[23] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[24] The Plaintiff seeks costs on the High Court Scale but this matter falls within the Magistrates Court jurisdiction. I am therefore awarding costs on the applicable Magistrates Court Scale.

Order

[25] Accordingly, I make the following order: -

- (1) The Defendant is ordered to pay Plaintiff the sum of R100 000 plus costs on the Magistrates Court scale.



Z KHAN

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	13 March 2024
JUDGMENT DATE:	15 March 2024 – judgment handed down electronically
REPESANTATIVES:	
Counsel for the Applicant:	Adv. Malema
Instructed by:	Madeleine Gowrie Attorneys
For the defendant:	Ms N. Cingo
Attorneys for the defendant:	State Attorneys.