



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

Case Number: 2858/2017

(1)	REPORTABLE: <i>yes/no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>yes/no</i>
	
E.M. KUBUSHI	
DATE: 10/03/2021	

In the matter between:

NTULI CASANDRA

FIRST PLAINTIFF

MBALI KHUMALO

SECOND PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

KUBUSHI J,

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

[1] The claim in this matter involves two plaintiffs who were arrested and detained by members of the South African Police Service ("SAPS"). Initially the plaintiffs had instituted separate actions under case numbers 2851/2017 and 2858/2017. Prior to the commencement of the proceedings, the separate actions instituted by the plaintiffs were consolidated under case number 2858/2017. The plaintiffs also applied for an amendment of their particulars of claim to the effect that the date of arrest should read 10 August 2016 and the date of the release of the plaintiffs 15 August 2016. The application was granted and the particulars of claim accordingly amended.

[2] The matter comes before this court, against the defendant, the Minister of Police ("the Minister"), by way of claims for unlawful arrest and detention of the first plaintiff, Cassandra Ntuli ("Ms Ntuli") and the second plaintiff, Ngobile Patience Mbali Khumalo ("Ms Khumalo"), respectively. It is alleged that the plaintiffs were unlawfully arrested by members of SAPS at 21h30 on 10 August 2016 and subsequently detained at Sebokeng Police Station during the period 10 August 2016 up until 15 August 2016 when they were taken to court, where the prosecutor refused to enrol the matter. When the plaintiffs left the cells the investigating officer of the case instructed them to go with him. This led to a dispute between the parties as to whether when the plaintiffs left the holding cells after the prosecutor had refused to enrol the matter, they were released from detention or they were still in detention.

[3] On application by the plaintiffs' counsel, *per* agreement between the parties, an order separating the issues of liability and *quantum* was granted. The matter proceeded only on liability and the issue of *quantum* was postponed.

[4] At all material times, the Minister was the executive authority responsible for SAPS. It is averred in the particulars of claim that the Minister is vicariously liable for the unlawful actions, or omissions, of the said employees of SAPS, who were allegedly acting in their capacity and within the cause and scope of their authority and employment as members of SAPS.

[5] For ease of reference, and unless the context otherwise dictates, I shall, in this judgment refer to the plaintiffs in their respective names and collectively as the plaintiffs.

THE ADMISSIBILITY OF EVIDENCE

[6] The evidence in this matter was led by two witnesses, one for the plaintiffs and one for the defence. The testimony on behalf of the plaintiffs was tendered by Ms Khumalo whilst for the defence it was proffered by Lieutenant Colonel Grobler ("Colonel Grobler"), who is one of the police officers who effected the arrest of the plaintiffs. I note that the parties in their heads of argument refer to him as a Captain but he introduced himself as

Lieutenant Colonel at the hearing. I shall, therefore, in this judgment refer to him as such.

[7] During the trial, the parties' respective counsel referred the witnesses under cross examination to the statements other than those made by the witness being cross examined. It became a bone of contention whether a witness under cross examination could be asked questions about the contents of a statement, even though such statement was discovered, that was not tendered into evidence by the author thereof, and whether evidence elicited from such a statement could be admitted to evidence. In that regard, I ruled that counsel must argue the matter during closing arguments in order for a ruling to be made as to the admissibility of such evidence.

[8] In their closing remarks both counsel for the plaintiffs and the defendant conceded that the pre-trial minutes, filed of record, are the starting point in determining the admissibility of the evidence relating to the discovered documents. The agreement between the parties in relation to discovered documents was couched as follows in the pre-trial minutes:

"The parties agree that the documents contained in the document bundle will be what they purport to be and that formal proof of the documents is not required unless one party notifies the other party before the trial date that it requires the document to be proven, the truth and the contents of the document will still be required to be proven unless the parties agree otherwise."

[9] The parties were, correctly so, eventually in agreement that in order for the statements referred to during cross examination to be admitted to evidence, they ought to have been handed in by the author(s), thereof. Failing such, it is required that the party seeking such admission apply to have same admitted on the basis of either section 3 of Law of Evidence Amendment Act¹ or Civil Proceedings Evidence Act.² The statements were not handed in by their respective authors, nor was application for their admission made. On account thereof, the evidence relating to such statements should be rejected on the basis of inadmissible hearsay.

[10] On that basis, only the evidence of the plaintiffs' witness, Ms Khumalo and that of the defendant's witness, Colonel Grobler which was tendered in court, together with the statements authored by them, formed the evidence on which this matter stands to be adjudicated.

[11] The parties were agreed that the defendants would bear the *onus* to prove the lawfulness of the arrest and the duty to adduce evidence, therefore, the defendant was the first to lead evidence.

THE UNLAWFUL ARREST

[12] The key issue for determination by this court at this stage of the proceedings, is whether the plaintiffs' arrest and detention from 21h30 on

¹ Law of Evidence Amendment Act 45 of 1988.

² Civil Proceedings Evidence Act 25 of 1965.

10 August 2016 until 15 August 2016, at 15h00 was lawful. This requires the court to further examine whether at the time of the arrest, the arresting officer had exercised a reasonable suspicion that the plaintiffs had committed the offence for which they were arrested, to wit, kidnapping; and if it is so, whether the arresting officer exercised a discretion whether or not it was necessary to arrest the plaintiffs; and whether the plaintiffs' detention beyond the 48-hour period, was lawful.

WHETHER THE ARREST WAS LAWFUL

[13] As the basis for the arrest, the defendant relies on section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA). This sub-section provides that:

"(1) A peace officer may without a warrant, arrest any person:

(b) whom he reasonably suspects of having committed an offence referred to in schedule 1, other than an offence of escaping from lawful custody."

[14] The jurisdictional requirements for a successful reliance on section 40 (1) (b) of the CPA are trite. In the matter of *Minister of Safety and Security v Sekhoto*,³ the Supreme Court of Appeal stated that the following four jurisdictional factors should be present to justify an arrest in terms of section 40 (1) (b) of the CPA:

³ *The Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA).

- (i) The arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect, committed an offence referred to in schedule 1; and
- (iv) The suspicion must rest on reasonable grounds.

[15] In the present circumstances, it is common cause that the arrestor was a peace officer, and the offence alleged to have been committed fell under schedule 1 of the Criminal Procedure Act. It is not in dispute that Colonel Grobler had a suspicion that the plaintiffs committed the offence of kidnapping. What is in dispute is whether such suspicion rested on reasonable grounds.

Did the suspicion rest on reasonable grounds?

[16] The test as to whether a reasonable suspicion could have existed and did exist, is to be determined by an objective standard, namely that of a reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer.⁴

[17] In the matter of *Mvu v Minister of Safety and Security*,⁵ when explaining reasonable suspicion, the court made the following remarks:

"The fourth requirement, i.e. that the suspicion must rest on reasonable grounds, is objectively justiciable: "...the test is not

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H.

⁵ *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ).

whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion".

[18] Whilst in *Minister of Safety and Security v Swart*,⁶ the court expressed itself as follows:

"It is furthermore trite that the reasonableness of the suspicion of any arresting officer acting under s 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence."

[19] In order to justify the arrest, the defendant called Colonel Grobler as a witness. According to Colonel Grobler, the arresting officer in this instance, he was part of a search and rescue team of a victim that was allegedly kidnapped. The team had earlier that day at approximately 20h00 on 10 August 2016, assembled at Everton Police Station where they were briefed regarding the kidnapping of one Victor Tsotetsi ("Victor"). It was conveyed during the briefing to the team that the suspects who kidnapped Victor were travelling in a two door red Golf with registration number BMT 451 GP ("the Golf"). They were also informed that according to information received, the Golf might be in the area of Lenasia.

⁶ *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 266 (SCA) para 20.

[20] Armed with the aforesaid information Colonel Grobler and a certain Captain Jacobs proceeded in the direction of Lenasia in an unmarked police motor vehicle in search of the motor vehicle fitting the description they were given during the briefing. On entering the area of Lenasia Colonel Grobler and Captain Jacobs parked their motor vehicle at a garage to purchase cool drinks and to fill in fuel. It was approximately 21h30 and the garage area was well lit. Whilst at the garage, Colonel Grobler noticed a stationary Golf motor vehicle with a reddish colour, parked on the opposite side of the road adjacent to the garage. They decided to investigate same. They drove with their motor vehicle in the direction of the stationery Golf. They drove passed the Golf and in doing so noticed that it was indeed the Golf with the corresponding registration number as provided during the briefing. Colonel Grobler also noticed that there were three occupants sitting in the rear seat of the Golf. Having satisfied themselves that the Golf matched the identity of the motor vehicle they were looking for, they called for backup. After some time, before the backup arrived, the two officials decided not to wait any longer but to proceed to confront the occupants of the Golf. They drove towards the Golf which was still parked in the same place with its rear end facing towards a wall and the front facing the garage. They parked their motor vehicle in front of the Golf with their lights on. Colonel Grobler and Captain Jacobs alighted from their motor vehicle, immediately identified themselves to the occupants of the Golf as police officials. Colonel Grobler also produced and showed his police identification card. Colonel Grobler directed the three occupants being two African females and an African male, to alight from the

Golf. They were requested to lie down and identify themselves. The two females identified themselves as Cassandra Ntuli and Patience Khumalo, being the plaintiffs in this matter, and the African male identified himself as Victor Tsotetsi (Victor).

[21] Victor told Colonel Grobler that he was kidnapped and that the two females, being the plaintiffs, formed part of the group of people that kidnapped him. Colonel Grobler decided to arrest the plaintiffs. In doing so, informed the plaintiffs of their constitutional rights and the reason for their arrest and asked them to provide him with their version to which they did not respond. Subsequent thereto, the backup arrived and the plaintiffs were transported to the police station. Colonel Grobler then attended at the Lenz police station to make his arresting statement as contained in the docket under Case Number 181/08/2016.

[22] From Colonel Grobler's testimony it can be ascertained that the following information was at his disposal when he made the arrest: the identity of the motor vehicle which they were on the lookout for; the identity of the person who was reported to be kidnapped; the identity of the kidnappers and the fact that the Golf was found in Lenasia.

[23] Colonel Grobler was informed during the briefing that the persons suspected to have kidnapped Victor were travelling in a two doors red Golf heading for Lenasia, and they were also provided with the registration number of that Golf. The Golf they came across in Lenasia had two doors, was red in colour and its registration number matched the registration

number that was provided during the briefing. The male person they found in the Golf identified himself as Victor Tsotetsi, which is the name they were given at the briefing as the person who was kidnapped. Victor confirmed to Colonel Grobler that he was kidnapped and that the other two occupants of the Golf were part of the group of persons who kidnapped him.

[24] The question, therefore, is whether the above information, objectively speaking, empowered Colonel Grobler to arrest and further detain the plaintiffs, as he did.

[25] Counsel for the plaintiffs submits that the defence by the defendant that the arrest was lawful, falls to be dismissed and that the court should declare the plaintiffs' arrest and detention unlawful. It is submitted on behalf of the plaintiffs that regard being had to Colonel Grobler's own version, he did not exercise a reasonable suspicion based on the following grounds:

The objective facts, did not evince any offence of kidnapping

[26] The argument by the plaintiffs' counsel is that on the reading of Colonel Grobler's arresting statement coupled with his evidence in court, his analysis of the objective facts did not evince any offence of kidnapping.

[27] The contention is that during cross-examination, Colonel Grobler confirmed that in a kidnapping case: the kidnapped person would be restrained by some measure of duress. He confirmed that these are elements of an offence of kidnapping. He also conceded that, in this case, Victor was

not tied up or under duress; the plaintiffs were unarmed; and had no means of restricting Victor in any manner.

[28] This evidence was further confirmed in his arresting statement, wherein Colonel Grobler mentions that the key elements in relation to an offence of kidnapping were not present i.e. Victor was not tied up, was not under duress, the plaintiffs were unarmed and had no means of restricting his movements. This, according to counsel, is a clear indication that on Colonel Grobler's own analysis of the objective facts, they did not evince any offence of kidnapping.

[29] This argument by the plaintiffs' counsel fails to take the evidence tendered by Colonel Grobler into account when he testified as follows:

"... this is what I observed. And keeping in mind, and that is why I wanted to, to answer the question previously – but I was interrupted is – this is what I observed and every time when I observe in a kidnapping when we retrieve or recover or find a victim, the victim cannot be, does not need to be restrained in chains. He does not need to be cuffed in, in handcuffs. Who knows what the kidnappers told him that they are going to do to the parents, for example, if he runs away? So, and that is what happened. There is, it is not just a case that you are bound to a chair, you are tied up and, because you are a victim of kidnapping. You can have free movement. It is not necessary for him to be harmed, chained or even removed from his freedom in totality. He can move in this, in this room. He can move

in a house. It depends what the victim, what fear the victim, or the, the kidnappers bestow on the victim. That is why I mentioned this because I did not observe these, these aspects that I, that I wrote. Keep in mind that, that is why I am saying, a victim, each victim must be handled in his own totality."

[30] Colonel Grobler's evidence in this regard is correct. In the South African law, kidnapping is defined as "the unlawful, intentional deprivation of a person's freedom of movement". The two key elements of kidnapping are the unlawful deprivation of the freedom of the individual. The use of force or duress is not an element of the offence. That Colonel Grobler did not observe any manner in which the plaintiffs restrained Victor's freedom of movement does not mean that he did not entertain a suspicion that an offence of kidnapping was committed or being committed.

[31] The evidence of Colonel Grobler is that he decided to arrest the plaintiffs based on the facts at his disposal when he made the arrest. He took into account that the Golf fit the description and had the registration number as conveyed to them during the briefing, the prevailing circumstances and the fact that Victor identified himself as the person who was allegedly kidnapped as *per* the information at hand and that Victor immediately pointed out the plaintiffs as co-accomplices to the kidnap.

[32] Colonel Grobler was also cross-examined with regards to the statement made by the complainant in the criminal matter (Victor's mother)

and it was put to him that if he had knowledge of same he would have realised that the statement did not justify a complaint of kidnapping.

[33] I am in agreement with counsel for the defendant that the statement of Victor's mother is inadmissible as it was not properly tendered into evidence. Even if the statement would have been admitted, its content would have been irrelevant for the purpose of determining whether Colonel Grobler acted reasonably in arresting the plaintiffs. It is trite that the information to be taken into account should only be that which was within the knowledge of Colonel Grobler, as the arresting officer, immediately prior to the arrest. No information obtained subsequent to the arrest or that is not within the knowledge of the arresting officer at the time of effecting the arrest, should be considered. The enquiry here should be, objectively speaking, what information Colonel Grobler had at his disposal when he made the arrest and did that information objectively speaking, empower him to arrest and further detain the plaintiffs, as he did. In the final analysis the question ought to be, would a reasonable police officer with the same information which was within the knowledge of Colonel Grobler at the time of arrest, have arrested the plaintiff?

[34] Therefore, the facts within the knowledge of Colonel Grobler at the time when he made the arrest, justified a suspicion that the offence of kidnapping was committed or being committed.

The arrest was made on strength of Victor's report

[35] The submission made in this regard is that on his own version as *per* the arresting statement together with the evidence he tendered in court, Colonel Grobler did not have sufficient reasons to arrest the plaintiffs. The central issue on which the plaintiff's counsel focussed on during his cross-examination of Colonel Grobler was that the plaintiffs were at no stage afforded an opportunity to present their version to the arresting officer. In support of this assertion, the plaintiffs' counsel, with the aim of showing that the decision to arrest was exercised unreasonably, relied on the possible improbability or unreliability of certain allegations, and discrepancies in the arresting statement of Colonel Grobler, which indicated that on the reading of the arresting statement, nowhere was it mentioned that he asked for an explanation or response to the allegations by Victor.

[36] Counsel, further, relied on the concession made by Colonel Grobler during his testimony that on the reading of his statement, it appears that he spoke to Victor who informed him that he was kidnapped by the plaintiffs and based on the report by Victor, he arrested the plaintiffs. He then read them their rights in terms of the Constitution and informed them of the reason for their arrest which was relayed in English, and they understood.

[37] Counsel's main complaint was that Colonel Grobler arrested the plaintiffs on the strength of a report from Victor that he was kidnapped by the plaintiffs and that such a report on its own was not enough to create a reasonable suspicion which warranted the arrest of the plaintiffs. It was then put to Colonel Grobler that under the circumstances the arrest was unlawful

and that he (Colonel Grobler) did not have sufficient reasons to arrest the plaintiffs and did not have a reasonable suspicion that the plaintiffs committed the offence of kidnapping.

[38] According to plaintiffs' counsel, there is a duty on a police officer before he can form a reasonable suspicion to analyse and assess the quality of the information at his disposal critically and not accept it lightly where it can be checked. Colonel Grobler was enjoined to seek the plaintiffs' version and investigate their exculpatory version, before forming a reasonable suspicion and deciding to arrest, which he failed to do. What he did, afterwards, does not cure the failure, it is submitted.

[39] The line of attack is misconceived. It must be kept in mind that subsection 40 (1) (b) of the CPA does not require certainty, the police officer need only harbour a suspicion of the offence having been committed. A suspicion inherently involves an absence of certainty or adequate proof. A suspicion can be reasonable despite there being insufficient evidence for a *prima facie* case. The arresting officer is entitled to consider all the information, even based on hearsay, and does not have to be convinced that there was in fact evidence proving the guilt of the arrestee beyond reasonable doubt. It was, therefore, not expected of Colonel Grobler to satisfy himself to the same extent as a court would.

[40] Counsel seems to lose sight of the fact that when Victor made the statement to Colonel Grobler, Colonel Grobler already had the information in his knowledge that he used to arrest the plaintiffs. He had already identified

the two doors red Golf with the matching registration numbers in Lenasia. He had already been given the name of the person who was kidnapped. Victor's statement confirmed the information that he already had, that he received at the briefing.

[41] I agree with the submission by the defendant's counsel that the plaintiffs' counsel is, in this regard, wrong. The fact that an opportunity to give an explanation was not given to the plaintiffs is not one of the jurisdictional facts that must exist before the arresting officer could effect an arrest. The failure to provide the plaintiffs an opportunity of explanation and to investigate their exculpatory version is something that might come into play when considering whether the police officer properly exercised the discretion to effect an arrest, but as far as the jurisdictional facts to justify an arrest are concerned, that is undoubtedly not one of the requirements. An explanation from the suspect is not one of the jurisdictional facts to justify the arrest. Once the jurisdictional factors are determined it is the end of the case.

[42] Colonel Grobler's evidence is that an opportunity was, indeed, given to the plaintiffs to put their version forward, but they opted to remain silent. He testified that it must be borne in mind that in effecting an arrest, the suspect must be given the opportunity to give an explanation, although that duty only arises after the decision to arrest is made and that, that is the basis for explaining to a suspect his or her rights in terms of section 35 of the Constitution. In reply to a question from the bench Colonel Grobler explained and confirmed that it is exactly what occurred in this instance. Colonel

Grobler persisted that with all the information at his disposal, which included the information conveyed during the briefing, the colour and registration number of the Golf, the suspicious manner how the Golf was parked, the fact that Victor identified himself as the victim, corroborating their information and Victor pointing out the plaintiffs as co-perpetrators in his kidnapping, he had a reasonable suspicion that the plaintiffs committed a Schedule 1 offence and decided to arrest them.

[43] On the reasons stated above, I am satisfied that Colonel Grobler was armed with more than sufficient information to form a reasonable suspicion that the plaintiffs committed the offence of kidnapping.

The Discretion was not exercised properly

[44] It is trite that even if it is so that the arresting officer entertained a reasonable suspicion, the question that must follow is whether the arresting officer exercised a discretion whether or not, it was necessary to arrest the plaintiffs.

[45] It has been held that once the jurisdictional facts for an arrest have been established, a discretion arises. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The arresting officer, it should be emphasised, is not obliged to effect an arrest.⁷ The arresting officer has a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires the arresting

⁷ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 28.

officer to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry.⁸

[46] In other words, the court should enquire whether in effecting an arrest, the arresting officers exercised their discretion at all. And if they did, whether they exercised it properly cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, and that the discretion conferred in section 40 (1) of the Criminal Procedure Act must be exercised 'in light of the Bill of Rights'.⁹ The discretion must be exercised capriciously, rationally and not arbitrarily.¹⁰

[47] In *Sekhoto*, the Supreme Court of Appeal decided that 'the general rule is also that a party who attacks the exercise of discretion, whether jurisdictional facts are present, bears the *onus* of proof. This is the position whether or not the right to freedom is compromised.' The *onus*, thus, was on the plaintiffs to proof that the discretion was not exercised properly.

[48] In the present case, it is submitted on behalf of the plaintiffs that on the evidence before court, it is clear that Colonel Grobler, when he effected the arrests, failed to exercise a discretion. Even though he confirmed under cross examination that he exercised the discretion, he, however failed to demonstrate how he exercised such discretion.

[49] This point by plaintiffs' counsel, was buttressed by the submission that on his own version, Colonel Grobler did not exercise a discretion because

⁸ *Raduvha v Minister of Safety and Security and Another* (2016) ZACC 24 para 42.

⁹ *Raduvha* case para 44.

¹⁰ *Sekhoto* case para 38

after he had spoken to Victor, he turned around to the plaintiffs and read them their rights and told them of the reason of their arrest and asked that they be taken away. There is no indication that he considered other methods to secure the plaintiffs' attendance at court.

[50] The defendant's counsel contended in argument that if Colonel Grobler exercised his discretion to arrest, then if the plaintiffs want to attack that discretion, and intent to make out a case that the discretion was not exercised *bona fide*, the plaintiffs must allege same in the pleadings. This, however, has been alleged.

[51] The plaintiffs in paragraph 6 of the particulars of claim allege that:-

"6.2 The arrest was made without any reasonable suspicion and/or grounds for suspecting the Plaintiff of committing a Schedule 1 offence in terms of Act 51 of 1977; *alternatively*, the arresting officer did not entertain an objectively sustainable suspicion based on reasonable grounds that the Plaintiff had committed a Schedule 1 offence.

6.3 *Alternatively* to 6.2 above the arresting officer did not exercise his discretion to arrest: in in good faith, rationally and not arbitrarily; . . . "

[52] It is trite that an arrest is one of the methods of securing the attendance of an accused before court for the purpose of trial. The decision

to arrest must be based on the intention to bring the arrested person to justice.

[53] The legal position, as set out in *Sekhoto*,¹¹ is that police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.

[54] The court in *Sekhoto* went further to state the following:

"[44] . . . Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were

¹¹ *Sekhoto* case para 39.

suspected in this case — which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years — clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.”

[55] I am in agreement with the proposition by the defendant's counsel that on the facts of this case, the plaintiffs failed to prove any facts or basis on which it can be found that Colonel Grobler did not exercise his discretion to arrest in good faith, rationally and not arbitrarily. The evidence indicate that Colonel Grobler appreciated that he had a discretion whether or not to arrest the plaintiffs without a warrant, this came out clearly during cross examination. The nature of the offences of which the plaintiffs were suspected in this case, which ordinarily attract heavy sentences of imprisonment clearly justified their arrest. The facts that were within the knowledge of Colonel Grobler at the time of arrest are rationally connected to his decision to arrest the plaintiffs.

[56] In the light of the information that was within his knowledge together with Victor's report that he has been kidnapped, Colonel Grobler was entitled to exercise his discretion in favour of an arrest. He positively identified the motor vehicle which it was alleged the kidnappers were using, he finds the person who they have been told has been kidnapped inside that motor vehicle, the person confirms his identity and that he has been kidnapped and

further points out the plaintiffs as his kidnappers. Whether it is Victor that confirms that he has been kidnapped or it is Thapelo that arrives there and confirms that Victor has been kidnapped, does not really matter. The fact of the matter is, Victor is identified. He is the person who according to the information that was conveyed at the briefing, was kidnapped. He tells the policemen that these are the people that kidnapped me. For Colonel Grobler to have exercised a discretion to arrest on those facts, does not warrant the criticism levelled against him. Besides no basis were laid for any criticism against his decision to arrest.

On the totality of the evidence

[57] Counsel for the plaintiffs' in argument submits that in order for a court to decide whether or not the defendant has discharged its *onus*, the court must employ the often-employed test where a court is faced with two mutually destructive versions as outlined by the court in the matter of *National Employers General Insurance Co Ltd v Jagers*.¹² Counsel contents that since the version proffered by Ms Khumalo as to the events of that night contradicts that of Colonel Grobler, the court must on the totality of the evidence accept the version of Ms Khumalo as the truth of what occurred.

[58] I am more inclined to accept the suggestion by the defendant's counsel that it is not necessary to delve into the question of the credibility of the witnesses, for the simple reason that all the important and material facts,

¹² *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 44D – H.

except for one issue, on the alleged unlawfulness of the arrest of the plaintiffs, are based on common cause facts.

[59] The evidence of Ms Khumalo in rebuttal of the Defendant's version, is that on the day in question, they were sitting with Victor in the Golf whilst waiting for Xolani, the driver of the Golf and another gentleman who had gone to the garage to buy drinks. They had stopped at the garage on their way to Lenasia police station where Victor's mother had suggested that they meet. The Golf was parked across the street from the garage with its back facing the wall.

[60] Whilst so sitting, they were approached by a number of police officers who pointed them with firearms and ordered them to get out of the Golf and lie on the ground. The three alighted from the Golf and lied down on the ground. The police officers kicked them (including Victor) around on the legs – spreading their legs.

[61] A friend of Victor, Thapelo, arrived on the scene in the company of Victor's mother and pointed out at Victor and informed the police officers that Victor is the one they were looking for and that he (Victor) was kidnapped. Victor was surprised that it was said that he has been kidnapped. Victor was asked to stand up and Colonel Grobler moved with him to the side and talked to him. Ms Khumalo could not hear what they were talking about. The plaintiffs were then ordered to stand up and were taken in different motor vehicles to the police station.

[62] In essence counsel for the plaintiffs wants this court to accept the plaintiffs evidence as regards the fact that whilst the plaintiffs were lying on the ground, Thapelo arrived and pointed out Victor as the person who has been kidnapped and that Victor expressed surprise that he has been kidnapped; that the plaintiffs were not asked to provide a version in response to the allegations by Victor; they were taken to the police station where they were arrested and detained even though the police officers there accepted that there was no case against them.

[63] To my mind, the evidence of Ms Khumalo, save that the plaintiffs were not asked to provide a version in response to the allegations by Victor, corroborates the version of Colonel Grobler.

[64] From the totality of the evidence tendered, it is evident that Victor was identified as the person who was kidnapped, either by Victor himself or by Thapelo, as testified by Ms Khumalo. What is clear is that at the time of arrest Colonel Grobler was possessed of the knowledge that Victor is the person who they were earlier briefed, was kidnapped. The evidence of Ms Khumalo also confirms that of Colonel Grobler that the plaintiffs were travelling in a red Golf with the registration number that matched the one Colonel Grobler received during the briefing and that the police officers found them in Lenasia in the company of Victor.

This claim stands to be dismissed.

THE UNLAWFUL DETENTION

[65] It is trite law that if an arrest is lawful the subsequent detention is also rendered lawful. It follows that if the arrest itself is in fact lawful, as is the case here, then the detention, *per se*, cannot be unlawful.

[66] This is buttressed by the provisions of section 39 (3) of the Criminal Procedure Act which stipulate that:

"The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

[67] It is common cause that, in this instance, the unlawfulness of the detention would have flowed from the alleged unlawful arrest. The plaintiffs' claims for unlawful detention is based on the allegation in the particulars of claim that they were not brought before court within the statutory required 48 (forty-eight) hour period.

[68] The allegation by the plaintiffs that they were not brought to court within the period of 48 hours is unfounded and not true. The objective facts before me is that they were brought to court within the said period as extended by the provisions of section 50 (1) (c) (ii) and (d) (i) of the CPA read with section 35 (1) (d) of the Constitution.

[69] In terms of the said sections, any person who is arrested and in detention shall be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest. If the period of 48 hours expires

outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a court not later than the end of the first court day after the expiry of the 48 hours.

[70] Section 50 (1) (c) of the CPA and section 35 (1) (d) of the Constitution provides that should the period of 48 hours after the arrest expire after ordinary court hours, the accused will be brought before court on the following day. The subsection also makes particular provision for the situation where the 48-hour period expires on a weekend. In such an instance the person under arrest should be brought before court on the Monday, subject thereto that this is an ordinary court day.

[71] It is common cause that the plaintiffs were arrested on Wednesday 10 August 2016 at 21h30. The period of 48 hours started running at that time and expired at 20h30 on Friday 12 August 2016. The 48-hour period, thus, expired after ordinary court hours. The following day on which the police could have taken the plaintiffs to court was a Saturday which is not an ordinary court day. Therefore, the first ordinary court day after the expiry of the 48 hours was on Monday 15 August 2016. The plaintiffs were taken to court on the said Monday hence, objectively speaking, they were taken to court within the 48 hours. Therefore, to have brought the plaintiffs to court only on Monday was lawful and within the ambit of the provisions of the Criminal Procedure Act and of the Constitution.

[72] The contention by the plaintiff's counsel, however, is that even though the arrest of the plaintiffs was found to be lawful, their detention was still

unlawful due to other grounds. Firstly, the proposition is that the detention is unlawful because the police unreasonably failed to take the plaintiffs to court before the expiration of the 48-hour period.

[73] According to counsel for the plaintiffs, even though section 50 (1) of the CPA enjoins the police to take the arrested person to court not later than 48 hours after the arrest, there is no need for the police to unreasonably wait until the 48 hours have expired before they take the arrested person to court. The contention is that if there are no reasonable reasons why the person arrested was not taken to court within the 48-hour period, the detention is unlawful.

[74] In this regard, the submission made by counsel is that in order to give effect to the provisions of section 50 (1) of the CPA, the sub-section must be read and understood through the prism of the Constitution. Counsel concedes that the police have the power or authority to detain, or are entitled to detain a suspect; but argues that this court should take the constitutional imperatives not to deprive a person of freedom arbitrarily or without just cause, into consideration, when implementing the provisions of the sub-section. Such imperatives, according to counsel, oblige the police to act with haste and must not just detain an arrested person and leave her/him in the cells until the expiration of the 48-hour period. Where it is possible, counsel contends, the police must take reasonable steps to ensure that the 48-hour period does not expire before an arrested person is brought before court. Like in this instance where the plaintiffs were arrested on Wednesday

evening and charged on Thursday evening, counsel contends that, unless there are reasonable reasons, ideally the police should have taken the plaintiffs to court at the very least by 16h00 on Friday and not wait for the 48-hour period to expire, as they did.

[75] The second ground is that the detention of the plaintiffs, from 9h00 on the morning of Monday 15 August 2016, which is the time when they were released from the court cells, until 15h00 that day, when they were released by Investigating Officer Thipe, is unlawful.

[76] The evidence of Ms Khumalo is that the plaintiffs were released from the holding cell at 9h00 on the morning of Monday 15 August 2016. The plaintiffs were released into the hands of Investigating Officer Thipe who ordered them to follow him to his motor vehicle and instructed them to go into the said motor vehicle without providing them any reasons or informing them that the prosecutor refused to enrol their case. Investigating Officer Thipe only released the plaintiffs at 15h00 that date after having driven with them to collect bribe money from Ms Ntuli's sister.

[77] The two grounds on which the plaintiffs contend render their detention unlawful are in my view, totally separate and new causes of action which should have been specifically pleaded. The *onus* to prove that the lawful detention for some reason became unlawful falls on the plaintiffs. Having failed to plead the said causes of action, in my opinion, amounts to trial by ambush!

It is a well-known fact that the purpose of pleadings is to define the issues for the other party and the court and it is for the court to adjudicate upon the disputes and those disputes alone.¹³

[78] In *Minister of Safety and Security v Slabbert*,¹⁴ the Supreme Court of Appeal held that:

"Party has a duty to allege in the pleadings the material facts upon which it relies, it is impermissible for the plaintiff to plead a particular case and seek to establish a different case It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding the case."

[79] If the plaintiff's case is that the lawful detention resulting from the lawful arrest by Colonel Grobler, became unlawful for some reason, they had the *onus* to plead according to those facts, but plaintiffs failed to do so. There is not a single allegation in the particulars of claim to the effect that the police were supposed to take the plaintiffs to court before the expiry of 48 hours after they were arrested; or that the unlawful detention continued even after the plaintiffs were released from the holding cells when the prosecutor refused to enrol their matter; or that the plaintiffs were, after the release from the holding cells, again arrested and or detained; or that the investigating officer or any other member of SAPS acted unlawfully in that regard.

¹³ *Mahlangu and Another v Minister of Police* 2020 (2) SACR 136 (SCA) para 26.

¹⁴ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11.

[80] I agree with the defendant's submission that where the police acted unlawfully after the unlawful arrest, any harm resulting from having acted unlawfully is not caused by the unlawful arrest but is caused by that unlawful conduct. Just as any unlawful conduct by the police after a lawful arrest would not constitute an unlawful detention. Therefore, an unlawful detention, if any, will have been occasioned by the conduct of the police which occurred after the lawful arrest; and such conduct should have been pleaded as a new and separate cause of action.

[81] The plaintiffs' claim for unlawful detention would have flowed from the alleged unlawful arrest. Having found that the arrest was lawful and the plaintiffs having not pleaded the other grounds to establish the unlawfulness of the detention, their claim for unlawful detention ought to fail, as well.

COSTS

[82] Both parties prayed for costs in the event that they are successful and contended that such costs should include costs of two counsel. On a question from the bench whether it was necessary that the parties should have employed the services of two counsel in this ordinary run of the mill case of unlawful arrest and detention, I was given two reasons why it was necessary. Firstly, I was informed that the question of the post detention that was anticipated to come, is something that may be not trite in our law and has not been previously dealt with by our courts, hence the employment of two

counsel in that regard was necessary. Secondly, because both parties employed two counsel.

[83] As is trite the question of whether to award costs and which costs ought to be awarded, is within the discretion of the court. Having determined the issues and made my findings, I do not think this is a case that required the employment of two counsel.

[84] As I have already indicated, this is an ordinary run of the mill case of unlawful arrest and detention. Costs of two counsel should not be allowed.

ORDER

[85] Consequently, the following order is made:

1. The plaintiffs' claims for unlawful arrest and detention are dismissed.
2. The plaintiffs are ordered to pay costs of suit jointly and severally, the one paying the other to be absolved.



E.M KUBUSHI
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Appearance:

Plaintiff's Counsel	: Adv. D. Mtsweni
Plaintiff's Attorneys	: Gildenhuis Malatji Incorporated
Defendant's Counsel	: Adv. M M M Van Zyl SC
Defendant's Attorneys	: State Attorney, Pretoria
Date of hearing	: 23-30 November 2020
Date of judgment	: 10 March 2021