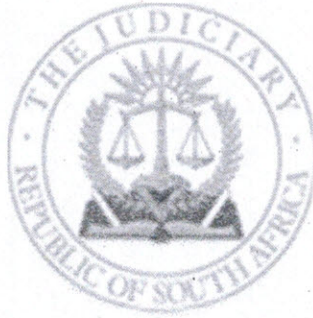




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED No
DATE:	8 February 2019.....
SIGNATURE:	<i>eiees</i>

Case No. 53974/15

In the matter between:

QUINTON LEE DUNN

FIRST PLAINTIFF

SHAUN CORNELIUS BRONKHORST

SECOND PLAINTIFF

PHILLIPUS DAWID LOTTERING

THIRD PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MILLAR, A J

1. The Plaintiffs brought an action for damages against the defendant for damages arising out of what was alleged to be their unlawful arrest and detention. The defendant admitted the arrests but placed in issue their unlawfulness.
2. The parties agreed that the action proceed at this stage for the determination of liability and in the circumstances sought an order in terms of Rule 33(4) of the Uniform Rules separating the issue of liability from that of the quantum of damages. I granted the order sought.
3. It was common cause that on 4 March 2013 and at Brits in the North-West Province, the plaintiffs were arrested. They were arrested, without a warrant having been first issued and thereafter detained at the Brits Police Station until their release later the same day.
4. The defendant accepted that it bears the onus of proving that the arrests were lawful and that it had the duty to begin.
5. The defendant called Sergeant Legodi as a witness. He testified that at the time of the arrests, he had been a constable and had been in the service for 7 years. He was and still is stationed at the Brits police station. On the day in question the police had been called to the premises of a company called "Pat Cornick". A complaint had been made that workers there who were on strike had been demanding their money and were "singing and dancing".

He had gone to the scene with three other officers – Lieutenant Dlamini, Constable Madia and Constable Mngadi. They had driven there in two marked Nissan police vehicles and Legodi had driven with Constable Madia.

6. When they arrived at the scene it appeared peaceful and Lieutenant Dlamini had taken charge of the scene. There were none of the signs that usually accompanied strikes such as stones in the road, blockades and burning tyre's. He spoke to the workers who he found a short distance from the premises and they informed him that people had been shot and taken to hospital. He then proceeded to cordon off the scene and made arrangements for the Local Criminal Record Centre to send someone to begin investigating and take photographs. Lieutenant Dlamini remained on the scene.
7. He had then gone with Constable Madia to the Brits hospital where he had seen four persons who had suffered injuries. He described the injuries as appearing serious and that one of the injured appeared to have been shot in the back. He went back to the scene and was told by Thabiso Molefe and Charles Nyalunga that the people who had been shot, had been shot by the first plaintiff and members of PPS Security from some distance away. He did not speak to anyone else at the scene. He then approached the plaintiffs and without asking them for their version of what had happened, informed them that he intended to arrest them on a charge of attempted murder.
8. The plaintiffs were peaceful and co-operative. He had disarmed them and read them their rights. They were not handcuffed and had voluntarily climbed into his vehicle and gone with him back to the station. When they had arrived there, he had again read them their rights and they had signed and been given SAP14 forms – the "Notice of Rights in Terms of the Constitution". This had occurred at 11h30 for the second plaintiff and at 12h12 for the first plaintiff. He had then handed them over to be held in custody.

9. The defendant also called Detective Nkwana, Mr. Mataboge and Mr. Marema as witnesses. All three gave evidence which was corroborative of an incident at "Pat Cornick" on the day in question and that people had been shot. None of the three had spoken to Legodi on the day in the period immediately prior to his decision to arrest the plaintiff's.
10. The first plaintiff testified. On the day in question he had been at the premises of "Pat Cornick" together with various employees of his company PPS Security, which included the second and third plaintiff's. With him was also Mr. Ngwenya who also provided security to "Pat Cornick". Some of the workers were on strike and had gathered in the vicinity of the premises. Also, in the vicinity were job seekers who were there to apply for positions at "Pat Cornick".
11. The situation became volatile and the job seekers were advised to come back another day so as not to antagonize the strikers. While the job seekers were moving off, the strikers engaged with them. The first plaintiff called on them to stop and they had in turn thrown stones at them. They had then heard screams of pain and had seen strikers assaulting someone a short way off. A "flash bang" was fired to scare the strikers off and three security officers sent on foot to help. Two vehicles with more officers were also sent. Rubber bullets were also fired.
12. The officers rescued a job seeker by the name of Rose Makhubele who was injured and brought her back to safety. She had an injury to her head and face and was bleeding. Her clothing was damaged.
13. A short while later the three plaintiffs had given statements to the police setting out what happened. These were taken down by Warrant Officer Kemp the station commander of the Brits police station. The statements were taken down at 09h53. Mr. Ngwenya and Ms.

Makhubela remained at the scene. A while later the first and second plaintiffs had been approached by Lieutenant Dlamini and placed under arrest. The third plaintiff was not present at the time, so he was telephoned and asked to go to the police station which he subsequently did.

14. The plaintiff also called Mr. Ngwenya and Ms. Makhubele, both of whom corroborated the evidence of the first plaintiff.
15. The plaintiff's dispute that the arrest was effected by Legodi and he was challenged on this aspect. He was adamant that he was the one who arrested the plaintiffs. The defendant was critical of the evidence of Ms. Makhubele and challenged it as a fabrication. It was put to her that this was so, simply because she had never laid charges against the people who had assaulted her. She explained this, to my mind satisfactorily by saying that she did not know the persons who had assaulted her except by sight and thus could not identify the assailants by name to make a complaint at the police station.
16. It is common cause that the plaintiffs were arrested without a warrant. Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that, "a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1".
17. It was held by the Supreme Court of Appeal in *Duncan v Minister of Law and Order*¹ 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 1986 (2) SA 805 (A) at 818 G-H

- (1) the arrestor must be a peace officer;
- (2) the arrestor must entertain a suspicion;
- (3) the suspicion must be that the suspect committed an offence referred to in schedule 1;
- (4) the suspicion must rest on reasonable grounds."

18. The test to be applied is an objective one.² It is not in issue that Legodi (or Dlamini) is a peace officer as defined in the Act nor that given the information furnished to him relating to the incident that he entertained a suspicion of the commission of an offence contemplated in Schedule 1.
19. What is in issue is whether, objectively, Legodi's (or Dlamini's) suspicion rested on reasonable grounds.
20. In *Mabona and Another v Minister of Law and Order*³ it was stated that "*The test whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of 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 have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it 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*

² Duncan supra at 814 D-E where it was stated "it seems clear that the test is not 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"; see also *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 (GSJ)

³ 1988 (2) SA 654 (SE) at 658 E-H

which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion."

20. The onus of proving the lawfulness of the arrest in a matter such as the present one lies with the defendant⁴.
21. Whether the arrest was effected by Legodi or Dlamini is to my mind immaterial in the present matter. The plaintiffs had on the day in question already made statements in which the reasons for their action, that is to halt the assault on Ms. Makhubela, was set out.
22. These statements were made to the police before the arrest was effected and at the time of the arrest, even if Legodi or Dlamini did not have the statements, they could have interviewed the plaintiffs or Mr. Ngwenya or Ms. Makhubele, all of whom were available on the scene, to ascertain the circumstances under which the plaintiffs had acted.
23. While the evidence of Legodi shows clearly that he harbored a suspicion, this was based exclusively on the information furnished by Molefe and Nyalunga and on his observations at the hospital. Since Dlamini was not called to testify, it is unclear on what basis he harbored any suspicion, if he did indeed effect the arrest. For either Legodi and Dlamini, It seems to me that further enquiry from readily available witnesses by was reasonably necessary in the circumstances.

⁴ Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589 E-F; Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A).

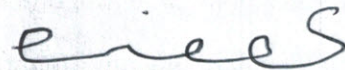
24. In the circumstances, I find that Legodi or Dlamini could and should have conducted further enquiries before the summary arrest of the plaintiffs and that accordingly the arrest and detention of the plaintiffs was not based on "solid grounds"⁵ and was unlawful.

26. It is ordered:

26.1 The defendant is liable for such damages as the plaintiffs may prove arising out of their arrest and detention on 4 March 2013;

26.2 The defendant is to pay the plaintiff's costs of suit to date on the scale as between party and party.

26.3 The determination of the quantum of damages is postponed *sine die*.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 5 & 6 FEBRUARY 2019

JUDGMENT DELIVERED ON: 8 FEBRUARY 2019

COUNSEL FOR THE PLAINTIFF: ADV J MOLLER

INSTRUCTED BY: LOURENS ATTORNEYS

⁵ Mabona supra

REFERENCE:

MR C LOURENS

COUNSEL FOR THE DEFENDANT :

ADV P PHAMBA

INSTRUCTED BY:

THE STATE ATTORNEY - PRETORIA

REFERENCE:

MR M LETSOKO