



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

CASE NO: 32378/2016

MOLEKO BEVAN KABELO

PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND DEFENDANT

JUDGMENT

SARDIWALLA J:

INTRODUCTION:

1. The Plaintiff claimed for damages arising from an unlawful arrest by the Defendants.
2. The issue before this court is to determine whether the arrest was lawful and whether the subsequent decision by the second defendant to prosecute was reasonable. The arrest took place without a warrant in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA).

BACKGROUND:

3. On the 10 June 2015, the plaintiff was arrested in terms of S40 (1) (b) of the CPA by Constable Abel Sibanyoni and .Sergeant Rebecca Mathlolokwgane. The plaintiff was arrested on suspicion of armed robbery.
4. Counsel advised this Court that the plaintiff was released on 5 November 2015 on a Section 174 discharge as the prosecution failed to prove its case against the plaintiff.
5. In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached.

THE PLEADINGS:

6. It is common cause that the police officers who arrested the plaintiff were acting within the course and scope of their employment as police officials of the South African Police Services.
7. The plaintiff claims to have suffered damage for loss of freedom, invasion of his privacy and impairment to his dignity in the amount of R1 500 000, 00. However this Court was requested to only make a finding on the merits. The aspect of quantum would be dealt by the parties at a later stage.

THE EVIDENCE:

8. The defendants called four witnesses whilst the Plaintiff testified himself.

CONSTABLE SIBANYONI

9. Sibanyoni testified that on 10 June 2015 he was on patrol duty together with Sergeant Mathlolokwgane when they received a complainant that someone was being attacked by a mob at 1st Avenue and Heatherdale. When they arrived at the scene they found the plaintiff surrounded by the complainant and the community. They were told by community members that the plaintiff had robbed the complainant of her cell phone, attempted to rape her but that the victim fought back and as a result he stabbed her with a broken bottle. He testified that when they arrived at the scene the plaintiff had already sustained injuries therefore for his safety he was removed and placed into the back of their vehicle. He indicated that on interviewing a community member and the complainant they both pointed out the plaintiff as the perpetrator. He confirmed that the complainant had sustained visible injuries but that the plaintiff denied any involvement in the alleged crime. He thereafter informed the plaintiff that he was being arrested and the reasons for the arrest. The plaintiff was taken to the police station where the plaintiff was charged. He testified that the purpose of the arrest was to bring the plaintiff before court. He further testified that he had formed a reasonable suspicion after interviewing the community members and the complainant who pointed the plaintiff out as the suspect.

10. He testified that he did not recover the weapon as it is not always possible to recover a weapon as there are instances where the suspects dispose of the weapons. He averred that he could not remember the clothing that the plaintiff wore when he was arrested. He re-iterated that he arrested the plaintiff because he was pointed out to him as the offender. He testifies that he is not responsible for charging suspects only arresting them.

SERGEANT MATHLOLOKGWANE

11. She confirmed that she was on duty with Constable Sibanyoni when they

received a complaint that someone was being attacked by a mob on 1st Avenue and Heatherdale. She confirmed that they found the plaintiff surrounded by community members who had tied his hands using cable ties. They decided that it was safer to move the plaintiff to the vehicle. She testified that they questioned the plaintiff about what had happened and that he indicated that he had an altercation with a person who searched him but did not point out that person to them. She testified that the complainant pointed out the plaintiff as the suspect. She indicated that a member of the police forum was present but that she did not take his statement. She indicated that she did not interview the complainant's husband. That when they went back to the vehicle they interrogated the plaintiff but he denied any involvement in the alleged crime but did not want to make a written statement. She averred that she formulated her suspicion by interviewing community members and the complainant who all pointed the plaintiff out as the offender. She testified that the weapon was not recovered from the scene of the crime and that none of the items stolen were found on the plaintiff's possession. She also could not state what the plaintiff was wearing on that day. The plaintiff was thereafter taken to the Akasi Police Station to be charged and later to the clinic for medical treatment. She testified that the detectives are responsible for charging suspects; it is only her duty once a reasonable suspicion is formed to arrest the suspect.

MR MATHLATSI (NDPP)

12. He testified that he is the prosecutor in the matter. He was satisfied that there was a prima facie case against the plaintiff and enrolled the matter for a bail hearing. He testified that he had the statements of the complainant, her husband and that of the arresting office. It was on the information provided that he believed that there was a case against the plaintiff. He stated that the plaintiff was charged with armed robbery and appeared before court on 12 June 2015 where the matter was remanded to 19 June 2015 for further investigation. He further testified that after several postponements for further investigation the bail hearing was finally held on 1 July 2015 and was denied on the basis that no exceptional circumstances existed to permit the plaintiff's release on bail. The matter was then transferred to the regional court. He indicated that the state had a reasonable and probable cause to charge the plaintiff and that it is not necessary for a case to have exhibits in order to convict as items can sometimes

be lost. He testified that the reason the plaintiff was not charged with attempted rape was that the act was not complete and therefore insufficient to prove all the required elements. He re-iterated that upon his assessment of the facts he believed that there was a case made out against the plaintiff.

MS SHIVHAMBU (NDPP)

13. She testified that she is the prosecutor in the matter and that she viewed the docket on 9 September 2015 which included the statements of the complainant, her husband, the arresting officer and the J88 form. She testified that she was satisfied that there was a prima facie case against the plaintiff. She indicated that she did not investigate the matter further as she was of the view that there was sufficient evidence to convict the plaintiff. She averred that the elements of armed robbery fit the plaintiff's case and therefore it is not necessary for a weapon to be found in order to secure a conviction. She stated that there was insufficient evidence to charge the plaintiff with attempted rape. She re-iterated that she was convinced that the matter was ready for trial after she consulted with the witnesses as they did not contradict each other.

PLAINTIFF

14. He testified that on 10 June 2015 he exited a train at Ventersnes train station at around 13h00 which is a 30 minute walk from Wonder park mall where he was headed to submit his resume at one of the retails. He had in his possession a transparent identity packet which contained a red track top, his resume and headphones. In his pocket he had a black X-touch Samsung phone that his brother had purchased for him. He testified that he was wearing a black all-star sneaker, silver and black t-shirt and navy chinos. Whilst he was walking he met a man who demanded to search him and to see his cell phone. The man accused him of robbing his wife because he saw the red jacket that was in his bag. Whilst he was searching for his phone in his pocket the man struck him with a brick on the head. He then ran into the bushes and into someone's yard to get away from the complainant's husband. He used his t-shirt to stop the bleeding and put on the red track top. He indicated that he was caught by the owner of the property and members of the armed response. The community thereafter gathered together with the complainant and her husband where the complainant

pointed him out as the perpetrator. It was at this stage that the community members assaulted him. When the police arrived they removed him from the scene and placed him at the back of their vehicle. The police then interviewed the complainant and her husband who pointed him out as the perpetrator. He submitted that the police informed him that they were arresting him for using a weapon to rob the complainant however no items were found in his possession or were presented as exhibits during the proceedings. He stated that the complainant and her husband were taken to the police station and was detained at Soshanguve Police station. After several appearances he was released on a discharge in terms of Section 174 on 5 November 2015. He testified that he was legally represented.

The Plaintiff's argument

15. Counsel on behalf of the Plaintiff persisted with *inter alia* the following arguments:

15.1 The defendant failed to make a valid defence to the arrest;

15.2 The arresting officer a failed to conduct an investigation in order to establish the reasonableness of the suspicion and therefore police officers had failed to exercise their discretion rationally nor did they apply their mind to the information given.

15.3 There were mutually destructive versions before the Court;

The suspects' version was not taken into account;

Counsel referred the Court to **Mobono v The State**¹ where the test is whether there are good and sufficient grounds for the suspicion;

15.4 Counsel correctly pointed out that the suspicion must be based on concrete grounds and contended that such grounds were not established.

The Defendant's argument

16. Counsel for the defendant cautioned the court to appreciate the

¹ 1988 (2) SA 654 at 658

following:

- 16.1 A peace officer is entitled to arrest without a warrant on the basis that it is reasonable to identify the suspect's involvement.
- 16.2 One does not require concrete evidence to establish that an offence has been committed;
- 16.3 There is only a suspicion required, not proof beyond a reasonable doubt;
- 16.4 Counsel referred to *Johannes Papa Kgapola v Minister of Police*² that a pointing out of a suspect was considered *pima facie* proof and that under those circumstances an arrest cannot be said to be unreasonable.

ANALYSIS AND FINDINGS:

- 17. Section 40(1) of the CPA gives peace officers extraordinary powers to arrest. Thus the circumstances when such arrests are made must be considered carefully otherwise such arrests are considered to be unlawful.
- 18. In *Duncan v Minister of Law and Order*³, the Court established that jurisdictional facts must exist before such power can be exercised namely:
 - i. the arrester must be a peace officer;
 - ii. the peace officer must entertain a suspicion;
 - iii. it must be a suspicion that the arrestee committed a schedule 1 offence;
 - iv. the suspicion must rest on reasonable grounds.
- 19. Once these jurisdictional facts are present a discretion arises whether to arrest or not. Such discretion must be exercised in good faith, rationally and not arbitrarily. This is an objective enquiry with relation to the facts

Minister of Safety and Security v Sekhoto and Another⁴

² 1986 (2) SA 80 at 818 F-H

³ *supra*

⁴ 2011 (1) SACR 315 SCA

20. Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion⁵.
21. The arrestor's grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a "*reasonable*" suspicion before the arrest is made.
- :
22. This test was succinctly summarized in **Mobona v Minister of Law and Order**⁶ where it was established that what is required is suspicion not certainty. Such suspicion must make sense otherwise it is frivolous or arbitrary and not reasonable.
23. There must be evidence that the arresting officer formed a suspicion which is objectively sustainable⁷.
24. In **Tsose v Minister of Justice**⁸ it was emphasized that the arrest must be with the intention of bringing the arrestees before Court. An arrest can take place lawfully, where the arrestor objectively speaking, has a reasonable suspicion against the suspect but has to conduct further investigations after the arrest before finally deciding to charge the arrestee.
25. Arrests can therefore take place even if the arrester realised that at the time of the arrest he does not have sufficient proof for a conviction⁹.
26. It should be noted that the events subsequent to the arrests do not have any bearing upon whether their suspicion was reasonable. Therefore this Court will not deal with the evidence pertaining thereto.
27. The crux of the dispute between the parties was whether the suspicion that

⁵ *R v Heerden* 1958 (3) SA 150 (T)

⁶ 1988 (2) SA 654 SEC

⁷ *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 313 (T) ¹

⁸ 1 951 (3) SA 10A

⁹ *Songono v Minister of Law and Order* 1996 (4) SA 384 SEC

the Plaintiff committed the offence was established on reasonable grounds.

Objective test

28. This test was set out in the **Mabono** matter *supra*. The test of whether the suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is objective. The enquiry is therefore - would a reasonable man in the particular Defendant's position and possessed the same information, have considered that there were good and sufficient grounds for suspecting that the Plaintiffs were guilty of the offence for which he sought to arrest the Plaintiff?
29. In evaluating such 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, i.e. 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 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 which will justify an arrest. This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However the suspicion must be based upon solid grounds..."*
- (my underlining¹⁰.*
30. In applying the test objectively the conduct of the two police officers prior to effecting the arrest must be closely examined.
31. Both police officers relied on the eye witness's testimonies, the complainant and her husband. The police officers interviewed the eye witnesses personally and had taken their statements and there were no contradictions. The plaintiff was read his rights at the scene before he was arrested and taken to the police station.

¹⁰ *Mabono supra at p 658*

Both officers admitted that none of the alleged stolen items were recovered on the plaintiff but indicated that this was not necessary for an arrest. The main objective of the arrest was to bring the suspect before Court. Was this sufficient to establish there were reasonable grounds existed to form the suspicion?

32. Harms DP in the **Sekhoto** matter at 327b-c held that:

"once the required jurisdictional facts are present, the discretion or not to arrest arise. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. The standard was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the Court. The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached".

33. *It is trite law and as Harms DP in the Sekhofo matter at page 333*

succinctly held that "if a defendant wishes to rely on s40(l)(b) defence, he has to plead the four jurisdictional facts. This requires that the facts on which the defence is based must be set out. "

Onus

34. It is well established principle that the onus rests on the arresting officer to prove the lawfulness of the arrest. In this case the defendants have shown that they exercised their suspicion reasonably, that is they met the fourth jurisdictional requirement¹¹. Moreover this Court is aware that arrests without warrants are not always made upon written affidavits. In certain cases police officers rely on oral testimony. What was crucial is what had they done to establish that solid grounds existed for the suspicion.

35. Having regard to the evidence before this Court and in light of the aforesaid authorities, I am satisfied that a reasonable suspicion was established and that it was based on solid grounds. The police officers did make certain enquiries and investigate the accuracy of the information before they acted upon it. All the

¹¹ *Minister of Safety and Security and Another v Swart 2012 (2) SACR 226 SCA*

witnesses identified the plaintiff as the perpetrator. This Court is thus in agreement that the pleadings clearly state the jurisdictional requirements and the facts supporting thereto. Consequently this Court is convinced that the arrest was lawful if one has regard to the conduct of the police officers prior to the arrest. They had analysed the testimony independently and relied on eye witness's testimony.

Malicious prosecution

36. The test for malicious prosecution is set out in **Minister of Safety and Security v Moleko**¹² it was held that the following must be proven:-

In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

- a) that the defendants set the law in motion (instigated or instituted the proceedings);*
- b) that (the defendants acted without reasonable and probable cause;*
- c) that the defendants acted with "malice " (or animus injuriandi); and*
- d) that the prosecution has failed, (in this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further) the cases of Rudolph and others v Minister of Safety and Security¹³, and Minister of Safety and Security v Seymour¹⁴ have discussed this issue as well.*

a) that the defendants set the law in motion (instigated or instituted the proceedings)

37. It is common cause that as result of the plaintiff's arrest that the matter was enrolled and criminal proceedings were instituted against him.

b) The defendant had no reasonable or probable cause to do so

38. The plaintiff submits that without any evidence from the scene linking the plaintiff to the crime on a serious charge of armed robbery. That it was the duty of the defendants to

¹² [2008] 3 ALL SA 47 (SCA) at paragraph 8

¹³ 2009 (5) S A 94 (SCA) (also at [2009] 3 ALL SA 323 (SCA))

¹⁴ 2006 (6) SA 320 (SCA)

conduct a thorough investigation to the matter instead of relying solely on the eye witnesses testimonies. Further that the discrepancies in what he was wearing should have been enough to warrant a proper investigation into his identity therefore the prosecution had no probable cause for instituting criminal proceedings against him.

c) that the defendants acted with “malice ” (or animus in iudicium)

39. The element of intention as proved above required for malice is present. It has been accepted that a reasonable person in the position of the defendants would have taken the same steps to investigate the matter especially confirming that the plaintiff's clothes matched the description given by the eye-witnesses. There was no effort by the prosecution to determine with any level of certainty that the plaintiff was indeed the person so described or to determine if there was any possibility of mistaken identity. Even though the defendants honestly believed that the plaintiff was guilty simply relying on the pointing out of the plaintiff is sufficient in law for an arrest but insufficient to sustain a conviction. Disregarding the discrepancies or need for actual evidence to support their version can only be considered to have been intended to be malicious. The only explanation tendered by the defendants is their reliance on the plaintiff's request for mediation, which in any event is in dispute and cannot be used against him. This however still does not answer why without any actual evidence against the plaintiff the matter was even enrolled for trial.

d) that the prosecution has failed.

40. It is common cause that the prosecution failed for lack of evidence and that the plaintiff was discharged in terms of section 174.

41. Having regard to the above I therefore conclude that the requirements for malicious prosecution have been met.

CONCLUSION:

42. This Court's finding therefore is that the defendants had failed to show on a balance of probabilities that the prosecution wasn't malicious.

- 43. The following order is therefore made:**
- 1. The defence of unlawful arrest is dismissed;**
 - 2. The defence of malicious prosecution is upheld;**
 - 3. The Plaintiff is entitled to such damages as he may be able to prove he sustained due to the malicious prosecution by Defendant;**
 - 4. The Defendants are to pay the costs of this trial.**

SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	30 April 2019
Date of judgment	:	05 August 2019
Plaintiff's Counsel	:	Adv.: M Mthombeni
Plaintiff's Attorneys	:	Nobela Attorneys
Defendant's Counsel	:	Adv.: B Nodada
Defendant's Attorneys	:	State Attorney