

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case no: 847/2017

In the matter between:

LABOUR KHAYALETHU MALIBELA

Applicant

and

MINISTER OF POLICE

Respondent

JUDGMENT

CROUSE, AJ:

1. The plaintiff, Mr Labour Khayaletu Malibela, sues the defendant, the Minister of Police, for wrongful arrest and detention.
2. The defendant accepted the duty to begin and the onus to prove that the arrest and detention were lawful. The defendant called one witness, Captain Sipika. He is the station commander at the Steve Tshwete Police Station and was also the arresting officer.
3. Captain Sipika's evidence was that he was phoned by the chairperson of a community structure on Sunday 2 April 2017 at about 7h30. Information was given that a person was being attacked by the community for stock theft. He went alone from his home to the place where the alleged attack was being perpetrated. There he found a certain Mr Akhona Peter. Mr Peter's hands were tied. He had open wounds on his face and head and Captain Sipika could see

some bleeding. The community had already questioned the said Mr Peter about the stock theft and he had already provided the names of his co-perpetrators. The community was angry and threatened to kill the perpetrators of the stock theft and burn their houses down. Captain Sipika estimated that there was a mob of about 100 people. The dog unit and the flying squad were also present.

4. After repeating his story to Captain Sipika, Mr Peter took Captain Sipika and the rest of the police to the place where a bull was slaughtered. They found evidence of a slaughter, namely the end of the bull's tail as well as contents of the entrails. Mr Peter named five others as perpetrators. Mr Peter also informed them that the group stole a heifer as well. They went looking for this heifer amongst other animals, but the heifer was not found. Evidence later obtained confirmed that a heifer was indeed stolen from Mr Peter's relative.
5. Captain Sipika and the police proceeded to arrest each of the persons named as co-perpetrators. The plaintiff was amongst them. Prior to the plaintiff's arrest, Mr Peter told the community as well as Captain Sipika that the plaintiff's motor vehicle was used to convey the stolen bull's meat after the slaughter. Captain Sipika established that the plaintiff indeed owned a motor vehicle. On his arrest the plaintiff denied being part of the group of perpetrators. Captain Sipika did not believe him. The plaintiff was detained from about 11h45 on Sunday 2 April 2017 until he was taken to Court on Tuesday 4 April 2017.
6. Captain Sipika's testified that he was of the opinion that he was justified in arresting the plaintiff and the alleged co-perpetrators as he suspected them to be part of the group that stole and slaughtered the bull. The bull that was slaughtered belonged to a woman who had lent it to a member of Mr Peter's

family for breeding purposes. The members of the community were very upset and Captain Sipika feared for the lives of the alleged perpetrators as the community were highly charged because they had lost many animals to stock theft.

7. The plaintiff testified. He is a 51-year-old man. He attended school up to Grade 12. He testified that the day prior to his arrest he was involved in a motor vehicle accident. He was experiencing pain and was in fact waiting for his brother to take him to the doctor. The police arrived instead. Mr Peter pointed him out to Captain Sipika and he was arrested. He did not know Mr Peter, but he knew the other persons who were arrested with him. They are younger than him. He remained in custody for three days and thereafter he was released at court. The criminal matter has never been proceeded with.
8. Other than the pointing out by Mr Peter, the plaintiff's version during his evidence differs completely from the version presented by Captain Sipika, but this version was never put to Captain Sipika during cross-examination. Examples of Captain Sipika's evidence which were only denied during the plaintiff's evidence are for example:
 - 8.1. Captain Sipika testified that after the plaintiff was pointed out, he explained the allegations made by Mr Peter against the plaintiff to the plaintiff and that the plaintiff denied being involved in the stock theft. The plaintiff testified that he was never told of the charge against him and therefore never denied his involvement;
 - 8.2. Captain Sipika testified that he arrested the plaintiff for stock theft. The plaintiff denied that he was arrested for stock theft, he only learned

about the stock theft charge when he was “forced” to sign an acknowledgment of his constitutional rights;

- 8.3. Captain Sipika testified that Mr Peter was injured. The plaintiff testified that he saw Mr Peter during the pointing out and thereafter during visits to various scenes, yet he did not see any injuries;
- 8.4. Captain Sipika testified that the plaintiff was only arrested after the police inspected the place where the slaughtering took place. The plaintiff testified that he was also at this place but he was not allowed out of the motor vehicle;
- 8.5. Captain Sipika testified that the plaintiff was only arrested after the police had searched for the heifer. The plaintiff testified that he was also at this place but he was not allowed out of the motor vehicle;
- 8.6. Captain Sipika testified that the persons arrested were taken back to the community to inform the community that they were arrested, but Captain Sipika did not allow the community close to the police van, as he was afraid that the community might overpower the police and assault the suspects. This was disputed during cross-examination, but during his testimony the plaintiff admitted that this had in fact happened, but then testified he was in another motor vehicle and the crowd was able to look at him;
- 8.7. Captain Sipika testified that the crowd was angry. The plaintiff testified that the crowd was peaceful;
- 8.8. Captain Sipika testified that the plaintiff was incarcerated for two days, whereas the plaintiff (despite his pleadings to the contrary) testified that he was incarcerated for three days. The plaintiff testified that he was

only released on the Wednesday and not the Tuesday as testified by Captain Sipika.

9. In my opinion, Captain Sipika was a credible witness. He could not remember the length of time each aspect to his investigation took. He was criticised for this. In my opinion nothing turns on this. The fact that he was not willing to speculate or to tell an untruth rather adds to his credibility than distracts therefrom, as it was never suggested that these aspects of his investigation did not take place.
10. In my opinion, the plaintiff was not a good witness. At one stage he refused to answer questions, he was impertinent towards the defendant's counsel and raised his voice. I had to request him to answer questions. His version grew more serious during his testimony. In cross-examination of Captain Sipika, no allegations of any adverse consequences of his arrest were made. During his evidence in chief the plaintiff stated that the cell was akin to a pigsty, but did not support this inference with facts. He also testified that the other inmates took away their things and then clarified that their blankets were taken and if any one of them wanted to sleep they had to do so without blankets. During cross-examination he stated that their shoes were taken. He was vague on the mechanism of this taking, and rather resorted to being argumentative. During cross-examination the plaintiff stated for the first time that he informed Captain Sipika that he had been in pain as a result of his accident the previous day. It was only after re-examination, when counsel was given permission to ask further questions after clarification questions by myself, that the plaintiff stated

that after his arrest he is now experiencing eye problems, whereas before this arrest his eyesight was perfect.

11. I accept that the plaintiff has no onus to prove that his arrest was unlawful, but I wonder why the plaintiff's version did not include evidence that he had not been involved in the stock theft and that there had been no reason whatsoever for his arrest and incarceration. The plaintiff had rather decided to base his defence on the fact that Mr Peter's allegations to the police would have been inadmissible in a court of law and that Captain Sipika's suspicion could therefore not have been reasonable, so the argument went, as one cannot be arrested on inadmissible evidence.
12. The plaintiff's arrest was without a warrant. The defendant's case is the arrest was lawful by virtue of the fact that the arrest was made in terms of section 40(1)(g) of the Criminal Procedure Act 51 of 1977 (CPA), meaning that the plaintiff's arrest was by a peace officer who reasonably suspected him of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce. According to the learned author *Hiemstra*, this means the police officer held a reasonable suspicion that a suspect contravened of the Stock Theft Act 57 of 1959.
13. It is accepted that stock theft took place. It is accepted that Captain Sipika was a peace officer. It must be accepted that Captain Sipika had a suspicion that the plaintiff had been involved in the stock theft.
14. The only question remaining is whether Captain Sipika's suspicion was a reasonable one.

15. In *Mabona & others v Minister of Law and Order & others*¹, Jones J, dealing with sub-section 40(1)(b) of the CPA, which sets a similar test as [in] sub-section 40(1)(g), stated:

"The test of 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 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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

16. The grounds for the suspicion must be considered to determine whether the suspicion held by Captain Sipika was reasonable, meaning that a reasonable man who possessed the same facts would hold the same suspicion. This consideration is of necessity *ex post facto*, and a court must guard against taking an ivory tower approach.
17. Prior to the plaintiff's arrest on that Sunday morning, Captain Sipika conducted further investigation. The facts forming the basis of the suspicion are plain enough. He was taken to the place where the bull was slaughtered and he ascertained thus that Mr Peter had personal knowledge of the slaughter. Mr Peter also informed of another animal that was also stolen. He ascertained

¹ 1988 (2) SA 654 (SE) at 658G-H.

whether the plaintiff had a car to transport the meat as alleged by Mr Peter. Mr Peter pointed the plaintiff out together with other suspects. Admittedly without still further investigation this is not very strong evidence and might not lead to a conviction even if Mr Peter were to become a section 204 witness. Captain Sipika's hand was, however, forced to immediately arrest so that the angry crowd whose members were aware of the plaintiff's identity did not carry out the threat to kill him and burn down his house. His evidence was that it would have been impractical in these circumstances to first obtain a warrant for the arrest. It was a Sunday and there was this angry mob. Captain Sipika had to arrest the plaintiff and the other alleged perpetrators to ensure the ends of justice were met. He specifically testified that his purpose in arresting the plaintiff was merely to bring him to justice. Considered holistically, albeit it not very strong evidence, the facts available to him were sufficient to create a reasonable suspicion for arrest. In my opinion, any reasonable police officer faced with these facts and threats² would have been found in derelict of his duties had he not effected an arrest. Captain Sipika's exercise of his discretion to arrest the plaintiff cannot be faulted in these circumstances.

18. The defendant has proven on a balance of probabilities that the plaintiff's arrest was lawfully made.

² *Minister of Safety and Security v Sekhoto and another 2010 (1) SACR 388 (FB)* at 398-399 "Were there grounds for infringing upon the constitutional rights as to security of the person, which every person has under s 12 of the Constitution? (*Le Roux v Minister of Safety and Security* supra para 43.) If a suspect -(i) does not present a danger to society (ii) will not abscond (iii) will not harm self or others (iv) is not in danger of being harmed by others (v) may be able and be keen to disprove the police allegations, arrest will ordinarily not be the appropriate way of ensuring the suspect's presence in court (*Louw* supra at 185d - e)."

19. Accordingly, I make the following order:

The plaintiff's claim is dismissed with costs.

E CROUSE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard	:	26 August 2019
Date Reserved	:	26 August 2019
Date Delivered	:	27 August 2019