



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

2/2/18

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>Yes</i>
<i>2/2/2018</i>	
<i>[Signature]</i>	
DATE	SIGNATURE

CASE NO: 25300/2014

In the matter between:

SELLO MOSES LEBELO

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

1. The plaintiff instituted action against the defendant claiming damages arising from his alleged unlawful arrest and detention by a police officer acting in the course and scope of his duty with the defendant. The defendant denied liability and the parties joined issue in respect of the question of liability. The question this had court to decide was thus whether the plaintiff's arrest by Constable Moloto on 29 May 2013 and his detention thereafter by Constable Moloto up to the date of plaintiff's first appearance before the court on 31 May 2013, was lawful or unlawful. The issue of quantum was postponed sine die which included the question of whether the plaintiff's continued incarceration after 31 May 2013 until his eventual release on bail was similarly lawful or unlawful.
2. The defendant pleaded that the arrest and subsequent detention was lawful in terms of section 40 (1) (b) of the Criminal Procedure Act, Act 51 of 1977, in that the arresting officer entertained a reasonable suspicion that the plaintiff had committed the Schedule 1 offence of theft.
3. It was common cause between the parties that the onus was on the defendant to allege and prove the lawfulness of the arrest and detention. In this regard the defendant had to prove on a balance of probability that the arrestor was a peace officer, that he had entertained a reasonable suspicion, that the suspicion was that the suspect had committed a Schedule 1 offence, and that the suspicion was based on reasonable grounds. It is trite that the onus rests on a defendant to justify an arrest. See *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA).

4. A brief background to the matter is the following. It was common cause between the parties that the plaintiff was arrested by Constable Moloto on 29 May 2013 without a warrant of arrest. The plaintiff appeared in court on 31 May 2013 and thereafter on regular occasions until the case against him was withdrawn on 6 September 2013.
5. The defendant accepted the duty to begin and presented the evidence of two witnesses, namely the arresting and detaining officer, Constable Moloto, who was also the investigating officer in the case, and his colleague, the temporary investigating officer in the case while Constable Moloto was on vacation, Constable Hlako.
6. After the plaintiff had closed its case, the defendant, without closing his case, applied for judgement against the defendant. After some debate regarding the approach of the court in such a situation, Advocate Geach SC, appearing on behalf of the plaintiff, closed the plaintiff's case.
7. Constable Hlako was not involved at all when the plaintiff was arrested and detained by Constable Moloko and his evidence was consequently of no relevance and need not be referred to.
8. Constable Moloto's evidence regarding the sequence of events was not very clear but it seemed that on 24 May 2013 he was at the corner of Church Street and Vermeulen Street, which is now Madiba Street, in Pretoria. He testified that an informer had informed him of a crime which had been committed at that point

by a person known as "Ghost". While Constable Moloto was at the streetcorner he saw the complainant, Mrs M.M. Maluleke, who informed him that her laptop computer had been stolen from her vehicle which was parked at that corner. He told her to report the matter to the Pretoria Central Police Station where he was also stationed.

9. Mrs Maluleke made a statement on 24 May 2013 in which she stated that at approximately 10:20 on that same day she had parked her car at that particular corner and when she came back she was informed by two car guards that they saw two male persons opening the boot of her car and taking her laptop. They, the eyewitnesses, further told her that those two persons threatened them if they should inform on them. She further stated that according to the two car guards, the eyewitnesses, which were Mr Thabo Ramatsetse and Mr Joel Swart, the two persons who had opened the boot of her car and had stolen her laptop were a man known as Jazzman who was in the company of a man by the name of Molefe Botha. In the statement of Mrs Maluleke it was stated that the laptop was a black Apple Mac computer but the word "black" had been deleted and the word "silver" had been written above it. Constable Moloto could not explain why the colour description of the computer had been changed or by whom it had been changed or when. Constable Moloto testified that he read and verified the affidavit.
10. Constable Moloto further testified that on 28 May 2013 he went back to the same streetcorner and spoke to the eyewitnesses Messrs Ramatsetse and Swart. They

accompanied him to the Pretoria Central Police Station where he took their statements. The relevant part of the statement of Mr Joel Swart reads as follows:

"On Friday 2013-05-24 at about 10:30 I was at Cnr Vermeulen (Madiba) and Paul Kruger Street. I was helping to park the cars and wash them. I then saw Jazzman open a rear boot and taking out a laptop silver in colour. He then putted it inside his bag. Dark blue in colour. Molefe then followed him using Paul Kruger Street. From there I do not know where they went. That is all I can explain."

11. The relevant part of the statement of Mr Thabo Samuel Ramatsetse reads as follows:

"On Friday 2013-05-24 at about 10:15 I was at corner Church and Madiba street doing my daily job to park vehicles. As I was busy I saw Jazzman on a brown Nissan. He opened a boot and took out a silver laptop. He then putted inside his bag. Dark blue in colour. He closed the boot and left. He took Paul Kruger Street going South direction. Molefe then accompanied him. I then did not see where they went to."

12. Constable Moloto further testified that on the next day, 29 May 2013, he was in the area of the police cells inside the Pretoria Central Police Station. There he saw the one eyewitness, Mr Ramatsetse. He testified that Mr Ramatsetse pointed at the plaintiff, who was apparently also in that area, and said that he was

one of the persons who stole the laptop. Constable Moloto then arrested the person who was the plaintiff.

13. Constable Moloto added that Mr Ramatsetse told him this person used a remote control of a gate to jam the signal of the motor vehicle when the complainant was trying to lock the vehicle. This prevented the vehicle from being locked and allowed the other suspect to open the car and steal the laptop.

14. Constable Moloto made a statement on the same day of the plaintiff's arrest namely 29 May 2013. In paragraph 2 of that statement he said the following:

"On Wednesday 2013-05-29 at about 11:15 I was at the cells Pretoria Central Cells when I was approached by one of my witness Ramatsetse. He informed that he is been arrested of source of danger. He then showed me one of my suspect whom he saw when they took the laptop out of a motor vehicle that belongs to Maria Maluleka.

I then went to him and introduce myself. I told him that he is my suspect on Pretoria Central CAS 1085/05/2013. Theft out of motor vehicles. Then told him his rights and told him that I am arresting him. His name is Sello Lebelo (known as Ghost)."

15. According to Constable Moloto he arrested the plaintiff because he was pointed out by Mr Ramatsetse.

16. It was submitted on behalf of the plaintiff that although Constable Moloto was the investigating officer and in possession of the crime docket, he failed to investigate the obvious errors and contradictions between the statements and neither did he investigate the alteration in the complainant's own statement regarding the colour of the allegedly stolen laptop computer. It was submitted that in reality Constable Moloto had done no investigation and simply relied on the pointing out by Mr Ramatsetse for the arrest of the plaintiff.
17. In this regard reference was made by Advocate Geach to the matter of Mabona and another v Minister of Law and Order and others 1998 (2) SA 654 (SE) at p658 which reads as follows:

"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." (my underlining)

18. On behalf of the plaintiff reference was also made to the matter of Matsietsie v Minister of police (A 3103/2015) [2017] ZAGPJHC 29 (20 February 2017) at paragraph [9] where the following was said:

"In Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H where Van Heerden JA explained that once the jurisdictional requirements of section 40(1)(b) of the Criminal Procedure Act 51 of 1997 (the CPA) are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by section 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on section 40(1) will not avail the peace officer."

19. I respectfully concur with the aforesaid findings. In order to establish whether Constable Moloto could have entertained a reasonable suspicion that the plaintiff had committed the crime of theft, it is necessary to analyse the information he had at his disposal prior to the arrest of the plaintiff.
20. The information he obtained from the statement of the complainant was that she had been told by two alleged eyewitnesses, namely Mr Ramatsetse and Mr

Swart, that two male persons opened the boot of her car; took out a silver laptop; threatened the two eyewitnesses, and walked away. According to the eyewitnesses the thieves were a certain Jazzman and a certain Molefe Botha.

21. However, according to the written statements of the two eyewitnesses taken down by Constable Moloto, quite a different version was given. According to their statements it was only Jazzman who opened the boot of the vehicle. There was no mention of a second person opening the vehicle or even in the proximity of the vehicle. Furthermore it was clear that Jazzman then moved away from the vehicle towards the South. At that point the laptop was not visible as it was inside a bag carried by Jazzman. Then, at some point, a person known as Molefe followed Jazzman, according to one of the eyewitnesses, or joined Jazzman, according to the other eyewitness.
22. There were thus significant differences in the versions of the eyewitnesses given to Constable Moloto and to the complainant, Mrs Maluleke, respectively. Furthermore and in any event, on none of the versions, the person known to the eyewitnesses as Molefe, had, on the face of it, anything to do with the theft of the laptop. Nothing was said or reported to have been said, by the eyewitnesses, that could implicate the person known as Molefe with the theft committed by Jazzman.
23. Furthermore, there was no evidence whatsoever to suggest that the person known as Molefe was in fact the plaintiff. According to Constable Moloto his

informer had mentioned the name "Ghost" as the person who had committed some or other crime at that particular corner.

24. It seems clear that Constable Moloto did not investigate at all the discrepancies between the names Ghost, Molefe and that of the plaintiff, before arresting the plaintiff. But what is more disturbing is that even if it were to be accepted that all these names refer to the plaintiff, there was no evidence whatsoever at his disposal that the plaintiff, or Molefe, or Ghost, or whoever this person was, had participated in the theft of the laptop computer. According to the statement of the two eyewitnesses to Constable Moloto, this person merely followed or may even have joined Jazzman at a stage after Jazzman had already committed the theft.
25. The discrepancy in their versions namely that there were two persons at the vehicle who had opened the boot and stolen the laptop and threatened Mr. Ramatsetse and Mr Swart, as opposed to the version that the boot was only opened by Jazzman who took out the laptop and moved down Church Street, after which he was joined by Molefe, was also not investigated and cleared up. This discrepancy is of particular importance since it reflects on the question whether another person, be it Molefe, Ghost, the plaintiff or anybody else, had also participated in the theft.
26. On the information at his disposal Constable Moloto could therefore not have formed a reasonable suspicion, firstly, that a second person was in fact involved with Jazzman in the theft of the laptop computer, and, secondly, that such a person was the plaintiff.

27. Due to the aforesaid serious discrepancies in the versions at his disposal and the lack of vital information to form any opinion in regard to crucial elements of the case, the fact that the one eyewitness, Mr Ramatsetse, pointed out the plaintiff at the cells, is simply not sufficient to overcome the aforesaid difficulties. I consequently agree with the submission on behalf of the plaintiff that Constable Moloto simply arrested the plaintiff on the pointing out of the one eyewitness and not as a result of a reasonable suspicion which he could have had based on the information at his disposal.
28. Advocate Matlou, for the defendant, submitted, *inter alia*, that although the quality of the investigation of Constable Moloto was questionable and that he failed "to ask the right questions", his conduct was nevertheless reasonable and that he did not arrest the plaintiff with an ulterior motive. It was submitted that he acted on the information he possessed and on what his witness had told him.
29. The fact remains, however, that Constable Moloto had information at his disposal which was so contradictory and inadequate that it couldn't even remotely be said that another person, apart from Jazzman, had been involved in the theft. Furthermore that even if there was such a second person, that that person could have been the plaintiff. There were simply too many contradictions, discrepancies and unanswered questions to constitute a basis for a reasonable suspicion that the plaintiff had been part of the theft.
30. On behalf of the defendant mention was also made of the issue of the remote control which could have been used in the perpetration of the theft. Firstly, if

anybody had used a remote control in order to prevent the vehicle from being locked by the complainant, such would have been a vital piece of information against the person who had used the remote control. Yet, when Constable Moloto interviewed the two eyewitnesses and took down their statements, not a word was said about a remote control. It is inconceivable that none of the eyewitnesses would have mentioned the use of a remote control if it had been the truth, as it would have been the only manner in which another person who was not in the close proximity of the vehicle, could have been part of the theft. Furthermore, Constable Moloto clearly gathered no evidence to support the idea that a remote control had been used by anybody prior to the theft of the laptop computer.

31. During his evidence in chief no reference was made to the paragraph in the statement of Constable Moloto referring to the remote control which he allegedly found on the person of the plaintiff after his arrest. It was also belatedly during his cross-examination that Constable Moloto stated that Mr Ramatsetse informed him about the use of the remote control. I have serious doubts about the truthfulness of this evidence not only because of the manner in which it came out late during cross-examination but also because of the fact that this vital piece of information, if it were to be the truth, had not been mentioned in Constable Moloto's statement which he wrote after the arrest of the plaintiff. It is inconceivable that he would have omitted such a vital detail from his statement.

32. It was further submitted on behalf of the plaintiff that according to the evidence of Constable Moloto he was not aware that theft was a Schedule 1 offence and that this fact alone dealt a fatal blow to the defence regarding the legality of the plaintiff's arrest. In this regard I was referred to the matters of *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk) and *Naidoo v Minister of police* (20431/2014) [2015] 152 (2 October 2015) paragraph [42].
33. Having regard to all the evidence it is clear that Constable Moloto relied solely on the report made to him by Mr Ramatsetse in pointing out the plaintiff at the police cells and that he did not actually form his own suspicion, and could not have formed his own suspicion for the reasons mentioned above, and consequently that no reliance can be placed on section 40 of the Criminal Procedure Act to make the arrest and detention of the plaintiff lawful. For the reasons mentioned above Constable Moloto could never have formed a reasonable suspicion that the plaintiff was guilty of theft.
34. Consequently the defendant has failed to make out a case that the arrest and detention of the plaintiff was lawfully justified. The defendant's evidence clearly demonstrates that Constable Moloto never had or could ever have had, objectively, a reasonable suspicion as is required for a lawful arrest in terms of section 40 (1) (b) of the criminal Procedure Act.
35. As far as costs are concerned there is no reason why costs should not follow the event. I am also satisfied that the costs of senior counsel should be included. I have been asked by Advocate Geach SC to make a cost order which refers to

certain specific items which in his submission the plaintiff is entitled to but which would apparently not be allowed by the Taxing Master unless specifically included in the court order. I am prepared to make such an order.

36. In the result the following order is made:

1. The arrest of the plaintiff without a warrant on 29 May 2013 and his detention until 31 ^{May} ~~made~~ 2013 was unlawful.



2. The defendant must pay the Plaintiff's taxed or agreed party and party costs of suit on the High Court scale to date hereof, including but not limited to the fees of the interpreter Mr. R Buda and of Senior Counsel, including Senior Counsel's reasonable fees for preparation and advice on evidence, as well as the reasonable travelling and subsistence expenses for attending at court of the Plaintiff, who is declared to be a necessary witness.

3. It is recorded that all the other issues herein have been postponed *sine die* as was earlier ordered on 31 January 2018 and it is noted that such issues include the question of whether the Plaintiff's continued incarceration after 31 May 2013 until his eventual release on bail was similarly lawful or unlawful.



C.P. RABIE

JUDGE OF THE HIGH COURT