



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 2424/2017

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

02/08/2018
DATE

Ms Mthimkulu
SIGNATURE

In the matter between:

MANYORO ISAIAL MTHIMKULU

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

M.G PHATUDI J:

SUMMARY:

Criminal procedure-Arrest-lawfulness or otherwise of arrest without a warrant-Section 40 (1) (b) Act 51 of 1977 as amended- Issue whether the peace officer had reasonable grounds for his suspicion to effect arrest- offence to fall within ambit of schedule 1 of the Act- purpose of arrest solely to bring arrestee to justice- Principle: It is not sufficient for a litigant to allege that arrestor was an employee of defendant-cogent evidence required that arrestor was a peace officer-Held, Claims i and ii dismissed, Claim iii succeeds with costs.

1. The plaintiff in this matter instituted a law suit against the Defendant for damages arising out of alleged unlawful arrest and assault. In its particulars of claim, claims 1 and 2 refer to alleged unlawful arrest on 31 March 2016 and 11 October 2016, respectively. Claim 3, that of assault, allegedly occurred on 11 October 2016.
2. All the three claims are defended.

3. At the commencement of the trial on 06 June 2018, the parties recorded and agreed, preliminarily, that five (5) sets of bundles of documents shall constitute the Court bundle for purposes of trial. They were identified as follows:-

- 3.1. Bundle "A" - Pleading Bundle;
- 3.2. Bundle "B" - Notices Bundle;
- 3.3. Bundle "C" - Documents Bundle;
- 3.4. Bundle "D" - Pre-trial minutes dated 05 June 2018, and
- 3.5. Bundle "E" - Photo Album.

4. It was further agreed that as recorded in the pre-trial Minutes, the merits be separated from quantum. The trial would therefore be confined to the determination of the merits only.

5. It was common cause that because of the Nature of the claims for alleged unlawful arrest, the defendant carried the burden to prove the lawfulness of the arrest in terms of Section 40 (1) (b) of the Criminal Procedure Act 1977¹)

¹ Act 51 of 1977, as amended

THE DEFENDANT'S CASE

6. The Defendant called Godfrey Thakadu Rasebotsa to testify on its behalf. His evidence in chief can be summarized as follows:-

6.1. On 30 March 2016, he laid a charge of robbery which was coupled with assault against one Isaiah Mthimkulu, the plaintiff in this matter. He alleged that the incident happened on the night of 24 March 2016, while on his way home from a certain bar-lounge in his village in Botlokwa.

6.2. His two assailants tripped him, he fell to the ground, was assaulted, searched and robbed of his wallet, his Public Driver's Permit, bank cards and some R800.00 found in his wallet. He identified "Mothomogolo" ("Plaintiff) as one of the men who attacked him, but could not properly identify the other unknown man.

6.3. He said he could identify the plaintiff through lights of a motor vehicle that emerged at the scene during the robbery. Apart from

that, he thoroughly knew the plaintiff as he is his co – villager in the area. Furthermore, the witness also pointed out at the plaintiff who was in court attendance during the hearing.

- 6.4. Prior to opening a case docket for the robbery on 25 March 2016, the witness phoned the plaintiff and demanded the return of his assets he was robbed of. Seeing that the plaintiff reneged on his promise to see him that evening, the witness proceeded to lay a charge against him on 30 March 2016 for assault and robbery.
- 6.5. Following the complaint he made, a case docket was opened as a result of which the plaintiff was arrested on 31 March 2016, by one Seargent Mailula. ("Mailula").
- 6.6. The witness directed Mailula and one Constable Mashakeng ("Mashakeng") to the plaintiff's informal hair salon, where he pointed him out as one of his robbers. He was there and then arrested.
- 6.7. He also intimated that had it not been that he, the witness, did not preferr charges against the plaintiff, he would not have been arrested.

7. Cross-examined, he confirmed that he made a statement to the police when he opened the case docket against the plaintiff. The relevant sworn statement² formed the nub of his complaint to the police.

8. Next to testify for the Defendant was Warrant officer Abednico Mailula.

In brief he said:-

8.1. He is a police officer with 30 years experience as such, and that on 30 March 2016, he was attached to Botlokwa police station. He was an investigating officer and commander allocating case dockets.

8.2. When he reported on duty on 31 March 2016, he found a case docket already opened up by one Rasebotsa who was complainant in the case.

8.3. On perusal, he noted that the complaint raised was one of assault and robbery. He and Mashakeng went out to trace the complainant, Rasebotsa.

² Bundle C, pp 28 -30

Rasebotsa directed the 2 police officers to the suspect, Isaiah Mthimkulu, the plaintiff herein, where he was found in his informal hair salon, a shack structure from where he conducted his business. The complainant pointed out the plaintiff to them.

8.4. Having identified themselves as police officials and the purpose of their visit there, which was to arrest him and reasons therefor, he first explained to plaintiff his constitutional rights regarding persons placed under arrest. He explained to him in detail, the rights notoriously known as Section 35 (constitution Act) rights.

8.5. He was then taken to the police station where Mashakeng obtained a statement from him, and recorded his details in the cell register, where he also allegedly explained to the plaintiff his notice rights in terms of Section 35 referred to.

8.6. He also stated that having read the case docket³ he formed an "impression" that the complaint was robbery and assault and initiated further investigation, then an arrest followed.

³ Bundle "6" pp 26 -31

- 8.7. Cross- examined, Mailula alluded to a sworn statement he made detailing how he as investigating officer came to arrest the plaintiff⁴
9. It was at this stage of the proceedings that the defendant closed its case in respect of Claim 1 with no further witness to call.

THE PLAINTIFF'S CASE

10. The Plaintiff also testified pursuant to his arrest on 31 March 2016. He stated that he was then at his hair salon attending to customers when 2 police officers arrived in the company of one Rasebotsa. He said the police officers asked him if he knew Rasebotsa and he confirmed that he knew him. He then said that the police officers informed him of their intention to arrest him for alleged robbery. His business was searched.
- He was driven by police to his homestead where again a search was conducted.
 - While at his homestead, the police informed his mother that he was arrested for alleged robbery.

⁴ Bundle "6" pp 46 - 47

- He was subsequently taken to the police station where he was formally charged, and furnished with a certain document called “notice of rights”⁵

11. The witness testified further that it was indeed Rasebotsa who laid assault and robbery charges against him for the incident of 24 March 2016.

12. He, however, raised an alibi as a denial of the allegations against him. Be that as it may, it is common cause that the charges against him had since been withdrawn as part of an amicable settlement of their dispute with Rasebotsa.

13. Testifying with reference to Claims 2 and 3, the plaintiff went on to say that he was arrested by a certain police officer while at his homestead on 11 October 2016. This was when he was in the company of his girlfriend who we later gather was one Ms Rebecca Monyela (“Monyela”).

⁵ Bundle “6”, p19

14. On arrival, one of the police officers displayed to him a copy of the Protection Order issued by the local Magistrate's Court, which he was asked to sign as an acknowledgement of receipt thereof.
15. As he was not shown where to affix his signature on the document, he refused to sign it. For that, he was assaulted, one of them hand cuffed his left hand and threatened to be killed if he resisted to sign. He was in the process allegedly sprayed with a pepper spray and finally subdued, and fell down on the ground.
16. While he fell down, the police men kicked him with booted feet and assaulted him with fists. In the process, one of them hit him with a pistol on the left of his face and as a result sustained injuries.
17. He asked his girlfriend (Monyela) to take pictures depicting his injured face. I will revert to this aspect in due course.
18. He was then taken to the police station and kept in a holding cell, and later driven back home.

19. After a while the police officers returned to him with a Protection Order, of which he was again asked to sign, which he did.
20. The witness later proceeded to lay a charge of assault against the men who assaulted him. He was also furnished with a J88 Form.
21. Although he did not know by name the police man who assaulted him he, however, managed to point him out in court for identification purposes. The police officer was later called as a defence witness. His introduction into court prior to his testimony was with the defence's consent.
22. The J88 medico-legal examination report ⁶⁾ was also handed up as part of the record of the proceedings. I propose to re-examine the evidential value of this document in the course of this judgment.
23. Furthermore, "Bundle"E", being a photo album (photos 20 – 22) were

⁶ Bundle "6", pp5 -9

also handed up as an exhibit evincing the nature and extent of the injuries sustained by the plaintiff due to alleged assault. Once again, the photo album was submitted with the defence's consent.

24. Monyela was called to testify for the plaintiff. She confirmed that on 11 October 2016 she and plaintiff were together at his homestead. Police arrived there with a Protection Order meant to be delivered to him.
25. Her evidence in the main was to corroborate the plaintiff's evidence relating to the assault. She also confirmed as being the photographer of Bundle "E", photo album.
26. It was at this stage that the plaintiff's case on claims 2 and 3 was closed.

THE DEFENCE'S CASE – Claims 2 and 3

The defence's case in respect of Claims 2 and 3, respectively was put as follows:-

RONALD MPHAPHULI'S EVIDENCE

27. He said in – chief that:

27.1. He is a police constable attached to Botlokwa police station, in crime prevention unit.

27.2. He denied ever delivering a protection order nor assaulting the plaintiff as alleged. He also denied arresting him either.

27.3. He was subpoenaed to attend court as a witness from the 04th to 11th June 2018, and that was when according to him the plaintiff and his witness might have seen or observed him as he waited for his turn to testify in court.

THE ISSUES:

28. The questions that require determination are two-pronged:

(a). whether the alleged arrests were unlawful within the purview of

Section 40 (1) (b) of the Act, and

- (b). whether the plaintiff was assaulted by one of the police officers on 11 October 2016 as alleged.

COMMON CAUSE FACTS:

29. It is common cause that the plaintiff was arrested by the police officers on 31 March 2016 without a warrant of arrest in terms of Section 40 (1) (b) of the Act. The arrest, according to the evidence presented by the arresting police officers, was allegedly for an offence of assault and robbery against the plaintiff, the latter offence of which falls within the ambit of Schedule 1 offences.
30. The complainant in Claim 1, (Rasebotsa) was he who identified and pointed out the plaintiff to the police officers before his arrest.
31. The defendant, as it is trite law, had the onus thrust on it to prove the lawfulness of the arrest in respect of Claim I.

32. Furthermore, as to Claims II and III, respectively, the plaintiff, however, had the onus placed on him to establish his claims on a balance of probabilities.
33. It is furthermore not in dispute that Rasebotsa was he who in fact set the law in motion when he laid charges of assault and common robbery on 30 March 2016 against the plaintiff. A case docket was opened.
34. Upon reporting on duty at Botlokwa Police Station on 31 March 2016, Mailula on perusal of the information placed to the police in the docket by Rasebotsa, made further inquiries from him, and he ultimately directed the two men, (Mailula and Mashakeng, the police) to the plaintiff's hair salon. The plaintiff also confirmed this arrest on the same day on 31 March 2016. This is common cause between the parties.
35. It is furthermore also common cause that Mailula and Mashakeng were at the time of the plaintiff's arrest on 31 March 2016, police officers as defined in Section 40 (1) (b) of the Act, and that in effecting the arrests, did so within the scope of their employment and duties as police officers,

36. Counsel for the plaintiff conceded in his argument (heads of argument) that the plaintiff was detained from 31 March 2016 to 01 April 2016, whereafter he was admitted to bail by the district Magistrate's Court.

LEGAL FRAMEWORK

37. It is axiomatic that Section 40 (1) (b) of Act 51 of 1977 explicitly sets out the jurisdictional factors that must be present before a police officer who arrests any person whom he/she reasonably suspects of having committed an offence delineated in Schedule 1 of the Act, may effect an arrest without a warrant of arrest. These jurisdictional pre-requisites that might justify an arrest in accordance with the section sound as follows:-

37.1. The arrestor must be a peace officer;

37.2. The arrestor must entertain a suspicion;

37.3. The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, and

37.4. The suspicion must rest on reasonable grounds –

See **Duncan v Minister of Law and Order**⁷

For purposes of the inquiry before me, the reasonableness or otherwise of the suspicion must, in my view, be that the arrestee committed the alleged robbery referred to in Schedule 1 of the Act.

38. Accordingly, when police have arrested and detained a person and once the arrest and detention are admitted, as in the present instance, the onus of proving lawfulness of the arrest shifts on the state.⁸ Such arrest, must be justified by the defendant. This is precisely because “an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law”⁹.

39. In the instant matter, the only issue between the parties in relation to the suit concerned is whether the peace officer (Mailula) had reasonable

⁷ 1986 (2) SA 805 (A) at 818 G - H.

⁸ Mhanga v Minister of Safety and Security [2002] 2 All SA 534 (TK)

⁹ Minister of Law and Order and Others v Hurtley and Another 1986 (3) SA 568 (A) at 589 E – F per Rabie CJ.

grounds for his suspicion which culminated in the plaintiff's arrest in relation to Claim I.

40. In this particular instance, Mailula's evidence gave a graphic account of how and the circumstances under which, having perused the police docket, and having conducted preliminary investigation in the complaint brought to his attention, proceeded to arrest the plaintiff. That, having also had occasion to peruse thoroughly the police case docket, formed "impression" that a robbery had been committed by the plaintiff against Rasebotsa, the complaint before the case was later withdrawn by means of "ADR "between the parties. (Alternative Disputes Resolution) Based on this suspicion, Mailula went on to effect the arrest.
41. Counsel for the plaintiff submitted, for purposes of Claim I, that Mailula should have went on to investigate the plaintiff's alleged alibi before affecting arrest since he denied any involvement in the alleged robbery. It is not surprising that the learned counsel adopted this line of reasoning. Counsel for the plaintiff apparently based his contention on the overturned judgment and approach adopted by Bertelsmann J in

Louw and Another V Minister of Safety and Security and Others 2006 (2) SACR 178 (T) at 186 (a) – c and 187 (e). The Louw's case has been rejected in the instructive case of **Minister of Safety and Security V Sekhoto**,¹⁰ where Harms DP (as he then was) stated at paragraph 22 that:-

“[22]

With all due respect to the different High Court judgments referred to, applying all the interpretational skills at my disposal and taking words of Langa CJ in Hyundai seriously, I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.”

42. Turning to counsel for the plaintiff's submission that “what Sekhoto did not do was to diminish the requirement of reasonableness” is, with respect, misguided. The **Sekhoto's** case emphasized that “once the jurisdictional facts for an arrest, whether in terms of any paragraph of

¹⁰ 2011 (I) SACR 315 at 325 e – f, para : 22

S40 (1) or in terms of S. 43 are present, a discretion arises" (P.327, para: 38)

43. No doubt, the discretion must be properly exercised, that is, Judiciously so. The exercise of such a discretion will be patently unlawful if the peace officer effecting the arrest culpably invokes the power conferred for a purpose unconnected to or not envisaged by the law-giver. The intention to arrest must, of course, be solely to bring the arrestee to justice, nothing more and nothing less. The arrest is no more than one step in that process.
44. Having had regard to the requirements for Section 40 (1) (b) as aptly laid down in **Sekhoto's** decision, it follows that previous decisions which sought to introduce some constitutional issues by the backdoor, such as **Le Roux v Minister of Safety and Security** *supra* were clearly wrong, and should, with respect, not to be followed.
45. In view of the considerations aforesaid and bearing in mind the facts

in casu, it follows that claim I was ill – conceived and is found to lack merit. The defendant succeeded in discharging the onus cast on it. Claim I accordingly fails and is therefore dismissed.

46. I now turn the spot light on Claim II and III, respectively. Unlike in respect of Claim I, the *onus* has now drifted on the Plaintiff to establish its claim on a balance of probabilities. I proceed to consider first, Claim II, that of alleged “arrest”.

47. The plaintiff in its particulars of claim with reference to this claim pleaded as follows:-

“Claim II – paragraph 8.

“On 11 October 2016 at 14h00 at house 5364 Botlokwa plaintiff was arrested by Maphaphuli for no reason at all and kept in custody at the Botlokwa Police Station and released the same day by the employees of Defendant”.

48. These allegations are, however, emphatically denied by the Defendant in its plea. I may hasten to add that allegations of the “arrest”

being unlawful are also placed in dispute, the same being denied. It is generally accepted practice that he who alleges, carries the burden to prove the allegations he makes.

49. The claim in respect of the "arrest" that allegedly occurred on 11 October 2016 has some shortcomings for the following reasons:-

49.1. First, although its particulars of claim, in particular, paragraph 8, it is alleged that "plaintiff was arrested by Maphaphuli" and in paragraph 11, that the said "Maphaphuli was acting with (in) the course and scope of his duty as employee of defendant at all reasonable times," (own underlining) nowhere was evidence adduced by the plaintiff that sought to accentuate on the capacity in which Maphaphuli acted within the course and scope of his duty as an "employee" of the defendant. To complete the puzzle, cogent evidence was required that defined Maphaphuli as a peace officer who effected the alleged "arrest". It is not, in my view, sufficient merely to allege that he was an "employee" without pointing out his status as a police officer to constitute unlawful

arrest. Furthermore, no evidence was led to cure that defect in plaintiff's evidence on that aspect.

49.2. Similarly, in paragraph 8 referred to, the plaintiff pleaded that he was kept in custody at Botlokwa Police Station and **released the same day**. Again, plaintiff led no evidence alleging whether or not his detention was in excess of 48 hours after the alleged arrest, to constitute unlawful arrest.

50. That said, the next enquiry is whether the plaintiff was in fact arrested unlawfully by Maphaphuli on 11 October 2016 as alleged.

51. On his own version, the plaintiff testified that 2 police officers arrived at his homestead to deliver a court process, a Protection Order issued against him.¹¹ According to him he refused to sign it, apparently not shown where to sign as an acknowledgement of its receipt by him. For his resistance, the police took him to the police station and later he was taken by the same police officers back home.

¹¹ Bundle "6", pp 12 -18, dated 19.09.2016 (Form 2)

Later, the police returned with a Protection Order properly issued on 11 October 2016¹², which the plaintiff this time around agreed to sign.

52. From his evidence, nothing is suggestive that the plaintiff, apart from being driven to the police station, was legally speaking, placed under arrest on 11 October 2016 by Mphaphuli.
53. Notwithstanding the fact that the Magistrate who issued the Protection Order dated 11 October 2016 authorized the "arrest of the Respondent, the execution of which is suspended"(Items 4.2 and 4.3. thereof), it does not appear plain from both his evidence and that of Monyela, his witness, that the plaintiff was ever placed under arrest or detained within the meaning of a legal arrest. Claim II, therefore lacks merit and ought to fail.
54. The evidence of the plaintiff and Monyela at best however corroborates each other in respect of the alleged assault in Claim III. The photo album, Exhibit E, J88 medical report, which were not disputed by the Defendant are self-speaking. The Plaintiff's evidence and that of Monyela, sufficiently corroborate the alleged assault as described by the

¹² Bundle "C" pp 23 -25. (Form 7)

plaintiff. Both plaintiff and Rebecca alleged that 2 police officers came to plaintiff's homestead where he was assaulted. The identity of the responsible police officer who assaulted him was confirmed by both the plaintiff and Monyela by pointing him out in court with the defence's consent.

55. In the light of these considerations, I am satisfied that there is adequate evidence of assault on the person of the plaintiff by one of the 2 police officers who came to deliver the Protection Order on 11 October 2016. The assault was actuated, in all probability, by plaintiff having refused to sign for the initial Form 2, which was an application form, not Form 7. The plaintiff has proved its claim in respect of Assault on a balance of probabilities. This claim succeeds. In the result, I make an order as follows:

ORDER

1. Claim I and Claim II are dismissed with costs.
2. Claim III (assault) is granted with costs.
3. The issue of quantum in respect of Claim III is reserved for determination in due course.



M.G PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

REPRESENTATIONS:

- | | | |
|------------------------------|---|------------------------|
| 1. Counsel for the Plaintiff | : | Adv M.S Schnehage |
| Instructed by | : | Smit & Maree Attorneys |
| | | Polokwane |
| 2. Counsel for Defendant | : | Adv L. Nkoana |
| Instructed by | : | The State Attorney |
| | | Polokwane |
| 3. Date heard | : | 06 to 12 June 2018 |
| 4. Date Delivered | : | 02 August 2018 |