

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE No: 1209/2013

REPORTABLE: YES/NO	
(1)	OF INTEREST TO THE JUDGES: YES/NO
(2)	REVISED.
DATE	SIGNATURE
10/8/2018	

In the matter between:

MAUPE RAIDER MPHAHLELE

: PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY

: DEFENDANT

JUDGMENT

SEMENYA J:

1. Plaintiff instituted action for damages in the amount of R500 000.00, for unlawful arrest and detention and assault by the members of the South African Police Services, who were in the employ of the defendant and acting within the scope of their duties.
2. The parties have agreed, and it was so ordered, that the issue of merits and quantum should be separated in terms of Rule 33 of the Rules of Court. This judgment concerns merits only.
3. It is common cause that the plaintiff was arrested without a warrant at his home where he is running a business of a spaza shop at about 11:00 on the 5 October 2011. He was thereupon taken to Lebowakgomo police station where he was detained for allegedly five days. He was charged with assault on police, malicious damage to property and obstructing a police officer in the execution of his duties. The defendant's version is that the criminal case against the plaintiff was case was subsequently withdrawn. The plaintiff on the other hand submitted that the case went on trial and he was subsequently acquitted.
4. Whereas the arrest and detention of the plaintiff is admitted by the defendant, the unlawfulness of that arrest and detention is disputed. The defendant is relying on section 40 (1) (a) of the Criminal Procedure Act 51 of 1977 (the Act) on the basis that the plaintiff was allegedly arrested for committing an offence in the presence of police officers.

5. The claim rests on the facts as summarized hereinunder. The version of the two police officers, Constable Calvin Mabale Mphahlele and warrant officer Morris Madimetja Modula (Modula), who arrested the plaintiff in this matter, is almost identical. The two witnesses testified that they were, as at the date of the incident, in the employ of the South African Police Service and stationed at Lebowakgomo police station. They were officially on duty on Wednesday of the 5 October 2011 together with Calvin Madupe Mphahlele (Tshupe), who has since resigned, performing patrol duties at Thamagane, Ga-Mphahlele. They approached a group of boys who were leaning against a wall at the plaintiff's spaza shop. They searched them after they had introduced themselves to the said boys as police officers. Dagga was found in one of the boys named Zinny's pocket. It is common cause that this Zinny is not mentally sound.
6. According to the witnesses the plaintiff came and objected to the search, saying that the boys were his customers and the police cannot just come there and arrest them. The plaintiff poked Tshupe with a finger and slapped him with an open hand. He further pulled him with his clothes thereby tearing his T-shirt. The plaintiff was arrested for offences assault, malicious damage to property and obstructing police officers in the execution of their duties on Modula's instructions. Modula testified that it was not necessary to apply for a warrant as the offences were committed in the presence of a peace officer.

7. During cross-examination the two police officers denied that they assaulted the plaintiff by kicking him with booted feet. In answering the question whether the arrest of the plaintiff was an extreme measure, the two witnesses stated that the arrest of the plaintiff was commensurate with the seriousness of the offences that he has committed. The witnesses admitted that the incident happened at 11:00 and that they arrived at the police station at 12:40. In explaining what have happened between 11:00 and 12:40, Modula stated that it took some time to manage to arrest the plaintiff who was resisting and further that they had to travel from Thamagane to Lebowakgomo.
8. The plaintiff confirmed that he is the owner of the spaza shop that was visited by the police on the 5 October 2011. According to his version, the police arrived there at the spaza shop and searched them. Two of the officers were not in uniform and the vehicle they were travelling in was unmarked. As they were so searching, Tshupe kicked one of the boys. He objected and told the officers that we are living in a democratic country and the law does not allow them to hit other people.
9. The plaintiff stated further that the officers grabbed him by his clothes and kicked him while he had fallen to the ground. They tore the buttons of his shirt and the zip of his pair of trousers. He was then and there thrown into the police van like an animal. He was then tied to the van. The police drove around with him and went with him to Tshupe's house where they had lunch. He was taken to Lebowakgomo police station where he was locked up in the

cells at 16:00. He was taken to court on Monday, after five days and was released on bail. He stated that he was subsequently acquitted on all charges.

10. It was put to the plaintiff that he cannot deny that he assaulted a police officer, insulted them, tore a T-shirt and interfered with them when they were performing their duties as their the version of the defendant's witnesses was not disputed during cross - examination. Although he conceded that assault, possession of dagga and malicious damage to property are criminal offences, he denied that any of the boys was found in possession of dagga at his spaza shop. He also denied that the police were justified in arresting him. It was further put to him that it is not correct that he was detained at 16:00 as the documents shows that he was taken to the cells at 12:40. The plaintiff's version that he was chained to the canopy was denied. The plaintiff denied that Zinny was at his spaza shop on the date of the incident.
11. Violet Ramadimetja Mphahlele, who testified on behalf of the plaintiff sated that she was at the bus stop, about 10 to 15m from the spaza shop when the officers arrived. She waited for a taxi from 8 to 11am. She saw the plaintiff retreating. She again saw the officers handling him in a rough manner. She approached the officer and asked them about the reasons why they were treating the plaintiff in that manner. She could see that the plaintiff's shirt and the zip of his trousers were torn off. She further confirmed the plaintiff's version that he was the only person who was arrested on that date.

12. It was put to the witness that it is improbable that she could have waited for a taxi for two hours. She stated that she did not see the plaintiff assaulting the police and that nothing had obscured her view. She could not say that the plaintiff was resisting arrest when she saw him retreating. She confirmed the plaintiff's version that the matter went on trial and that two police officers testified against the plaintiff.

13. In **Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (A)** at **589E-F** it was stated that an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that the action was justified in law. The defendant, in view of the admissions made, bore the burden of proving the lawfulness of the arrest and detention as well as the duty to begin.

14. Section 40 of the Act provides as follows:

"Arrest by a peace officer-

(1) A peace officer may without warrant arrest any person-

(a) who commits or attempt to commit any offence in his presence;"

15. Section 50 (1) (c) Of the Act provides that a person who is arrested with or without a warrant, and who is not released by reason that no charge is brought against him/her or bail is not granted to him/her in terms of section 59 or 59A, shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after arrest.

16. It is not in dispute that Modula who issued an instruction that the plaintiff should be arrested is a peace officer. It is further common cause that the plaintiff was arrested without a warrant for his arrest. The plaintiff disputes the defendant's allegations that he had committed offences in the presence of a peace officer.
17. The plaintiff's claim is bound to fail in case I find that the defendant has established the existence of all jurisdictional facts on a balance of probabilities. The test to be applied to the facts is whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the arrestee had *prima facie* committed an offence in his or her presence.-See **Scheepers v Minister of safety and Security 2015 (1) SACR 284 (ECG)**.
18. It was contended on behalf of the defendant that the arrest of the plaintiff without a warrant was lawful in that the plaintiff had committed the offences of assault on police, malicious damage to property and obstructing the police in the execution of their lawful duties. It was further argued that the detention of the plaintiff was justified in that it was done with the intention of taking the plaintiff to court. It was submitted that should the court find that the plaintiff was detained for a period longer than 48 hours without being brought to the lower court, the court should find that the defendant is liable for unlawful detention for the period outside the 48 hours only.

19. The defendant's contention that the version of the two witnesses who testified on behalf of the defendant was not challenged during cross-examination is correct. It is on this basis that I find no reason to reject the defendant's version that the plaintiff assaulted a police officer, tore his clothes and interfered with the performance of their duties when they wanted to arrest a person who was found in possession of dagga. I find that the two police officers were credible witnesses. I also fail to find any ill motive on their part.
20. On the other hand, I find it difficult to believe the version of Violet Mphahlele and that of the plaintiff. In the first place, the plaintiff did not say anything with regard to her presence at the scene. Secondly, she was about 10-15m away from the scene and could not deny that the plaintiff was resisting arrest when he was retreating when she saw what she referred to as Rough handling of the plaintiff by members of the police. I further agree with the defendant's submission that it is improbable that Violet could have waited for a taxi from 8am to 11am.
21. The plaintiff himself was a poor witness. He evaded clear and straightforward questions that were put to him during cross-examination. He hid behind the fact that he is not well conversant with English despite the fact that he was provided with the services of an interpreter. It cannot be true that he arrived at the police station at 16:00. The defendant's version that he was detained at 12:40 was not disputed, neither was it put to the defence witnesses that they were lying about that fact.

22. I accept the defendant's version that the plaintiff committed offences in their presence and that they had authority to arrest the plaintiff without a warrant in terms of section 40(1) (a) of the Act. It was however put to the two police officers that they could have used less drastic measures of ensuring the appearance of the plaintiff in court other than that of arresting him.

23. It was stated in **Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)** at [28] that "*once the jurisdictional facts for an arrest, whether in terms of any paragraph of s40 (1) or in terms of s43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to arrest.*"

24. I am unable to find any *mala fide* on the part of the arresting officers in arresting and detaining the plaintiff in this matter. Their intention was clearly to bring the accused to court. In their evidence they indicated that they regarded the offences the plaintiff has committed, in particular that of interference with the performance of their duties as serious. I cannot find any fault in their reasoning. The discretion was therefore exercised judiciously.

25. Section 50(1)(c) cited above must be read with section 35(1)(d)(i) of the Constitution of the Republic of South Africa, 1996. This section provides that *'Everyone who is arrested for allegedly committing an offence has a right -.... to be brought before a court as soon as reasonably possible, but not later than 48 hours.'* It is not in dispute that the plaintiff was arrested at about 11:00 on Wednesday of the 5 October 2011. It is further common cause that he was brought before court on the 10th. This was clearly after the expiration of 48 hours in contravention of the two statutes.

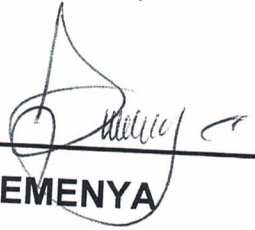
26. I agree with the submissions made on behalf of the defendant that the plaintiff's detention during the period that fall outside 48 hours is unlawful and that the defendant can only be held liable for those hours only for the purposes of quantification of damages.

27. The version of the police officers that they struggled to arrest the plaintiff to the extent that force was required cannot be rejected. Violet testified that she saw the plaintiff retreating and thereafter a scuffle ensued between him and police officers. The plaintiff clearly did not want the police to arrest him. The plaintiff's claim for damages on the basis of assault can therefore not succeed.

28. In the premise I make the following order:

26.1. The plaintiff's claim for damages for unlawful arrests and assault fails;

26.2. The plaintiff's claim for damages for unlawful detention succeeds only to the extent of detention outside the 48 hour period.



M.V SEMENYA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION.

APPEARANCES

ATTORNEYS FOR THE PLAINTIFF	: THOMAS GROBBLER ATT
COUNSEL FOR THE PLAINTIFF	: ATT. T. GROBBLER
ATTORNEY FOR THE DEFENDENT	: STATE ATTORNEY
COUNSEL FOR THE DEFENDENT	:
DATE OF HEARING	: 08 MAY 2018
DATE OF JUDGMENT	: 10 AUGUST 2018