



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

(1) REPORTABLE : ~~YES~~ / NO

(2) INTERESTED TO THE JUDGES : ~~YES~~ / NO

(3) REVISED

11/7/17
DATE

SIGNATURE

1076/2016

In the matter between:

MATSOBANE COMFORT LEKGOTHOANE

PLAINTIFF

and

NATIONAL COMMISSIONER OF SAPS & 3 OTHERS

DEFENDANT

JUDGMENT

MOKGOHLOA DJP

1. On 6 March 2015 violence broke out between Lebowakgomo Taxi Association and Mphahlele Taxi Association. A complaint was lodged at Lebowakgomo Police Station. On 9 March 2015 Captain Chuene arrested the plaintiff and charged him with public violence and pointing of a firearm. The plaintiff appeared in court on 10 March 2015 and was released on bail. He thereafter made several appearances at court until the charges against him were withdrawn.

2. On 14 August 2015, the plaintiff was again arrested by W/O Mapoulo and charged him with malicious injury to property. He appeared in court on 17 August 2015 and the case was postponed to 27 August 2015 for his formal bail application. He was granted bail on 27 August 2015 and on 2 October 2015, charges against him were withdrawn.
3. The plaintiff claims damages arising from the arrests and detentions in the sum of R75 000.00 in respect of claim A, and R2 265 136.00 in respect of claim B made up as follows:

Claim A

3.1.	Wrongful arrest and detention	R25 000.00
3.2.	Humiliation and harassment	R25 000.00
3.3.	Contumelia, deprivation of freedom of movement, freedom of association and discomfort	R25 000.00
	Total	R75 000.00

Claim B

3.4	Wrongful arrest and detention	R250 000.00
3.5	Humiliation and harassment	R100 000.00
3.6	Contumelia, deprivation of freedom of movement, freedom of association and discomfort	R25 000.00
3.7	Loss of income	R1 890 136.00
	Total	R2 265 136.00

4. In their plea, the defendants admitted the arrest and detention in respect of both claims but denied the wrongfulness thereof. They pleaded that the plaintiff was arrested on a

reasonable suspicion of having committed schedule 1 offences in terms of s40 (1) (b) of the Criminal Procedure Act (CPA)¹.

5. Two entirely different stories emerged as to the events relating to the arrests, with virtually no intersection between them. The versions of the defendants, who began leading evidence, was testified to by Captain Chuene and W/O Mapoulo.

Claim A

6. Captain Chuene testified that he received dockets relating to offences of unlawful pointing of a firearm, public violence and malicious injury to property. These offenses emanated from a taxi violence which occurred on 6 March 2015. He studied these dockets and noticed that the name Totolo Lekgothoane was mentioned as one of the suspects. He approached people who were already arrested in respect of the taxi violence to enquire whether this Totolo was amongst them. He found the plaintiff's brother Kingsley, who informed him that Totolo was his brother (the plaintiff). Kingsley phoned the plaintiff who came to the police station. Upon the plaintiff's arrival at the police station, Captain Chuene confirmed with the witnesses and complainants that indeed the plaintiff was Totolo. He then arrested the plaintiff.

Claim B

7. W/O Mapoulo testified that he was the investigating officer in the taxi violence case. According to him, there was no information as to who the suspect/s were. On a certain day, while he was at work, a certain person whom he described as a Zimbabwean (I prefer to refer to him as an informer) arrived at the police station and informed W/O Mapoulo that he was one of the people who were involved in the taxi shootings. The informer informed W/O Mapoulo that the plaintiff had requested him to assist shoot the LebowaKgomo taxis. W/O Mapoulo obtained a statement from the informer wherein he explained how the plan to shoot the taxis were carried out.

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8. Thereafter, W/O Mapoulo called the plaintiff to come to the police station. That is when the plaintiff was arrested and detained. According to W/O Mapoulo, the informer was shot and killed immediately after the plaintiff was arrested.
9. The plaintiff's version was that in the morning of 9 March 2015 he was on his way to work when Kingsley called him and informed him that he was arrested. The plaintiff proceeded to the police station to find out the reason for Kingsley's arrest. He met Captain Chuene who informed him that he is arresting him on charges emanating from the taxi violence. The plaintiff explained to Captain Chuene that he is a truck driver and not a taxi driver. Captain Chuene released Kingsley and detained the plaintiff. Captain Chuene enquired whether the plaintiff owns any firearm. The plaintiff informed him that he owns two licenced firearms and handed one of the firearms which was in his possession to Captain Chuene. Whilst in detention, the police proceeded to the plaintiff's house and seized the other firearm.
10. Regarding the name 'Totolo' the plaintiff denied this to be his name. According to him the taxi business belongs to his father and the business is called Totolo transport. This name also appears on his father's taxis.
11. On 10 March 2015 the plaintiff appeared in court and was released on bail. He called W/O Mapoulo to enquire about his firearms and was informed that the firearms have been taken for ballistic investigations. Later, charges against him were withdrawn.
12. On 14 August 2015 W/O Mapoulo called him to come to the police station to collect his firearms. The plaintiff arrived at the police station and was told to wait until 13h00. At 13h00 the plaintiff returned to W/O Mapoulo's office who then informed the plaintiff that the ballistic report linked his firearms to a number of offences. The plaintiff was thus arrested. He appeared in court on 17 August 2015 and was remanded in custody until 27 August when he was released on bail. Charges against him were subsequently withdrawn on 2 October 2015.
13. The plaintiff denied that W/O Mapoulo ever informed him about a statement made by an informer implicating him to the taxi shooting.

14. The plaintiff testified about the impact these arrests had on his employment. He stated that he is a truck driver delivering goods around Africa. He was employed at Pieter Esterhuizen driving a front liner truck which had two trailers when he was arrested on 9 March 2015. His routes were changed and he was made to do local deliveries. This affected his salary which was reduced because of change of routes. His employer advised him that he cannot trust the plaintiff with the delivery of expensive goods since he was involved in taxi violence.
15. The reduction of his salary made the plaintiff to look for another employment and he was hired at Catnis Constructions. He was then arrested two months after starting his new job. His employer was equally concerned about his arrest. He did not receive his salary from 17 August 2015 to 31 August 2015 (time when he was in custody) and his employer treated these days as unpaid leave.
16. Things became worse when the plaintiff's Public Permit Licence expired. He proceeded to the licensing department to renew his licence. The report of his fingerprints showed that he is in a data base of criminals and therefore his licence could not be renewed. This led to the plaintiff losing his employment. He has been unemployed since February 2016. He cannot obtain employment because his licence has expired. His wife left him because of his financial status. The community regards him as a criminal who goes around shooting people. His dignity was thus affected. He is black listed for failing to pay his debts and his properties have been executed. The plaintiff stated that to be associated with taxi violence has humiliated and degraded him.
17. Kingsley testified and confirmed that Totolo is not the plaintiff's name but it is the brand name used by his father on his taxis. He confirmed further that the plaintiff is a truck driver and was not a taxi driver nor a member of any taxi association and thus not involved in the taxi industry. He confirmed that he was arrested and he informed his brother, the plaintiff about the arrest. The plaintiff arrived at the police station and was arrested. He denied having told the police that the plaintiff is Totolo.
18. Albert Manamela (Manamela), a private investigator whose credentials were outlined, testified that he received instructions from the plaintiff's attorney to assist in this matter. He

consulted with the plaintiff who gave him the CAS numbers of the charges he had faced. He then met W/O Mapoulo who furnished him with documents relating to CAS 109/04/2014 and CAS 110/04/2014 which relates to charges which were preferred against the plaintiff. W/O Mapoulo informed him that the police did not have sufficient evidence until the public violence and pointing of a firearm cases were reported and plaintiff was arrested.

19. According to Manamela, W/O Mapoulo informed him that the plaintiff's firearms were seized and taken for ballistic investigations. The ballistic report linked the firearms to other crimes around Limpopo, Mpumalanga, Gauteng and KwaZulu – Natal. W/O Mapoulo informed Manamela that based on this report, he arrested the plaintiff. Manamela read and analysed the ballistic report and found that there was no indication that the plaintiff's firearms were linked to the cartridges found on the scene of any crime but the indication was that all cartridges were found to have been fired from the same firearm. Based on this investigation, Manamela came to a conclusion that the plaintiff was wrongfully arrested and detained.
20. The starting point in determining whether the arrest without a warrant is lawful or not is in the Criminal Procedure Act (CPA). Section 40 (1) (b) of the CPA provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the CPA.
21. In *Duncan v Minister of Law and Order*² the jurisdictional facts which must exist before the power conferred by section 40 (1) (b) may be invoked, were set out as follows: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1 of the CPA; and (iv) the suspicion must rest on reasonable grounds.
22. An arresting officer is therefore required to form a reasonable suspicion of a commission of an offence before arresting an individual, which arrest effectively deprives the individual of his/her liberty. The burden of prove that the arrest was justified and not wrongful rests on the defendant³.

² 1986 (2) SA 805 (A) at 818 F-H

³ Minister of safety and Security v Sekhoto 2011 (1) SACR 315

23. The question whether Captain Chuene and W/O Mapoulo had reasonable suspicion that the plaintiff committed the offences must be considered by taking into account that:

*"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."*⁴

24. When considering whether the suspicion was reasonable, it must be objectively clear that a reasonable man in the circumstances wherein the arresting officer finds himself would have suspected that the plaintiff had committed the offence.

25. Jone J stated the following in *Mabona v Minister of Law and Order*⁵:

"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 Eat 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, 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 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."

⁴ *Shabaan Bin Hussein and Other v Chong Fook Kam and Another* 1969 3 ALL ER 1627 (PC) as referred with approval in *Duncan v Minister of Law and Order* (supra)

⁵ 1988 (2) SA 654 (EC) at 658 E-H

26. It is not in dispute that taxi violence erupted on 6 March 2015. Equally not in dispute that Captain Chuene was allocated the dockets relating thereto. Captain Chuene studied the dockets and the name Totolo Lekgothoane appeared as a suspect. He confirmed this information from the people who were already arrested in this case. According to him, Kingsley informed him that Totolo was his brother, the plaintiff. Whether this is true or not, the fact remains that Kingsley and the plaintiff are somehow connected to the name Totolo.
27. Taking into consideration the fact that taxi violence is one of the thorny issues and a prevalent offence in our country, I find Captain Chuene's belief that the plaintiff was Totolo and his decision to arrest him, to be reasonable in the circumstance. In my view, and bearing in mind that at times it is necessary to strike while the iron is hot, Captain Chuene's decision to arrest the plaintiff in order to curb and stop this violence was justified.
28. I can however not say the same with W/O Mapoulo's conduct. He knew that the ballistic report did not link the plaintiff's firearms to this violence or any other offence emanating from the taxi violence. He however proceeded to arrest him. This arrest cannot be justified by any means. Furthermore, and with full knowledge that there exist no evidence to charge the plaintiff, W/O Mapoulo instituted criminal proceeding against the plaintiff without reasonable and probable cause. He attended the court proceedings and failed to advise the prosecutor of this. He disavowed during trial the defendants' plea that he arrested the plaintiff based on the ballistic report.
29. W/O Mapoulo's version about a statement obtained from an informer is equally questionable. According to him, he did not put this statement in the docket but kept it with him. This he did to protect the informer. He did not inform the prosecutor about the existence and contents of this statement because he did not trust the prosecutor. The existence of this statement was neither brought to the attention of the attorney in this matter who could have amended the plea to state that the plaintiff was arrested on the basis of the informer's statement. W/O Mapoulo is an experienced officer who has been a police for about 20 years. He knew the importance of making available all necessary information to the prosecutor and the attorney. His choice not to do so makes one to come to an inescapable conclusion that such informer or statement never existed. His version in

this respect should equally be rejected. In my view, W/O Mapoulo's conduct was unreasonable, unjustified and malicious.

30. During the trial and immediately before the cross examination of the plaintiff, Mr Ngoetjana for the defendants, attempted to hand in certain documents to the court. Plaintiff's counsel objected to such documents being handed in on the basis that they were not properly discovered. Mr Ngoetjana submitted that it was not necessary for the defendants to discover those documents because the plaintiff did not ask for the discovery in terms of R35 (1) of the Uniform Rules of Court. I referred Mr Ngoetjana to R35 (4) and adjourned the matter to enable the defendants to prepare and bring the application for that purpose. I did this because I realised that Mr Ngoetjana did not understand the provisions and purpose of R35. On the next day, Mr Ngoetjana made an attempt to argue the application but still failed. He failed to give adequate and satisfactory reasons for the defendants' failure to comply with the Rules. He failed to state whether those documents were or were not in the defendants' possession at the time of discovery, and if not, when did the defendants obtain possession thereof. I then dismissed the application with costs because I expected the defendants, being the state, to engage services of attorneys and counsel who are proficient, efficient and skilful, practitioners who bestow sufficient care and attention in the conduct of business entrusted to them.
31. Regarding the plaintiff's claim for loss of income, the defendants argued that this claim should be dismissed on the basis that it is a claim for pure economic loss which does not arise directly from damage to the plaintiff's person or property but as a result of negligence. Furthermore, the argument continued, there is no evidence that the police officer in arresting the plaintiff foresaw or should have foreseen that the plaintiff would suffer loss of income as a result of the arrest.
32. I find the above argument to be without substance. The plaintiff testified at length about the impact the arrest had on his employment and income. I have stated this in paragraph [14] – [16] of this judgment. I even requested the defendants' counsel to assist the plaintiff to have his name removed from the criminal records.

33. The *onus* is on the defendant to show that the arrest and detention was lawful⁶. The onus to prove loss of income is on the plaintiff. The lawfulness or otherwise of the arrest is resolved by which version is accepted. I have already indicated the reasons why I accept the evidence of Captain Chuene which rendered his conduct justifiable and reject W/O Mapoulo's evidence. I further find that the plaintiff discharged the *onus* placed on him to prove that he lost income as a result of the unlawful arrest and detention by W/O Mapoulo.
34. The question then, is what damages should be awarded in respect of claim B and loss of income. Mr Ngoetjana, for the defendant submitted that it would be difficult and impossible to determine the amount to be awarded since the plaintiff failed to plead and testify about the duration of his detention. He referred in particular that the time of the arrest and the release of the plaintiff was not stated. With due respect, Mr Ngoetjana ignores again the evidence tendered during trial. He further ignores the copy of the cell book registrar as appears in pages 102 – 106 of the plaintiff's expert bundle.
35. Regarding quantum on loss of income, the plaintiff consulted with a Clinical Psychologist and the Industrial Psychologist who compiled their respective reports. Based on these reports the actuary made calculation in respect of the plaintiff's loss of income. These experts' reports are not disputed.
36. I have been referred to a number of decided cases dealing with the award of damages in circumstances similar to this matter. The question of previous awards was reviewed in *Minister of Safety and Security v Seymour*⁷ which concluded that the only discernable pattern was that courts are not extravagant in such awards. The facts of each case must be evaluated on their own merits because few cases are directly comparable.
37. In the present matter, the plaintiff was arrested and detained for 13 days. During this time, he lost his employment. The arrest and subsequent charges caused his name to be listed in a data base of criminals. Consequently, he was unable to renew his professional public permit licence. These caused humiliation and degradation for the plaintiff who is still unemployed.

⁶ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) paras 24 and 25

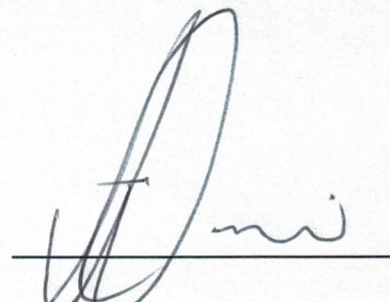
⁷ 2006 (6) SA 320 (SCA)

38. Taking all of the above factors into consideration, it seem to me that an award of R100 000.00 would be appropriate in respect of the arrest and detention. As regards loss of income, I cannot find any reason to deviate from the calculation by the actuary. Consequently therefore an amount of R1 890 136.00 should be awarded.

Order

Judgment is granted in favour of the plaintiff for:

1. Payment of the sum of R100 000.00 in respect of Claim B.
2. Payment of the sum of R1 890 136.00 in respect of loss of income.
3. Interest a *tempore morae* at the rate of 9% from 5 April 2016 to date of payment
4. Costs of suit.



MOKGOHLOA DJP

REPRESENTATIONS

- | | |
|------------------------------|--------------------------------|
| 1. For the Plaintiff | : Adv Nkoana |
| Instructed by | : Makgahlela Mashaba Attorneys |
| | |
| 2. Counsel for the defendant | : Adv Ngoetjana |
| Instructed by | : State Attorney |
| | |
| 3. Date of hearing | : 24 June 2017 |
| | |
| 4. Date handed down | : 11 July 2017 |