

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO

35137/2013
 CASE NUMBER: 17527/2013

17531/2013

10/2/2017

In the matter between:

PONTSHO EZEKIEL PULE

KARABO MARCUS KHALA

EMMANUEL MATOME PHOKU

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

and

THE MINISTER OF POLICE
 NATIONAL PROSECUTING AUTHORITY

1ST DEFENDANT

2ND DEFENDANT

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] At the commencement of trial I was informed that there are three plaintiff's before me, namely, Pontsho Ezekiel Pule ("Mr Pule"), Karabo Marcus Khala ("Mr Khala) and Emmanuel Matome Phoku ("Mr Phoku") ("the plaintiffs/suspects"). The three plaintiffs, individually, had initially issued summons for damages against the Minister of police ("the first defendant") for unlawful arrest and detention and against the National Prosecuting Authority ("the second defendant") for malicious prosecution. But, because the cause of action in the three matters was similar, the plaintiffs agreed to consolidate their respective claims.

[2] The parties were at odds as to who should be the first to lead evidence. The plaintiffs' contention was that in cases of this nature the *onus* is on the defendants, and they should, as such, lead evidence first. On the other hand, the defendants' submission was that in cases where there is a split *onus* the plaintiffs must lead evidence first. I ruled that the defendants should be first to testify.

[3] In addition to the pleadings two bundles of documents were handed in court as Bundle "A" and Bundle "B". Bundle "A" consisted of Index: Criminal Court Record and Bundle "B" consisted of Index: Docket. The parties provided me with heads of argument in support of their closing arguments, for which I am indebted.

MALICIOUS PROSECUTION

[4] During the hearing of the matter the plaintiffs abandoned their claims for malicious prosecution against the second defendant. Only the claim for unlawful arrest and detention against the first defendant is pursued.

WARRANT OF ARREST AND DETENTION

[5] The plaintiffs' allege in their particulars of claim that they were unlawfully, alternatively maliciously arrested and detained without a warrant by members of the South African Police Service acting within the scope of their employment with the first defendant. In its plea, the first defendant admits that the plaintiffs were arrested and subsequently detained but avers that the arrest and detention was lawful. In its defence the first defendant relies on a plea in terms of s 40 (1) (b) of the Criminal Procedure Act 51 of 1977 ("the Act").

First Defendant's Evidence

[6] In support of the claim for unlawful arrest and detention, the first defendant called one of the police officers who arrested and detained the plaintiffs to give evidence. The police officer's name is Detective Constable Moses Shimane Khoza ("Constable Khoza"). Constable Khoza's evidence is mostly undisputed by the plaintiffs.

[7] Constable Khoza testified that on 30 September 2011, he was allocated a docket wherein an offence of armed robbery with a firearm was reported. In the docket there were two statements made by Mr Ndlovu and Mr Sithole ("the complainants") who were allegedly robbed at gun point by four black men. The two were together at the time of the robbery. Mr Ndlovu was robbed of an amount of R27 000 and a cell phone and Mr Sithole was robbed of a cell phone. The statements were drafted by uniformed officers at Akasia Police Station where the robbery was reported. On receipt of the docket, Constable Khoza went to do a scene report at the scene of crime. In completing the scene report he interviewed the complainants who, amongst others, gave him a description of their assailants and that of the motor vehicle the suspects were driving in. The complainants told Constable Khoza that the alleged suspects were driving a white VW Polo Playa motor vehicle ("the Polo") and that the Polo did not have registration numbers that is, it had no number plates on it.

[8] According to the complainants there were four suspects in the Polo. The first suspect, who was the driver of the Polo, was a slender man, light in complexion, the second suspect was brown in complexion and also not too big – middle weight, the third suspect was dark in complexion and well built – he was wearing blue jeans and a Nike cap, he was the one with the firearm and the fourth suspect was dark in complexion and appeared to be older than the others. Constable Khoza was also shown a video footage of the robbery. The footage was not very clear and he was only able to identify the dark complexion man who appeared older than the other suspects.

[9] Constable Khoza testified further that on Friday 7 October 2011 at around 16h00, whilst on roll call reporting for duty, he was phoned by Mr Ndlovu who informed him (Constable Khoza) that he (Mr Ndlovu) was travelling along the R80 road and noticed a white VW Polo Playa, without number plates and with the people who robbed him on 30 September 2011 in it. Constable Khoza immediately excused himself from roll call. He received another phone call from Mr Ndlovu informing him that the Polo off ramped towards Wonder Park Mall ("Wonder Park") and that he (Mr Ndlovu) was following it. Constable Khoza, in the company of Constable Petla drove to Wonder Park where it was said the suspects were. Whilst on the way he radioed for backup which he received. Mr Ndlovu phoned him again and informed that the Polo is parked in Wonder Park and that the suspects have gone into the hardware store which was not far from the entrance of the Mall. On his arrival at Wonder Park, Mr Ndlovu was waiting for him. Mr Ndlovu showed him the Polo; it was white and did not have registration numbers. As they were waiting, three black men came out of the hardware store. Mr Ndlovu pointed at the three men and told him that they were the people who robbed him. The three men walked towards the Polo and the man who is light in complexion and who was the driver went to talk to another man who was in a green VW Caravelle motor vehicle parked nearby. Constable Khoza's evidence is that he looked at the men pointed out to him, analysed the information and came to a conclusion that the three men fitted the description given to him by Mr Ndlovu and as corroborated by Mr Sithole on 30 September 2011. The man who was well built was still wearing the Nike cap. Based on this information the plaintiffs were arrested together with the driver of the green Caravelle. They were taken to Akasia Police Station where they were detained until their appearance in court on Monday 10 October 2011.

The Issue

[10] The issue to be decided is whether, under the circumstances stated by the first defendant in its evidence, it can be said that the arrest and detention of the plaintiffs is lawful.

The Law Applicable

[11] It is trite that in order to succeed in a defence based on s 40 (1) (b) of the Act, that is, to prove that the arrest was lawful, the defendant is required to establish the following jurisdictional facts:

- (a) that the arrestor is a peace officer;
- (b) that the arrestor in fact entertained a suspicion;
- (c) the suspicion which he held was that the suspect (arrestee) had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and
- (d) that the suspicion rests on reasonable grounds.

[12] It is common cause between the parties that the plaintiffs were arrested by a peace officer, Constable Khoza, on 7 October 2011 and detained until 10 October 2011 when they appeared in court; the plaintiffs were arrested for the offence of armed robbery that form part of the offences in Schedule 1 of the Act. The parties are, however, not agreed about whether at the time Constable Khoza arrested the plaintiffs he held a suspicion that rested on reasonable grounds.

[13] The test to be applied in determining whether a peace officer "reasonably suspected" a person having committed an offence within the ambit of section 40 (1) (b) is objectively justiciable. The question is not whether a peace officer believed that he or she had reason to suspect, but whether, on an objective approach, he or she in fact had reasonable grounds for his or her suspicion. The test is that of a reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer.¹

Argument by the Plaintiffs

[14] The plaintiffs' argument is that there is no independent credible evidence upon which the arresting officer, Constable Khoza, relied on when he arrested the plaintiffs. The submission is that, at the time of arrest, Constable Khoza had the following evidence before him:

14.1 a statement by Mr Ndlovu dated 30 September 2011;

14.2 a Statement by Mr Sithole dated 30 September 2011;

14.3 an investigating diary with entries made on 30 September 2011;

14.4 a scene report; and

14.5 a video footage which was not clear enough.

[15] According to the plaintiffs, Constable Khoza should not have relied on these documents because the documents do not disclose the description of the alleged

¹ See Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (AD) at 579F – 580I.

suspects nor that of the motor vehicle involved in the robbery. As regards the description of the suspects, all the documents except the video footage mentions only that Mr Ndlovu was robbed R27 000 by four unknown black men. As regards the motor vehicle there are differences in that Mr Ndlovu's statement does not mention any motor vehicle; the investigation diary of Constable Khoza describes the motor vehicle as a Polo Classic and the scene report does not mention that the white Polo Playa did not have registration numbers, so it is argued. Based on the aforementioned, the contention is that a reasonable police officer faced with the same evidence would not effect an arrest for, such evidence is scanty and would have necessitated Constable Khoza to investigate the matter before arresting the plaintiffs. This submission in my view is misleading.

[16] The test in determining whether a peace officer "reasonably suspected" a person having committed an offence within the ambit of section 40 (1) (b) is that of a reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer.² (*My emphasis*) Therefore, the arresting officer must have had information establishing reasonable grounds for the suspicion immediately prior to the arrest.

[17] In this instance, I do not understand Constable Khoza to be saying that he arrested the plaintiffs on the basis of the information stated in paragraph [14] of this judgment. My understanding of Constable Khoza's evidence is that he arrested the plaintiffs on the basis of a pointing out by Mr Ndlovu. Constable Khoza had earlier,

² See Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (AD) at 580I.

on 30 September 2011, been given the description of the suspects and the motor vehicle they were using, by the complainants. On the day the suspects were arrested, they were pointed out to him by Mr Ndlovu. He (Constable Khoza) assessed the information at his disposal and came to the conclusion that the people and the motor vehicle pointed out to him fitted the description he was provided on 30 September 2011 and he then arrested the suspects. That is how I understand his evidence.

[18] In argument before me, the plaintiffs objected to the evidence of Constable Khoza, that the suspects were pointed out to him by Mr Ndlovu, on the basis that it is hearsay evidence and inadmissible. The contention is that to the extent that the first defendant did not lead the evidence of Mr Ndlovu, the person who saw the plaintiffs and called Constable Khoza and also pointed out the plaintiffs and the Polo to Constable Khoza, Constable Khoza's evidence to that effect, is hearsay. The evidence is not before the court as the person on whose credibility the probative value of the evidence depended was not called to give evidence. Without this evidence, Constable Khoza's evidence fails to establish suspicion resting on reasonable grounds, so the argument goes.

[19] I do not agree with the plaintiffs' submission that the evidence of the pointing out should be rejected as inadmissible merely because it is hearsay evidence. The arresting officer is said to be entitled to consider all the information, even based on

hearsay, and does not have to be convinced that there was in fact evidence proving the guilt of the arrestee beyond reasonable doubt.³

[20] It is, thus, my view that hearsay evidence at this stage would be allowed because the peace officer need only harbour a suspicion of the offence having been committed. Section 40 (1) (b) of the Act does not require certainty, only a reasonable suspicion. A suspicion inherently involves an absence of certainty or adequate proof. A suspicion can be reasonable despite there being insufficient evidence for a *prima facie* case. The peace officer is thus entitled to avail himself/herself of any information at his/her disposal even though it is hearsay in nature. He/she does not have to be convinced that there is in fact evidence proving the guilt of the arrestee beyond reasonable doubt. Constable Khoza was thus correct to have considered such information which was at his disposal. In his evidence he says based on this evidence (hearsay evidence) he looked at the suspects pointed out to him, analysed that information and concluded that the persons he was shown fit the description of the suspects as was given to him by Mr Ndlovu and Mr Sithole on 30 September 2011. The suspects were also driving in a white Polo Playa without registration numbers. We know that Constable Khoza was given the description of the suspects and the motor vehicle they used because he testified as such, and that evidence was not controverted by the plaintiffs. In fact all the aforesaid evidence of Constable Khoza was never disputed by the plaintiffs.

³ See Minister of Law and Order v Kader 1991 (1) SA 41 (A) at 50H.

[21] The plaintiffs' further submission that only the hearsay evidence contained in the statements of the complainants should be accepted by this court is not correct. Hearsay evidence whether oral or written remains hearsay evidence. A court cannot accept one and reject the other. The evidence contained in the statements of the complainants and the one that was orally related to Constable Khoza is hearsay evidence; all that evidence was at the disposal of Constable Khoza and he was entitled to make use of it.

[22] I am satisfied that the information at the disposal of Constable Khoza at the time he arrested the plaintiffs was sufficient for him to form a suspicion and that the suspicion rested on reasonable grounds. In my view, the actual information that Constable Khoza held prior the arrest of the plaintiffs is:

- 22.1 Firstly, the description of the suspects and the motor vehicle they were using as provided to him by the complainants on 30 September 2011.
- 22.2 Secondly, the suspects were pointed out to him by Mr Ndlovu as they exited the hardware store. The evidence of Constable Khoza that the suspects exited the hardware store together is corroborated by the evidence of Mr Pule and Mr Khala who testified that they all went into the hardware store together and came out together. This is against what was put to Constable Khoza under cross-examination that only one of the suspects went into the hardware store.
- 22.3 Thirdly, the plaintiffs were on the day they were arrested driving a white Polo Playa without registration numbers thus fitting the description of

the motor vehicle given to him on 30 September 2011. On the day of the arrest the Polo was also pointed out to him by Mr Ndlovu. I have to accept that the Polo which Constable Khoza saw at Wonder Park did not have registration numbers since his evidence was never challenged by the plaintiffs. It was not put to Constable Khoza that the Polo that the plaintiffs were driving in on the date they were arrested had registration numbers.

- 22.4 Lastly, before arresting the plaintiffs, Constable Khoza analysed the information at his disposal and satisfied himself that the persons he saw exiting the hardware store fitted the description that was given to him on 30 September 2011. For instance, the dark complexion man of average build was said to have been wearing a Nike cap on the day of the robbery and even on the day he was arrested the evidence of Constable Khoza is that he was wearing a similar cap. He did not just arrest the suspects when they exited the hardware store. He waited for them to get into the Polo and drive off before arresting them. This, in my view, ties the suspects to the Polo. This information is further corroborated by the evidence of the plaintiffs who confirmed that besides Mr Pule's cousin Harry, Mr Pule is the designated driver of a white Polo Playa and that on the day they were arrested Mr Pule was the driver thereof. Mr Pule in his evidence also confirmed that on 30 September 2011 he was driving the Polo.

These, in my view, are facts that establish that the information that was at Constable Khoza's disposal at the time of arrest was sufficient to raise a reasonable suspicion.

MALICIOUS ARREST

[23] In a claim based on malicious arrest it has been held that it is essential for the plaintiff to allege and prove that the defendant acted maliciously and without reasonable and probable cause.⁴

[24] In this instance, the plaintiffs in their particulars of claim do not allege that there were no reasonable and probable grounds for the arrest. The evidence led by the plaintiffs does not establish malice and/or that there was no reasonable and probable cause for the arrest, as well. Consequently the plaintiffs' claim based on malicious arrest must fail.

UNLAWFUL DETENTION

[25] Once the claim for unlawful arrest falls away the claim for unlawful detention must also not succeed.

COSTS

[26] The costs order must follow the successful party. I am not inclined to agree to the plaintiffs' submission that they could not proceed with the claim for malicious prosecution because they were furnished with the required information (the two bundles) ten minutes before the hearing of this matter. There are rules of court in place to assist litigants to compel their opponents to provide them with documentation and/or information they require. The plaintiffs were entitled to follow

⁴ See *Thompson & Another v Minister of Police & Another* at 373F – H.

such a route, having not done so they cannot be heard to be complaining as they want to do.

ORDER

[27] In the circumstances I make the following order:

27.1 The plaintiffs' claim for unlawful arrest and detention is dismissed with costs.

27.2 The plaintiffs are ordered to pay the costs for the claim for malicious prosecution up to the stage when the claim was abandoned.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 05 DECEMBER 2016
DATE OF JUDGMENT	: 10 FEBRUARY 2017
APPLICANT'S COUNSEL	: ADV. T. MORETLWE
APPLICANT'S ATTORNEY	: MAHLANGU MASHOKO INC.
RESPONDANTS' COUNSEL	: ADV. M PASWANE
RESPONDANTS' ATTORNEY	: STATE ATTORNEY