

IN THE REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of hearing: 19, 20 and 21 March 2015

Date of judgment: 20 May 2015

Case Number: 45031/2012

In the matter between:

P SETLHAPELO

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL PROSECUTING AUTHORITY

Second Defendant

JUDGMENT

A B ROSSOUW A J

- (1) The plaintiff proceeded with his claim against the first defendant (The Minister of Police) only for payment of damages in the amount of R500 000.00 based on unlawful arrest and unlawful detention. (The plaintiff has withdrawn his case against the second defendant (The National Prosecuting Authority) and he has abandoned the remainder of his claims). I shall henceforth refer to the first defendant as 'the defendant'.
- (2) The defendant admitted that the arrest was without a warrant and pleaded, in short, that the plaintiff was arrested for possession of suspected stolen property and that the arrest was lawful.
- (3) The following facts are common cause:
- (4) The plaintiff was arrested on 5 September 2010 without a warrant of arrest for possession of suspected stolen

property. He was detained at Brooklyn police station and subsequently transferred to Pretoria Central Prison where he was detained until his release. He appeared in court on 7 September 2010, ie within 48 hours of his arrest, when the matter was postponed for further investigation. The plaintiff was remanded in custody until 14 September 2010 when the charge against him was withdrawn.

- (5) The defendant, who had the duty to begin, called four witnesses, namely Constables Kekana, Molala, Mahafa and Nkwe.
- (6) Constable Kekana's evidence can be summarised as follows:
- (7) In 2010 he was stationed at Brooklyn Police Station. On 5 September 2010 he was on duty and his task was Visible Policing, which entailed patrolling, attending to complaints and stop and search. On Sunday 5 September 2010 he and Constable Molala were patrolling the Brooklyn area.

Constable Kekana spotted a gold VW Polo Playa at the corner of Lunnon street and Duxbury road. The manner in which the occupants looked at him made him suspicious. He then followed the car and stopped the driver. The plaintiff was the driver and he had a passenger with him. He requested the plaintiff to alight from the vehicle whereupon he requested the plaintiff's driver's licence. The plaintiff, instead of producing his own driver's licence, produced the driver's licence of his girlfriend, namely Nthabiseng Raseala. Constable Kekana then proceeded to search the vehicle and found three new books and eight new Casio scientific calculators in the boot of the vehicle. He asked the plaintiff about the origin of the goods whereupon the plaintiff said that he was the owner of the items and that he had purchased the items earlier on that day. Constable Kekana noticed that the price tags on the items had been removed and requested the pay slips of the items, which the plaintiff could not produce. The plaintiff then told him that the books belonged to his girlfriend, who had a shop in Vosloosrus. Constable Kekana requested the plaintiff to give him

Nthabiseng's cellphone number so that he could verify the plaintiff's explanation. The plaintiff gave Constable Kekana his girlfriend's number. Constable Kekana then dialled the number, but the voice recording on the phone replied that the number did not exist. He put the cellphone on loudspeaker so that the plaintiff could hear that the number did not exist. The plaintiff then explained that Nthabiseng's cellphone had been stolen on Friday 3 September 2015. Constable Kekana then asked for an alternative number in order to trace the plaintiff's girlfriend, but this could not be produced. He further testified that the price tags on the items had been removed in view of which he could not establish from which shop the items had been purchased. They then proceeded to Brooklyn police station to interview the plaintiff. When they interviewed the plaintiff at the police station, the plaintiff's companion remained seated in the car. When they finished interviewing the plaintiff, they wanted to interview the passenger, but when they got to the car, the passenger was not there. The plaintiff was detained in the cells at Brooklyn police station for being in possession of suspected

stolen property. The items found in the boot of the car were booked in at the police station. Constable Kekana placed a value of R2000 on the items. He further testified that the plaintiff's contradiction was the basis of his suspicion. He never suspected the passenger because on the plaintiff's version the passenger was not involved. His explanation for not questioning the passenger at the scene was because he did not want to question the passenger in public and he thought the passenger, if being consulted alone, would give him something to go on. When Constable Kekana knocked off at 18:00 the vehicle was still parked at the police station. No phone call to Nthabiseng was made in his presence. No alternative number was given to the police - the one that was given to them did not exist. He arrested the plaintiff at about 14:00 and at about 16:00 his work in respect of the docket was complete. Constable Kekana made a statement in which he did not mention anything about the plaintiff changing his versions. When cross-examined about this he testified that what he put in the statement was, according to him, enough.

(8) Constable Kekana's evidence was corroborated by Constable Molala in all material respects. He testified that when they asked the plaintiff where he had bought the items, the plaintiff told them at the CNA and when they asked him for the slips he could not produce it. The plaintiff then changed his version by telling them that the items belonged to his girlfriend, Nthabiseng. He also testified that the number given to them by the plaintiff did not exist and that they subsequently went to the Brooklyn police station. About a month after the plaintiff's arrest Constable Molala made a statement at the request of the investigating officer. His statement is virtually a copy of the statement of Constable Kekana. When cross-examined about this he testified that he used Constable Kekana's statement to refresh his memory and that he primarily used it to refresh his memory regarding the date and time of the incident.

(9) Constable Mahafa and Constable Nkwe also testified. Constable Mahafa, who was responsible for charging the plaintiff, testified that the plaintiff decided not to give a

written statement because he preferred to tell his story in court. Contable Nkwe was the investigating officer. He testified that because of his workload and the fact that the docket was not under his direct control and supervision all the time, it was impossible to verify the plaintiff's physical address in the limited time available. He also testified that it was not his responsibility to arrange for police bail. Both constables testified that it was not within their powers to grant police bail.

- (10) The plaintiff testified in his own case and he did not call any witnesses. His evidence can be summarised thus:
- (11) On 5 September 2010 whilst driving in the Brooklyn area he was stopped by two policemen. He was alone in the vehicle. and he was driving without a licence. They searched his person and the vehicle, but they never asked him for his licence. During cross-examination he conceded that they may have asked him for his licence. He further testified that Nthabiseng's driver's licence was attached to the keys of the

car and he said that he would not have produced his girlfriend's licence to the policemen. He was asked to open the bonnet of the car. After the policemen had satisfied themselves that the car was not stolen, they asked him to open the boot of the vehicle. There they found the books and the calculators and he was requested to accompany the policemen to the Brooklyn police station. No phone call was made to Nthabiseng at the scene where they stopped him. When they arrived at the police station the goods were removed from the vehicle and they entered the police station. Once inside he was again questioned about the origin of the items. He explained to the policemen that the items were donated by Exclusive Books and CNA to Nthabiseng in her capacity as youth leader of the church to which she belonged. He then phoned Nthabiseng, using the phone at the police station, and he explained to her that he was under arrest because the books and the calculators were found in his possession and he requested her to come and fetch the vehicle at the police station. Thereafter, according to the plaintiff, Nthabiseng went to the police

station, collected the vehicle's keys at the front desk of the police station and drove the vehicle back home. During cross-examination he was asked why his girlfriend did not bring the necessary evidence regarding the origin of the items found in the plaintiff's possession to the police station, upon which he replied that he was hoping that she would do it and that the policemen ought to have asked her about it. He could not remember whether Nthabiseng made a statement. His explanation as to why Nthabiseng, now his wife, was not called as a witness, was that she was traumatised by his arrest which caused her to lose their three month old baby and that she did not want to 'scratch the wounds' again. He also testified about the circumstances under which he was arrested and detained.

- (12) It is common cause that Nthabiseng did make a statement on 7 September 2010, ie two days after the plaintiff's arrest, in which she merely confirmed her address and that the plaintiff was residing with her.

(13) Mindful of the informative guidelines and principles set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martell Et Cie and others* 2003 (1) SA 11 (SCA) par 5 and mindful that the evidence must be weighed in its totality, the following:

(14) Although Constable Kekana was argumentative from time to time, he did not strike me as untruthful or unreliable. I say so because of the probability of his version, the reasonableness of his conduct, the consistency of his evidence, the absence of any contradictions with his extra-curial statement or with the common cause facts, the little interest he has in the outcome of this litigation, the manner in which he emerged from the test of his memory and the absence of any internal factual contradictions in his evidence. I can say the same about Constable Molala. Although Constable Molala was criticised during cross-examination for copying Constable Kekana's statement when making his own, he impressed me as a person who had an independent recollection of the events.

(15) Regarding the plaintiff's evidence, the following: He denied ever being asked for his driver's licence and he denied that he produced his girlfriend's driver's licence to the police. This part of his evidence must be rejected, because Constable Kekana not only knew the full names of the plaintiff's girlfriend but he also knew that the plaintiff had his girlfriend's driver's licence in his possession and he could only have known this if the plaintiff had given it to him. Furthermore, on the plaintiff's own version he spoke to Nthabiseng shortly after they had arrived at the police station. If he was telling the truth, I would have expected him to ask Nthabiseng to bring all the necessary proof regarding the origin of the books and the calculators to the police station as a matter of utmost importance and urgency so that he could be released. On his own version he did not ask her to do so, nor did he ask her to make a statement nor did he ask her to discuss the matter with the police nor did he ask her to assist him in any other way. What is even more unconvincing about his version is that, according to him, Nthabiseng arrived at the police station on the day of his

arrest and collected the keys without visiting the plaintiff or enquiring about the basis of her boyfriend's arrest and without offering any form of assistance. The plaintiff's evidence in this regard is obviously hearsay. No direct evidence was led as to who actually fetched the vehicle at the police station. If the plaintiff was telling the truth, I would have expected Nthabiseng to have visited the plaintiff and to have made her written statement regarding the plaintiff's physical address on that very same day and not two days later.

- (16) Regarding the reason as to why Nthabiseng did not testify, the following: On the plaintiff's own version she was not medically unfit to testify, but merely unwilling to do so for the reasons given by him. The plaintiff, who was legally represented, and Nthabiseng must have appreciated the importance of her testimony and her failure to give evidence, in my view, justifies an inference that she was not in a position to corroborate the plaintiff's version. In the light of all

these considerations I reject the plaintiff's version insofar as it contradicts Constables Kekana and Molala's versions.

(17) In terms of s 40(1)(e) of the Criminal Procedure Act 51 of 1977 ('the CPA') a peace officer may without a warrant arrest any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing.

(18) I could not find any reported judgment that deals with s 40(1)(e) of the CPA. It appears as if s 40(1)(e) applies to those crimes created by ss 36 and 37 of the General Law Amendment Act 62 of 1955.

(19) Section 36 of the General Law Amendment Act 62 of 1955 stipulates that any person who is found in possession of any goods, other than stock or produce as defined in s1 of the Stock Theft Act 57 of 1959, in regard to which there is a

reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

(20) It is trite that the *onus* to justify an arrest without a warrant is on the defendant, which means that the defendant must convince the court on a balance of probabilities that all jurisdictional facts existed for a lawful arrest.

(21) The jurisdictional facts for an arrest in terms of s 40(1)(e) of the CPA are the following: 1) the arrestor must be a peace officer, 2) the suspect must be found in possession of the property, 3) the arrestor must entertain a suspicion that the property has been stolen or illegally obtained, 4) the arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property and 5) the arrestor's suspicion must rest on reasonable grounds.

(22) If regard is had to s 36 of the General Law Amendment Act 62 of 1955, I am of the view that a suspicion originally based on insufficient grounds that the property has been stolen or illegally obtained or that a suspect has committed an offence in regard to property which is suspected of having been stolen or dishonestly acquired can become a reasonable suspicion as a result of something which the suspect says or does at the time when he is found in possession of the goods, such as giving an unacceptable explanation for his possession of such property.

(23) The plaintiff was found in possession of the property. The number and nature of the items found in the boot and the fact that the price tags had been removed were perhaps insufficient grounds to suspect that the property had been stolen, but when the plaintiff was asked for an explanation and he gave one explanation, changed his version and then gave another which could not be verified, the suspicion that the property had been stolen and that the plaintiff had

committed an offence in regard thereto, in my view, became objectively reasonable.

(24) In the result I find that the defendant has proved all the jurisdictional facts for a lawful arrest.

(25) The plaintiff further argued that the arrestor's discretion to arrest was improperly exercised.

(26) Jurisdictional facts should not be conflated with the exercise of a discretion. Where all the jurisdictional facts are present, the party who attacks the reasonableness of the exercise of a discretion bears the onus of proof. (*Sekhoto* supra para 49).

(27) What follows is a brief exposition of the legal position in this regard as explained in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at 373B-387A: Once the required jurisdictional facts for an arrest are present, a discretion whether or not to arrest arises. The discretion

must be exercised in good faith, rationally and not arbitrarily. The object of the arrest must be to bring the suspect before the court. Peace officers are entitled to exercise their discretion within the limits of the authorising statute, read in the light of the Bill of Rights, as they see fit so long as their discretion is exercised within the range of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. There must be a rational connection between the decision to arrest and the purpose for which the power was given and the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. The arrest is only the first step in the process. Once an arrest has been effected, the peace officer must bring the arrestee before court as soon as reasonably possible, and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain that is inherent in the power to arrest is exhausted. The authority to release or detain the suspect further is then within the discretion of the court or in some cases a senior

police officer. The enquiry to be made by the peace officer is only whether the case is one in which the decision to release or detain the suspect further ought properly to be made by a court or by a senior police officer as the case may be. Whether his decision on that question is rational depends upon the particular facts.

(28) I find that Constable Kekana's decision to arrest the plaintiff was objectively rational in the sense that his response was not beyond the range of responses open to a reasonable decision-maker and that his decision is rationally related to the purpose for which the power to arrest was given.

(29) In the premises I find that plaintiff has failed to prove on a balance of probabilities that Constable Kekana exercised his discretion to arrest in an improper or unlawful manner.

(30) The plaintiff further argued that even if the arrest was lawful, the plaintiff's detention at some point in time became

unlawful because police bail should have been granted to the plaintiff in terms of s 59(1)(a) of the CPA.

- (31) A lawful arrest does not necessarily render the full period of the subsequent detention lawful. (See *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (SGHC) paras 9 and 10A-B).
- (32) Section 59(1)(a) of the CPA stipulates that an accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official. Section 59(2) of the CPA affords such police bail the same effect as ordinary bail.

(33) Since the offence in respect of which the plaintiff was arrested does not fall within the ambit of Part II or Part III of Schedule 2 of the CPA, the plaintiff qualified to be considered for police bail.

(34) Section 35(1)(f) of the Constitution reads as follows:

'Everyone who is arrested for allegedly committing an offence has the right - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.'

(35) Section 35(1)(f) provides the principal template against which Chapter 9 of the CPA should be measured. (*S v Dlamini* 1999 (4) SA 623 (CC) para 5). Chapter 9 (sections 58-71) of the CPA is the chapter that deals with bail. Section 59(1)(a) of the CPA is prefatory and incidental to bail under s 60 of the CPA (*S v Dlamini* 641 footnote 19) and should be interpreted in the light of s 35(1)(f) of the Constitution.

- (36) Section 59(1)(a) of the CPA is silent as to the procedure that should be followed in respect of police bail.
- (37) In *S v Dlamini* para 7 Kriegler J writing for the Constitutional Court said that Chapter 9 of the CPA is an invaluable point of reference in any general enquiry into the law of bail and a primary source to be consulted in looking for an answer to any specific bail question and that it provides a comprehensive framework in which answers can be judged.
- (38) Section 60(1)(c) of the CPA stipulates that if the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall entertain from the accused whether he or she wishes that question to be considered by the court. In the light hereof, and guided by the provisions of s 60(1)(c) of the CPA, I am of the view that once the jurisdictional facts for the consideration of police bail in terms of s 59(1)(a) of the CPA are present, the police has a constitutional duty to ascertain as soon as reasonably possible after the arrest whether the arrestee wishes bail to

be considered. If the arrestee wishes to apply for police bail, the senior police official, in consultation with the investigating police official, must consider bail as a matter of urgency. A failure to inform the arrestee of his constitutional right to apply for bail or a failure to consider bail or any unreasonable delay in the process could, depending on the circumstances of the case, render the arrestee's further detention until his first appearance in court unlawful.

(39) Furthermore, an arrestee's right to a prompt decision is a procedural right independent of whether the right to liberty actually entitles the arrestee to bail. (*Magistrate Stutterheim v Mashiya* 2004 (5) SA 209 (A) par 16).

(40) Section 60(4)-(9) of the CPA provides guidelines as to what are factors for, and what are factors against, the grant of bail. Whether and to what extent any one or more of such factors are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer. (*S v Dlamini* par 43). In seeking to establish the

presence of such factors the judicial officer should act as pro-actively and inquisitorially as may be necessary. (*S v Dlamini* par 101). I am of the view that these guidelines and procedure to the extent that they are relevant and applicable to the particular situation should also be followed by the police official considering bail in terms of s 59(1)(a) of the CPA.

(41) The exercise of a discretion to grant or refuse bail must also be objectively rational and the same considerations as set out above in respect of the exercise of a discretion to arrest are *mutatis mutandis* applicable.

(42) If a plaintiff wishes to rely on the provisions of s 35(1)(f) of the Constitution read together with s 59(1)(a) of the CPA, the plaintiff's particulars of claim must contain sufficient factual allegations substantiating such a cause of action. The plaintiff must allege and prove that he was arrested for an offence not listed Part II or Part III of Schedule 2 of the CPA which entitled him to apply for police bail in terms of s

59(1)(a) of the CPA, that the defendant failed to inform the plaintiff of his right to apply for police bail or that the plaintiff failed to consider bail or that there was a delay in respect of his procedural right to be informed of his right to apply for police bail or to a prompt decision which was so unreasonable that it rendered his further detention unlawful or that, if bail was refused, the factual basis upon which the plaintiff relies for his conclusion that the refusal was objectively irrational. Although I could not find any direct authority in this regard, I can think of no considerations of practice, policy or fairness why the onus in respect of these allegation should not be on the plaintiff.

- (43) Because the plaintiff failed to properly raise unlawful detention in the context of s 59(1)(a) of the CPA in his pleadings, it was never an issue between the parties. If the plaintiff intended to raise it, he should have done so as set out above. The issue was also not properly ventilated during the trial. Furthermore, there was no evidence placed before

me that the plaintiff applied for police bail or that he was not informed of his rights in this regard.

(44) In the result I make the following order:

1. The plaintiff's claim is dismissed with costs, including all reserved costs.

A B ROSSOUW A J

DATE: 2013-05-15

DATE OF HEARING: 19, 20 AND 21 MARCH 2015

DATE OF JUDGMENT: 20 MAY 2015

FOR THE PLAINTIFF

ATTORNEY: R PHEEHA

ATTORNEYS: RAMOSHIMA PHEEHA ATTORNEYS

FOR THE DEFENDANT

ADVOCATE: K RAMAIMELA

ATTORNEYS: THE STATE ATTORNEY