

IN THE NORTH-GAUTENG HIGH COURT, PRETORIA

APPLICABLE: YES/NO.

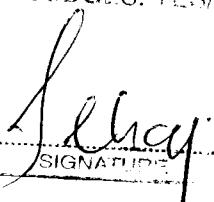
(REPUBLIC OF SOUTH AFRICA)

OF INTEREST TO OTHER JUDGES: YES/NO.

REVISED.

CASE NUMBER: 54617/2010

19/7/2013



SIGNATURE

In the matter between:

19/7/2013

M D MAPODILE

PLAINTIFF

AND

MINISTER OF POLICE

DEFENDANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant for damages suffered as a result of his unlawful and wrongful arrest on 12 May 2010 at Timbavati Complex, Karen Park, Pretoria and plaintiff was detained till 21 May 2010. The period in dispute for the purposes of this case is from the date of arrest till the date of first appearance at court which was on 17 May 2010. The plaintiff sues for damages in the amount of R1 000 000.00 plus interest at the rate of 15.5%.

[2] The plaintiff pleaded the following in his particulars of claim:

- “3. On or about the 12th May 2010 at about 21h30 at Timbavati Complex....., the Plaintiff was unlawfully and wrongfully arrested together with his younger brother....and.....Vusi by members of the South African Police in full view of a large group of people after the police and the group of people had severely assaulted Mpho.... and Vusi....without any justification
5. At the time of the Plaintiff's unlawful and wrongful arrestthe plaintiff requested an explanation of the charges against him and that the police provide protection to him....and to read his constitutional rights to him before being handcuffed and forced into the police van, but was ignored and threatened with violence as well”

[3] The defendant admitted the arrest but denied that it was wrongful and unlawful and that the arrest was effected after the plaintiff had been pointed out as the person who committed the offence of armed robbery and theft of a motor vehicle on 5 May 2010.

BACKGROUND FACTS

[4] Mr Moreroa ('Moreroa') a police officer stationed at Acacia and accompanied by his colleague Ms Mawelela responded to a complaint of a house robbery in progress. The complainant was one Mrs Vuma who resided at Timbavati complex and according to her, the perpetrators were still in the complex when the police arrived. Mr Morewa testified that he parked his vehicle inside the complex but in the

vicinity of the entrance to the complex. On their arrival at 21h30 the gate was not closed. Mrs Vuma was not called as a witness.

[5] Moreroa testified that he conducted an inspection of the complex in search for the robbers with some of the residents and did not find anybody. He left his colleague in the presence of a group of residents who had already assembled at the gate and they had called for police back up. He returned after hearing noise and noticing commotion at the gate. A group of people had assembled around another vehicle, an Avansa. He saw someone lying on the ground and that this individual was being assaulted by the group. He tried to stop the assault. He picked this individual up and placed him in the police van on the floor. On his arrival at the van he found another unknown man at the back of the van. He also noticed that other police officers had arrived on the scene. According to him three individuals, including the one he had assisted were being attacked by the group. At the time the three were placed in the police van for their protection only.

[6] Moreroa testified further, that a certain Mrs Tshetla, who was among the residents, and who had reported a case of robbery and motor vehicle theft on the 5 May 2010, pointed out the plaintiff who was in the van, as one of the robbers involved in the incident reported to the police. Moreroa testified that he was the one who opened their case but he was not in charge of the investigation. Mrs Tshetla called her husband who confirmed the identification of the plaintiff. He effected an arrest of the plaintiff at that moment and read him his rights and handcuffed him. Mrs Tshetla was not called as a witness. Mrs Vuma went to the police station where a case docket was opened..

[7] The plaintiff testified that he lived with his brother and sister at Timbavati

Complex. On 12 May 2010 he did not have enough petrol in his Golf vehicle to take his friend Vusi Masemola to Soshanguve. He arranged with his brother Mpho, who drives an Avansa to accompany him to Soshanguve. They first had to drop off the Golf at the complex. They arrived at the complex, in the Golf and Avansa at about 20h30. He was with Vusi in the Golf and Mpho drove alone. It was unusual to find the entrance gate closed. There were many people at the gate including two police vehicles which were facing each other outside the complex and about seven police officers. His brother negotiated with one of the gate keepers and they were let in. They exchanged vehicles and were on their way out in about ten minutes.

[8] At the gate they were stopped by the crowd and there was a woman wielding a steel pipe which she used to strike the bonnet of their vehicle. She demanded that they open the vehicle because Vusi who occupied the back seat, looked like a suspect. When the vehicle was opened his brother Mpho who was the driver was assaulted and one of the police officers took plaintiff to the police van because she feared that he too would be assaulted. The police officer was later identified as Mawelela.

[9] According to the plaintiff it was dark inside the van and there was a lot of noise outside. He was seated on the floor on the right hand side of the van and behind the driver. Later Vusi and Mpho were also put in the van. Vusi sat to the left of the van and Mpho lay on the floor of the van. It was while he was in the van that he heard a female voice saying, this is the person who robbed us and, that she had called someone to confirm. He did not know whom she was referring to and he did not see her. Later the van drove to the police station where they were handcuffed at reception and detained. The plaintiff testified that he was not arrested in the van at the complex and his rights were never read to him at the complex. At the police

station he enquired from one police officer why they were arrested and the response was that he would be informed later.

Vusi and Mpho were taken to hospital and he was later transferred to the Soshanguve Police station between 1h00 and 2h00 on the 13 May 2010. He was only taken to court for his first appearance on the 17 May 2010. He was released on bail on 21 May 2010 and later the charges were withdrawn due to lack of evidence.

[10] He was interviewed for the first time and formally charged by the police on Saturday the 15th May 2010 at about 11h00. It was more than 48 hours after his arrest. He was informed for the first of the reasons for his arrest, being for armed robbery and motor vehicle theft. His rights were also explained for the first time when his warning statement was taken. The plaintiff testified that he was emotionally and physically traumatized by the arrest, and that it was painful not knowing the reason for the arrest, he could not sleep, he could not eat and it was winter. The conditions inside the cells were unbearable.

[11] The plaintiff's sister, Mathilda, testified that between 19h30 and 20h00 while at home with her sister and children she heard noise coming from the direction of the main gates. They did not investigate the cause. Between 20h00 and 20h30 they watched the soapie *Generations* and shortly before it ended at 20h30, her two brothers, plaintiff and Mpho and a friend arrived. They explained that there was police presence at the gate. A group of people had assembled and that the gate was closed. They left after explaining that they were taking Vusi to Soshanguve. Three minutes after they had left she heard the sound at the gate becoming louder and louder and she proceeded to the gate to investigate. On her approach she noticed that the doors of the *Avanza* were open and that Mpho was being assaulted. After

rescuing him and placing him back in the Avanza a police officer arrived and insisted that he be taken to the police van for his protection. Some of the people recognized them as residents in the complex.

[12] According to her there were no police vehicles parked inside the premises. She noticed two police vehicles parked outside at the gate, facing each other. Mpho was placed in the van on the left and she remained at the Avanza. She spoke to a police officer Mawelela who informed her that she had seen Mpho enter the complex earlier on. She also heard people saying that the robbers were carrying firearms. She then asked the police to go to their home to conduct a search. She accompanied the police in the van and Mpho was taken along. She only realized that the plaintiff and Vusi were also in the van when she peeped into the van. It was dark inside but she recognized their clothing. The police searched the house for the firearms and did not find anything. At their home another group came and there was a woman who alleged that her Dodge vehicle had been stolen and this lady then lifted the flap of the police van canopy and said this is the one who took my vehicle. Mathilda did not know whom she was referring to. Thereafter her other brother and nephew arrived and they went to the police station.

[13] Mpho testified that when they were on their way out in his Avanza the group was all over the vehicle and he tried to explain that he was the one who had entered earlier on. He saw Vusi being assaulted and someone tripped him. He hit his head on the ground and fainted. When he came to, he was lying on the floor of the police van and it was dark. He did not see much at the complex. On arrival at the police station they were all handcuffed and made to sit under a concrete table at reception. He was later taken to hospital with Vusi.

THE ARREST

[14] The jurisdictional facts required for a peace officer to effect an arrest without a warrant are set out in Section 40(1)(b) of the Criminal Procedure Act 51 of 1977, which provides:

“A peace officer may without warrant arrest any person-

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1.....” (my underlining)

The jurisdictional facts being present, the arresting officer is obliged to exercise his discretion, whether or not to arrest the suspect, properly and *bona fide* and for purposes as contemplated within the meaning of the above provisions, **Duncan v Minister of Law and Order, 1986 (2) SA 805 (A), Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA).**

[15] When the police were summoned to Timbavati Complex on 12 May 2010 it was not about the incident of robbery reported by Mrs Tshetla on 5 May 2010. It was about the report of Mrs Vuma. Although there was dispute about the time when the police officers and the plaintiff arrived at the complex on 12 May 2010, the following facts are common cause:

1. On the arrival of Moreroa a group of people had already began gathering at the main entrance and this necessitated Moreroa calling for back-up.

When the plaintiff, his brother Mpho and his friend Vusi arrived at the complex later on, a larger group had assembled at the entrance, the gate

was closed and police back-up had arrived on the scene;

2. It took Vusi and company a few minutes to exchange vehicles, when they arrived at the exit gate they were attacked and they were put into Moreroa's police van in order to protect them from an assault by the group of people;
3. Moreroa was not present in the vicinity of the gate when the plaintiff and company arrived. He had gone in search of those who had attacked Mrs Vuma. He had been informed that the assailants were probably still in the complex. He was also not present when the plaintiff and company arrived back at the gate in the Avanza intending to leave the complex;
4. When Moreroa returned to the entrance he had no knowledge of the reason why the plaintiff and company and the Avanza were at the gate. He did not make any enquiries as to whether they were the people he had gone in search of.
5. Both Moreroa and the plaintiff testified that plaintiff, Mpho and Vusi were put into the van mainly for their protection. The plaintiff had been taken to the van by police officer Mawelela. At that stage no arrest had been effected on the plaintiff and he was not handcuffed when placed into the police van for his protection.

[16] There was further dispute about where the purported identification of the plaintiff took place. Moreroa testified that it took place not far from the entrance where his police vehicle was parked. At the time the plaintiff was at the back of the police van. The plaintiff and his sister Mathilda testified that the purported identification of the plaintiff occurred while plaintiff was still at the back of the van. At the time she had invited the police to her residence to conduct a search of her home, it being the place where the plaintiff and company had been shortly before they were put in the van. Moreroa testified that there was light in the van provided by head lights of vehicles which made it possible for the identification by Mrs Tshetla which was then confirmed by her husband. The plaintiff disputed such fact, he testified that it was dark in the van. In cross examination the plaintiff was confronted with the contents of his warning statement and it was pointed out to him that he had not only heard Mrs Tashetla's voice but had seen her at the complex when he was pointed out. The plaintiff was evasive during cross examination about what he said in his warning statement regarding Mrs Tshetla's identification. He stated in such statement that *'it was the first time to see the complainant when I was pointed on 2010-05-12 at Timbavati complex.'*

[17] It is clear from the evidence of Moreroa and the plaintiff's pleadings that the arrest occurred at the complex and not later at the police station and the time mentioned in the particulars of claim was confirmed by Moreroa. The plaintiff pleaded that he was *'unlawfully and wrongfully arrested.....in full view of a large group of people'* and that he *"requested an explanation of the charges...that the police provide protection to him..... to be read his constitutional rights before being handcuffed and forced into the police van, but that he was ignored and threatened with violence...."* In his evidence in chief plaintiff testified that he was arrested and

handcuffed at Acacia police station. He vehemently denied that he was arrested by Moreroa at the complex, he said he did not recall that and he was adamant that he was not arrested in the van

[18] The question to be asked in this instance is whether Moreroa reasonably entertained a suspicion that the plaintiff was the one who committed the robbery reported by Mrs Tshetla on 5 May 2010. In the Sekgotho matter *supra* Harms JA stated when referring to the Duncan matter *supra* (at 818H-J):

“[30].....an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature. This brings me back to the fact that the decision to arrest must be based on the intention to bring the arrested person to justice”

And he stated further:

[38]..... it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.

[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed to be optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight, so long as the discretion is exercised within this

range, the standard is not breached

[42]the power to arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least 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”

[44] While the purpose of the arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or the senior officer)Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose”

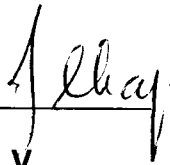
[19] Whether Moreroa exercised his discretion objectively is to be determined according to the facts of the case. In this matter Moreroa had not gone to Timbavati to investigate Mrs Tshetla's complaint and he did not have information on the identities of her assailants. In my view, the arrest happened suddenly, in a situation of a community who were up in arms about incidents of robbery which occurred within a few days of each other. Although Moreroa was not the investigating officer of Mrs Tshetla's case, he had knowledge of her complaint because he opened the case docket of the incident of 5 May 2010. Mrs Tshetla was known to him at the time he went to investigate Mrs Vuma's complaint on 12 May 2010.

[20] In cross examination Moreroa testified that he had no knowledge of Mrs Tshetla's presence among the group of people at the time. It was just coincidence that she was standing near the back door of the van when he opened it to put in one of the individuals whom he had rescued from the crowd. The plaintiff was sitting next to the door and there was no difficulty in him been seen by Mrs Tshetla. In my view given the volatile situation that had arisen, first the plaintiff and his companions were put in the police van for their protection, then arose the sudden identification of a suspect.

This was not a situation where Moreroa had the opportunity to still thoroughly establish certainty regarding identity, it was not even about whether this identification would have been admissible in court. This was a matter to be further investigated by the investigating officer. According to Moreroa the plaintiff was handed over and that concluded his involvement in the arrest. Having regard to the situation and in the circumstances it was, in my view, the most rational decision to take at the time because the jurisdictional facts were present when the arrest was effected.

[21] In the result the following order is given:

1. The plaintiff's claim is dismissed with costs.



TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	18 MARCH 2013
JUDGMENT RESERVED ON	:	25 MARCH 2013
ATTORNEYS FOR THE PLAINTIFF	:	L J LESO INC.
ATTORNEYS FOR RESPONDENT	:	THE STATE ATTORNEYS