



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

14/11/2013

CASE NO: 36594/2012

- (1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED. ☒

Kooverjie Kooverjie AJ:

In the matter between:

TEBOGO GEORGE MPONYA

Plaintiff

and

MINISTER OF POLICE

First Defendant

MUSHEKWA

Second Defendant

JUDGEMENT

Kooverjie AJ:

A. INTRODUCTION:

1. The Plaintiff claimed for damages arising from an unlawful arrest by the Defendants.
2. The issue before this court is to determine whether the arrest was lawful. The arrest took place without a warrant in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA).

B. BACKGROUND:

3. On the 1st December 2009, the Plaintiff was arrested in terms of S40 (1)(b) of the CPA and detained at the Brooklyn Police holding cells with an other co-suspect for 114 days.
4. The Plaintiff was arrested for the alleged theft of copper.
5. Counsel advised this Court that the Plaintiff was found not guilty at the criminal trial.
6. The circumstances leading to the arrest were essentially as follows:

- 6.1 Dodgen and Nenuheni, both constables, received a complaint on radio of an alleged theft of copper at a substation in Pretoria;
- 6.2 Both arrived at the site and spoke to the Manager, Noordman. Noordman informed them that his subordinate, Thlako had witnessed the theft of the copper wire by the two individuals, the one being the Plaintiff. The constables were shown the holes from which the copper was stolen;
- 6.3 Two statements were taken by the constables. Dodgen took Noordman's statement, while Nenuheni took Thlako's statement;
- 6.4 Thlako's testimony had been contested on the basis that:
 - 6.4.1 he spoke in Sepedi and the statement was taken in English;
 - 6.4.2 Thlako as the only eye witness was not called as a witness to testify at the trial. This caused prejudice to the Plaintiff as he could not be cross-examined;
 - 6.4.3 Dodgen was unable to communicate with or understand Thlako. Insofar as Thlako's version was concerned, Dodgen relied on what his co-constable told him. Based on this, he undertook to arrest the Plaintiff.

6.5 After the statements were taken, the two arrestees were found in the office where they were arrested after being advised of their constitutional rights.

C. THE PLEADINGS:

7. The claim is based on unlawful arrest and the onus is on the Defendants to show that the arrest was indeed lawful.
8. It is common cause that the policemen who were involved in the arrest were acting within the course and scope of their employment as policemen of the South African Police Services.
9. The Plaintiff claims to have suffered damage for loss of freedom, *contumelia*, trauma and damage to his dignity and reputation which amounted to a global amount of R3 420 000,00.
10. However this Court was requested to only make a finding on the merits. The aspect of quantum would be dealt by the parties at a later stage.
11. The Plaintiff raised certain points *in limine*, insofar as the pleadings were concerned.

12. The Plaintiff contended that the Defendants' paragraph 11 (Ad paragraph 6) was inadequately pleaded.

- Ad paragraph 6 reads:

"... Plaintiff was arrested pursuant to the provisions of s 40(1)(b) of the Criminal Procedure Act 51 of 1997 (CPA) in the following circumstances:

11.1 Plaintiff and a co-worker of his were caught stealing copper cables/wire and a charge of theft was laid against him and his co-worker at the Brooklyn Police Station by one Willem Andries Noordman".

12.1 The Defendants have merely pleaded by making a general reference to a statutory provision without pleading any facts supporting its defence.

12.2 The Defendants should have pleaded the jurisdictional requirements and the facts supporting each requirement, particularly on what basis they alleged that the suspicion was reasonable.

13. Hearsay

13.1 The Plaintiff further objected to the evidence led by the officers at the trial, particularly insofar as what was relayed to them by the eye witness, one Thlako. Counsel for the Plaintiff submitted that the evidence of the officers is hearsay. It was necessary

that the eye witness and the complainant should have testified at the trial.

13.2 Their absence at the trial caused prejudice to the Plaintiff as he was entitled to be given an opportunity to cross-examine these witnesses.

13.3 No sufficient explanation was proffered on behalf of the Defendants as to why these witnesses did not testify. The Court was requested to find the evidence of the Defendants' witnesses to be therefore inadmissible.

D. THE EVIDENCE:

14. The Defendants called three witnesses whilst the Plaintiff testified himself.

14.1 The first witness – Dodgen

In summary his evidence was the following:

14.1.1 Upon arrival at the scene Noordman advised him and his colleague of the theft of copper. He was shown three holes. He saw that from two holes the copper material

was missing. He then took Noordman's statement (which appears on p57 of the discovered documents. He attempted to communicate with Thlako, but was unable to. He spoke to the suspects in the office. He also searched the premises and did not find anything. Noordman informed him that Thlako saw the two suspects stealing the copper.

14.1.2 Based on the aforesaid, he confirmed that he was satisfied that the suspicion of theft of the copper was reasonable. He had sufficient grounds to effect the arrests.

14.1.3 Under cross examination it appeared that he was unable to challenge the fact that apart from obtaining the complainants and eye witness statements, his investigation was essentially based on examining the holes.

14.1.4 Counsel for the Plaintiff put to him that he should have analysed the facts and consider if Thlako's testimony was sustainable.

14.1.5 For instance, how far was Thlako from the two suspects, the depth of the hole, how many people were working on the site on that specific day, whether the other workers saw

anything. No other concrete evidence which included photos were taken of the scene nor did they bother to enquire the length, shape and weight of the copper.

14.2 **The second witness for the defendant – Nenuheni**

14.2.1 He confirmed that Noordman showed both him and Dodgen the holes where the copper was removed from and stated that the suspects were not supposed to be working at these holes. Thlako also told him that he saw two people who stole the copper wire. Although Thlako communicated in Sepedi, he took the statement in English.

14.2.2 They were taken to the suspects who were sitting in the "office". Dodgen spoke to them, explained to them the nature of the offence, and advised them of their constitutional rights.

14.2.3 In cross examination he testified that the hole was not fenced off and there was free movement around the hole. He also confirmed the stolen copper was not found on the site.

14.2.4 He further confirmed that Thlako informed him that he was working on site the entire day. Thlako was nearby the hole when he saw the suspects.

14.2.5 Counsel for the Plaintiff challenged him on the grounds that he had not applied in his mind in establishing that the suspicion was based on reasonable grounds. A "mini investigation" was required which *inter alia* involved walking around the site, taking photos, establishing the size of the copper, establishing if Thlako was aware of the suspects whereabouts for the entire day.

14.2.6 The witness persisted that he applied his mind properly. After evaluating the versions of the two witnesses he was satisfied that there would be a case against the suspects.

14.3 **The third witness – Mutshekwa**

14.3.1 Mutshekwa was cited as the Second Defendant in this matter. He was however of no assistance to the defence. He confirmed that he had nothing to do with the arrests nor was he involved in the investigation. His role was merely of an administrative nature.

14.3.2 As the investigating officer he admitted that he never conducted an investigation on site, nor did he enquire why the suspects were in custody. He only took a statement from Noordman as he was requested to do so by the criminal trial court at the time.

- **Plaintiff's version**

14.4 His testimony was essentially the following:

14.4.1 On the morning of 1 December 2009, he was picked up at Marabastad by Noordman and taken to build wooden caskets for casting concrete blocks that would serve as foundation.

14.4.2 There were ten people on site. Four were digging the foundation trenches, at least 16m from him. Thlako was working with five other workers also approximately 16m from him. He was the only person sawing planks and making caskets. There was no copper wires where he was working. The holes were not fenced off and people could move freely around the area.

14.4.3 Noordman only arrived at approximately 15h45 that afternoon. He then confronted the Plaintiff and the co-suspects about the missing copper. Both of them denied any knowledge of the missing copper. Noordman then called the police.

14.4.4 When the police officers questioned them they denied stealing the copper. Plaintiff testified that he was never informed of the reason for his arrest - namely the suspicion of stealing copper wire. They were arrested and taken to Brooklyn Police Station.

- **The Plaintiff's argument**

14.5 Counsel on behalf of the Plaintiff persisted with *inter alia* the following argument:

14.5.1 The arrests were based on the evidence of one witness, Thlako.

14.5.2 Thlako's testimony appears in a statement which was taken by Nenuheni. Dodgen did not understand Thlako and relied on what Nenuheni told him.

14.5.3 A sufficient investigation was not conducted. In order to establish the reasonableness of the suspicion the police officers had failed to exercise their discretion rationally nor did they apply their mind to the information given.

14.5.4 Furthermore the suspects' version was not taken into account.

- **The Defendant's argument**

14.6 Counsel for the defendant cautioned the court to appreciate the following:

14.6.1 A peace officer is entitled to arrest without a warrant on the basis that it is reasonable to identify the suspect's involvement.

14.6.2 One does not require concrete evidence to establish that an offence has been committed.

14.6.3 There is only a suspicion required, not proof beyond a reasonable doubt.

14.6.4 Counsel referred the Court to Mabona v The State 1988 (2)

SA 654 at 658 where the test is whether there are good and sufficient grounds for the suspicion;

14.6.5 Counsel correctly pointed out that the suspicion must be based on concrete grounds and contended that such grounds were established, namely that:

- (a) information was given to them by Thlako who saw the suspects cutting the copper;
- (b) Noordman confirming the aforesaid;
- (c) the constables had conducted a satisfactory investigation by inspecting the holes, noting the removed copper and searching for the copper on the premises;
- (d) it is eventually the National Prosecuting Authority whose task is to determine if they have a case to prosecute. Police officers are not triers of fact.

The aforesaid thus established a reasonable suspicion to effect the arrests and which is all that is required from them.

14.6.6 The Plaintiff cannot rely on hearsay as the parties have agreed at the pre-trial that the documents (discovery) are what they purport to be without admitting the contents thereof.

14.6.7 In any event all that the constable did was rely on information which he put in writing in the form of an affidavit. This is not always the case as arrests are effected upon reliance on oral statements as well.

E. ANALYSIS AND FINDINGS:

15. Section 40(1) of the CPA gives peace officers extraordinary powers to arrest. Thus the circumstances when such arrests are made must be considered carefully otherwise such arrests are considered to be unlawful.

16. In Duncan v Minister of Law and Order 1986 (2) SA 805 at 818 F-H, the Court established that jurisdictional facts must exist before such power can be exercised namely:

16.1 the arrester must be a peace officer;

16.2 the peace officer must entertain a suspicion;

16.3 it must be a suspicion that the arrestee committed a schedule 1 offence;

16.4 the suspicion must rest on reasonable grounds.

17. Once these jurisdictional facts are present a discretion arises whether to arrest or not. Such discretion must be exercised in good faith, rationally and not arbitrarily. This is an objective enquiry with relation to the facts Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA

18. Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion¹.

19. The arrestor's grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a "reasonable" suspicion before the arrest is made.

¹ R v Heerden 1958 (3) SA 150 (T)

20. This test was succinctly summarized in Mabona v Minister of Law and Order 1988 (2) SA 654 SEC where it was established that what is required is suspicion not certainty. Such suspicion must make sense otherwise it is frivolous or arbitrary and not reasonable.
21. There must be evidence that the arresting officer formed a suspicion which is objectively sustainable².
22. In Tsose v Minister of Justice 1951 (3) SA 10A it was emphasized that the arrest must be with the intention of bringing the arrestees before Court. An arrest can take place lawfully, where the arrestor objectively speaking, has a reasonable suspicion against the suspect but has to conduct further investigations after the arrest before finally deciding to charge the arrestee.
23. Arrests can therefore take place even if the arrester realised that at the time of the arrest he does not have sufficient proof for a conviction³.
24. It should be noted that the events subsequent to the arrests do not have any bearing upon whether their suspicion was reasonable. Therefore this Court will not deal with the evidence pertaining thereto.

² Ralekwa v Minister of Safety and Security 2004 (1) SACR 313 (T)

³ Songono v Minister of Law and Order 1996 (4) SA 384 SEC

25. The crux of the dispute between the parties was whether the suspicion that the Plaintiff committed a schedule 1 offence was established on reasonable grounds. This jurisdictional fact, as contended by the Plaintiff, was not satisfied.

- **Objective test**

26. This test was set out in the *Mabona* matter *supra*. The test of whether the suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is objective. The enquiry is therefore – **would a reasonable man in the particular Defendant's position and possessed the same information, have considered that there were good and sufficient grounds for suspecting that the Plaintiffs were guilty of the offence for which he sought to arrest the Plaintiffs?**
27. In evaluating such 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 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 a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However the suspicion must be based upon solid grounds..."
*(my underlining)*⁴.

28. In applying the test objectively the conduct of the two police officers prior to effecting the arrest must be closely examined.
29. Both police officers relied on the eye witness's testimony, one Thlako. Dodgen relied on his colleague, Nehuneni who communicated and took a statement from Thlako. The complainant, Noordman, relied on what Thlako told him. Noordman was not on the premises for most of the day. The evidence reflects that he arrived there in the late afternoon. It appears that the theft took place earlier in the day.
30. Both police officers testified that they were satisfied with the arrests and that a reasonable suspicion had been established.
31. Essentially they testified that they had examined the holes from where the copper wires were removed. They questioned the suspects in the office. They took statements from both Noordman and Thlako.

⁴ Mabona supra at p 658

32. Was this sufficient to establish there were reasonable grounds existed to form the suspicion?
33. In cross-examination counsel for the Plaintiff indicated that a "mini investigation" should have followed after the complaint was lodged with them.
34. They were expected to conduct a site inspection, take photographs of the scene of the crime, consult with the other workers working in the vicinity of the suspects, take measurements of the positions of the holes where the suspects were working, where Thlako was working, consider the measurements of the copper which would indicate how it could have been removed from the premises.
35. Having regard to the evidence before this Court and in light of the aforesaid authorities, it is not satisfied that a reasonable suspicion was established. A little more was required of them particularly in light of the fact that they relied on the testimony of one eye witness and did not form their own suspicion. Surely they were expected to assess Thlako's version critically and confirm his testimony with regard to the scene of the crime.

36. The suspicion has to be based on solid grounds. They were expected to make certain enquiries and investigate the accuracy of the information before acting upon it.
37. Reference is made to the Court's finding in the Ralekwa matter where the police officer did not form his own suspicion but relied on the opinion of the bank manager, which fell short of the test set out in the Mabona matter.
38. Harms DP in the Sekhoto matter at 327b-c held that:
- "once the required jurisdictional facts are present, the discretion or not to arrest arise. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. The standard was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the Court. The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached".*
39. Although counsel for the Defendants correctly relied on the Sekhoto matter where it was held that the arrestor was not called upon to determine whether or not a suspect ought to be detained pending trial, that was for the Court to determine, and the purpose of an arrest was simply to bring the suspect before Court so as to enable it to make

that determination⁵; the missing link shall remains that the suspicion was not reasonable.

40. Consequently this Court is not convinced that the arrest was lawful if one has regard to the conduct of the police officers prior to the arrest. They had not analysed the testimony independently but relied on Thlako's testimony.

- **Pleadings**

41. This Court further had regard to the criticism raised by the Plaintiff's counsel – namely that the Defendant should have pleaded the jurisdictional facts particularly that the suspicion rested on reasonable grounds. Such objections should have been raised at the plea stage where the Plaintiff should have excepted to the plea. Be that as it may, the pleadings however do not set out the cause of action fully.

42. It is trite law and as Harms DP in the Sekhoto matter at page 333 succinctly held that ***"if a defendant wishes to rely on s40(1)(b) defence, he has to plead the four jurisdictional facts. This requires that the facts on which the defence is based must be set out."***

⁵ Sekhoto matter *supra* at 331c-332a

43. This Court is thus in agreement that the pleadings lack the jurisdictional requirements and the facts supporting thereto.

- Onus

44. It is well established principle that the onus rests on the arresting officer to prove the lawfulness of the arrest. In this case the Defendants have failed to show that they exercised their suspicion reasonably, that is they met the fourth jurisdictional requirement⁶.

- Hearsay

45. This Court did not find it necessary to make a ruling on the "hearsay evidence" aspect at the trial and thus allowed the testimony of the police officers for the following reasons:

45.1 The issue before this Court is whether the police officers had formed a reasonable suspicion to arrest the suspects. The crux was to determine their conduct which would reflect whether they formed a reasonable suspicion or not. The officers testified at the trial what they had done to satisfy themselves that their suspicion was reasonable;

⁶ *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 SCA

45.2 In determining the above, the evidence before this Court was to consider all the facts prior to the arrest. Thlako's statement appears on page 55 of the bundle and is self explanatory – the relevant portion being:

"I am the witness of the case of a stolen copper. On Tuesday 2009, 12-07 morning when I was on duty doing my duties my cellphone rang and when I stopped doing my job to answer the phone. I then saw George the guy we worked together inside the hole where there was a copper cutting it. The other guy was outside the hole ..."

This Court has taken cognisance of such affidavit, which was only one of the factors to be considered by this Court.

45.3 Moreover this Court is aware that arrests without warrants are not always made upon written affidavits. In certain cases police officers rely on oral testimony. What was crucial is what had they done to establish that solid grounds existed for the suspicion.

D. CONCLUSION:

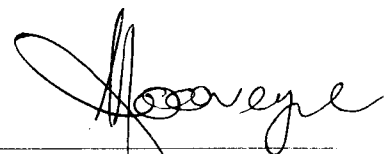
46. This Court's finding therefore is that the First Defendant had failed to show on a balance of probabilities that the arrest was lawful.

47. Moreover the Second Defendant played an insignificant role in this matter. Therefore it is appropriate to exclude him from this matter.

E. ORDER:

The following order is therefore made:

1. The defence is dismissed;
2. The Plaintiff is entitled to such damages as he may be able to prove he sustained due to the unlawful arrest and detention by the First Defendant;
3. The First Defendant is to pay the costs of this trial;
4. The question of damages is postponed *sine die*.



H'KOOVERJIE
Acting Judge of High Court