



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 15/43294

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
20/08/2024	
DATE	SIGNATURE

In the matter between:

MKHUSELI BHEME

First Plaintiff

JABU DOMENIC MOTAUNG

Second Plaintiff

AND

MINISTER OF POLICE

Defendant

JUDGMENT

MOLELEKI AJ:

Introduction

- [1] The plaintiffs claim damages from the defendant on the ground that they were unlawfully arrested and detained by police officers acting within the scope of their employment with the defendant. The claim arises out of their respective

arrests, both of which were without a warrant, on 2 June 2015 pursuant to an incident at Ivory Park, Gauteng Province.

- [2] The defendant defended the action and invoked the provisions of section 40(1) of the Criminal Procedure Act,¹ (the Act) to justify the lawfulness of the plaintiffs' arrest and their subsequent detention.
- [3] While the defendant admits having arrested the plaintiffs, the defendant denies that such arrest was in any way unlawful.

Issues

- [4] The court was called upon to adjudicate the following issues:
 - 4.1 firstly, the location and the circumstances under which the plaintiffs were arrested;
 - 4.2 secondly, whether the plaintiffs' arrest and subsequent detention was unlawful. If so, the determination of the plaintiffs' damages as a result thereof.
- [5] The defendant bore the duty to begin and the onus of proof to show on a balance of probabilities, that the arrest of the plaintiffs was lawful and justifiable. If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.
- [6] The defendant called Sergeant Malesela Alex Mooka to testify on its behalf. His testimony was that, he is attached to the Public Order Policing Unit of the South African Police Service. He has been a police officer for 19 years, 18 years of which in the Public Order Policing Unit. On 2 June 2015 at around 8h00 whilst on duty, information came through that there was a protest action in Ivory Park, Mnotho Street and that there was a significant number of people gathered. He and his colleagues were deployed to the area. Upon their arrival they found a

¹ Act 51 of 1977.

group of approximately 2000 people who had barricaded the road with poles, stones and burning tyres. There were two groups at loggerheads with each other. Attempts were made to diffuse the situation and disperse them to no avail. The group to which the first plaintiff was aligned started throwing stones and bottles at the police officers. The first plaintiff was spotted by Sergeant Mooka as one of the people that was pelting stones and bottles at police officers.

- [7] Sergeant Mooka was focusing on the first plaintiff whilst the first plaintiff threw a bottle at him. He charged at the first plaintiff and apprehended him. He took the first plaintiff to the police armoured vehicle, commonly known as "Inyala". According to Sergeant Mooka, other protesters were arrested by other police officers. All those that were arrested at the scene of the protest action were put inside the Inyala and were taken to Ivory park police station. Upon their arrival at the police station, the arrestees were processed and detained.
- [8] The first plaintiff denies that he was anywhere near Mnotho Street where the protest action was taking place. His version is that he was on night duty and knocked off at 6h00 during the morning of 2 June 2015. He arrived at Ivory Park where he resides to find that there was a protest action. He proceeded to his shack where he started preparing to rest. A group of people stormed his shack whilst running away from police officers. These people blocked the door to prevent the police officers gaining access. The police officers kicked the door of his shack open. The police officers took everyone out of the shack and made them to lie on the ground whilst kicking them.
- [9] The police officers took them all into the police vehicle and took them to the police station. Whilst inside the police vehicle, the police officers sprayed them with tear gas and pepper spray. At the police station, he was forced to sign a warning statement. They were detained from 2 June and on 4 June 2015, then they were taken to court for their first appearance before a Magistrate. The Magistrate refused him bail and was detained at Modderbee prison from then on until his release on his own recognizance on 12 June 2015. The first plaintiff

gave a description of the conditions of the police cells and of the prison which he said was unpleasant.

- [10] On the other hand, the second plaintiff testified that, on 2 June 2015 he was at his parental home watching television. He was not even aware that there was a protest action in the area. Three police officers stormed his house. Upon enquiring what was happening, the police officers started assaulting him. He was taken to the police Inyala where he found that there were other people that had also been arrested. He was made to lie on top of other people who were also lying on top of each other. They were taken to Ivory Park police station. They were processed and made to sign warning statements. On 4 June 2015, he appeared in court with the first plaintiff and one other person. Their case was postponed to 12 June 2015 and was detained at Modderbee prison. In both Ivory Park police station and Modderbee prison the conditions were unpleasant. He was later transferred to the juvenile section of the prison.

The Legal framework

- [11] An arrest without a warrant is prima facie wrongful and unlawful. Section 12(1) of the Constitution² provides for the right of every person not to be deprived arbitrarily or without just cause of his or her freedom. It is for these reasons that the defendant should allege and prove the lawfulness of the arrest and detention.
- [12] Section 40(1) of the Act provides that a peace officer may without a warrant arrest any person-
- (a) who commits or attempts to commit any offence in his presence;
 - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
 - (c) ...

² Act 108 of 1996.

- [13] It is incumbent of the arresting officer to justify that the arrest was lawful by satisfying all the jurisdictional facts as set out in *Duncan v Minister of Law and Order*,³ which must exist before the power conferred by section 40(1) may be invoked. These are: (a) the arrestor must be a peace officer; (b) the arrestor must exercise a suspicion; (c) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (d) the suspicion must rest on reasonable grounds.
- [14] The test to be applied is an objective one. Of significance is that the section requires suspicion and not certainty. However, the suspicion must be based upon solid grounds, otherwise it would be arbitrary. The test is whether a reasonable man in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence of public violence.
- [15] It is not in dispute that Sergeant Mooka is a peace officer as defined in the Act. Sergeant Mooka's evidence shows that he harboured a suspicion based on his observations during the protest action. When he observed the first plaintiff throw a bottle at him, Sergeant Mooka formed a reasonable suspicion that a Schedule 1 offence had been committed. He has satisfied the jurisdictional requirements in respect of the arrest of the first plaintiff.
- [16] The police officer who arrested the second plaintiff was not called to testify. It is, therefore, not clear on what basis he harboured any suspicion. However, in the present matter, it is, to my mind immaterial that the police officer who arrested the second plaintiff was not called to testify. To remove himself from the scene of the protest action the second plaintiff gave an untenable version. That will be dealt with below.

³ 1986 (2) SA 805 (A) at 818G-H.

- [17] The court is faced with two mutually destructive versions. This court is thus tasked with the responsibility to analyze and evaluate the evidence tendered in order to determine which of the versions is true. *National Employers' General Insurance Company Limited v Jagers*.⁴
- [18] The technique generally employed by courts in resolving two irreconcilable versions was set out in *Stellenbosch Farmers' Winery Group Ltd & Another Martell et Cie & Others*.⁵ To come to a conclusion, on the disputed issues a court must make findings on, (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.
- [19] The key facts on which the evidence of the plaintiffs and defendant differed are the following:
1. the plaintiffs asserted that they were not involved in the protest action;
 2. that they were arrested at their respective homes;
 3. Sergeant Mooka on the other hand stated that he noticed the first plaintiff during the protest action throwing a bottle at him;
 4. Sergeant Mooka further stated that those that were arrested from the scene of the protest action were taken to Ivory Park police station where they were charged with Public Violence.
- [20] In relation to the location at which the plaintiffs were arrested, it is useful to consider the documentation that was completed by the police officers relating to the arrest, together with the evidence given at the trial. The plaintiffs have not suggested any reason that the police officers at the Client Services Centre were motivated to lie on the documents upon their processing when they arrived at the police station. In these documents, it is stated that at the time of his arrest the first plaintiff was unemployed and that both plaintiffs had no signs of, nor did they report any form of assault. This documentary evidence supports Sergeant Mooka's oral evidence that the plaintiffs were not assaulted.

⁴ 1984 (4) SA 437 (A) at 440E.

⁵ [2002] ZASCA 98; 2003(1) SA 11 (SCA).

- [21] The evidence of Sergeant Mooka is preferred over that of the plaintiffs for the following basis: it was clear, concise and to the point. Sergeant Mooka was a confident witness. He related details of the incident without hesitation. Never once did he falter during his testimony. He remained steadfast on his version even under strenuous cross-examination. He was honest enough not to create the impression that he saw the second plaintiff at any point on the day of the protest. However, he was adamant the first plaintiff was part of the protest action and that he threw a bottle at him. He did not contradict himself in any material way or at all; his evidence was more probable than that of the plaintiffs.
- [22] In so far as the evidence of the plaintiffs is concerned, they contradicted themselves materially. I am mindful of the period that has elapsed between the occurrence of the incident and the trial. It is a period of about 9 years, and it may have impaired the recollection of the witnesses. In *McAlister v Wavelength 1188 CC and Another*,⁶ it was held that the versions adduced must not only be probable but must also accord with common sense.
- [23] It is highly improbable that the police officers would leave people who are protesting to go to the plaintiffs' homes and arrest them for no apparent reason. The evidence of the first plaintiff that he had been working night shift and that he had just arrived home when a group of men stormed his house is, in my view implausible. This version changed to him saying he was in the company of Sibongiseni and Masibulele. Masibulele was once again removed from the picture and stated that it was Masibulele's father who was there with him upon his arrest.
- [24] The first plaintiff's timeframes in relation to his arrest was inconsistent. In his particulars of claim it is stated that he was arrested at approximately 13h30. In his evidence in court he stated that the arrest took place at about 7h30, shortly after he had arrived home from night shift. It was asserted to Sergeant Mooka that following his arrest, the police officers drove around with him and other

⁶ [2012] ZAKZPHC 31.

suspects in harrowing condition for about 30 minutes. In his testimony, he refuted that the police drove around with them. To align his testimony with what was asserted to Sergeant Mooka, he stated that the police drove straight to the police station but that it is a 30-minute drive to the police station.

[25] Sergeant Mooka testified that the police station is not very far from where the first plaintiff was arrested. In my view, the police station is not as far as the first plaintiff has described it to be. This was an attempt to furnish support to the version that was asserted to Sergeant Mooka which version suggested that the police officers packed them one on top of the other and drove around with them merely to torture them. The version that the police officers drove straight to the police station was confirmed by the second plaintiff.

[26] In the section 3 Notice, in terms of the Institution of Legal Proceedings Against Certain Organs of State Act⁷ (section 3 Notice), which he attached as an annexure to his summons, the second plaintiff stated that upon his arrest he was placed inside a police vehicle. Amongst others, he found the first plaintiff. However, during his testimony, the second plaintiff denied having informed his legal representative who wrote the section 3 Notice on his behalf that he found the first plaintiff inside the police vehicle. Clearly, this is an attempt to dissociate from each other for having been together during the protest action. The first plaintiff also denied having seen the second plaintiff inside the police van. Having accepted that the first plaintiff was arrested at the scene of the protest action and that the police drove straight to the police station, the second plaintiff's version that he was arrested at his home falls to be rejected.

[27] Although the police officer who arrested the second plaintiff was not called to testify, based on the evidence before court, that is not a fatal shortcoming. According to Sergeant Mooka, no one who was arrested and placed inside the Inyala at that moment was arrested anywhere else except at Mnotho street where the protest action was taking place. The arrested protesters were taken

⁷ Act 40 of 2002.

to the Ivory Park police station in the police Inyala where they were detained. Sergeant Mooka testified that none amongst the arrested was assaulted, pepper sprayed or teargassed.

[28] The probabilities do not favour the plaintiffs that they were arrested in their respective homes without reason. It is not in dispute that there was a protest action attended by approximately 2000 people. There would have been no reason for the police officers to have entered the houses of innocent men, assaulted and arrested them. The first plaintiff on the other hand, to support his version, made it appear as though some of the protestors entered his house which led to the police officers ending up at his house. In his own version, the first plaintiff was wearing a vest and a pair of shorts. It is inexplicable why the police officers would have arrested him together with people who would have been easily distinguishable from him.

[29] In as much as Sergeant Mooka was a single witness, each of the plaintiffs were single witnesses regarding the events that occurred on the day of their respective arrest. That does not necessarily place any of them in a disadvantaged position. Their respective evidence still needs to be considered holistically to arrive at an objective conclusion. In *S v Sauls and others*,⁸ the court stated that:

“there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

[30] Essentially, this entails that evidence of a witness should not be rejected or disregarded merely because the witness has an interest or bias in the proceedings. However, it should be assessed as a whole and with caution having had regard to all the relevant considerations.

⁸ 1981 (3) SA 172 (A) at 180E-G.

- [31] There are conflicting versions surrounding the circumstances under which the second plaintiff was arrested. As stated, his initial version was that he was watching television in the dining room when three police officers entered his house. When he enquired what was going on, the police officers assaulted, grabbed and placed him inside a police Inyala. When confronted with the contents of the section 3 Notice which stated that the police officers entered through the kitchen where his mother and sister were and started mishandling his sister, he moved away from his initial version. During clarification by the court, the second plaintiff stated that he was alone in the house.
- [32] The second plaintiff's response to these discrepancies was that it could have been typographical errors and that he did not see the section 3 Notice. My assumption is that he suggested that he would have corrected such information if he had been given an opportunity to see the section 3 Notice. Contradictions are also found between the narration of events by the plaintiffs in court and as it is contained in their respective particulars of claim.
- [33] Contradictions *per se* do not lead to the rejection of a witness' evidence... They may simply be indicative of an error... Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.⁹
- [34] These abovementioned contradictions regrettably affect several key aspects of the evidence of the plaintiffs. These are material contradictions which cannot simply be brushed aside. It is not in dispute that the plaintiffs consulted with their legal representatives prior to the institution of legal proceedings against the defendant. It becomes unclear how the plaintiffs' narration of events to the attorneys suddenly portrayed a different story when reduced to typing.

⁹ See *S v Mkohle* 1990 (1) SACR 95 (A) at 98F-G.

- [35] The fact that the plaintiffs were ultimately released due to the Magistrate having refused the prosecutor a further postponement does not detract from the position as stipulated above. It could not have been expected of the police officers who attended to the protest action to have left the plaintiffs to their own devices and warned them to appear in court at some point later. The protestors had blocked the road, were burning tyres, throwing stones and bottles. The number of people involved was significantly high. Any reasonable person would regard such an event as a serious threat to the safety of those in the immediate vicinity.
- [36] From the conduct of the protesters they did not appear to be upstanding citizens who would abide by a warning from the police officers. The peace was disturbed by the two protesting groups. The group to which the first plaintiff aligned acted collectively, unlawfully and violently. On the totality of the evidence, I find that the plaintiffs partook in the protest action. They were arrested at the vicinity of where the protestors had gathered.
- [37] Given the situation at the time, as described by Sergeant Mooka that the protestors refused to disperse when instructed to do so by the law enforcement officers. They instead pelted stones and bottles. The exceptions to the general rule find application to this case. It is significant to not lose sight of the dangers and rigours of policing and the reality of what the police officers were confronted with at the time.
- [38] In *Minister of Safety and Security v Sekhoto and Another*,¹⁰ it was held that it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily. This essentially means that peace officers are entitled to exercise their discretion as they see fit, provided they remain within bounds of rationality.

¹⁰ 2011(5) SA 367 (SCA) at [38]-[39].

[39] I am satisfied that the police officers herein exercised their discretion in good faith, rationally and not arbitrarily.

Conclusion

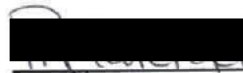
[40] On a conspectus of evidence, the evidence of the plaintiffs falls to be rejected as false and fraught with improbabilities. The testimony of Sergeant Mooka on the other hand, was credible and consistent with the probabilities. The defendant has therefore proved on a balance of probabilities that both plaintiffs were in the protest action. I am unable to find that the conduct of the police officers was unreasonable or unjustified in the circumstances.

[41] In the premises, the requisite jurisdictional facts necessary for an arrest under section 40(1)(a) of the Act have been proved. I find that the arrest of the plaintiffs on the charge of public violence was lawful.

[42] For the abovementioned considerations, the plaintiff's claims for wrongful arrest and detention should be dismissed.

Order

Accordingly, both the plaintiffs' claims against the defendant are dismissed with costs.



MOLELEKI AJ
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date of hearing: 31 May to 6 June 2024

Date of judgment: 20 August 2024

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