

REPUBLIC OF SOUTH AFRICA



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

Case Number: 38226/20

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
22/8/2024	[Redacted Signature]
DATE	SIGNATURE

In the matter between:

MANDLA AGRIPPA MOKOENA

PLAINTIFF

AND

MINISTER OF POLICE

1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS

2ND DEFENDANT

JUDGMENT

NEMUTANDANI AJ:

INTRODUCTION

[1] Mr Mandla Agrippa Mokoena ("the plaintiff") instituted an action for damages against the Minister of Police "the first defendant" and the Director of Public

Prosecutions “the second defendant”). The claim is for unlawful arrest and detention “claim 1” together with malicious prosecution” claim 2”. The relief sought for each claim is R 1 500 000.00 (One Million Five Hundred Thousand Rands).

- [2] The members of the South African Police Services arrested the plaintiff without a warrant of arrest on 16 March 2019. It was alleged that he was a suspect for the offences of house breaking with intent to rob and robbery with aggravating circumstances under Norkem Park Cas number 000149/03/2019. The plaintiff was thereafter detained at Norkem Park police cells and Modderbee prison until he was released on bail on 9 April 2019.

PLEADINGS

- [3] In his particulars of claim, the plaintiff alleged that on 16 March 2019, at 14:00 and at house number 112A Storm Street, Norkem Park, members of the South African Police Services unlawfully arrested and detained him. He alleges that the said arrest was consequent to members of the South African Police Service asking one Andile (the victim) to confirm whether the plaintiff was the perpetrator. Upon the said Andile confirming that he was the right person the arrest ensued thereat.
- [4] The plaintiff pleaded further that had members of the South African Police Services conducted thorough investigations, he would not have been arrested, detained and prosecuted.
- [5] The first defendant pleaded that the plaintiff was arrested after he was pointed out and positively identified by Andile that he was one of the suspects. The first defendant further denied that the arrest and detention of the plaintiff was unlawful. The defendant places the arrest within the parameters of section 40(1) (b) of the Criminal Procedure Act¹ as amended “the Act”. The first defendant specifically pleaded that the subsequent detention was in terms of

¹ 51 of 1977.

the provisions of section 50(1) of the Act and denied that the plaintiff suffered any damages.

- [6] At the pre-trial conference, parties agreed that there shall be no separation of issues. When the trial served before this court, it accordingly proceeded on both merits and quantum.
- [7] The parties further agreed that the plaintiff had a duty to begin. The first defendant bore the onus to justify the arrest and detention² whilst the plaintiff bore the onus to prove malicious prosecution.
- [8] On the second day of trial, after the plaintiff had closed his case, the plaintiff filed a Notice of Withdrawal of his claim for malicious prosecution against the second defendant.³

PLAINTIFF'S CASE

The evidence of the Plaintiff

- [9] He testified that some days prior to his arrest, there was a house robbery at Andile's homestead. The said homestead is few houses away from the place where his father (Mr Mokoena) conducts bakery business. The plaintiff assists his father at the said business premises. The investigating officer, one Detective Kwenaithe obtained his father's cellphone number, phoned him and enquired about plaintiff's whereabouts.
- [10] A telephonic arrangement was then made between Detective Kwenaithe and Mr Mokoena to meet at Andile's homestead with the plaintiff. On the arranged

² See JE Mahlangu and Another v Minister of Police [2021] ZACC10 at para [32] where it was held that once it has been established that the constitutional right not to be deprived of one's physical liberty has been interefered with, the deprivation is prima facie unlawful, and the infringer bears the onus to prove that the interference was justified.

³ Caselines 30-1.

time, on 16 March 2019, Mr Mokoena drove with the plaintiff to Andile's homestead.

- [11] On arrival thereat, Detective Kwenaithe was already there. Andile pointed the plaintiff as the intruder and the arrest followed. The plaintiff was charged, detained until he was released on bail, some 22 days later, on the 9 April 2019.
- [12] The plaintiff further told this court that the cells were unhygienic, there were no beds, he slept on dirty blankets and the cells smelt of faeces and blood. He was made to sleep on pieces of sponge, he was a victim of bugs which resulted in him cutting his dreadlocks. There was no privacy as two showers were shared amongst sixty (60) inmates. He was bullied and was forced to clean the cells as he is not gang affiliated.
- [13] He attended court until charges were provisionally withdrawn on 18 May 2020. The plaintiff was told by his attorney that the provisional withdrawal of the charges was because of his fingerprints not matching the ones uplifted at the crime scene.
- [14] During cross examination, the plaintiff conceded that his attorney could not have informed him of the reason of the provisional withdrawal because his attorney was not at court when the charges were provisionally withdrawn. The plaintiff conceded that the reason of the provisional withdrawal as contained in the charge sheet⁴ was because the complainants have relocated to Kwazulu Natal province and are untraceable coupled with lock down due to covid 19.
- [15] When it was also put to him that he was arrested because Andile Mthembu identified him as one of the robbers because he knew him very well. The plaintiff denied any involvement in the robbery as alleged.

Mr Mokoena Senior's evidence

⁴ Caselines 029-90.

- [16] He testified that the plaintiff is his son. On 15 March 2019, he was approached by the complainant (Andile's mother) who wanted the items stolen during a house robbery at her homestead on 13 March 2019. She informed him that her child, Andile Mthembu told her that during the said robbery, he did not see the intruders faces as they were wearing balaclavas but one of them had dreadlocks.
- [17] He believes that the plaintiff was implicated or suspected because it was said that one of the intruders had dreadlocks and at that time the plaintiff had dreadlocks. He testified further that he told the complainant that the plaintiff could not have been one of the robbers as on that day at the alleged time of commission of the offence the plaintiff was at home. Their home is situated some one hour walk from the business premises.
- [18] During cross examination, he told this court that Andile's elder brother was friends with the plaintiff and that the plaintiff would at times go to Andile's homestead. He further told this court that on the day of the commission of the offence, he retracted to his bedroom around 1:30 am and left the plaintiff at the lounge.

Defendant's case

The evidence of Detective Kwenaithe

- [19] She testified that she is a police officer with a total of seventeen years' experience within the South African Police Services. Around the 15 March 2019 she was assigned the docket in issue. She obtained the victims' and the complainants' statements (Andile and her Mother).
- [20] Upon interviewing Andile, a thirteen-year-old at the time, he informed her that on the early evening of the date of the robbery, he was at the lounge watching television when he heard noise of an attempted break-in at the door. He screamed and the noise stopped. Moments later, when a television programme named Uzalo was playing, he heard the noise of an attempted

break-in and he again screamed for help and the noise stopped. He retracted to his bedroom to sleep. Whilst asleep, he was awoken by the same attempted break-in noise, he woke up, switched the bathroom light on and off and went to the lounge and watched television until he dozed off or fell asleep.

- [21] He was awakened by three intruders who were now in-front of him at the lounge. The dining room light was on and television was also playing. He could identify two of the intruders. Andile further told her that, the one is a guy he knows from church and the one is a guy who sells kotas by the bakery on the same street who has dreadlocks, and the third intruder is unknown to him.

- [22] Andile further informed her that the guy who sells kotas and the one he recognised his face from church are the ones who unplugged the television and the amplifier. The unknown third suspect sat next to him holding a firearm. The dreadlock guy took the television outside and thereafter all three intruders assaulted him.

- [23] They then went to his mother's bedroom where they stole some items. Thereafter, he saw them jumping over the wall to the neighbour's yard and he also jumped the wall to the next-door neighbour where he sought and obtained help.

- [24] She further told this court that after interviewing Andile, he was very precise about the whole narration and details regarding the said robbery. When he mentioned the plaintiff as one of the intruders, he was certain that one of them is his brothers' friend and he sometimes sells kotas at the bakery on the same street few houses from his homestead.

- [25] Detective Kwenaithe further testified that consequent to this identification of the suspect, she went to the bakery shop looking for the plaintiff and did not find him. Thereat, she found a lady worker who gave her Mr Mokoena's cell phone number. She then phoned and informed Mr Mokoena that he is looking for

the plaintiff and arrangements were then made that he will bring him at the complainants' homestead.

[26] Thereat, Andile again identified and pointed the plaintiff as the suspect and the arrest followed. She further testified that she arrested the plaintiff because a schedule 1 and/or 6 offence where a firearm was used was reported. She could not grant police bail even if she wanted because the nature of the offences falls outside the ambit of police bail.

[27] She testified further that the case was provisionally withdrawn due to the fact that the complainant and victim were not traceable at their homestead or telephonically for court purposes.

Issues for determination

[28] The issue for determination is whether or not the arrest of the plaintiff by members of the first defendant and the subsequent detention was unlawful, and if it was, whether he suffered any damages and costs.

The law

[29] Section 12 (1) of the Constitution⁵ provides:

“12(1) Everyone has a right of freedom and security of the person which includes a right –

(a) not to be deprived of freedom a beautifully without just cause

(b) not to be detained without trial

(c) to be free from all forms of violence from either public or private sources

(d) not to be tortured in anyway and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

[30] Subsection 40(1)(b) of the Act reads as follows:-

⁵ Act 108 of 1996.

“A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.”

[31] The jurisdictional facts for a subsection 40(1)(b) defence are that:-

1. The arrestor must be a peace officer;
2. The arrestor must entertain a suspicion;
3. The suspicion must be that the suspect committed an offence referred to in Schedule 1; and
4. The suspicion must rest on reasonable grounds.⁶

[32] In Heimstra's *Criminal Procedure*,⁷ the learned author, with reference to the *Sekhoto* case (*supra*) summarises the law pertaining to arrest without warrant as follows:-

1. The jurisdictional prerequisites for subsection 40(1)(b) must be present;
2. The arrestor must be aware that he or she has a discretion to arrest;
3. The arrestor must exercise that discretion with reference to the facts;
4. There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[33] The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an **initial** suspicion, steps have to be taken to have

⁶ See *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA).

⁷ Page 5-8.

it confirmed in order to make it a **reasonable** suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.⁸

- [34] In the matter of *Olivier v Minister of Safety and Security and Another*,⁹ the court at 445 D to F stated the following with regard to the proposition that each case must be decided on its own facts, namely:-

"This entails that the adjudicator of facts should look at the prevailing circumstances **at the time** when the arrest was made and ask himself the question - was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employment, and then residence, cooperation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation. The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court's view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort."

- [35] The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.¹⁰ In objectively determining when an arrestor has acted arbitrarily the court should consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) whether the discretion was exercised reasonably, rationally and not arbitrary.

DISCUSSION

⁸ 1993 (1) SACR 434 (TPD); Heimstra (supra) at 5-8.

⁹ 2009 (3) SA 434 (WLD).

¹⁰ *Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the republic of South Africa and Others* 2000 (2) SA 674 (CC) paragraphs 85-86, at page 708D-F.

- [36] The defendant's case rests, in the main, on the assertion that Detective Kwenaithe reasonably suspected that the plaintiff and other suspects have committed offences listed in schedule 1 and 6 of the Act. The said offences ranged from assault of a minor, house breaking with intent to rob and robbery with aggravating circumstances.
- [37] This suspicion was premised on the information which was at her disposal obtained from the victim that he saw the suspects during the commission of the offence, identified and pointed the plaintiff as one of the suspects and in fact knew the plaintiff as he was his elder brothers' friend. Furthermore, he knew him as the guy who sells kotas at the bakery next to his homestead.
- [38] Can it be said that after Andile, a thirteen years old minor who witnessed and was a victim of the robbery, where a firearm was used, who was assaulted and identified the plaintiff as one of the perpetrators, the arresting officer in exercising her discretion to arrest the plaintiff acted arbitrarily, irrationally and without probable cause? The answer is a resonant no.
- [39] The following factual disputes exist on the circumstances attendant upon the arrest of the plaintiff. On the version of Detective Kwenaithe, Andile knew the plaintiff as the suspect. In contrast, on the version of the plaintiff and his father, the complainant told them that Andile did not see the intruders but only saw that one of the intruders had dreadlocks. The plaintiff's action is predicated on the assertion that Andile only pointed him because he had dreadlocks.
- [40] The *locus classicus* on resolving factual disputes is *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others*¹¹ where the Court held that:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a

2003 (1) SA 11 (SCA).¹¹

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. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[41] On a logical approach to the evidence, if it were not for the information obtained that the plaintiff was a suspect before the arrest, no basis would have existed for:

- (a) Firstly, Andile's mother approaching Mr Mokoena with a request that he should tell the plaintiff to return the stolen items.
- (b) Secondly, Detective Kwenaithe would not have gone to the bakery premises in search of the plaintiff if she was not entertaining a suspicion that the plaintiff was a suspect.

(c) Thirdly, even if Mr Mokoena was informed that Andile did not see the suspects, it will not be far-fetched to conclude that it was for Andile's safety.

[42] Detective Kwenaithe was a reliable witness. Her evidence lacked any contradictions and exaggerations contrary to the plaintiff and Mr Mokoena's evidence. The said contradictions relating to amongst others the reason of the provisional withdrawal of the charges and the justifications relating to the whereabouts of the plaintiff on the night the offences were allegedly committed.

[43] It is improbable that the plaintiff could only be arrested owing to the fact that he had dreadlocks. To this end, Detective Kwenaithe's evidence to the effect that the arrest followed identification and pointing out of the plaintiff as a suspect by Andile is accepted by this court.

[44] The plaintiff's version that he was arrested because thorough investigations were not conducted is improbable and is accordingly rejected by this court. If Detective Kwenaithe was in such a haste to arrest the plaintiff, she would have just effected the arrest without confirmations and verifications that the plaintiff was indeed one of the suspects. In the circumstances of this case, identification of the plaintiff as the suspect is unquestionable.

[45] The ratio in *Mabona v Minister of Law and Order and Others*¹² resonates with the facts of the present matter. There the Court said:

"[1] Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen goods knowing it to have been stolen? It seems to me that in evaluating his 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

¹² 1988 (2) SA 654 (E) at 658 E-H.

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 he will not accept it lightly or without checking it where it can be checked. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[46] I am satisfied that Detective Kwenaité assessed the quality of the information at her disposal. She went to plaintiff's bakery place to verify that the plaintiff was the person referred to by Andile. When Andile was pointed out at the victim's homestead, I cannot fault her exercise of her discretion to finally arrest the plaintiff.

[47] In *Biyela v Minister of police*¹³ the following was said at paragraph [35]:

"[35] What is required is that the arresting officer must form a reasonable suspicion that a sch 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a sch 1 offence."

[48] On the totality of evidence before court, I accordingly accept and find that Detective Kwenaité, a peace officer entertained a reasonable suspicion that a schedule 1 offence has been committed following information received from the complainants. I further accept that the suspicion was that the plaintiff committed a schedule 1 offence, and the suspicion rested on reasonable grounds. The arrest of the plaintiff was accordingly on the evidence, justified in terms of section 40(1)(b) of the Act.

¹³ 2023 (1) SACR 235 (SCA).

DETENTION

[49] The first defendant's pleaded case in respect of the alleged detention is that the detention after arrest was in terms of section 50(1) of the Act. It is indeed correct that Detective Kwenaitse was not empowered to release the plaintiff as the offences fell within the ambit of schedule 6 of the Act. Considering the nature of the charges, fairness and the interests of justice, the further detention of the plaintiff after his first appearance where the prosecution was opposed to plaintiff's release on bail cannot be attributed to the first defendant. Consequent to this court's finding that the arrest was lawful, I find that the subsequent detention was justified and thus lawful.

COSTS

[50] The general rule is that costs follow suite, I find no basis to deviate from the general rule.

ORDER

[51] In the result the following order is made:

1. The plaintiff's action is dismissed, with costs.

F.S NEMUTANDANI
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: *This judgment was handed down electronically by circulation to the parties' and/or parties' legal representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 14:00 on 22 August 2024*

APPEARANCES:

For the PLAINTIFF : ADV S MCASA
Instructed by : STEVE NKOSI & PARTNERS ATTORNEYS
KEMPTON PARK
REF: SN/sx/M1593
TEL: 011 394 4870
FAX: 011 975 5708
EMAIL: steve.nkosipartners@gmail.com

For the DEFENDANT : ADV M MADULA
Instructed by : STATE ATTORNEY
JOHANNESBURG
REF: 4753/20/P22
TEL: 011 330 7623
E-MAIL: CSetlhatlole@justice.gov.za

Matter heard on : 15 & 16 MAY 2024
Judgment Delivered on : 22 AUGUST 2024