



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **A131/2024**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO
 DATE:
 SIGNATURE:

In the matter between:

THE MINISTER OF POLICE

Appellant

and

SELLO JOHANNES MAKHATHOLELA

First Respondent

NOMVUYO VIOLET TEKA

Second Respondent

SIPHAMANDLA PETROS MKHONZA

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] This appeal concerns the judgment and order of Acting Justice Phahlane (the court *a quo*) in a claim instituted by the respondents against the appellant for unlawful arrest and detention. The court *a quo* held that the appellant is liable

for the respondent's proven damages relating to the unlawful arrest and detention.

- [2] The appellant's appeal, leave to appeal being granted by the court *a quo*, is directed at the aforesaid finding of the court *a quo*.

Factual matrix

- [3] On 15 May 2015, the first and second respondents, both police reservists at Pretoria Central Police Station was instructed together with another police reservist, constable Masombuka, to patrol the area around Bosman Street and to be on the lookout for suspected drug users. During the performance of their duties the police reservists accosted a certain Mr Hlongwane ("Hlongwane").
- [4] From their observations Hlongwane appeared to be under the influence of alcohol. When the police reservists interviewed Hlongwane, their suspicion was confirmed, and they arrested him for being drunk in public. Hlongwane was requested to accompany the police reservists to the police station.
- [5] On their way to the police station they came across one of their colleagues, Siphamandla Mkhonza, the third respondent herein. The third respondent informed them that he was on his way to Capitec Bank in Bosman Street to open a bank account. During the course of the aforesaid events Hlongwane made a phone call to his wife, sergeant Hlongwane, and informed her that "*your subordinates had arrested me*".
- [6] Shortly thereafter a police van appeared. The police van was driven by constable Ledwaba, and he was accompanied by sergeant Hlongwane. Without providing any reasons, the police reservists and the third respondent were searched by sergeant Hlongwane and constable Ledwaba. Constable Ledwaba found money in the possession of the third respondent and Hlongwane remarked that it is the money that was taken from him by the respondents. According to Hlongwane R 2000,00 was taken from him.

- [7] The respondents were informed by sergeant Hlongwane and constable Ledwaba that they are under arrest for common robbery. Neither sergeant Hlongwane nor constable Ledwaba asked any questions or requested an explanation from the respondents prior to their arrest.
- [8] The appellant admitted that the respondents were arrested without a warrant and pleaded that the arrest was lawful, in that the police officers acted in terms of the provisions of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977.
- [9] In support of the pleaded defence, both sergeant Hlongwane and constable Ledwaba testified. Sergeant Hlongwane confirmed that she received a call from her husband who had indicated that he had been robbed. She requested constable Ledwaba to accompany her to Bosman Street where her husband could be found. Upon their arrival they could not find her husband and she asked the hawkers in the area whether they had seen someone in the company of police officers. The hawkers informed her that they had seen a man who had been assaulted by police officers and that the man had followed the police officers down Bosman Street. Significantly, the hawkers did not mention that a robbery occurred.
- [10] Be that as it may. Sergeant Hlongwane and constable Ledwaba found her husband in Bosman Street, and he pointed to two males and two females who were in civilian clothes. Upon noticing that Hlongwane was in the company of the police, the respondents, who were some distance away, walked towards them and stated that Hlongwane was drunk. She asked her husband for an explanation and he stated that he was assaulted and searched by the respondents at Freedom supermarket.
- [11] Constable Hlongwane informed the respondents that they were going to be searched and whilst constable Ledwaba was busy searching the first respondent, the third respondent took out money from his pocket and said: *"this is my money, I'm going to apply for a driver's licence with it."* She asked the third respondent whether she could count the money and after counting the money she handed it to constable Ledwaba.

- [12] Constable Ledwaba testified that after stopping the vehicle, the respondents approached them and did not attempt to run away. Constable Ledwaba confirmed that he searched the third respondent and that the third respondent had R 4 350, 00 in his hands. During cross-examination constable Ledwaba changed his version and testified that he found the money in the third respondent's pocket. He could not explain the contradiction in his evidence.
- [13] It was put to constable Ledwaba that he only relied on the statement of Hlongwane and that he did not make any efforts to interview independent witnesses to establish the circumstances of the case. Constable Ledwaba agreed. When it was put to him that this failure meant that he did not establish a reasonable suspicion prior to the arrest, he responded in the affirmative.

Judgment and grounds of appeal

- [14] In view of the aforesaid evidence, the court *a quo* found that constable Ledwaba relied solely on the evidence of a single witness, to wit Hlongwane, when he effected the arrest. The court, furthermore, held that the fact that the third respondent had R 4 350, 00 in his possession, whereas only R 2000,00 was allegedly taken from Hlongwane should have concerned constable Ledwaba.
- [15] This fact coupled with constable Ledwaba's admission that he did not make any further enquiries and that he did not give the respondents an opportunity to state their version, resulted in the court *a quo* finding that constable Ledwaba's suspicion was not based on reasonable grounds.
- [16] The appellant contended that the court *a quo* erred in finding that constable Ledwaba's suspicion was not reasonable. The appellant submitted that constable Ledwaba's failure to investigate the matter further was of no moment. According to the appellant an arrest is not unlawful merely because the arrestor acted on information, the quality of which was not subjected to scrutiny. In this regard, the appellant referred to *Mawu and Another v Minister of Police* 2015 (2) SACR 14 (WCC) and more specifically par [31]:

"[31] To the extent that it is suggested that this passage is authority for the proposition that for a reasonable suspicion to be formed the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information the quality of which has not been subjected to scrutiny will render an arrest unlawful, I disagree. I am unable to find anything in the provision of s 40 (1) (b) which leads to the conclusion that this is the requirement. A lawful arrest in terms of s 40 (1) (b) can be made upon a reasonable suspicion. And in *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 465 H the word "suspicion" was defined as meaning an absence of certainty and of adequate proof. The Court went on to refer to the remarks of Lord Devlin in the Privy Council in *Shaaban Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 ALL ER 1626 at 1630 in which the word "suspicion" in its ordinary meaning "was defined as a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of investigation of which the obtaining of prima facie proof is [its] end".

Discussion

- [17] The reasonableness of a suspicion depends on the facts of each case. As a starting point, it is apposite to have regard to the requirements for forming a reasonable suspicion. In *Mabona and Another v Minister of Law and Others* 1988 (2) SA 654 (SE) at 658E-H, the following formulated the requirements as follows:

"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 property 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 need to swear out a warrant, ie 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. 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 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."

- [18] I fully align myself with the aforesaid test. The right to freedom is of paramount importance. This much was confirmed in *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 466 D-E:

"The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the Legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt."

- [19] With the advent of our Constitution in 1996, the right to freedom and security of the person was enshrined in the Bill of Rights and more specifically in section 12.

- [20] In *casu* constable Ledwaba had ample time to interview witnesses at the scene of the alleged robbery. The respondents approached constable Ledwaba and there was no indication that they would run away or evade arrest. The respondents were, furthermore, colleagues of constable Ledwaba and he knew where to find them in the event that an arrest was necessary. Constable Ledwaba's conduct is in stark contrast to the requirement in *Mabona* that an arresting officer should not accept a version "*lightly or without checking it where it can be checked*".

- [21] Constable Ledwaba, furthermore, failed to request an explanation from the respondents which explanation could have been exculpatory. In *Minister of*

Police v Dhali (CA327/2017) [2019] ZAECHGHC 16 (26 February 2019) the court stated the following at para [13]:

"It is trite that police officers purporting to act in terms of Section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest."

- [22] Applying the aforesaid legal principles to the facts in *casu*, I am of the view that the court *a quo* correctly held that constable Ledwaba's suspicion that the respondents committed robbery was not based on reasonable grounds.

ORDER

In the result, I propose the following order:

The appeal is dismissed with costs.

[REDACTED]

M. P. MOTH

JUDGE OF THE HIGH COURT, PRETORIA

I concur

[REDACTED]

N. JANSE VAN NIEWENHUIZEN

JUDGE OF THE HIGH COURT, PRETORIA

I concur

[REDACTED]

R. FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 07 October 2024

Date of judgement: 21 January 2025

APPEARANCES

For the Appellant: Advocate WN Mothibe

Instructed by: State Attorney Pretoria

For the Respondents: Advocate H Lekalakala

Instructed by: MWIM & Associates Inc