

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A241/22**

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

21/01/2025

DATE

SIGNATURE

In the matter between:

FANKA FANKY ISAAC MAKOPO

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

MBONGWE J (HASSIM J and LESUFI AJ CONCURRING)

INTRODUCTION

- [1] This is an appeal against the judgment and orders of Makhoba, J dated 15 June 2022 in which he dismissed the Appellant's two claims for unlawful arrest and

detention without the relevant warrants of arrests having been issued. Makhoba, J found that the offence the Appellant was arrested for on 11 January 2015 and again on 14 February 2015 fell within the purview of Schedule 1 of the Criminal Procedure Act and that the arrests were in accordance with the provisions of section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 and, consequently, lawful.

THE LAW

- [2] It is trite that the right to liberty and freedom of movement is enshrined in the Constitution and the Bill of Rights. The infringement of that right and deprivation of a person's freedom of movement is, consequently, *prima facie* unlawful. In respect of an arrest and detention, it behoves the arrestor to produce justification for the arrest and detention. The Appellant's cause of action stems from his undisputed arrests on both 11 January 2015 and 14 February 2015 without warrants for his arrests having been issued. The Respondent, as the political head of the SAPS is obliged procedurally to commence and lead evidence justifying the arrests of the Appellant.

THE EVIDENCE AND BACKGROUND FACTS

- [3] The State called, as its first witness, Mr Skosana, who was the victim of the alleged assault that resulted in the arrests of the Appellant. Skosana (hereinafter referred to as 'the complainant') testified that he was driving his motor vehicle in Moteti Village, Mpumalanga Province, on 10 January 2015 when a motor vehicle

that was driving behind him collided with the back of his vehicle. He stopped his vehicle and noticed the passenger from the vehicle behind, Mr Nkoana, disembarking and walking towards his motor vehicle. Before he could reach the complainant, Mr Nkoana loudly advised the Appellant that the complainant was travelling alone. On hearing that, the complainant thought the occurrence was no ordinary accident, but a car hijacking. He got out of his vehicle and ran away. Nkoana, however, caught up with him and tripped the complainant who fell to the ground. When the Appellant came, the complainant pleaded with him to call the police. In response, the Appellant advised him that he was a police officer.

- [4] The Appellant and Nkoana tied the complainant's hands with a tie. The complainant asked why his hands were being tied and was told that it was because he had run away. The Appellant directed that they drive to the police station and that he would drive in his car with the complainant and that Nkoana was to follow in the complainant's vehicle.
- [5] The complainant questioned when the vehicles drove past the police station, but got no response. The vehicles proceeded to Moloto Village and stopped at a tavern. The complainant was taken inside the tavern where he saw a traditional healer. Both the Appellant and Nkoana went to have a private conversation with the traditional healer after which they went to another room where they talked to each other. They came out with the Appellant holding a sjambok and a knife in his hands. The Appellant demanded that the complainant undress and sjamboked him when he showed resistance. The assault continued as Nkoana undressed the complainant. The Appellant then grabbed the complainant's

genitalia and forcefully began to cut them with the knife. According to the Appellant's J88, the cut resulted in the exposure of one of the complainant's testicles.

- [6] During the assault, the complainant was given a note book by the Appellant who demanded that he writes in isiNdebele that the complainant will pay an amount of R5 000,00 for damages to the Appellant's motor vehicle and that payment will be made in two instalments of R2 500.00 and that, his vehicle will be released to him upon him effecting the last payment.
- [7] There was an interruption when three men knocked at the door. They had come to buy cigarettes. On seeing the condition of the complainant, one of the men enquired whether he had been assaulted or was in an accident. The man was rebuked by the Appellant and Nkoana, but the men shouted back. Shortly thereafter the Appellant advised Nkoana that they should drive to "*drop this thing*" (complainant) on Moloto Road.
- [8] After being dropped off, the complainant approached and sought help from a police officer whom he saw emerging. That officer called for an ambulance which transported the complainant to hospital.
- [9] On his discharge from hospital the following day, the complainant went to the police station to report the incident. He was taken by police officers to Moloto Village to point out the tavern concerned. The Appellant and Nkoana were found in the tavern. The police saw the bloodied chair the complainant sat on when he

was assaulted. The Appellant assaulted the complainant, in the presence of the police officers, for bringing them to his tavern. Having stopped the assault, one officer advised the complainant to lay charges against the Appellant whom they took along to the police station.

[10] On arrival at the police station, the complainant was taken into one room and the Appellant and Nkoana to a separate room.

[11] A police officer subsequently brought the Appellant and Nkoana to the room occupied by the complainant. The officer advised the complainant not to lay criminal charges against the Appellant, but the complainant turned down the advice. The officer then uttered the words '*this is not a court*', before he shook hands with the Appellant and Nkoana and left the room.

[12] The complainant was made to sign documents after which he together with the Appellant and Nkoana were taken in a police vehicle to Nkoana's house where the complainant's vehicle was kept. Though not specified, it appears that the complainant was handed his motor vehicle because he testified that he had asked the Appellant for money to buy petrol, but his request was turned down. The Appellant and Nkoana were released without a case docket having been opened.

[13] The complainant had to go back to hospital a few days later as his genitalia had swelled and become septic. He was admitted to hospital on 19 January 2015 and

discharged during February 2015 with instructions that he returns to the hospital every morning for his septic wound to be cleaned and treated.

[14] After his discharge, the complainant went to the police station again to lay assault charges against the Appellant and Nkoana. A case docket was opened. The complainant testified that on 14 February 2015 he pointed out the Appellant and Nkoana to the Investigating Officer, Tladi, who arrested them.

[15] It is noteworthy that the complainant testified that the wound was still septic during the trial and that he had not healed completely.

[16] The second witness for the defendant was the investigating officer in the matter, Tladi, a police officer with fourteen years of experience at the time. He testified that he was handed the case docket. During his interview of the complainant he had seen the wound that had been inflicted on the complainant by the Appellant and Nkoana and had arrested the two on 14 February 2015 upon them being pointed out by the complainant. Both suspects were kept in custody in the police cells and released on bail of R500.00 each on 16 March 2015. The defence then closed its case.

[17] I pause to state that it is not clear from the record what had transpired between the date of the second arrest on 14 February 2015 to 16 March 2015 when the Appellant was released on bail of R500.00.

[18] The Appellant/ Plaintiff moved an application for absolution from the instance;- (ought to be an application for the dismissal of the defendant's defence, in my view), on the grounds that no justification had been established for the arrests of the Appellant and the contention that as an assault with intent to do grievous bodily harm for which the Appellant was arrested is not a schedule 1 offence.

[19] The trial court dismissed the application reasoning that while Schedule 1 does not mention the offence of assault with intent to do grievous bodily harm, it does list a serious wound. It is clear that the trial court had concluded that the wound inflicted on the complainant and which it described as an almost castration, was a dangerous wound envisioned in Schedule 1. The complainant's J88 form that was handed in by agreement described the complainant's wound to his genitalia as a laceration exposing one testicle.

SUMMARY OF THE PLAINTIFF'S CASE

[20] The Appellant was the first witness to testify in his case. He testified that he was driving his motor vehicle on 10 January 2015 when the complainant's vehicle collided with his. The complainant had failed to stop after the collision resulting in him giving chase until the complainant's vehicle came to a stop when it collided with a school fence. The complainant had run out of his motor vehicle, but the Appellant and Nkoana chased, and apprehended, him.

[21] The Appellant had then suggested that they drive to the police station. He directed that he will drive with the complainant in his vehicle and that Nkoana will follow in the complainant's vehicle.

[22] As they were driving, the complainant pleaded with him not to report the accident as he (the complainant) was drunk and did not have a driver's licence. The complainant undertook to pay R5 000.00 in two equal instalments for the damages to the Appellant's vehicle and that his vehicle will only be returned to him when he makes the last payment. It was on this basis that the Appellant drove to his tavern for the agreement to be reduced to writing. The Appellant testified that he had informed the police that he was in possession of that agreement. The Appellant denied that he had assaulted the complainant.

[23] Mr Nkoana was the second witness called to testify for the Plaintiff/Appellant. In his evidence, Mr Nkoana corroborated the evidence of the Appellant. It was on this basis that counsel for the Appellant argued against the trial court's rejection of the Appellant's case. This argument had to be rejected as Mr Nkoana was not present in the Appellant's vehicle when the alleged agreement or undertaking by the complainant to pay for the damages to the Appellant's vehicle was allegedly concluded or made.

JUDGMENT OF THE COURT A QUO

[24] In his judgment handed down on 15 June 2022, Makhoba J found that the arrests and detentions of the Appellant were in accordance with the provisions of section 40(1)(b) and were, therefore, lawful. He dismissed both of the Appellant's claims

with costs. It is these orders that resulted in this appeal which comes before us with the leave of the court *a quo*.

APPELLANT'S GROUNDS OF APPEAL

[25] The gravamen of the Appellant's case on appeal appeared, save for the criticism of the trial court's preference of the version of the complainant, to rest on issues of law. In the appeal before us, this court is called upon to adjudicate on whether the trial court had erred:

- 25.1 in accepting the version of the State witness, Mr Skosana, who was the complainant in the matter that gave rise to the alleged unlawful arrests and detentions of the Appellant and rejecting the version of the Appellant.
- 25.2 in finding that the first arrest and detention of the Appellant on 11 January 2015 without a warrant issued for assault with intent to do grievous bodily harm was lawful;
- 25.3 in finding that the second arrest and detention of the Appellant on 14 February 2015 for the same offence was lawful.
- 25.4 in not finding that the offence of assault with intent to do grievous bodily harm does not fall within the purview of Schedule 1 of the Criminal Procedure Act 51 of 1977.

25.5 in not finding that the second arrest and detention of the Appellant for the same offence he had earlier been arrested and detained for on 11 January 2015 amounted to double jeopardy.

25.6 in dismissing the Appellant's claims with costs.

PRINCIPLES APPLICABLE ON APPEAL

[26] It is an established principle of our law that a court hearing an appeal has very stringent authority to interfere with the factual findings of the trial court. The court of appeal will only interfere where it is clear that the trial court had misdirected itself in its findings on the facts or the application of the law in the matter before it resulting in a clearly incorrect decision being made.¹

THE LAW

[27] The provisions of Section 40 (1) (b) of the Criminal Procedure Act, set out the essential jurisdictional grounding for the execution of an arrest without a warrant and read thus:

"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 escape from lawful custody."

[28] There is a plethora of authorities dealing with and giving clarity on the concepts of a reasonable suspicion that has to be based on reasonable grounds.² An important aspect to be constantly borne in mind is that the arresting officer has a

¹ See *Director of Public Prosecution Gauteng v Pistorius* 2016(1) SACR 413 (SCA)

² See *Duncan v Minister of Law and Order* 1986 SA (2) 805 (A)

discretion and which he must exercise reasonably having regard to all the circumstances pertaining to the case.

THE CONSTITUTION

[29] In terms of the Constitution every person has a right to liberty and freedom of movement. The arrest and detention of a person constitutes an infringement of this right and is, consequently, prima facie unlawful. It is for this reason that the law imposes an obligation on the arrestor to provide a justification for the arrest to demonstrate that the arrest was lawful.

[30] The issue of a suspicion and the reasonableness or lack thereof in effecting the arrest did not arise as the arrest was the result of a complaint that the complainant had been abducted, viciously assaulted and robbed of his motor vehicle by the Appellant, who had impersonated a police officer, and Nkoana. These are serious offences which led to the police proceeding with the complainant to the Appellant's home on 11 January 2015. They found the Appellant present. The Appellant became aggressive and assaulted the complainant again – this time in the presence of the police. The police had stopped the assault, advised the complainant to open a case against the Appellant whom they took along to the police station. It cannot be argued that the police had not acted justifiably in taking the appellant along to the police station when the assault on the complainant was committed in their presence. There were, in my view, two justifying factors for the arrest of the Appellant.

[31] The developments at the police station do not, however, suggest that the Appellant had actually been arrested. In particular, both the Appellant and

Nkoana were accommodated in one room, not a police cell, and so was the complainant, albeit in a separate room. The Appellant and Nkoana were removed from their room to the room the complainant was in. In the presence of the Appellant and Nkoana, the police officer advised the complainant not to open a case against the Appellant. Despite his refusal, the complainant was made to sign a document before he, together with the Appellant and Nkoana were driven to Nkoana's house where the complainant was handed possession of his vehicle and the Appellant and Nkoana released.

[32] The aforementioned developments appear to me to have been some sort of mediation as opposed to an arrest and detention that would entitle the Appellant to a claim. The Appellant's testimony that he had thought the case was finalised in this fashion, although misguided, serves as confirmation of the purported mediation. The Appellant knew that the complainant had rejected the advice that he should not lay charges against him, in the first instance. It is unfortunate that the Appellant's counsel appeared to have shared the same misconception as the Appellant – hence his incorrect argument that the trial court ought to have found that the second arrest on 14 February 2015 amounted to a double jeopardy. In my view, the Appellant was neither arrested nor detained on 11 January 2015. I expand on the basis of this view later. In any event, even if it was to be viewed as an arrest, the trial court's finding that both arrests had been lawful would still be supported by the facts.

[33] In respect of the second arrest on 14 February 2015, a case had been opened and amongst the docket contents was a completed J88 form describing the serious injuries the complainant had suffered. The investigating officer had

properly exercised his discretion in arresting the Appellant on the basis of the contents of the J88 form.

- [34] At the heart of the dispute with regard to both arrests and detentions was the contention proffered on behalf of the Appellant that assault with grievous bodily harm for which the Appellant was arrested does not fall within the purview of Schedule 1. It is important to note the basis of the findings of the trial judge in this regard, where he states at para 49 of the judgment:

"[49] 'Taking into account the nature of the injury sustained by the complainant and the duration of his stay in hospital, I am satisfied that the injury sustained is likely to endanger life or the use of a limb or organ. I am therefore of the view that the offence the plaintiff was arrested for is listed in the schedule. I am also of the view that when Sergeant Tladi arrested the plaintiff he exercised his discretion properly.'"

Elsewhere in the judgment the learned judge described the nature of the complaint's wound as a near castration of the complainant. This more than adequately reasoned finding cannot be faulted, in my view. The Appellant's contention otherwise stands to be dismissed.

- [35] The Appellant's argument that the trial court had erred in not finding that the second arrest of the Appellant on 14 February 2015 for the same offence he had earlier on 11 January 2015 been arrested for amounted to a double jeopardy lacks legal grounding and displays a misunderstanding of the concept of double jeopardy. Double jeopardy occurs where the offender who had previously been found guilty of committing a wrong and sanctioned is later charged again for the

same offence and it is sought that he be sanctioned again. The second arrest of the Appellant was due to the insistence of the complainant to lay the charge he was prevented from laying against the Appellant on 11 January 2015. Double jeopardy does not find application in the circumstances of this case and the Appellant's contention stands to be dismissed.

[36] The last of the grounds of appeal is in respect of the contention that the trial court had erred in accepting the uncorroborated version of the complainant and rejecting the corroborated evidence of the Appellant. Having read the record of the proceedings in the court *a quo*, I find that the trial court correctly found that the Appellant's version was a fabrication and rejected it.

CONCLUSION

[37] In line with the findings in this judgment, the appeal must fail.

ORDER

[38] The following order is made:

1. The appeal is dismissed with costs.



MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Appellant: Adv D. Mosoma, Adv TT Sebata

Instructed by: GMI Incorporated

For the Respondent: Adv S Manganye

Instructed by: State Attorney, Pretoria

Date of hearing: 10 October 2024

Date of delivery: 21 January 2025

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 21 JANUARY 2025.