

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

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

20 November 2024
DATE


SIGNATURE

CASE NO: 6031/2018

In the matter between:

LEBOGANG DITLHOKWE

Plaintiff

and

MINISTER OF POLICE

1st Defendant

MBULUNGENI STEPHEN NESENGENI

2nd Defendant

THAPELO PHEKENYANE

3rd Defendant

JUDGMENT

(The matter was heard on 17 September 2024 in open court and after hearing counsel for the parties, judgment was reserved. The reserved judgment was handed down by uploading the judgment onto the electronic file of the matter on CaseLines and the date of the judgment is deemed to be the date of uploading of the judgment onto CaseLines)

BEFORE: HOLLAND-MUTER J:

[1] The Plaintiff instituted two claims against the Defendants for (1) the alleged unlawful arrest and (2) his subsequent detention at the Kagiso Police Station on 6 July 2015. The Plaintiff was taken to the Kagiso Police Station by members of the police on suspicion of theft of a cell phone and detained at the police station for approximate 2 hours. He was not charged of any offence before he was released by the police after his arrest.

[2] The parties agreed beforehand that the issue of quantum and merits be separated and the court was only to determine the merits issue and that the quantum issue is postponed *sine die*. The alleged quantum is R 19 013 536-00, the amount for alleged future loss of income, past loss of income, future medical expenses and general damages. The question of what quantum, if any, to be awarded is not before this court.

[3] The Defendants initially filed a special plea regarding non-compliance with the provisions of Act 40 of 2002 regarding the notice of intention to institute legal proceedings against the Defendants but the special plea was no longer persisted when the Defendants filed the amended plea.

[4] The Defendants denied that they unlawfully and intentionally deprived the Plaintiff of his liberty and further that they assaulted the Plaintiff. The

amended plea impacted on the onus to prove and this will be discussed later. The Plaintiff proceeded to start with presenting evidence.

EVIDENCE ON BEHALF OF THE PLAINTIFF:

LEBOGANG DITHLOKWE:

[5] He is the Plaintiff in this matter. He resided in Kagiso and went to visit an ill child a few houses from his parental home, the child related to him via his father. They were sitting inside the house around a table when another young child entered the room saying that she lost his cell phone. He suggested that the child contact her mother to inform her but this led to an argument and he decided to leave for his own home a distance away.

[6] While he was leaving the premises the children shouted at him accusing him of stealing the phone. He returned to his parents' home and after a while his mother and younger brother came into the house.

[7] Shortly thereafter, about 15:00, the young child who accused him of stealing the phone and her mother entered the Plaintiff's family home. The mother, also known as "Mama", demanded from him to give her the missing cell phone but he replied that he did not have the phone.

[8] This lady, "Mama", told the Plaintiff's mother that if they do not give the cell phone, she will contact the police to solve the problem. The Plaintiff's mother invited Mama to proceed and contact the police. It was almost 15:30 when Mama left. Shortly thereafter a young boy came to the house and informed the Plaintiff that the police wanted to talk to him. He left his house and while walking along the street to Mama's house, a police vehicle (single

cab bakkie) stopped next to him and he was told to get inside the bakkie. One of the officers said he must produce the phone and the passenger officer scratched his back with what he perceives to be a key. He sat between the two police officers and they proceeded towards Mama's house.

[9] Arriving at Mama's house the police informed Mama that he did not produce the phone. Mama then said the police must take the Plaintiff to the police station. The police and the Plaintiff left for the police station with the Plaintiff seated between the two police officers in the bakkie. They proceeded to the Kagiso Police Station for what was later called a *preliminary investigation* by the officers.

[10] On arrival at the police station, he was taken to a room inside. The room had a long bench to sit upon and he was seated on the bench with his feet apart. There was a water tap on the side wall in the room. His hands hanging over the arm rest, were handcuffed with his feet underneath the arm rest of the bench and his hands over the arm rest.

[11] The one officer had a plastic container with water and he poured some water over the Plaintiff's head and body. He was asked to produce the phone but his reply was that he did not have the phone. The other officer had a soaked wet plastic bag which he placed over the Plaintiff's head. As he was blinded by the plastic bag, he could feel that someone tugged his T-shirt up and he felt a shock on his body with a hand held electric current. He was again asked to give the phone but he did not have a phone.

[12] The ordeal with the electric shock continued for some time while the plastic bag was removed from his face. The bag was again filled with water by the one officer who said "*I will deal with you*". The bag was again stretched over his head and the electric shock continued. He was struck with a police baton on his legs by the other officer and they continued to torture him for

some time, continuing asking for the phone. The one said that they will not let him go before he wets his pants. The one officer took the Plaintiff's cell phone from his pocket and smashed it on the floor before the Plaintiff.

[13] His nose started to bleed and he was instructed to wash his face and he used his T-shirt to clean his face. The plastic bag was drawn over his face and head for a third time and he was gasping for breath. He was again tied up to the bench with the handcuffs and they continued to ask about the phone. He recalls being handcuffed at least three times. He eventually wet his pants after the continuous assault on him. This ordeal continued for at least until 18:00.

[14] He was taken back to the police vehicle around 18:00 when they pushed in inside the back of a police van and returned to Mama's house. On arrival the police informed Mama that the Plaintiff did not have the phone. On entering the premises and after Mama was informed that he did not have a phone, the next door neighbour lady asked the Plaintiff what happened and said to the Plaintiff: *"Tshepo, please tell the truth, did you take the phone"* and the Plaintiff answered that he did not take the phone. He again said he did not have the phone and that he wanted to go home. He still had his blood stained T-shirt with him.

[15] When he arrived home at about 18:00, his mother inquired what happened and asked about the blood on his T-shirt. He explained what happened and she took him to the police station. A senior police officer helped them and the Plaintiff accounted what happened. He was given a J 88 medical form and went to the hospital because he was experiencing breathing problems. He was not admitted to hospital but the J 88 was completed at the hospital. He later received an anonymous phone call insisting that he withdraw the charges he pressed. He could not identify the caller.

[16] There were certain aspects where his evidence differed from the version put to him during cross-examination and the court will deal with these aspects below.

[17] He is adamant that his constitutional rights were never read or explained to him during the whole incident. He also stated that the officers smashed his Nokia phone in his presence at the police station.

[18] The J 88 medical form completed by a doctor at the hospital recording certain "*abrasions on the back and wrists with a 1 cm scratch on his back*". The scratch was where the one officer scratched him in the bakkie with a key. No other visible injuries were noted.

[19] The pleadings mentioned that the police officers hit him with a sjambok but he did not testify to that. He persisted that they hit him with an unknown object on his back but no marks were noted by the doctor.

MAKUTU ONICA DITHLOKWE:

[20] She is the Plaintiff's mother. She, "Onica", corroborated his version that Mama came to their house accusing the Plaintiff of theft of a cell phone. When asked whether Mama saw the Plaintiff taking the phone, Mama replied that one of the children made a report to her that Lebogang took the phone. The Plaintiff denied the accusation when Mama accused him of the theft and Plaintiff's mother told Mama that she can report it to the police. Mama left and shortly thereafter a young child came and informed the Plaintiff that the police was looking for him.

[21] Onica told the Plaintiff to go to where the police was but she did not accompany him. She later sent her brother to go and search for the Plaintiff at Mama's. He later returned and the Plaintiff came home some two (2) hours later. It was almost at sunset.

[22] The Plaintiff was crying while holding his stomach. She observed that the Plaintiff was in pain and saw the blood stained T-shirt. The Plaintiff was gasping to breath. The Plaintiff reported what happened and she took the Plaintiff to the police station. The officer attending to them gave her the J 88 form to take to a doctor to complete which she did. She saw the mark on the Plaintiff's side looking like a "*bitten*" mark. This was the scratch by the key done by the one officer.

[23] This concluded the evidence on behalf of the Plaintiff.

EVIDENCE ON BEHALF OF THE DEFENDANTS:

THABELA AUBREY PHEKONYANA:

[24] He is a member of the police services stationed at the Kagiso police station. He has 21 years of experience as a police officer.

[25] He was performing patrol duties on 6 July 2015 on the streets of Kagiso. He was accompanied by his fellow officer Mbulungeni Stephen Nesengani when they received a radio message of a complaint. He was the driver of the police bakkie.

[26] On arrival at the address given, he met Mama who made a report that the child's cell phone was stolen. The boy who allegedly stole the phone was on the premises and was called to the police. The boy came out from the house to them and after they explained the reason for their presence, the boy denied taking the phone.

[27] Mama suggested that they take the boy to the police station to question him. The police decided to follow the suggestion and took the boy in the vehicle to the station. The boy was in the single cabin between the two officers. After arriving at the police station, they took the boy into a small office where there were a table and chairs.

[28] In the office they again asked the boy (the Plaintiff) about the phone and he replied that he knew nothing of a phone. This interrogation went on for about ten minutes. The witness did not describe what and how the interrogation was conducted. They then returned to Mama's place with the Plaintiff and told her the boy was sticking to his denial that he knew nothing of the phone. They asked Mama whether she wants to open a case and she declined it. They left the Plaintiff there and left the premises.

[29] Phekenyane said nothing about any assault or about the allegations that the Plaintiff was handcuffed or that a water filled plastic was drawn over his face and head. His version was a blank denial that they assaulted and tortured the Plaintiff. He said the sole purpose of a *preliminary investigation* was a step prior to the opening of a case. He did not explain what exactly happened during the *preliminary investigation*. He only stated that it depends on the charge pressed and the questions asked. This aspect was left hanging in the air.

[30] He admitted that the Plaintiff was handcuffed because a crime was committed, but immediately tried to down talk it by saying handcuffing depends on the nature of the crime and the person involved. This was with

respect a feeble attempt to justify any handcuffing. This explanation is with respect void of any truth.

MBULUNGENI STEPHEN NESENGANI:

[31] The witness testified that he was a police officer for 15 years. He was on patrol duty in Kagiso with his colleague when they received a report of alleged theft. They arrived at the premises of the complainant, one Mama, who made a report that a boy stole her cell phone.

[32] She left them at the gate, went inside her house and returned with a boy whom she alleged was the culprit. They, he and his colleague, questioned the boy there on the street without success.

[33] They took the boy (the Plaintiff) with the police bakkie to the police station. On arrival at the police station, they took the Plaintiff into a room close to the charge office. The Plaintiff was seated on a chair and they questioned him about the phone. The Plaintiff denied the allegation and this *interrogation* continued for about ten minutes.

[34] They took the Plaintiff back the premises of Mama and informed her that the Plaintiff had no knowledge of a phone. They asked Mama whether she wants to charge the Plaintiff but Mama said no.

[35] Although the witness stuck to his version during cross-examination to deny any assault of the Plaintiff, he also did not give any explanation what is meant by the *preliminary investigation* that they conducted. All that the court can infer from their version is that they asked him a couple of times about the phone. This explanation has no merit. He did however concede that although the complainant asked them to take the boy to the police station, he took the decision to take the Plaintiff to the station.

[36] The Defendant's case was closed while the court thought that Mama would also testify as she was the complainant in the alleged theft matter.

EVALUATION:

[37] The court is faced with two destructive versions. Both cannot be true. The court has to compare the versions with the other to decide which version is the truth and which version should be rejected.

[38] The test to determine which version should be accepted and which can be rejected has been confirmed in **Dreyer v AXZS Industries 2006(5) SA 548 SCA p558 C-G**. The SCA confirmed the decision on **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003(1) SA 11 SCA** pars [5-7] and [14-15]. The court has to make a finding on *(a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities*.

[39] The court has to consider the impression the witness made while testifying; the candour and demeanour of the witness in the witness-box; his bias; internal contradictions in his evidence; external contradictions with what was pleaded or put on his behalf; the probabilities or improbabilities in his version; his performance compared with the other witnesses testifying over the same incident; his reliability depending on the opportunities he had to experience or observe the event in question; the quality and independence of his recall of the incident and also where the onus to proof was and was it successfully discharged?

[40] The onus to proof in matters of unlawful arrest and detention rests on the Defendant. Section 40(1)(b) of the Criminal Procedure Act, Act 51 Of 1877 (CPA), is clear on this. It is then for the Defendant to prove that the arresting officer had a reasonable suspicion that the suspect was guilty of an offence as

referred to in Schedule 1 of the CPA, that the arrestor entertained a suspicion on reasonable grounds. These are the so-called jurisdictional facts. Should the arrestor succeed in proving these facts, the arrest is lawful. See **Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 SCA**.

[41] In **Minister of Safety and Security v Swart 2012 92) SACR 226 SCA at 232** it was held that the reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same facts form a suspicion that a person has committed a schedule 1 offence.

[42] Taking the facts into consideration, the court is of the view that the police officers must have had doubt whether the Plaintiff took the phone. He was questioned there on the spot by the police and the answer remained the same that the Plaintiff denied any knowledge of theft thereof. It was in the presence of Mama and on her suggestion, Officer Nesengani decided to take the Plaintiff to the police station for *preliminary investigation*. If it was clear from the questioning at the premises of Mama that the Plaintiff denied any theft, it is difficult to understand what similar questioning at the police station would result in. in view of the vague explanation what a *preliminary investigation* was, it is difficult to accept the version of the two police officers on this aspect.

[43] The police denied any assault of the Plaintiff but his version of blood on his T-shirt is corroborated by his mother. Although the J 88 does not indicate much, the fact that there was a scratch recorded that coincides with where the Plaintiff said the one officer scratched him.

[44] The difference in time at the police station favours the Plaintiff; the police aver that they questioned the Plaintiff for not more than 10 minutes but his mother corroborates the Plaintiff's version that he was at the station for almost two hours. Having considered all the aspects in the evidence, the court

is satisfied that the version of the Plaintiff should be accepted and that of the police officers be rejected. There is sufficient acceptable evidence that the Plaintiff was indeed assaulted at the police station.

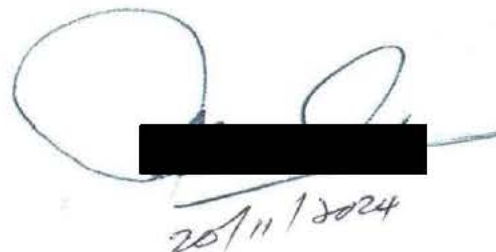
[45] Regarding the arrest, the police officers admitted that the Plaintiff was handcuffed at some stage and he was taken to the police station under their control. This action by the police can only be regarded that the Plaintiff was arrested and his liberty was infringed. There are various cases finding that the limitation of a person's movement or restriction of his liberty amounts to arrest. It is not necessary to formally inform the suspect that he was now arrested. The arrest can be inferred from the factual occurrence.

[46] The police did not form their own suspicion but acted on the suggestion of Mama. In view of the constant denial by the Plaintiff it should have dawned to the police that the allegations are not sufficient to form a reasonable suspicion that the Plaintiff committed a schedule 1 offence. Although the two police officers' evidence was to a certain extent very similar, it remains debatable why their versions were so closely the same. The downfall to a large extent was that they did not explain what the *preliminary investigation* came down to and why was it necessary to take the Plaintiff to the police station where they gained nothing more from questioning the Plaintiff. The reasonable inference is that they took the Plaintiff to the police station to extract some sort of admission from him in an environment conducive for such *preliminary investigation*. The court is of the view that the police officers arrested the Plaintiff without a warrant and that the arrest amounts to an unlawful arrest.

ORDER:

1. The Plaintiff's claim for unlawful arrest, detention and assault is granted with costs. Costs to be on a party-and-party Scale, Scale B.

2. The issue of quantum of damages suffered by the Plaintiff consequent the injuries he sustained as a result of the unlawful arrest, detention and assault is postponed sine die.



Judge of the Pretoria High Court

Matter was heard on 12, 13 & 17 September 2024

Judgment handed down on 20 November 2024

Appearances:

Obo the Plaintiff: Adv M G MOLAI

Obo the Defendants: Adv M M MABODJA (KGWALE)