

REPUBLIC OF SOUTH AFRICA



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

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

11/12/2024
DATE


SIGNATURE

CASE NO:11614/17

In the matter between:

ELLIOT BOGEBE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

BEFORE THE HONOURABLE JUDGE, MATJELE AJ

1. In this action matter, Mr. Elliot Bogebo, the plaintiff, is suing the Minister of Police, the defendant, for unlawful arrest and detention by members of the SAPS. It is not

in dispute that the plaintiff was arrested on the 28th February 2014 and remained in custody until he obtained bail on the 9th April 2014. He effectively spent a month and two weeks in police custody.

2. What is in dispute is lawfulness of the arrest and subsequent detention till release on bail. As the onus and duty to begin is on the Defendant, two witnesses testified on his behalf being the alleged arresting officer, Sergeant (Sgt.) Ms. Kedibone Eunice Marumolo (formerly surnamed Goretetseng at time of incident); and the investigating officer (I/O) Sgt. Mr. Hilgard Alson Nene. Only the plaintiff, Elliot Bogebo, testified on his behalf, after the defendant closed its case.

Evidence:

3. Sgt. Marumolo testified that on the 28th February 2014 she, while in the company of her crew driver Sgt. Ntobeng, a male officer, patrolling and carrying out visible policing duties on the streets of Kwa-Thema township, received a police station radio call that there was an armed robbery suspect at a certain tuck-shop situated at 47 Job Maseko Street in KwaThema, which was not far from where they were. They rushed there.
4. Upon arrival there, she interviewed the complainant, owner of the tuck shop, who was already in the company of Sgt. Ngobeni, her colleague who was not on duty at the time. The complainant pointed at the Plaintiff, who at the time was standing at the window of the tuckshop as one of the three people who robbed him and his cousin earlier that month on the 15th February 2014, at their other tuck shop situated at Lepelle Street, Kwa-Thema. The presence of Sgt Ngobeni who was not

on duty, at the scene of arrest is not disputed. Only the role he played is on the day in question is in dispute.

5. Upon interviewing the complainant, he informed her that the plaintiff was one of the three robbers who robbed him and his cousin. One of the robbers had pointed him with a firearm, while the plaintiff is the one who searched him, taking from him a Black-Berry cell phone and money, before all three fled. Upon being questioned if he is certain about the plaintiff's identity, he maintained it was him, and explained his role and that when he searched him they were facing each other, and also he knows him as his customer in the vicinity of his tuck shop, not living far away from where the incident took place.
6. She thereafter went to the suspect, the plaintiff, and interviewed him. She asked if he knew the complainant, and he confirmed knowing him, as he sells at a tuck shop not far from his house, referring to the tuck shop on Job Maseko Street. She told him allegations by the complainant, which allegations he denied. Showed him her appointment card and told him her name. She then informed him that she was going to arrest him for the alleged armed robbery. She read him his constitutional rights to legal representation, to remain silent, and the right to be released on bail. He then asked her crew Sgt Ntobeni to search him. He was searched and nothing was found on him. She handcuffed him and took him to Kwa-Thema Police station with their marked police van.
7. Asked what was in her mind to arrest the plaintiff despite his denial of allegations, she stated that it's because the complainant pointed him out.

8. At the police station, she entered him in the SAP 14 register as an arrested person, and then gave him a written notice of his rights, which both the plaintiff and her signed. Because there were no detention cells at Kwa-Thema police station, they took him to Dunnoter police station where he was left with the police commanders there for detention.
9. She was confronted with complainant's statement which says at robbery, they were inside the car when approached by the 3 assailants, and not outside and offloading at the time of the incident, and could not have been face to face with the complainant, as alleged by the complainant. She maintained what she was told by the complainant. Asked why she did not investigate further, she indicated that it is the investigating officer's job, and not hers.
10. The second witness of the defendant, Sgt. Hilgard Alson Nene, the investigating officer (I/O) in the matter, testified that he was a constable at the time he investigated the matter in 2014. Per trial bundle he received the docket for investigations on the 18th February 2014, from his superior. This is obviously 10 days prior to the plaintiff's arrest. It is his evidence that he followed all processes as an investigation officer in handling the plaintiff's case after his arrest till he obtained bail.
11. According to him this was a schedule 6 offence, for which he was opposing bail. In addition, he opposed bail because the plaintiff had a previous conviction of theft, relevant to charge he was facing of armed robbery. He denied all suggestions that the release of the plaintiff was delayed by his failure to attend court. He insisted that he was in court at all times the matter was in court, contrary to what was recorded on the charge sheet. He maintained that It is rather the plaintiff who

delayed his release by changing lawyers often, at least three times, which would necessitate consultation by plaintiff with each lawyer, thereby leading to the individual postponements.

12. The plaintiff, Mr Elliot Bogebo, testified that on the 28th February 2014 he was going to church with his sister and niece, when he decided to stop at the tuck-shop in Buti Street, to buy cigarette. While so doing with a R100 note, he was given his 20 pack of RG Switch cigarette, but the person inside the shop asked where he got such a big amount of money from, referring to his R100 note. This Pakistan man even surmised that it must be his own money. He caused him to wait for a while looking for change. While so waiting another African male person whose name he does not know, and who did not introduce himself, just tapped him on the shoulder and showed him a card with inscription "SAP" and a police badge. He told the plaintiff that he heard what the seller said. This person took him into his unmarked double-cab van, and then drove with him to another tuck-shop situated at Job Maseko Street.

13. While seated at the back seat of this unmarked vehicle, a marked police van arrived. Two police officers, a male and a female, arrived. The female remained next to their marked vehicle, whilst the male officer is the one who approached him, took him out of the vehicle he was seated at, searched him, and took him to their marked police van. He denied that he was taken by the female police officer, Sgt. Marumolo, to their van. During the escort, the Plaintiff noticed a Pakistani individual taking his photograph with a cell phone. He requested the police officer to inspect the individual's phone for the photograph, but this request was denied. He also

denied being processed at the Kwa-Thema Police station by the same female officer, but by the male officer who took him to the marked police van.

14. He says no constitutional rights were explained to him either at the scene of the arrest, or at Kwa Thema police station. At the station, he overheard discussions among the officers regarding charges of robbery, cell phones, money, and the use of a firearm. However, he was not personally informed, nor was he formally charged at Kwa Thema Police Station. He was later transferred to Dunnottar Police Station, where he was officially charged only on Sunday, 2 March 2014, around 16:00.

15. At Dunnottar Police Station, he was confined in a small cell of approximately 3 meters by 3 meters in size, with five other detainees. He was harassed by these detainees, demanding money and cigarettes, and physically assaulting him. He did not receive medical treatment for the injuries he sustained. The police officers did not take action after he reported. There was no privacy when one uses the toilet, as there was no door leading to the toilet. Each detainee was provided with three blankets: two to be placed on the concrete floor for sleeping and one for covering.

16. On Monday, 3 March 2014, the Plaintiff was taken to Springs Court for his initial appearance. On that bail application day and subsequent bail appearances, his bail was opposed by the investigating officer. According to him the I/O, whose identity he could not recall, was consistently not present in court, which resulted in several postponements of bail application purposes.

17. Upon returning from his first appearance in Springs court, he was transferred to Modderbee Prison, where he remained until his release on bail. The cell at

Modderbee Prison was approximately 3 meters by 10 meters in size, accommodating between 40 and 42 prisoners at a time. He experienced continual harassment and physical assault by fellow inmates, demanding money and cigarettes, with such incidents occurring primarily in the showers or toilets, areas not visible to prison officials. He says he had been separated from his wife and children for a period of one month and two weeks, when he was released on bail on the 9th April 2014.

18. There are two directly opposing versions before court as to where exactly the plaintiff was arrested, whether his constitutional rights were explained, whether the arresting officer asked him any questions at the scene of arrest or not, whether the I/O deliberately prolonged his stay in custody pending bail application.

19. What is common cause and established fact is that the plaintiff was arrested and detained pending bail application, and in total stayed a month and two weeks in police custody.

Issues

20. The issues in dispute are:

- a. Whether the plaintiff's arrest was lawful? The crucial issue that arises in this case is whether the arresting police officials, acting on the allegations of the complainant, formed a reasonable suspicion that the plaintiff had had been one of the three robbers who robbed the complainant and his cousin at gun point, as contemplated in section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA); and

- b. Whether the subsequent detention after arrest, until bail was granted, was lawful or unlawful within the ambit of section 50 CPA?

Law

21. It is trite that the *onus* rests on the arresting officer to prove the lawfulness of the arrest. The reasonableness of the suspicion of an arresting officer acting under section 40(1)(b) of the CPA, must be approached objectively. The question, therefore, is whether any reasonable person, confronted with the same information the arresting officer was apprised of, would form a suspicion that the plaintiff had committed the alleged offence, which is a Schedule 1 offence?

22. Section 40(1)(b) of the CPA deals with arrests without a warrant, and provides as follows:

'40. Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person –

(b) whom he reasonably suspects of having committed an offence referred in Schedule 1, other than the offence of escaping from lawful custody.'

23. Of the essential facts having to be present to justify an arrest without a warrant, it is for purposes of the present case, only necessary to consider whether the suspicion was based on reasonable grounds, as held in cases of Duncan and Sekhoto decisions.¹

¹ *Duncan v Minister of Law & Order* [1986 \(2\) SA 805](#) (A) at 818G-H; and *Minister of Safety & Security v Sekhoto & another* [2011 \(1\) SACR 315](#) (SCA) para [6].

24. The peace officer needs to prove the jurisdictional facts in the said section first.

Once proven, then the discretion whether to arrest or not arises. The intention for arresting should be for only one reason, to bring the arrested person to justice.²

25. Exercise of discretion to arrest by the arresting officer must be applied in good faith, rationally and not arbitrarily, as stated in *Devenish v Minister of Safety and Security*.³ In terms of this case the arresting investigating officer should listen to people who allege to have witnessed the offence, and who claim to be eyewitnesses, analyse and assess the quality of their information prior to effecting an arrest. In *Sithebe v Minister of Police*⁴ such an eyewitness was available at arrest telling the police they are making a mistake, but they proceeded with the arrest nonetheless, only relying on the pointing out by the complainant, who was also present at arrest.

Reasonable suspicion

26. In the present case, it is not the investigating officer who effected the arrest but patrolling police officers, including Sgt. Marumulo, who responded to a radio call from the police station as to the whereabouts of a wanted suspect in respect of an already open armed robbery case. They responded not in possession of a docket.

27. They interviewed the complainant and the plaintiff who were both at the scene. According to the arresting officer, Sgt. Marumulo, the complainant positively identified the plaintiff as one of the assailants. As to his role in the alleged robbery, he told her that he is the one who searched him taking his money and cellphone,

² *Minister of Safety & Security v Sekhoto & another* Supra at paras 29-31.

³ *Devenish v Minister of Safety and Security* (unreported, GJ case no.07151/2013, 20 May 2016 at 101 to 106.

⁴ 2014 JDR 1882 (GJ) 189-191

while another was pointing him and his cousin with a firearm. When she reverted to the plaintiff, he was silent or denying involvement and decided to effect arrest. Other than Sgt. Ngobeneni who was in the scene, though not on duty.

28. As to how she formulated a reasonable suspicion to justify arrest, she stated that the complainant said he knew the plaintiff well even before the incident, and even on his police statement made before arrest, "A1" statement, he did not know the robbers' names but could identify them as he knew them, all living in Kwa-Thema. This meant the complainant knew them even prior to the incident, which in the mind of Sgt. Marumulo eliminated the prospect of mistaken identity.

29. I am also satisfied that the arresting officer's decision to arrest of the plaintiff was in good faith, applied rationally and not arbitrarily. She told the court that there was no way she would let the plaintiff go in the midst of the fire armed robbery allegations, and expect him to bring himself in court. All other further investigations she left to the investigating officer to do, as she was not so appointed.

Arrest and detention

30. As stated above, there are two directly opposed versions before court as, to where exactly the plaintiff was arrested, whether his constitutional rights were explained, whether the arresting officer asked him any questions at the scene of arrest or not, and whether the I/O deliberately prolonged his stay in custody pending bail application.

31. Where there are two directly opposing versions before **court**, the plaintiff can only succeed if he shows that his version, as a matter of probability is true, and that of the witnesses for the defendant, false. See *Cotler v Variety Travel Goods (Pty) Ltd.*

⁵ Also The determination of issues herein requires me to assess the credibility of the witnesses, their reliability and the probabilities.⁶

Unlawful Arrest:

32. I will start with arrest and then end with detention. The allegations of assault I will not entertain, as this cause of action has not been pleaded by the plaintiff.

33. As to where the plaintiff was arrested whether at a tuck shop at Buti Street or one at 47 Job Maseko Street, I will begin by stating that it is common cause that there was Constable Ngobeni who was not on duty, upon the arrival of Marumulo and her crew at Job Maseko street. The plaintiff alleges he was arrested at a tuckshop in Buti Street, and brought to the another in Job Maseko street by Ngobeni. This allegation is disputed by the defendant's counsels, to the extent that they argue that if such happened the plaintiff should lay charges of abduction. I reject this version by the plaintiff in that from his evidence, the Pakistani national who delayed giving him his change, according to him, was at Buti Street, where he was tapped on the shoulder by Constable Ngobeni, and apprehended. On the other hand, Sergeant Marumulo interviewed the same Pakistani victim at Job Maseko street, where the plaintiff admits is where he was arrested by SAPS members in a marked police vehicle. According to his version he left Buti Street in the company of this person who only showed his SAPS card, Ngobeni. Yet upon the arrival of Marumulo and crew at Job Maseko, she finds and interviews the complainant at Job Maseko street, not Buti Street.

⁵ *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A).

⁶ *Stellenbosch Farmers Winery Group Ltd and another v Martell Et Cie & Others* 2003 (1) SA 11 (SCA) and para 5.

34. There are clear loose ends in the plaintiff's version, as only he and Cst. Ngobeni left Buti street going to Job Maseko street. No explanation is tendered as to how the said Pakistani national left the Buti Street tuckshop, and happened to be interviewed by the police at Job Maseko street tuck shop. The plaintiff could not assist the court because when asked about the identity of the Pakistani he bought from at Buti Street, where he always bought cigarette from every day for the last three years prior to the incident, he battled to identify him. As a result, he couldn't be asked if the Pakistani national who alleged the money belonged to him at Buti Street is the same person Marumulo said she spoke with upon arrival at Job Maseko Street. The whole allegation of his arrest in a different street is not sustainable, and is therefore rejected as untruth.

35. The plaintiff denies that he was arrested and charged by the female officer, Sergeant Marumulo, but by her male counterpart, Sgt. Ntobeng. Objective evidence, the constitutional rights form signed by both the plaintiff and Marumulo at the police station, indicates otherwise. It is indeed illogical why Sgt. Ntobeng would effect the arrest and later hand the suspect at the police station, yet assign Marumulo, his female colleague, to replace him by making an arresting statement, sign constitutional rights form and all other things like SAP 14, for the work done by him.

36. If the plaintiff was alleging that Ntobeng had violated him in one form or another, this would make sense. However, according to the plaintiff, the latter did not assault him or do anything bad towards him, except taking him to the police van, and later into the police station upon arrival there. On the other hand, according to Sgt. Marumulo she effected the arrest and also processed the accused at the police

station, which is corroborated by documentary evidence: the docket, arresting statement and constitutional rights form. The plaintiff's version in this respect stands to be rejected, and that of the defendant accepted as truth.

37. The plaintiff denied that legal rights were ever explained to him whether at scene of arrest or at the police station. Sergeant Marumulo argued she did on both occasions, and further averred in respect of the latter that she even gave them to the plaintiff in written format. The latter has been proven to be true, and the plaintiff conceded same and confirmed the signature next to that of Sgt. Marumulo to be his. This confirms the defendant's version to be true in respect of date and what actually occurred. It follows that I have to accept the defendant's version of events that even at the scene of arrest same were explained, and therefore reject the plaintiff's version in totality regarding the explanation of rights.

38. According to the plaintiff he was charged at Dunnoter Police station on Sunday, a day before he went to court for the first time, the 3rd March 2014, instead of all documentary evidence and contents of the docket presented before me is also to the contrary, but corroborates the defendant's version of events. The plaintiff's version in this respect also is rejected as untruth.

Unlawful detention:

39. Subsequent to arrest, and while in police and/or Correctional Services department custody, it is clear from evidence that the plaintiff made four court appearances, viz: the 3rd March 2014, his first appearance without a lawyer; the 17th March 2014 represented by Adv. Graf where the matter was transferred from Regional Court to the District Court for bail purposes; the 24th March 2014 represented by Mr. Mulaudzi; the 1st April 2014 represented by Ms. Stander; and lastly postponed to

the 9th April 2014 when bail application was heard and granted. According to the plaintiff, these postponements were caused by the absence of the investigating officer, as he was informed by his attorneys, as he was in custody. None of these attorneys were called as witnesses to corroborate his version, especially as he ultimately stated that he was informed by them that the I/O was not in attendance on each appearance. He did not know as he was in the cells.

40. On the other hand, the Investigating officer testified that the reasons for postponements were caused by the plaintiff's frequent change of attorneys, who individually needed a time to consult with him. The I/o was present in court on all occasions, and his police diary also completed by his seniors confirms that he was in court. In addition, from the Court appearance sheet of the Regional and district courts, as stated above, there were different legal representatives on each court appearance which give credence to the I/O's version that he was in court on all those occasions. The cause for postponements was the need for each practitioner to consult with the plaintiff for bail application, which he was opposing.

41. According to the plaintiff, even on the day bail was heard, the I/O had to be called while leaving the court premises, giving impression that he was evading to testify, which would have caused further detention of the plaintiff, without bail. The objective evidence, however, proves that he was not needed. Bail was heard via affidavits by both the state and the plaintiff. In any event the I/O disputed all that, stating that he was in court even on the day of bail. No one had to call him from anywhere.

42. It is my conclusion that the version that is backed by documentary evidence before the court and also plausible is the version by the I/O Nene, more so that the plaintiff's evidence is predominantly hearsay from his respective attorneys. He even apologised during evidence when confronted with the I/O's version. The Plaintiff's version is therefore rejected as not able to sustain his pleaded case.

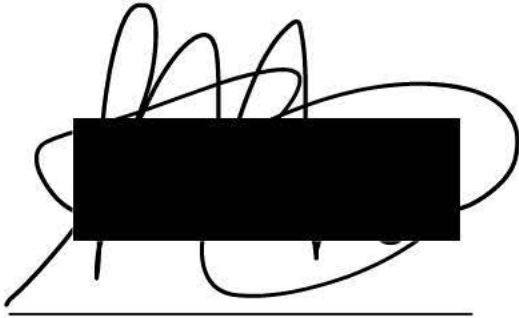
Conclusion

43. In general, the plaintiff really was not a convincing witness. His recollection of events or facts of the case he sought to prove his case left much to be desired. His testimony lacked certainty and clarity in many aspects. As stated above, his evidence contradicts documentary evidence, including that signed by him. There were several untruths, e.g., that in his schedule 6 bail affidavit he stated he had no previous convictions, whereas he had one of theft, relevant to charge he was facing at the time. Also, he claimed to have been married at the time, whereas in that very bail affidavit, he was not married. He battled to explain the contradictions convincingly, and thus proven to be untrustworthy and not credible.

44. In general, the plaintiff failed to discharge the onus upon him to prove his allegations on a balance of probabilities, whereas the defendant's witnesses discharged the onus upon them as per section 40(1)(b) CPA and subsequent further detention. It follows that the plaintiff's claims in regard to unlawful arrest and detention must fail. Accordingly, there is no need to deal with aspect relating to quantum of damages.

ORDER

a) In the result, the plaintiff's claims are dismissed with costs.



LMA MATJELE

ACTING JUDGE OF THE HIGH COURT

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Ref:2582/17/P22

Date of the Hearing: 22 August 2024

Heads of Argument: 29 August 2024

Date of Judgment: 11th December 2024