



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 5171/2017

Reportable	Yes/No
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In the matter between:

SIYANDA HOLOLO

Plaintiff

and

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] The plaintiff instituted an action against the Minister of Police (the first defendant) and the National Director of Public Prosecutions (the second defendant) by the members of the South African Police Services (SAPS) who were acting within the course and scope of employment.

[2] At a pre-trial conference held on 25 July 2024, the parties agreed that the defendants would bear the duty of beginning and that there would be no separation of issues between the merits and the quantum. This agreement was subsequently ratified at the commencement of the court proceedings.

The pleadings

[3] In pursuit of the claim for unlawful arrest and detention against the first defendant, the plaintiff alleges that SAPS lacked justification for arresting him, as no reasonable grounds existed to suggest that he committed the alleged crime of murder. Therefore, SAPS acted in bad faith, by failing to exercise its discretion in the plaintiff's favour. Consequently, the plaintiff asserts that his arrest and detention from 09 to 12 October 2015 was unlawful and wrongful.

[4] Further to the plaintiff's claim, on 12 October 2015, he appeared in the Mthatha Magistrate's Court, where the State opposed his release on bail and requested a postponement. This led to multiple postponements until he was eventually released on bail on 12 November 2015.

[5] The plaintiff claims therefore that his detention from 12 October to 12 November 2015 was unlawful, malicious and without justification, alleging that the first defendant improperly influenced the second defendant to oppose bail and sought postponement. Consequently, so he claims, the detention was carried out with malice, arbitrarily, capriciously, unreasonably, and with the sole intention of injuring him.

[6] In their plea, the defendants deny that the plaintiff's arrest was wrongful or unlawful. Furthermore, they aver that the plaintiff was facing a charge of murder, for which he had been positively identified.

The evidence

[7] The defendants relied on the testimony from three key witnesses: Ms Monica Siziwe Ntozini (Ms Ntozini), Constable Bonga Stofile (the arresting officer) and Mr

Sicelo Mbaleki (the Public Prosecutor). Their collective evidence revealed that Manana's death (the deceased) resulted from an assault by the plaintiff and an unidentified co-worker at Zonwabele Tavern, where the plaintiff and the unidentified co-worker worked as security guards.

[8] According to Ms Ntozini, an eyewitness, on 26 September 2015, a dispute erupted between the deceased, the plaintiff and his co-worker. The deceased became aggressive throwing a bottle at the plaintiff and his co-worker, and then fled. The plaintiff together with his co-worker chased and assaulted him until he fell. While he lay on the ground, the assault continued through kicking. The deceased bled profusely until bystanders intervened, prompting the plaintiff and the co-worker to leave the scene. Ms Ntozini observed that the deceased was extremely cold.

[9] She knew the deceased as a homeless individual who was currently in the care of Mr Matshaya, a church Bishop. After witnessing the incident, she contacted Bishop Matshaya and called an ambulance, which transported the deceased to the hospital.

[10] Ms Ntozini later learned of the deceased's passing through Bishop Matshaya's announcement on Unitra Community Radio (UCR FM) where he was a broadcaster. After hearing about the deceased's death, she reached out to the caregiver at Bishop Matshaya's home, which provided shelter to homeless individuals including the deceased. She contacted the caregiver to share her eyewitness account of the incident. She subsequently provided a formal statement to the police detailing her observations. Following the deceased's death, Ms Khikhi Ntombentsha (the deceased's mother) filed charges at the police station and made a statement. In her statement, she explained that she only went to the hospital on 30 September 2015 after being informed that her son had been admitted. She relied on what she had been informed that her son was brutally assaulted in town. Although she was asked to identify the deceased's body, she only saw his face and could not observe the injuries on his body.

[11] Upon reviewing the case docket, which included the deceased's mother's statement and Ms Ntozini's account, the arresting officer concluded that the

deceased's death resulted from the assault inflicted by the plaintiff and his co-worker. This realisation led him to recognise that a murder charge had a basis. He subsequently interviewed Ms Ntozini who confirmed her acquaintance with one of the assailants.

[12] The evidence further revealed that Ms Ntozini had proactively taken a photograph of the plaintiff to preserve his identity and facilitate sharing with the authorities. She subsequently escorted the arresting officer and his colleague to positively identify the assailant, leading to the plaintiff's arrest.

[13] On 12 October 2015, the date of the plaintiff's first appearance before the court, the Public Prosecutor examined the docket contents, and based on the evidence presented, formed a prima facie opinion that the plaintiff had a case to answer thereby warranting the enrolment of the murder charge under Schedule 5 of the Criminal Procedure Act¹ (CPA). On the same day, the plaintiff appeared in court, and the Magistrate ordered his detention pending the completion of bail profiling, which the public prosecutor explained included fingerprinting, background checks and address verification. The further detention also aimed at enabling assessment of previous convictions, pending matters and eligibility for bail release.

[14] Since the plaintiff opted to be represented by Legal Aid, South Africa, his legal representative was present during the proceedings, whereupon the matter was postponed for seven days to allow for the completion of the bail profiling. The public prosecutor distinguished between the bail information sheet and stated that it contains preliminary information provided by the accused during arrest and bail profiling is more of a comprehensive process. The bail profiling is typically delayed due to the police station's busy schedules.

[15] Probably due to the police station's work schedule, the matter was postponed twice to await the bail profiling, so he explained. The Public Prosecutor testified that in schedule 5 offences, the burden lies with the accused to demonstrate that the interests of justice permit their release. Typically, a bail application may be heard on

¹ Act 51 of 1977.

the first day of appearance, but in this case, insufficient information precluded an eligibility assessment. Consequently, the court delayed proceedings pending the completion of profiling.

[16] The Public Prosecutor further emphasized that, in Schedule 5 offences, bail can only be granted by the court, following a hearing of evidence. Police do not have the authority to release accused persons in such cases. According to the Public Prosecutor, the case was withdrawn on 30 March 2016, due to the post-mortem's report's conclusion that the deceased's injuries resulted from a motor vehicle accident.

[17] The plaintiff testified that, although he was not an employee of the tavern at the time, he was present during the altercation. He clarified that he intended to intervene in the fight between Mr Sinovuyo Ngaleka and Mr Sikhumbuzo Dlamini who were chasing and assaulting the deceased. According to the plaintiff, the deceased instigated the fight by assaulting Mr Ngaleka with a bottle. He stated that he witnessed the pair continuously assaulting the deceased who had fallen. Despite being helpless, the deceased eventually got up and left the scene. The plaintiff confirmed the intervention of the bystanders.

[18] The plaintiff alleged that his arrest was unlawful citing the police's failure to inform him of his Constitutional rights at the time of arrest. He claimed that his rights were only explained after he was detained in prison. Furthermore, during his time at the Madeira police station, he was not informed of the reasons for his detention and was not afforded an opportunity to state his side of the story. Had this been done, it would have allowed the police an opportunity to assess whether his arrest was warranted, so he testified.

[19] The plaintiff testified that since the charge against him was assault, the police could have employed alternative measures to bring his attendance to the court rather than effecting immediate arrest. He further testified that the police and the Public Prosecutor misrepresented facts to the court and wrongly exaggerated the charge which led to his prolonged detention. The correct charge was assault, so he maintained.

[20] He further testified that the detention environment was inhumane characterized by unsanitary conditions with filthy surroundings, dirty blankets infested with lice, frequent assaults among detainees, and a pervasive, overwhelming stench of blood.

Issues

[21] The primary issue for determination is whether the plaintiff's arrest and detention on a charge of murder was justified. Additionally, this court must assess whether in arresting the plaintiff, the arresting officer objectively exercised his discretion. Furthermore, it must be determined whether the post-detention court proceedings were legally justified. Lastly, this court must consider whether the SAPS and the Prosecutors acted in malice in motivating the plaintiff's detention post-court appearance.

The legal principles

[22] Our jurisprudence boasts a rich legacy of precedence that vigorously safeguards the freedom and security of persons. This is rooted in the Constitution of the Republic of South Africa, which enshrines the right to be free from arbitrary deprivation of liberty without just cause.² In instances where the arrest is deemed necessary, the onus rests with the arrestor to demonstrate that the arrest was objectively justifiable and lawful.³

[23] Pursuant to section 40(1)(b) of the CPA, a peace officer is empowered to arrest a suspect without a warrant in circumstances where there is reasonable ground to believe that the suspect has committed a Schedule 1 offence, excluding the offence of escaping from lawful custody.⁴

² Section 12, Act 108 of 1996, The Constitution.

³ *Minister of Law and Order and Others v Hurley and Another* 1986(3) SA 568 AD at 589 E-F; *Minister of Law-and-Order v Matshoba* 1990 (1) SA 280 AD at 284.

⁴ For an arrest to be lawful, three essential jurisdictional facts must be met: (1) the arresting officer must be a peace officer; (2) the arresting officer must have entertained a reasonable suspicion that a Schedule 1 offence had been committed (3) such suspicion must be grounded in reasonable circumstances

[24] The *Mabona*⁵ ruling, which is paraphrased below, clarifies the standard for forming a reasonable suspicion. According to Jones J, this standard is objective and involves three key considerations: to begin with, the enquiry is whether a reasonable person in the arrestor's position and having the same information would have considered that there were 'good and sufficient grounds' for suspecting that the arrestee had committed a Schedule 1 offence; additionally, the arrestor is required to verify the information wherever possible; furthermore, while section 40(1) (b) of the CPA requires 'suspicion' and 'not' certainty', the suspicion must be grounded on reliable information rather than being arbitrary or speculative.

[25] Upon establishing the jurisdictional facts contemplated in section 40(1)(b) of the CPA, the arresting officer is vested with the discretion to decide whether to arrest the suspect, thereby exercising his power. The *Sekhoto*⁶ matter establishes important boundaries on the exercise of discretion in forming a reasonable suspicion. The boundaries of discretion in forming a reasonable suspicion, as articulated by Harms DP in paragraphs 42-44, can be paraphrased as follows:

1. Peace officers are afforded a measure of discretion in exercising their powers, provided that their decisions remain rational and within the bounds of reasonableness,
2. The standard is not violated merely because an officer exercises their discretion in a way that differs from the court's notion of the optimal approach.
3. The applicable standard is not one of perfection or optimality, but rather rationality. If the officer's decision falls within a reasonable range of options, the standard is satisfied, even if it is not the best possible choice in hindsight.

⁵ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654, 658 E-H

⁶ 2011 (1) SACR 315 (SCA).

4. The power to arrest is intended solely to facilitate the administration of justice, by bringing the suspect before the court. However, the arrest is merely one step in this broader process which ultimately seeks to determine guilt or innocence.
5. After the arrest, the suspect must be brought before a court as soon as reasonably possible. Thereafter, the authority to detain the suspect further lies within the discretion of the court, which will determine whether the continued detention is justified.
6. The discretion to detain a suspect is subject to a comprehensive statutory framework. If a peace officer were only permitted to arrest a suspect when satisfied that he might not attend trial, the statutory framework would severely be undermined. It is untenable to imply that a statute (law) restricts the power to arrest when such limitation is not explicitly stated in the statute (law).
7. The arresting officer is not required to determine whether the suspect should be detained pending trial, that decision rests with the court. In most cases, it is a straightforward matter to bring the suspect before the court, enabling it to make that determination.
8. The peace officer's enquiry is not focused on determining the best means of bringing the suspect to trial, but rather on whether the case warrants a court decision. The rationality of the arresting officer's decision depends on the specific facts of the case. However, in cases involving serious crimes, such as those listed in Schedule 1, it is unlikely that an arresting officer would be criticized for arresting a suspect to bring him before court.

The parties' legal submissions

[26] The court expresses its appreciation for the diligent efforts of both parties in submitting the heads of argument in a timely matter, which significantly contributed to the expeditious finalisation of these proceedings. Notwithstanding this, it is not the

court's intention to reproduce the entirety of this judgment by exhaustively addressing every issue raised in the heads of argument.

[27] Most notably, *Ms Nhantsi*, counsel for the plaintiff, contended that the arresting officer neglected to verify the information available to him prior to arresting the plaintiff. Specifically, she argued that the officer failed to interview the plaintiff to ascertain whether he had participated in the alleged assault.

[28] The deceased passed away on 28 September 2015, due to head injuries sustained in a motor vehicle accident. Notably, this crucial information was not verified. Relying on *Sekhoto* precedent, counsel contended that the decision to arrest the plaintiff given these circumstances was inherently irrational.

[29] She maintained that the arresting officer should have employed less invasive methods to arrest the plaintiff. By failing to do so, he failed to exercise his discretion in an objective manner.

[30] Moreover, *Ms Nhantsi* argued that the second defendant should be held liable for the unlawful post-detention court appearance. This liability stems from the second defendant's failure to discharge her legal duty, specifically her obligation to inform the court about the weakness in the state's case which would enable the court to exercise its discretion and potentially release the plaintiff either on bail or on warning.

[31] Conversely, *Mr Mnqandi*, counsel for the defendants raised several critical points regarding the plaintiff's evidence asserting that he failed to adequately cross-examine the defendants' witness on key issues. He further contended that the post-detention court appearance was as a direct result of a court order, and therefore could not be attributed to the defendants. In essence, *Mr Mnqandi* submitted that there is no evidence to suggest that the defendants' actions were unlawful.

The court's analysis of evidence

[32] Our courts have consistently held that when an arrest or detention is effected by or at the instance of a public official or authority, the responsible official must

justify the arrest or detention. This justification requires the official to point to the specific statute or statutory regulation or statutory regulation conferring the power to arrest or detain; demonstrate that they acted within the scope of the power conferred; and show that they observed the relevant provisions of the statute or regulations that empowered them to take such action.⁷

[33] In this instance, the arresting officer's power to arrest without a warrant is conferred by section 40(1) (b) of the CPA. Furthermore, murder is classified as Schedule 1 and 5 of the CPA. It must be emphasized that in the present case, the developments after the arrest are irrelevant in assessing whether the arresting officer's suspicion was reasonably justified at the time of arrest. Accordingly, it is pertinent to note that the post-mortem report, which contradicted the evidence of assault and subsequently led to the withdrawal of the charges against the plaintiff, constitutes a development that occurred after the plaintiff's arrest.

Arrest and detention from 09 to 12 October 2015

[34] At the time of the arrest, the arresting officer's assessment was based on the statement of the deceased's mother, who reported that her son had been murdered. A murder docket had already been opened and Ms Ntozini's statement had already been obtained. During interviews with the arresting officer, Ms Ntozini consistently informed the arresting officer that the plaintiff and his co-worker had severely assaulted the deceased, leaving him lying at the scene bleeding. The fact that the plaintiff was not employed at the tavern at the time is irrelevant. What is pertinent is that he was present at the scene where the deceased was severely assaulted.

[35] Another significant consideration is that the arresting officer exercised cautionary measures to ensure that the correct person was arrested. At the time of the arrest, he was accompanied by his colleague and Ms Ntozini who had previously witnessed the assault and obtained a photograph of the suspect. Ms Ntozini positively identified the plaintiff as the suspect pointing him out to the police. It is

⁷ *Madyibi v Minister of Police* (4132/17) [2020] ZAECMHC 11;2020(2) SACR 243 (ECM) (17 March 2020).

therefore concluded that the suspicion that the plaintiff had committed a crime of murder was grounded on reasonable and solid circumstances. Consequently, the argument positing that the arresting officer should have verified the reliability of the information at his disposal is without merit.

[36] An argument was raised that the arresting officer failed to exercise his discretion objectively when arresting the plaintiff and that less invasive methods of arrest should have been employed. At the time, the arresting officer was dealing with a serious crime of murder, as reported to the police. According to the docket statements and interviews, there was no indication that the deceased was involved in a motor vehicle accident. The available information suggested that the deceased died shortly after being brutally assaulted by the plaintiff and his co-worker after he was taken to hospital. Therefore, the arresting officer had no reason to anticipate that the post-mortem report would contradict the evidence possessed at the time of the arrest.

[37] Pursuant to the principles established in the *Sekhoto* matter, it was not reasonable to expect the arresting officer to employ less invasive means of arrest given the seriousness of the murder charge. In my opinion, the arresting officer's actions in arresting the plaintiff, informing him of his Constitutional rights and detaining him were motivated solely by the need to bring him to justice. Therefore, it was for the court to exercise its discretion in determining whether the plaintiff should be further detained.

Detention from 12 October to 12 November 2015

[38] The same rationale applies to the Public Prosecutor who enrolled the case. He was duty bound to consider the prima facie evidence at his disposal and enrol the matter. As he could not have anticipated the post-mortem's contradictory findings, by virtue of powers vested in him, he decided that a murder charge was appropriate and not assault as suggested by the plaintiff's counsel. The National Prosecuting Authority (NPA) is a single and independent body that derives its powers from the Constitution. In terms of Section 179(2) of the Constitution, the NPA has the power to institute and conduct criminal proceedings on behalf of the state and to carry out

the necessary functions incidental to instituting criminal proceedings.⁸ The NDPP's duty is to hold the individuals accountable for their actions, deter crime and protect the public from harm. She must maintain a fair and just society and play a critical role in ensuring that justice is served for all. This mandate must be exercised without fear, favour or prejudice.

[39] This then triggers a question on whether the defendants improperly used the state's legal machinery to unjustly and maliciously deprive the plaintiff of his personal liberty. The issue of malicious deprivation of liberty was addressed by the Supreme Court of Appeal (SCA) in *Minister of Police v Nontsele*.⁹ At paragraph [37], Dambuza JA (with Makgoka and Mabindla-Boqwana JJA concurring) held:

“Malicious deprivation of liberty occurs when lawful restraint is inflicted upon a person's liability by means of an act of law, unjustifiably, with intention to injure, and with improper motive. Neethling and Potgieter describes it as follows:’ Unlike wrongful deprivation of liberty, where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant, the conduct in the case of malicious deprivation of liberty takes place under the *guise of a valid judicial process*. The defendant makes improper use of the legal machinery of the state, either through a policeman acting on his own discretion or through a valid warrant in depriving the plaintiff of his liberty. The actual deprivation of liberty is consequently not carried out by the defendant himself or by his servant or agent but by the machinery of the state through a valid judicial process.

As a result, the plaintiff will have to prove the following in order to succeed in an action based on malicious deprivation of the liberty; that the defendant instigated the deprivation of liberty; that the instigation was without reasonable

⁸ Section 20 of the National Prosecuting Authority Act provides-

‘(1) The power as contemplated in section 179(2) of the Constitution and all relevant sections of the Constitution, to-

(a) institute and conduct criminal proceedings on behalf of the State.

(b) carry out the necessary functions incidental to the instituting and conducting criminal proceedings; and

(c) discontinue criminal proceedings, vests in the prosecuting authority and shall. For all purposes exercised on behalf of the Republic.’

⁹ (547/2022) [2024] ZASCA 137 (11 October 2024).

and probable cause; and that the defendant acted with *animus iniuriandi*. These requirements are similar to those of malicious prosecution.” [footnotes omitted]

[40] In *Nontsele*’s case¹⁰, the SCA went further to explain that the test of breach of a legal duty, or wrongful conduct on the part of the police and the Minister plays no part in the inquiry into the allegations of malicious and collusion-driven detention.

[41] Therefore, in the present instance, the inquiry is whether the plaintiff had proved *animus iniuriandi* on the part of the members of the defendants. Except to reiterate that after the enrolment of the case, the subsequent postponements were the direct result of the court orders necessitating the gathering of information prior to the bail application hearing, the plaintiff failed to adduce evidence to prove that this process was malicious due to the defendants’ actions. Accordingly, Ms *Nhantsi* conflated the test applicable in the breach of a legal duty owed to the plaintiff and the inquiry that is applicable to the allegations of malicious and collusion-driven detention

[42] Even if this court is incorrect in its finding on this point, there is no evidence to suggest that there was a breach of the legal duty by the defendants against the plaintiff. Section 60(11) (b) of the CPA justifies detention in cases that are classified under Schedule 5. This provision reads:

“Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –

(b) in Schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his release”

¹⁰ Footnote 9 above (at paragraph 39).

[43] The word '*shall*' demonstrate that the detention is peremptory, and the court can only release the accused after having heard the evidence and exercising its discretion based on the circumstances of the case. In this scenario, the onus was placed upon the plaintiff to adduce evidence to prove that the interest of justice permitted his release. At the plaintiff's first appearance in court, and prior to the obtainment of the post-mortem report, there was strong prima facie evidence that he had committed the crime of murder.

[44] The acquisition of bail information, a step that was comprehensively explained by the Public Prosecutor, was crucial in considering the plaintiff's release. Throughout the postponements, he was legally represented thereby ensuring that the process leading to his bail application unfolded fairly. It is noteworthy that, generally, in Schedule 5 offences, even if the state does not oppose bail, the court has the power to request reasons for the lack of opposition.¹¹ The court may then exercise its discretion, give the matter a reasonable postponement, and require more information before deciding whether to release the accused on bail or warning. Due to the inquisitorial nature of these proceedings, the judicial intervention is significant, and consequently, the decision to further detain the accused is not in the hands of SAPS and or the Public Prosecutor. Therefore, in the case under consideration, there is no legal basis to challenge the plaintiff's further detention which ultimately spanned for a period of one month.

[45] The Constitution mandates police officers to prevent, investigate and combat crime, maintain public order, safeguard citizens and uphold the law.¹² The South African Police Act¹³ enables officers to exercise their authority and fulfil their legally granted responsibilities, subject to the Constitutional parameters and respect for individuals' fundamental rights. Conversely, failing to effect justified arrests and detentions may erode public trust in the criminal justice system. I, therefore, conclude that the arrest and subsequent detentions of the plaintiff were lawful. It then follows that the plaintiff's claims must fail.

¹¹ Section 60(2) of the CPA provides: "In bail proceedings the court-(d) shall, where the prosecutor does not oppose bail, in respect of matters referred to in subsection 11(a) and(b), requires of the prosecutor to place on record the reason for not opposing the bail application."

¹² Section 205 (3) of the Constitution.

¹³ Act 68 of 1995.

Order

[46] The plaintiff's claims are dismissed with costs on Scale "A", as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : Adv N.O Nhantsi
Instructed by : N Golifili Inc.
Mthatha

Counsel for the Defendant : Adv N. P. Mnqandi
Instructed by : State Attorney
Mthatha

Heard on : 15 November 2024
Judgment Delivered on : 10 December 2024