



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

Case number: 11029/2017

Date: 3 February 2025

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED
3 February 2025 DATE  SIGNATURE

In the matter between:

DUMISANI SHADRACK NKUMANE

Plaintiff

and

THE MINISTER OF POLICE
NATIONAL PROSECUTING AUTHORITY OF
SOUTH AFRICA

First Defendant

Second Defendant

JUDGMENT

MINNAAR AJ:

Introduction:

[1] On 17 November 2015, the plaintiff was arrested by members of the South African Police Service ("SAPS"). In terms of the amended particulars of claim, it is the case of the plaintiff that the arrest was unlawful. The plaintiff's claim consists of four claims, and it is his pleaded case:

- a. Claim A against the first defendant: unlawful arrest on 17 November 2015. After the arrest, the plaintiff was unlawfully detained until 19 November 2015. R300 000.00 (three hundred thousand rands) is claimed for depriving the plaintiff of his liberty and for distress, humiliation, inconvenience and injury to his dignity.
- b. Claim B against the first defendant: during his detention, specifically on 17 November 2015, members of the SAPS assaulted the plaintiff. As a result of the assault, the plaintiff suffered damages of R150 000.00 (one hundred and fifty thousand rands) for violation of his physical integrity, pain and suffering and humiliation.
- c. Claim C against the first and second defendant: the plaintiff was remanded in custody until 3 October 2016. His bail application was opposed by the prosecutor who acted on the instigation of the members of the SAPS and/or upon his own initiative. The plaintiff's bail was refused, and he remained in custody until charges against the plaintiff were withdrawn on 3 October 2016. The members of the SAPS and the prosecutor had a legal duty to ensure that there were sufficient grounds to justify the plaintiff's detention, to ensure that there were sufficient grounds to oppose bail, to disclose to the court the weak or non-existent case against the plaintiff, to disclose to the court that there was no reason to suspect that the plaintiff will not stand trial if released on bail and to ensure that they act with objectivity and in the public interest. This legal duty was unlawfully, negligently or intentionally breached resulting in the plaintiff being kept in custody from 17 November 2015 to 3 October 2016. R2 000 000.00 (two million

rand) is claimed for depriving the plaintiff of his liberty and for distress, humiliation, inconvenience and injury to his dignity.

- d. Claim D against the first and second defendant: due to his unlawful arrest and detention, the plaintiff suffered a loss of income for the duration of his incarceration. When he was arrested on 17 November 2015 he was employed as a truck driver earning a salary of R4 500.00 (four thousand five hundred rands) per week. The plaintiff claims R216 000.00 (two hundred and sixteen thousand rand) for the loss in income.

[2] The defendants defended the action. An amended plea was delivered. It is the defendants' pleaded case:

- a. The plaintiff was lawfully arrested for the offence of theft, in accordance with section 40(1)(b) of the Criminal Procedure Act 51 of 1977¹ as amended ("the Act") in that:
- i. The arresting officer was a peace officer;
 - ii. The arresting officer entertained a suspicion;
 - iii. The suspicion was that the plaintiff committed an offence referred to in Schedule 1 of the Act;
 - iv. The suspicion was reasonable in that the plaintiff admitted to his complicity in the commission of the offence; and
 - v. The purpose of the arrest was for further investigation, to process the plaintiff administratively and to bring him to justice.
- b. The plaintiff was lawfully and reasonably detained per section 50 of the Act², in that:

¹ "A peace officer may without warrant arrest any person-

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

"(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

- (i) no charge is to be brought against him or her; or

- i. The plaintiff was taken to a police station as soon as possible after his arrest;
 - ii. The plaintiff was informed of his Rights in terms of the constitution, which included his right to bail and legal representation; and
 - iii. The plaintiff was taken to court in accordance with the purpose of his arrest.
- c. Bail was opposed by the prosecutor on the evidence before him, linking the plaintiff to the offence and the nature of the offence.
 - d. The decision to proceed with criminal proceedings, was based on reasonable and probable cause, without malice and in good faith.
 - e. The assault and loss of income are denied, and the defendants deny being liable for any damages suffered by the plaintiff.

[3] At the commencement of the trial, the defendants withdrew their special plea challenging the plaintiff's claim that there was due compliance with the provisions of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

[4] The arrest and detention of the plaintiff is admitted and as such the onus of proving the lawfulness of the arrest and detention rests on the defendants.³

[5] In *Duncan v Minister of Law and Order*⁴, the jurisdictional facts for a section 40(1)(b) defence are:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

³ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F; *Mhaga v Minister of Safety & Security* [2001] 2 All SA 534 (Tk)

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H

- (3) There must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds.'

[6] To decide what is a reasonable suspicion there must be evidence that the arresting officer formed a suspicion which is objectively sustainable. It was described thus by Jones J in *Mabona and Another v Minister of Law and Order and Others*:⁵

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and . . . (t)he reasonable man will therefore analyse and asses the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.'

[7] It is imperative to note that there was no duty on the arresting officer to determine the guilt of the plaintiff at the time of the arrest. All that was needed was a reasonable suspicion that the plaintiff committed an offence as referred to in Schedule 1 of the Act.

[8] The decision to arrest is to bring the arrested person to justice.⁶ The arrest is only one step in that process. Once an arrest has been effected,

⁵ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E – G:

⁶ *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) (2002 (2) SACR 105; 2002 (7) BCLR 663) paras 49 – 50; and the authorities referred to in *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A) at 645.

the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.⁷

Defendants' testimony:

[9] Retired Captain Mahundla testified that he was a lieutenant in 2015, and he was based at the SAPS in Sandton. On 17 November 2015, he received a call from Captain Mogoro stationed at the Truck Jacking Division. Captain Mogoro requested him to go and attend to a confession at the SAPS Midrand. The request came around 15h15 in the afternoon. When he arrived at Midrand, he was taken to the parade room, and the plaintiff was brought to him. Captain Mahundla testified that he had blank papers with him. He further testified that he read the plaintiff his rights. It is his testimony that the plaintiff conveyed to him what happened with the alleged truck hijacking, and he noted it in the confession. The responses to the questions provided were correctly reflected. They communicated in both English and isiZulu. On the last page of the confession, the plaintiff signed and provided his thumbprint. The plaintiff wrote the following on the last page of the confession: "*The statemeunt sumited is true an nuting wil change.*" (sic)

[10] During cross-examination, it was denied that the plaintiff understands English. Captain Mahundla was adamant that he explained the contents of the confession to the plaintiff and that he read the confession to the plaintiff. On the allegation of having known of the details of the case against the plaintiff before taking the confession, Captain Mahundla responded that he could not take a confession if he was not informed of the charges against the confessor as he needed to know what charge is applicable.

⁷ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at par 42

[11] Captain Mahundla made a good impression as a witness and there is no basis to question the credibility of his testimony.

[12] Sergeant Mosoeunyane testified that she was the investigation officer on the case. In 2015 she was a detective constable. On 17 November 2015, her commander, Captain Mokgoro, informed her about a hijacked truck and some stolen goods in Midrand. She was informed that the goods were Huawei cell phones and tablets. She was instructed to go to the SAPS Akasia to fetch a docket relevant to the hijacked truck.

[13] On the Akasia docket, Sergeant Mosoeunyane testified that the plaintiff opened a case of truck hijacking at Akasia. When she arrived at SAPS Midrand, she was informed by Lieutenant-Colonel Sithole, her overhead commander, that they were busy with a confession by the plaintiff. The plaintiff was then brought to her by Captain Mokgoro and Lieutenant-Colonel Sithole informed her that the plaintiff must be locked up because he had given a confession that it was the plan of the plaintiff and his accomplices to hijack the truck. This plan was made even before the plaintiff left for Durban to collect the load. According to her, Lieutenant-Colonel Sithole informed her that the suggested charge was hijacking but he suggested that they should discuss with the prosecutor as to the type of charge.

[14] Sergeant Mosoeunyane testified that she spoke to Mr Ramushe, the prosecutor at Wynberg Magistrates Court. He explained to her that the plaintiff can be charged with some charge of hijacking but in court, the charge would change to perjury. She testified that there was then one charge of hijacking and one charge of possession (of stolen goods). She confirmed that she then read the plaintiff his rights and arrested him. In terms of the Notice of Rights in terms of the Constitution, the plaintiff was detained for truck hijacking. It is her testimony that the plaintiff understood his rights, which were written in English but explained to the plaintiff in Sesotho. She testified that the plaintiff was informed that he

was being arrested for truck hijacking. It was explained to the plaintiff that when he gets to court, he will face charges of perjury and defeating the ends of justice.

[15] During cross-examination, Sergeant Mosoeunyane conceded that she never testified that the plaintiff committed the offence of theft. She testified that she formed the reasonable suspicion to arrest on the contents of the plaintiff's confession.

[16] Sergeant Mosoeunyane made a good impression as a witness and there is no basis why her testimony should be questioned or rejected by the court.

[17] Mr Mapiri, a public prosecutor at the Alexandra Regional Court testified. He only became involved in the prosecution of the plaintiff's case on 19 January 2016. He did however testify on the sequence of court appearances and outcomes as recorded on the court file.

[18] I pause to state that, according to the charge sheet, the plaintiff, being accused 1 with Ernest Chinama being accused 2, was charged with theft of Sansui tablets to the value of around R8 500 000.00 (eight million five hundred thousand rand), being the property of Vital Distribution Solutions / Gregory Mark Kessell.

[19] Mr Mapiri testified that the plaintiff first appeared on 19 November 2015 and the case was postponed to 2 December 2015. From the court file it is evident that the right to apply for legal representation and bail was explained to the accused. The accused did not want to apply for bail

[20] On 2 December 2015, the plaintiff was legally represented, and it is recorded that the bail application was abandoned. Further postponements followed and on 28 January 2016 the accused applied for bail: bail was refused. Thereafter the case was postponed on numerous occasions for different reasons. As some stage Mr Mahlasela

was replaced by Mr Mapheto who was eventually replaced by Me Mpeke to represent the plaintiff. On 3 October 2016 Me Mpeke appeared on behalf of the plaintiff. A request was made by the State for a further postponement as one of the State witnesses were not at court and further suspects had to be arrested. Me Mpeke objected to a further postponement and the Magistrate struck the case from the roll due to the State witness not being present.

[21] Mr Mapiri testified that the Director of Public Prosecutions gave an instruction on 7 December 2016 to proceed with the criminal trial. A new charge sheet was prepared. In terms of this charge sheet the charge is theft of 994 tablets and cell phones valued at around R8 500 000.00 (eight million five hundred thousand rand) being the property of Vital Distribution Solutions (Pty) Ltd. According to Mr Mapiri, the docket is still open, and the case has not been closed nor has the charges been withdrawn.

[22] Mr Mapiri made a good impression as a witness and his testimony is accepted.

[23] The last witness for the defendants was another prosecutor, Mr Ramushu. He made a good impression as a witness. Mr Ramushu testified that he received the docket from the investigation officer. In the docket was the A1 statement deposed to be the plaintiff when he laid the charge at Akasia and also the confession. It was difficult to formulate the charge on the first appearance but on his reading of the A1 statement the charge was armed robbery.

[24] During cross-examination, Mister Ramushu testified that theft can be a competent verdict of robbery.

The plaintiff's testimony:

[25] The plaintiff testified through an isiZulu interpreter. His highest education is standard 6 and currently he is doing temporary jobs to earn

a living. At the time of the incident, he was a truck driver with Vital and he earned about R4 500.00 (four thousand five hundred rand per week). After his release from detention, he attempted to go back to his work but was chased away by the security.

[26] According to his testimony, he was the victim of a hijacking when he was en route from Durban to Johannesburg. He was also kidnapped and was dropped off, bound and gagged next to a road. Eventually, a vehicle stopped, and he was assisted to the SAPS Akasia where he laid a charge. Later in the afternoon, he was taken to another police station. An official came and took the plaintiff into a different room. This official asked him some questions and wrote it down. He was thereafter released but when he was outside, two men came and took him back into the police station. It was not explained to him on what charge he was arrested and he never confessed to any crime.

[27] The next morning, four men came and assaulted him. They forced him to sign some documents. He never read the document he signed. After the assault he coughed up blood and, despite asking, was not given any medical assistance. He mentioned this to his legal representative, Mr Mahlasela and placed it on record at one of his court appearances. It was only then, whilst being detained at Sun City, that he received medical attention.

[28] He confirmed appearing in court on numerous occasions but remained adamant that never abandoned his request for bail. On the circumstances surrounding his detention at Sun City, the plaintiff testified that the cell he was kept in had filthy, invested blankets and a filthy and smelly toilet. He could not recall much more of the conditions. He was eventually released and could go back home.

[29] During cross-examination, the plaintiff was painstakingly taken through the confession. It was interesting to note that, whilst the plaintiff

and his counsel maintained that the plaintiff was not fluent in English, he answered some of the questions the defendants' counsel asked even before it was translated.

[30] On the A1 statement, he responded that the members of the SAP told him what to stay in it. Even though this was the statement he lodged to report the alleged hijacking he testified that it *'might'* be his signature on the last page thereof. It is unclear to the court why the plaintiff did not unequivocally confirm that it is indeed his signature on this statement.

[31] The plaintiff was also very evasive about the contents of the confession. It is interesting to note that the A1 and the confession share some intricate details, and it begs the question as to how members of the SAPS at Akasia, and Captain Mahundla in Midrand, would have known what to put in these documents if the information was not conveyed to them by the plaintiff. The plaintiff also responded that it might be his signature on the last page of the confession. On a question from the court, the plaintiff confirmed that it indeed was his signature on the last page of the confession. He further confirmed that he placed his right thumbprint on this page. On most of the details in the confession, dealing with the planned hijacking, the plaintiff answered that he could not remember. He recalled that he was promised the amount of R2 000 000.00 (two million rand). He also remembers some details of the hijacking. The plaintiff also confirmed that it is his handwriting on the last page of the confession.

[32] On the assault, it was put to the plaintiff that the confession is dated 17 November 2015, yet he testified that he was only assaulted on 18 November 2015 and that there would be no reason why he would be assaulted after the members of the SAPS already obtained a confession. The plaintiff remained adamant that he was assaulted. He insisted that he coughed blood, and he reported this to court to seek medical assistance. According to the plaintiff, he only saw a doctor after 3 (three)

weeks. He testified that he did not receive any medical certificate but was only given pain tablets and coughing tablets.

[33] On the record of proceedings, the plaintiff testified in cross-examination that he was never informed of his rights to apply for bail. When he was eventually released, he was informed by the Magistrate that he was found not to be guilty. This testimony is in stark contrast of what was recorded on the case file, testified to by Mr Mapiri.

[34] At the initial stages of the cross-examination, the plaintiff was evasive in his responses. Thereafter he seemed to have a clearer recollection of what transpired, and he answered most of the questions in the affirmative.

[35] The plaintiff did not impress with his testimony. Some details he could easily remember whilst on other simple issues, such as his signature, he was evasive. No probable explanation was provided as to why so much detail would be included in the confession. It is improbable that he did not convey all the details to Captain Mahundla. A bold allegation was made that he was told what to say in his A1 statement at Akasia. This is also improbable as the purpose of the A1 statement was to register a complaint. The improbabilities of the plaintiff's testimony do not assist him in any manner or form.

Analysis:

[36] The confession reads:
"On Sunday 2015 the previous three weeks I received the telephone call from Comfort and he asked me to come and work as the overtime. I responded I am on duty at about 10:00 until the next day to take the load to Umlambithi in Natal, Drakensburg warehouse. While I was still with him he alleged that there were

stuff like laptops and computer plasma television I must load in my truck and while on my way they will hi-jack me to take the stuff and I don't agree with them and I Comfort with another guy they called him Boetie offered me the amount of R2.M I was offered the telephone so that they head me they can be able to get a hold of me in that phone (Nokia).

I worked in the factor a week and after I get a load to Pinetown Clicks I spend the half day and I was later instructed to go to Spedator Prospectus in Durban to load the stuff to Johannesburg, and before I finished to load and I received the telephone call from Comfort and he asked me if I was finished to load the stuff in my truck. he further informed me that if I finished I must drive to Pinetown to fill the diesel in my truck, when I finished I proceed to Pinetown Vital Company to wait a call from the guy watching the tracker. I received the phone call from the tracker man that informed me that he other truck driver was finished and I moved out from the Company to meet him at N3. Where / when I was on my way I received the telephone call from Comfort informed me somebody is going to call me and he is no longer contacted me.

I received a telephone call from the unknown black male speaking Zulu and he asked me where I was travelling from. He instructed me to meet him at Shell garage Escort. I informed him that I cannot stop there because we are not allowed to stop there in Escort. I proceed drive until Harrismith where I help myself in the Caltex garage and nothing happened. I drive until Villiers and I

stop the vehicle in the Engine garage. While I jumped from out from the truck and I was approached by three males. One Indian and two black males. One of the black males were in possession of the firearm and I was instructed to go back to the truck.

The black male not the one with the firearm instructed me to drive the truck until to the next to N3. He asked me slinger the steel to remove the trailer from the head of the truck and I was instructed to move a little bit in front so tell to remove the trailer and at the same time I was instructed to jumped into the white BMW registration number unknown and I left the truck in the street with everything.

I was instructed to hand my phones to them. and I was tied by hands and feet cables black in colour, and I was asked to close my mouth with a sellotape black in colour. They drove some few kilometres and they stop and I found myself to be taken out from the BMW to another vehicle when I didn't be able to identified the vehicle and they put me in the boot and the driver was an Indian male and the black having the firearm.

I found myself in Pretoria and I was help by the black male and take me to the police station to report live case. I did not sustain any injuries. I can't be able to identify the suspects." (sic)

- [37] If regard is had to the contents of the confession, it is very detailed as to names, dates, places and locations of the planned truck hi-jacking and what occurred during the high-jacking and thereafter. It is improbable that Captain Mahundla had such detailed information to

include in the confession. The only reasonable conclusion is that it was indeed the plaintiff who provided this information to Captain Mahundla.

[38] Schedule 1 of the Act includes robbery and theft (whether under the common law or a statutory provision). It also includes the provision: *'Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.'*

[39] Hijacking as such is not listed in Schedule 1. In Schedule 6 reference is made to robbery involving the taking of a motor vehicle. On my reading of the Schedules, I am satisfied that robbery of a motor vehicle, or 'hijacking' as more commonly referred to, is robbery falling under Schedule 1.

[40] The plaintiff was detained on the charge of truck hijacking. In the confession, reference was made to plans made between Comfort and the plaintiff as to how the hijacking would be conducted and a promise was made to the plaintiff who would be paid R2 000 000.0 (two million rands) for his part. The detention of the plaintiff was premised on a reasonable suspicion that the plaintiff was involved in, at least, the planning of the hijacking. This would entail a conspiracy to commit the offence of robbery.

[41] Objectively, I am satisfied that the four jurisdictional facts were met. Sergeant Mosoeunyane was a peace officer; she entertained a suspicion that the plaintiff had committed a Schedule 1 offence, and the suspicion was on reasonable grounds.

[42] It follows that the plaintiff was lawfully arrested in terms of Section 40(1)(b) of the Act. The plaintiff's subsequent detention was also lawful. He applied for bail, which application was dismissed. When the plaintiff was released from detention on 3 October 2016, it was not because he

was not found guilty but because the criminal case was struck from the roll due to the State witness not being at court.

[43] Considering the above, the plaintiff's claims A and B cannot succeed.

[44] On the probabilities before this court, the court is not convinced that the plaintiff was assaulted as alleged. According to the plaintiff, the assault took place on the day after he gave his confession. This is highly improbable. Despite his testimony that the assault was reported to the court, no note of any assault or complaint is to be found on the court record. No medical certificate was tendered into evidence. The plaintiff has failed to make out a case for the relief claimed under claim C.

[45] Claim D deals with the plaintiff's loss of income. The plaintiff had a duty to prove his claim for loss of income. Apart from his testimony that he earned R4 500.00 per week before his arrest, no evidence was tendered to prove this income nor was there any evidence to prove the amount claimed. For instance, one would have expected an actuarial report with calculations. It follows further that where the arrest was found to be lawful, the defendants cannot be held liable for any loss of income suffered by the plaintiff as a result of the arrest. Claim D therefore stands to be dismissed.

Costs:

[46] There is no basis for why costs should not follow the outcome. It was argued that costs should be awarded on Scale B: the court is in agreement with this approach.

ORDER:

The following order is made:

1. The plaintiff's claims A, B, C and D are dismissed.

2. The plaintiff shall pay the defendants' costs of the action on the High Court scale to be taxed on Scale B.



Minnaar AJ

Case number	: 11029/2017
Heard on	: 15 October 2024, 16 October 2024, 17 October 2024, 18 October 2024 and 31 October 2024
For the Plaintiff	: Adv L J Leeuw
Instructed by	: E Talane Inc
For the Defendant	: Adv M Pompo
Instructed by	: The State Attorney
Date of Judgment	: 3 February 2025