

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 24378/2019

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20/02/2025	[Signature]

WILLEM ABRAHAM ODENDAAL

PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICES**

SECOND DEFENDANT

**THE PROVINCIAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICES**

THIRD DEFENDANT

THE STATE ATTORNEY

INTERESTED PARTY

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 20 February 2025.

JUDGMENT

MAHALELO J

Introduction

- [1] The Plaintiff instituted action for damages against the defendants for unlawful arrest and detention, defamation, loss of income and assault after he was arrested without a warrant and detained by members of the South African Police Services (SAPS) on 11 October 2018 on a charge of theft.
- [2] It is alleged by the plaintiff that members of the SAPS were acting within the cause and scope of their employment as servants of the first defendant in arresting and detaining him. At the commencement of the trial the plaintiff abandoned his claim for assault, defamation and loss of income.
- [3] It is trite that the onus rest on the defendant to justify an arrest. As Rabie CJ explained in *Minister of Law and Order v Hurly*¹ that:
- “An arrest constitutes an interference with the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest to another person should bear the onus of proving that his action was justified in law.”
- [4] The following facts are common cause between the parties:
- a. The plaintiff was arrested on 11 October 2018 at around 7h20 on a charge of theft.
 - b. The plaintiff was detained at Roodepoort Police Station and was released the next morning on 12 October 2018 without appearing in court.

The defendant's case

- [5] The defendant led the evidence of the arresting officer Captain Myburgh and that

¹ 1986(3) SA 568 (A) at 589 E-F.

of Sergeant Mlambo who was responsible for the cells during the period in question. The evidence led in this matter can be summarised as follows: Captain Myburgh testified that on the 11 October 2018 he was working in the tracing team which is responsible for tracing suspects who cannot be located. He contacted Ms Burgers (the complainant) regarding the case which she had opened against the plaintiff the previous day. He then received a call from his work cell phone number advising him that the plaintiff was at the OK Mini Market Kite Harison in Roodepoort. He asked the complainant to meet him there and the complainant pointed the plaintiff out to him. He introduced himself to the plaintiff and advise him why he was being arrested. He explained to the plaintiff his constitutional rights. His job was only to track and arrest the plaintiff and take him to the police station to be charged and appear in court. He is not the investigating officer of the case. There was nothing to investigate at that point as he was to hand over the docket to the investigating department for further investigation. He never assaulted the plaintiff or violently arrested him, and he never called the plaintiff "skelm" and or "gamors".

- [7] During cross-examination, it was put to him that he was called to the Mini market by "Ricky", the owner of the property where the complainant was residing and it was explained to him that the plaintiff had been doing renovations at Ricky's place and he was there on that day to collect the remote to open Ricky's place to proceed with the renovation. Captain Myburgh responded that he only knew that the plaintiff was paid money by the complainant to repair the garage door which he never did and he disappeared.
- [8] Sergeant Mlambo testified about the conditions of the cells wherein the plaintiff was detained on 11 October 2018. He stated that he started work at 06H00 until 18h00. The plaintiff was detained that day at around 07:30 in the morning. There were 7 inmates detained together with him in his cell. The cells were cleaned and all suspects including the plaintiff ate breakfast, lunch and supper. Before he knocked off there were 13 inmates in the cell, however he does not know how many came after he had knocked off, but according to the OB book only 3 inmates came in therefore the cells were not overcrowded. The suspects in the cells had 2 to 3 mattresses and blankets each. The blankets from the cells are washed regularly and on that particular day all the blankets were clean. There were no blocked toilets, and none were reported to him or his commander when they visited the cells.

- [9] During cross examination, it was put to him that the plaintiff did not eat breakfast and lunch on the day that he was arrested. He denied and reiterated that it was against the law that suspects were not served with breakfast, lunch and supper. It was also put to him that the cells were overcrowded and that the plaintiff slept next to 16 other inmates in the cell. He insisted that the cells were not overcrowded.

The plaintiff's case

- [10] The plaintiff is the only witness who testified in support of his case. He testified that he is 68 years old. He has lived in the area of Roodepoort for many years and he is well known in the society. He was doing construction and renovation work at 11 Heron Street Horizon, a residential property owned by Ricky. The complainant occupies a flat on that property. During 2015 he entered into an agreement with Ricky in terms of which he was to perform certain building work and/or renovations at Rickys property. Their agreement ran over a period of some three years as the work was ongoing as new work was being added on an ad hoc basis. Additionally, an agreement was reached between him and Ricky that he will perform certain work at the flat occupied by the complainant and the complainant will pay. In this regard the complainant made a payment of R2 200.00 to him to repair the garage door which he had not yet repaired due to busy schedule.
- [11] On 4 October 2018, he planned with Ricky to collect the remote for the gate to gain access to the property in order to do renovations. On the 11 October 2018 at approximately 07h30 he went to Ricky at the OK Mini Market in his bakkie loaded with tools, materials and several workers to collect the remote for the gate. Whilst speaking to Ricky inside the OK Mini Market Captain Myburgh approached him from behind and arrested him. He warned him not to resist the arrest as additional charges could be laid against him. At this point the shop was very busy, and a lot of people were in close proximity to where the arrest took place.
- [12] The arrest was violent because Captain Myburgh grabbed him from behind around the neck and in a loud and aggressive voice shouted obscenities towards him. He yelled at him in no uncertain terms that he will ensure that he never gets out of jail whilst manhandling him in a strong chokehold around the neck. He kept on asking why he

was being arrested and what was to happen to his bakkie, workers and his tools. At this stage he was not aware that Captain Myburgh was in the company of Ms Botha who was busy making arrangements with the workers and to drive the bakkie to the police station. He was manhandled and put inside the police van. At some stage, Ms Botha had to tell Captain Myburgh that his violent actions and name calling of the plaintiff were uncalled for. He was taken to Roodepoort police station. He was handed to the cell commander at around 7 h50.

- [13] Whilst being processed at the police station he was handed several documents to sign. Firstly, he signed a notice of rights at 7h50. Simultaneously, he signed a statement regarding interview with a suspect. He was then locked up in a holding cell with various other detainees. The condition of the holding cell was bad. The toilet was blocked and overflowing. The sponges and blankets to sleep on were extremely filthy. The holding cell was clearly filthy and not cleaned on a regular basis. Throughout the day, the detainees complained about the conditions, but it fell on deaf ears. The sleeping conditions were worse because the cell was overcrowded, so much so that one detainee had to sleep with his head right next to the stinky blocked toilet. The next morning, he was released to go home because the complainant had withdrawn the case the previous night. He was traumatized as a result of the arrest and detention. He still suffers from anxiety six years after the incident. He had to use medication and is still doing so.

Legal Principles

- [14] Section 40(1)(b) of the Criminal Procedure Act 51 of 1955 (the Act) authorises a peace officer to arrest, without a warrant any person, "*whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody*". In *Duncan v Minister of Law and Order*,² Van Heerden JA set out the jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the Act may be invoked. It was stated as follows:

"The so-called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.

² 1986 (2) SA 805 (A).

(2) He must entertain a suspicion.

(3) It 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.”³

[15] In order to prove the fourth requirement, the test is not whether the peace officer believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion.

[16] Furthermore, the arrestor must not only prove that he had reasonable grounds for believing that the arrestee committed a Schedule 1 offence, but also that the arrestee had the requisite *mens rea* for committing the offence.⁴

[17] Peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court. A number of choices may be open for him, all which may fall within the range of rationality. The standard is not perfect or even the optimum, judged from the vantage hindsight and so long as the discretion is exercised within this range the standard is not breached.”⁵

[18] Section 12(1)(a) of the Constitution guarantees everyone the right to freedom and security of the person, “*which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause*”. The courts have held that an arrest under the circumstances set out in section 40(1)(b) could not amount to deprivation of freedom which is arbitrary or without just cause. However, bearing in mind that the section authorises drastic and severe intrusion into the freedoms and security of persons, the courts have explained that the test to determine whether the reasonable suspicion was within the meaning of section 40(1)(b) was whether a reasonable person in the defendant’s position and possessed of the same information, would have considered

³ *Id* at 818G-H.

⁴ *Id* at 814D-E.

⁵ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

that there were sufficient grounds for suspecting that the plaintiff has committed the offence.⁶

- [19] The discretion whether or not to arrest arises once the jurisdictional facts for an arrest are present.⁷ In *Sekhoto*⁸ it was held that: "... *the decision to arrest must be based on the intention to bring the arrested person to justice*". In *Minister of Law-and-Order v Hurley and Another*⁹ it was held that the question whether a peace officer reasonably suspected or had reasonable grounds for suspecting that "*the person whom he arrested without warrant had committed an offence is objectively justiciable*". Therefore, the test is not whether an arresting officer believes that he has reasonable grounds to suspect, but whether objectively, he has reasonable grounds for his suspicion. In *Sekhoto*,¹⁰ Harms DP held that:

"This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached."

- [19] In *Mabona and Another v Minister of Law and Order and Others*,¹¹ Jones J stated as follows:

"This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion".

⁶ *S v Nel and Another* 1980 (4) SA 28 (E) at 33H.

⁷ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at para 28.

⁸ At para 30.

⁹ 1986 (3) SA 568 (A) at 579F.

¹⁰ At para 39.

¹¹ 1988 (2) SA 654 (SE) at 658G-H.

Analysis of the evidence

- [20] Having set out the legal principles that apply to the issues, I am called upon to decide whether the defendant has discharged the onus in justifying the plaintiff's arrest and detention by showing that the arresting officer exercised his discretion to arrest the plaintiff rationally.
- [21] Although theft is an offence listed in Schedule 1 of the Criminal Procedure Act. I am of the view that Captain Myburgh did not exercise his discretion rationally in arresting and detaining the plaintiff for reasons that will become apparent in the judgment.
- [22] The plaintiff testified that whilst he was speaking to Ricky inside the OK Mini market Captain Myburgh approached him from behind and arrested him in a violent manner. He warned him not to resist as additional charges could be laid against him. He yelled at him and stated that he would make sure that he did not get out of jail. The plaintiff kept on asking why he was being arrested and Captain Myburgh never responded. In my view, had Captain Myburgh explained to the plaintiff the reason for his arrest the plaintiff would have been given an opportunity to explain to him what he knew about the matter. That would have enabled Captain Myburgh to understand that this was not a criminal matter, and the arrest of the plaintiff would be unlawful.
- [23] Captain Myburgh stated that upon receiving the docket, he contacted the complainant to verify the information contained in the A1 statement. It does not appear to me that Captain Myburgh verified information in the docket through the plaintiff as it would have been obvious to him that the charge of theft preferred against the plaintiff was not for R22 000.00 but only for R2 200.00 and that this was a civil contractual dispute as he testified that there was an agreement concluded between the complainant and the plaintiff in the docket. Captain Myburgh was adamant that he did not need to investigate the matter before arresting the plaintiff as upon a simple perusal of the documents he had in his possession together with the fact of the complainant pointing the plaintiff out was sufficient for him to arrest and detain the plaintiff. I disagree. It is trite that the arresting officer has the discretion to arrest, and this discretion must be exercised having regard to the evidence at hand. Had Captain Myburgh investigated the contents of the docket and properly interviewed the complainant he would have exercised his discretion rationally.

[24] Against the backdrop of events and the facts that were common cause at the time of plaintiffs' arrest, I am of the view that the plaintiff successfully argued that Captain Myburgh acted *mala fide*. He acted upon a charge which was laid by the complainant, a charge which emanated from a breach of contract. It is my view that Captain Myburgh's conduct is not protected by the provisions of section 40(1)(b) of the Act and that the arrest and detention was unlawful.

Quantum

[25] Turning to the issue of quantum, I bear in mind what was held in *Minister of Safety and Security v Tyulu*¹² when the Supreme Court Appeal stated the following:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) 325 para 17; *Rudolph & others v Minister of Safety and Security & Others* (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29)."

[26] In evaluating what damages to award to the plaintiff, *Visser en Potgieter*¹³ states the following factors that generally play a role in the assessment of damages in similar cases, an assessment to determine what is fundamentally fair and equitable, as follows:

¹² 2009 (2) SACR 282 (SCA) at para 26.

¹³ *Law of Damages*, Third Edition at p505 to 548.

“... The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or ‘malice’ on the part of the defendant; the harsh conduct of the defendants; the duration and nature of the deprivation of liberty; the status, standing, age and health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; award in previous comparable cases; the fact that in addition to physical freedom, other personality interest such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and according to some, the view that *actio injuriarum* also have a punitive function.”

[27] The plaintiff justified the amount of R200 000.00 which he had claimed by referring to a number of similar judgments. I have had regard to them and am mindful that they only serve as a guide without losing sight of the facts of this matter. The ultimate purpose of this award is to compensate the plaintiff for his injured feelings and not to enrich him. I have to balance such interests when compensating him.

[28] Having given careful consideration to all the relevant factors, including the age of the plaintiff, the circumstances of his arrest, its nature and duration, his social standing and the effect of the arrest on him, I am of the view that that a fair and appropriate award of damages for the plaintiff’s unlawful arrest and detention is an amount of R35 000.00.

[29] In the result, the following order is made:

1. Judgment is entered in favour of the plaintiff.
2. The first defendant is ordered to pay the plaintiff damages in the sum of R35 000.00 (thirty-five thousand rands only).
3. Defendant is ordered to pay interest on the aforesaid sum *a tempore morae* from the date of summons.
4. Cost of suit



MB MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 06 September 2024

Date of Judgement: 20 February 2025

Appearances

Counsel for Plaintiff: Adv. W Davel

Instructed by: Spruyt Lamprecht and Du Preez Attorneys

Defendant's Counsel: Adv. Tshungu S

Instructed by: Office of the State Attorneys