

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>26 August 2025</u>	
DATE	SIGNATURE

APPEAL NO: **A146/2024**

CASE NO: **18144/21**

In the matter between:

THABO GERALD KOMANE

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by

email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 26 August 2025.

JUDGMENT

COLLIS J (Mngqibisa-Thusi et Millar JJ concurring)

INTRODUCTION

1. This is an appeal to the Full Court of the Gauteng Division of the High Court Pretoria, with leave granted by the Supreme Court of Appeal. The appeal is against the judgment handed down on 8 June 2023 by Acting Justice Mlotshwa sitting as the court *a quo*.

GROUND OF APPEAL

2. The appellant's grounds of appeal can succinctly be summarised as follows:

2.1 That the court *a quo* erred and/or misdirected itself in reaching the conclusion that the defendant discharged the onus cast upon it, to prove on a balance of probabilities, that the plaintiff's arrest was lawful.

2.2 That the court *a quo* erred and/or misdirected itself, in finding that Sergeant Masoga was the arresting officer.

2.3 That the court *a quo* erred and/or misdirected itself, in not finding that the Station Commander was, in actual fact, the arresting officer.

2.4 That the court *a quo* erred and/or misdirected itself, in not making a finding that the defendant's case is premised on hearsay evidence, particularly in regards to the following:

2.4.1. Sergeant Masoga did not read the complainant's (Maringa) statement;

2.4.2 Did not see the docket; and

2.4.3 Did not do his investigation, nor satisfy himself of the facts, but relied solely on Warrant Officer Semanya's say so.

3. The Notice of Appeal further alleges that the court *a quo* erred and/or misdirected itself, in not coming to the conclusion that hearsay evidence can only be used, against the plaintiff, if it meets the requirements of section 3 of the Law of Evidence Amendment Act 45 of 1988.

4. That the court *a quo* erred and/or misdirected itself, in finding that the police officer's conduct would be wrong if they had arrested Maringa and Khazamula, and let the plaintiff go.

EVIDENCE LED AT TRIAL

5. The facts giving rise to this case can be summarised briefly as follows: Mr Komane, the appellant testified that on 26 April 2020, he went to the scene of an accident to transport persons to a clinic who were involved in a collision. As he was driving through a place called Nokakeng he encountered people driving in a Corolla, who approached his vehicle. This Corolla vehicle overtook him and flagged him to stop. A person he later knew as Banda, then approached his vehicle and with pliers pulled a valve from one of his tyres. He then alighted from his motor vehicle to speak to Banda. At the same time another person called Tsepang smashed his windows using a jack. His radio speakers were also removed. In retaliation he then picked up a stone to threaten his assailants. These assailants then left.

6. He thereafter with the help of another taxi, went to the police station to lay a complaint and on arrival at the station he found the "assailants," even the one who smashed his window, already at the station. He was then encouraged by the police to rather negotiate with his assailants to see as to whether the issue could not be resolved amongst them. As it could not, he then proceeded to open a case of malicious damage to his motor vehicle.

7. To his surprise he found himself on the wrong side of the law and was himself then arrested for malicious damage to property, this after he failed to negotiate with his attackers. It appears that his attackers also had

opened a criminal case against him. Upon his arrest he was first placed inside a dark room, and later transported to Siyabuswa Police Station in the company of the two assailants. When they arrived at Siyabuswa Police Station he was placed in a crowded cell and stripped of his clothes by other inmates. He was made to sleep on the floor next to the toilet and never given any food for the entire duration of his stay inside the cell. His detention was until the 28th April 2020 and he was later released on bail. These charges were ultimately withdrawn against him, after he attended court a few times.

8. The respondent led the evidence of one witness Sergeant Masoga who testified as follows:

On 26 April 2020, he reported on duty for his evening shift, at Mmametlhake Police Station and that is when he met the appellant, who informed him that he was there to open a criminal case against the people who damaged his vehicle. Further that on the instruction of his Station Commander he arrested Mr Komane, this after he and the assailants present failed to negotiate and reach an agreement about the cross charges laid against one another. Sergeant Masoga testified that at no point did he see Mr Komane commit a crime in his presence, and merely carried out his arrest without a warrant as the parties on either side was unable to resolve the matter amicably.

9. Prior to the arrest, Sergeant Masoga testified that he had no sight of the docket opened against the appellant before he carried out the arrest nor did he read the statements of the complainants or conduct any investigation of his own. It was his evidence that if people are laying counter charges against each other and they cannot negotiate a solution to their dispute, then the police officers must arrest the complainants without a warrant.

ISSUES FOR DETERMINATION IN THIS APPEAL

10. In this appeal the first issue for determination is whether the Court a quo misdirected itself in finding that Sergeant Masoga was the arresting officer who harboured a reasonable suspicion when he carried out the arrest on the appellant without a warrant.

11. It is trite that the person affecting the arrest is a person who (i) must be a peace officer; (ii) the arrestor must entertain a reasonable suspicion; (iii) the suspicion must be that the suspect (arrestee) committed a Schedule 1 offence; and (iv) the suspicion must rest on reasonable grounds.¹

12. In the present matter, the respondent in the plea admitted the arrest and raised a plea in terms of section 40 (1) (b) of Act 51 of 1977, thus a

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 at 818G-H.

justification for the arrest. As a result of this plea, the respondent had the duty to begin and also it bore the onus of proof, which should be discharged on a balance of probabilities.

FIRST GROUND OF APPEAL

The Court erred and/or misdirected itself, in reaching the conclusion that the Defendant discharged the onus cast upon it, to prove on a balance of probabilities that the Plaintiff's arrest was lawful, that Sergeant Masoga was the arresting officer and its failure to find that the Station Commander was instead the arresting officer.

13. As already mentioned above, the respondent carried the onus of proof, which onus must be discharged on a balance of probability. In this regard it was the evidence of Sergeant Masoga that he carried out the arrest of the appellant when he reported on duty that evening. At the time he was informed by a colleague that a docket has already been opened as against the appellant by members of a rival taxi association. Albeit that he never read the statement made in the other docket so opened, or verified the allegations made against the appellant he proceeded to effect the arrest of the appellant as the opposing parties could not resolve the dispute amongst themselves at the station.

14. Sergeant Masoga never testified that he acted on instructions of his Station Commander to effect the physical arrest of the appellant. During his testimony he was also not confronted with this version. As such it is rather opportunistic to now at appeal stage place this version before this Court. On the first ground of appeal, the question still remains as to whether Sergeant Masoga harboured a reasonable suspicion against the appellant before he effected the arrest.

15. In the absence of having read the statement of the docket already opened as against the appellant or having interviewed the complainant in this other docket, it follows that he could not have formed a reasonable suspicion before he carried out the arrest of the appellant. To merely have carried out the arrest of the appellant as the two rival associations could not resolve their dispute as per his testimony, is simply not understanding his obligations and responsibilities in terms of the provisions of section 40(1) (b) of the Criminal Procedure Act 51/1977. Absent such reasonable suspicion being formed by Sergeant Masoga, there simply could be no justification for the arrest.

16. The court a quo having concluded that the respondent discharged its onus and that there was no need for the arresting officer to have read the complainants' statement contained in the other docket amounts to a

misdirection on the part of the court *a quo* and on this basis alone the appeal should succeed.

17. Furthermore, the court *a quo* also misdirected itself by finding that the arrest could be carried out simply because there was an earlier complaint filed against the appellant. Any earlier complaint filed at the same station is also no basis for having effected the arrest of the appellant. Here too a misdirection on the part of the court *a quo* has occurred.

18. Therefore, on the first ground of appeal so listed I conclude that the court *a quo* misdirected itself and based on this ground alone, the appeal should succeed.

SECOND GROUND OF APPEAL

The honourable court erred and/ or misdirected itself in not finding that the respondent's case is premised on hearsay evidence when regard is had to the following concessions made by Sergeant Masoga during evidence that he did not read the complainant in the other dockets statement, that he did not see the other docket and lastly that he did not do any investigation of the facts.

19. During his testimony, Sergeant Masoga conceded that he did not read the complainant's statement prior to arresting the appellant. Sergeant Masoga also conceded that he did not witness the appellant committing any offence and was merely informed when he reported on duty that the appellant had allegedly committed an offence. As such he relied exclusively on the report made to him by his colleague and based on this report he carried out the arrest.

20. During the trial before the court a quo Sergeant Masoga was the only witness who testified on behalf of the respondent and as such what was reported to him in relation to the offence allegedly having been committed by the appellant was not corroborated by the police officer who opened the other docket.

21. Section 3 of the Law of Evidence Amendment Act 45 of 1988, provides as follows:

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence

depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

22. Having regard to the provisions of section 3 above, it is clear that the probative value of the testimony proffered by Sergeant Masoga in relation to the commissioning of the offence was dependant on the respondent having called another witness to corroborate what was said by Sergeant Masoga. This the respondent had failed to do and as such a great portion of Sergeant Masoga's evidence was hearsay evidence.

23. The court *a quo*, should not have relied on the hearsay evidence as presented by Sergeant Masoga, without this portion of his evidence being corroborated by his colleague that made a report to him. As such there had been non-compliance with section 3(1)(b) of Act 45 of 1988.

24. It is for the above reason that I find that there is also merit in the second ground of appeal so listed and as such it is my considered view that the appellant ought to succeed on the merits.

25. In turning to the determination of the *quantum* by the court *a quo*, the appellant applied to admit the expert report in terms of Rule 38(2). The respondent did not raise an objection to the expert report being admitted as such.

26. The transcribed record however does not reflect that the court *a quo* formally admitted the expert report or dealt with it as a court of first instance.

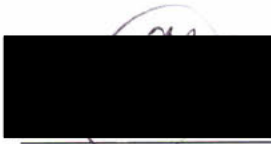
27. Absent such, the issue of *quantum* cannot be adjudicated for the first time by this court on appeal.

28. For this reason, I propose that the matter be remitted back to the court *a quo* for adjudication of the *quantum*.

29. In the result I propose the following order:

29.1 On the merits the appeal is upheld with costs of two counsel.

29.2 The trial for the determination of the *quantum* is remitted back to the trial court for adjudication.



COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

I agree and it is so ordered.



MNGQIBISA-THUSI J

JUDGE OF THE HIGH

COURT

I agree



MILLAR J

JUDGE OF THE HIGH

COURT

APPEARANCES

Counsel for the Appellant: Adv.DM Kekana

Adv. KC Mokgope

Instructed By: Savage Jooste and Adams

Counsel for the Respondent: Adv. M. Musetha

Instructed By: Office of the State Attorney, Pretoria

Date of Hearing: 16 October 2024

Date of Judgment: 26 August 2025