



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

CASE NO.: 628/2023

Reportable	Yes/No
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In the matter between:

NOBAHLE DAMOYI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] The plaintiff instituted an action against the Minister of Police (the defendant) claiming damages in the amount of R700 000 (Seven Hundred Thousand Rand) for the alleged unlawful arrest and detention. The arrest was effected by the members of the South African Police Services (SAPS) acting

within the course and scope of the defendant's employment.

[2] By agreement between the parties, the trial proceeded in respect of both the merits and the quantum.

[3] In her particulars of claim, the plaintiff explained the facts leading to her arrest, which are largely common cause. The defendant admits to the arrest and subsequent detention but claims it was lawful.

[4] The law is settled, once the arrest is admitted, the defendant bears the onus to prove lawfulness on a balance of probabilities. In *Minister of Law and Order and others v Hurley and Another*¹, the appellate court held that:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

In *casu*, the trial proceeded on that basis.

The evidence

[5] Around 2019, the world discovered a deadly disease known as corona virus. Precautionary measures were developed to curb the spread of the virus. The virus was contagious and the South African President declared a state of disaster.

[6] During the curfew, certain regulations were put in place including the ban of selling liquor in terms of the regulations promulgated under s 27(2) of the COVID-19 Disaster Management Act 2002.² It is common cause that during

¹ *Minister of Law and Order and Others v Hurley and Another* [1986] ZASCA 53; [1986] 2 All SA 428 (A) paras 65-66. See also *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) at para 32.

²Regulations issued in terms of s 27(2) of the Disaster Management Act 57 of 2002, originally published in Government Notice No. 318 published in Government Gazette No. 43107 of 18 March 2020, and amended by Government Notice No. 398 published in Government Gazette No. 43148 of 25 March 2020; amended by

this period, there was heavy police visibility aiming at maintaining law and order, specifically helping to reduce the spread of the virus.

[7] On 30 April 2020, the plaintiff had some few bottles of liquor at home and the police received a tip-off that she was selling liquor. They visited her home for the purpose of verifying the said information and to act accordingly. The plaintiff was in the company of her family including her minor children. They found the liquor as advised, however the plaintiff claimed that the liquor was for a traditional ceremony which was planned post-curfew.

[8] The police asked the plaintiff to prepare herself for arrest. They took her away in a police van, detained her and later gave her a J534 which is a written notice to appear in court (the notice). According to the notice the plaintiff was to appear in court on 29 May 2020, a date that was identified as a trial date. The notice had an option of an admission of guilt fine of R10 000 which was payable on or before 21 May 2020.

[9] On the date of the trial, the plaintiff went to court as advised. The prosecutor informed her to go home as her case was not on the list of cases that were enrolled for the day. It is therefore common cause that the arrest and detention did not culminate in any formal charges or criminal prosecution against the plaintiff.

[10] The evidence of the plaintiff and that of Constable Nkosikho Madikane (the arresting officer) parted ways in respect of the following: The plaintiff testified that she was detained in the police cells from the late hours of 30 April 2020 until 1 May 2020 around 1.am. Conversely, the arresting officer explained that the plaintiff was in the police custody for at least 30 minutes and was never detained in the police cells.

[11] During cross-examination, the defendant's counsel noted a discrepancy in the plaintiff's evidence pertaining to whether during her arrest she was handcuffed or not. Despite her handcuffing being mentioned in the particulars of claim, in cross-examination the plaintiff maintained that she was not handcuffed.

The issues

[12] The issues for determination are whether the plaintiff's arrest and subsequent detention were lawful and whether she is entitled to compensation for damages suffered as a result of the alleged unlawful arrest and detention.

The legal principles

[13] In terms of our law arrest and detention without a warrant is *prima facie* unlawful unless it fits the exceptions outlined under s 40 (1) of the Criminal Procedure Act 51 of 1977 (the CPA). In this case, it is common cause that the arresting officer effected the arrest without a warrant. The defendant's case hinges on the provisions of s 40 (1) (b) of the CPA.

[14] Section 40 (1) (b) of the CPA which is couched in discretionary terms provides as follows:

‘40 Arrest by peace officer without a warrant.

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

(a)...

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

[15] In *Duncan v Minister of Law and Order*³, a landmark case that established the jurisdictional facts required for a lawful arrest without a warrant,

³ 1986 (2) SA 805 (A) at 818.

the following was stated: that the person making the arrest must be a peace officer as defined under the CPA; the peace officer must entertain a suspicion that an offence has been committed; the suspected offence must be one listed under Schedule 1 and that the suspicion must be based on solid grounds.

[16] The test for reasonable suspicion is objective. The question is whether a reasonable person in the peace officer's position with the same information would have suspected the person of having committed a schedule 1 offence. Essentially, the legal position is that the suspicion should not be more than just a hunch or a unparticularised suspicion.⁴

The court's analysis of evidence

[17] In the case under consideration, there is no doubt that the arresting officer was a peace officer as contemplated under s 40 (1) of the CPA. Notwithstanding this, more is required to establish whether he acted within the confines of the law.

[18] Our courts have consistently held that the justification to arrest requires a responsible official to point to the specific statute or statutory regulation conferring the power to arrest or detain. They must 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.⁵

[19] A conspectus of facts clearly demonstrates that there was no evidence that liquor was sold in the house. The plaintiff's explanation regarding the presence of few liquor bottles at home sounds plausible in the absence of evidence demonstrating that liquor was sold. This therefore weakens the case for a reasonable suspicion.

⁴ *Mabona v Minister of Police* 1988 (2) SA 654, 658 E-H

⁵ *Madyibi v Minister of Police* (4132/17) [2020] ZAECHMHC 11;2020(2) SACR 243 (ECM) (17 March 2020).

[20] Moreover, a proper evaluation of the list of Schedule 1 offences reveals that only serious offences are included under this Schedule. In my opinion, the legislature would not have anticipated that covid 19 or corona virus would arise, warranting the listing of illegal selling of liquor under Schedule 1. Therefore, the regulation that the plaintiff allegedly violated did not fall under Schedule 1 in the list of offences in terms of the CPA.

[21] A similar finding was made by Sibiya AJ in *Shobede v Minister of Police*⁶ where the court explicitly stated that the offence of selling liquor in contravention of the regulations which were issued in gazette notice 43107 on March 2020 is not listed as Schedule 1 offence in terms of the CPA.

[22] Moreover, the fact that the regulation in question allows for an admission of guilt fine suggests that this offence was categorised as a less serious offence. Notably, these regulations were promulgated on an emergency basis for a specific and brief period. In any event, under cross-examination, the arresting officer did not even know what Schedule 1 entailed. Although this is very much understood, the defendant's reliance on s 40 (1) (b) of the CPA which requires the offence allegedly committed to be listed under Schedule 1 was misplaced. Therefore, the requirements set out in *Duncan*⁷ were not satisfied, rendering the arrest and subsequent detention unjustified.

Quantum of damages

[23] The freedom and security of persons is safeguarded by the Constitution.⁸ Section 12 of the Constitution provides that:

‘ (1) Everyone has the right to freedom and security of the person, which includes the right

⁶ [2025] ZAKZDHC 53 at paras 29-30.

⁷ Fn 3 supra.

⁸ The Constitution of the Republic of South Africa, 1996.

(a) not to be deprived of freedom arbitrarily or without just cause.

(b) not to be detained without a trial.’

[24] In *Minister of Safety and Security v Tyulu*⁹, the SCA stated that 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 needed solatium for his or her injured feelings. Therefore, the damages awarded should be commensurate with the injury inflicted.

[25] Notwithstanding this, the basic principle is that the courts should be astute to ensure that the award made reflects the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of liberty is viewed.¹⁰

[26] In *Rahim and Another v Minister of Home Affairs*¹¹, the SCA stated the following:

‘The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty, the amount of satisfaction is calculated by the court ex aequo et bono inter alia the following:

- (i) the circumstances under which the deprivation took place;
- (ii) the conduct of the defendants;
- (iii) the nature and duration of the deprivation.’

⁹ [2009] 4 All SA 38 (SCA) at para 26.

¹⁰ *Tyulu* supra at para 26.

¹¹ [2015] 3 All SA 425 (SCA) at para 27.

[27] In the circumstances of this case, the police seriously infringed the plaintiff's right to dignity and privacy. The police visit was conducted at night without any valid justification. The arresting officer acted on a tip-off and failed to apply his mind objectively.

[28] The fact that the arrest was effected in full view of the minor children is concerning. There was a clear disregard for the paramountcy of the best interests of the minor children. The children were left at home at night unattended. In her testimony the plaintiff explained how this arrest and subsequent detention affected her emotional state. She testified that she was very hurt and concerned about a 14-year-old she left at home. She explained that the 14-year-old is mentally challenged.

[29] The plaintiff testified that she was confronted by the community members asking her to explain why she did not inform them that she was selling liquor. She explained that the arrest and detention affected her physical well-being. As a person suffering from arthritis, she felt very cold during her period of detention.

[30] Regarding the duration of detention, this court accepts that the plaintiff was arrested around 21:00 and released in the early hours of the morning around 1 a.m. This period is calculated at approximately 4 hours.

[31] The question is whether R700 000 (Seven Hundred Thousand Rand) which is the amount claimed for damages is justified in the circumstances of this case. The SCA¹² has recently warned legal practitioners to exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and

¹² *Dijan v Minister of Police* [2022] ZASCA 103 (23 June 2022) at para 20.

excessive amounts in the particulars of claim. The SCA further cautioned the courts to refrain from awarding exorbitant amounts lavishly.

[32] A similar remark was made in *Pitt v Economic Insurance Co Ltd*¹³, where Holmes J remarked as follows:

‘I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff but must not pour our largesse from the horn of plenty at the defendant’s expense.’

[33] Despite the pain and suffering caused by the unlawful arrest and detention, I conclude that an amount of R700 000 is not justified in the circumstances of this case. However, I have taken cognisance of all the factors cumulatively including the awards in previous cases.¹⁴ I therefore conclude that an amount of R140 000 (One Hundred and Forty Thousand Rand) is justified.

Order:

[34] In the result, the following order shall issue:

1. Judgment is granted in favour of the plaintiff against the defendant.

¹³ 1957 (3) SA 284 (D) at 287E-F.

¹⁴In *Peterson v Minister of Safety and Security* [2009] ZAECPH 65, Plasket J awarded R60 000 for unlawful arrest and detention despite the plaintiff only having been in custody for eight hours, on the basis of the indignity of the situation: the Plaintiff was arrested in a state of undress, observed by people in the street and subjected to malicious conduct on the part of his arrestor; In an unreported judgment of *Hermanus Arnodus Barnard v The Minister of Police and Helgard Potgieter*, Case no: CA98/2022, ECD, Makhanda delivered on 3 May 2022, the Appellant was awarded a sum of R25 000 after he was unlawfully arrested and detained for approximately six hours.

2. The defendant shall compensate the plaintiff an amount of R140 000 (One Hundred and Forty Thousand Rand) for damages suffered as a result of unlawful arrest and detention.

3. The defendant shall pay interest at the above amount, calculated at the legal rate, from the date of the judgment to the date of payment.

4. The defendant shall pay costs of this action on Scale A pursuant to 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 M Somandi
Instructed by : MSITSHANA INCORPORATED
Makhanda

Counsel for the Defendant : Adv Mzamo
Instructed by : State Attorney
Gqeberha

Heard on : 10 November 2025
Judgment Delivered on : 20 January 2026