



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

Case no: 1318/2024

In the matter between:

**SIPHESIHLE HOPEWELL KAKANA**

Plaintiff

and

**THE MINISTER OF POLICE**

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Second Defendant

---

**JUDGMENT**

---

**Appels AJ**

**Introduction**

[1] This is an action for damages in which the plaintiff claims against the first defendant for alleged unlawful arrest and detention. The action was initially instituted against both defendants. In this regard, the plaintiff claimed:

a) in respect of claim 1, against the first defendant for unlawful arrest and detention before the first court appearance;

b) in respect of claim 2, against both defendants for his further detention from his first appearance to his release from custody; and

c) in respect of claim 3, against the second defendant only for malicious prosecution.

[2] All claims against the second defendant were withdrawn during the course of the trial. During closing argument, the plaintiff's counsel also indicated that the plaintiff will not persist with the claim against the first defendant for the further detention following the plaintiff's first appearance in court.

### **The facts**

[3] The facts of this matter are common cause. The plaintiff, along with another man, was arrested by a member of the SAPS, Sgt Ngcokazi, on 4 February 2022 without a warrant of arrest. They were detained until their first appearance in the Magistrates' Court on 7 February 2022 on a charge of robbery with aggravating circumstances. After the plaintiff's first appearance on 7 February 2022, he was detained in terms of successive remand orders issued by the magistrate. He was eventually released from custody when he was discharged by the presiding magistrate in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("the CPA").

[4] By agreement the following documents were admitted into evidence:

a) The transcribed record of the bail and criminal trial proceedings in the Magistrates' Court, marked Exhibit A;

b) An indexed bundle of documents, containing sworn statements, bail information form, investigation diary and the Regional Court charge sheet, marked Exhibit B; and

- c) The minutes of a rule 37 pre-trial conference, marked Exhibit C. It was recorded *inter alia* in the minutes that the documents referred to above may be admitted into evidence without the necessity of having to prove the contents thereof.

[5] The plaintiff's arrest was preceded by a report of an armed robbery made by two complainants, Thandiswa and Unathi Kalipa ("the complainants"). It appears from two sworn statements made by Unathi Kalipa ("Unathi"), admitted into evidence as part of Exhibit B, that on 4 February 2022 at approximately 21h30, his home, which he shared with Thandiswa Kalipa ("Thandiswa"), was invaded by two men, one of whom was armed with a firearm. The complainants were robbed of certain of their belongings, including their motor vehicle.

[6] The robbery was reported to the SAPS who sent two members, Sgt Ngcokazi and St Hoza to attend to the scene. While Unathi was standing outside his home, giving a statement to the police about the armed robbery, the plaintiff and his co-accused walked past them. Unathi identified and pointed them out to the SAPS members as the two men who invaded his home earlier that same evening. He stated that he recognised them by their complexion, the clothes that they are wearing and the fact that one of them wore a beard.

[7] The plaintiff was arrested by Sgt Ngcokazi, after having been so identified and pointed out by Unathi as one of the armed robbers who invaded his home. Notably, the plaintiff conceded during cross-examination that he was wearing a beard on the evening of 4 February 2022 when he was pointed out by Unathi.

[8] After his arrest, the plaintiff appeared in court on 7 February 2022 on a charge of robbery with aggravating circumstances. A bail application was brought on 21 February 2022, with judgment being handed down on 28 February 2022. The magistrate refused bail and the plaintiff remained in custody. The plaintiff thereafter made numerous court appearances, and he was remanded in custody by order of the magistrate until he was discharged at the end of the state's case in accordance with section 174 of the CPA on 13 February 2024.

[9] In his ruling in terms of section 174 of the CPA, the magistrate recorded that the evidence of the complainants 'as far as the identity of the robber is concerned, is not sufficient'. In this regard, the magistrate pointed out various deficiencies and inconsistencies in their evidence regarding the identity of the armed robbers who invaded their home.

[10] The plaintiff made several concessions during cross-examination. He conceded that he was identified and pointed out by Unathi as one of the armed robbers who invaded his home and that he was arrested after being so identified. He also conceded that it was reasonable for the police to arrest him after having been so identified and pointed out. He also conceded that he was wearing a beard on 4 February 2022.

[11] The contents of Exhibit A, as it relates to the bail proceedings were put to the plaintiff during cross-examination and he was forced to make further concessions regarding his detention after his first appearance in court. In this regard, he conceded that he was given the opportunity to apply for bail; that he presented evidence during the bail proceedings and that the investigating officer also gave evidence at the bail hearing.

[12] The plaintiff could not point to anything in the evidence given by the investigation officer that was untrue. In this regard, the plaintiff conceded that the investigating officer stated that he was arrested because he was pointed out and identified by the complainant as the person who carried out the robbery. The investigating officer's evidence in this regard was in accordance with the sworn statements of the complainants. The plaintiff was further forced to concede that the magistrate considered all the evidence that was presented in court before giving judgment in the bail application.

## **Analysis**

[13] It is common cause that the plaintiff was arrested without a warrant and accordingly the onus to justify the arrest rests on the defendant.<sup>1</sup> In this regard, the first defendant pleaded that the arrest was lawful in terms of section 40(1)(b) of the CPA in that the plaintiff was reasonably suspected of having committed an offence mentioned in Schedule 1 of the CPA.<sup>2</sup>

[14] In *Duncan v Minister of Law and Order*<sup>3</sup> it was held that the jurisdictional requirements for a lawful arrest in terms of section 40(1)(b) of the CPA are that:

- a) the arrestor must be a peace officer;
- b) there must have been a suspicion that
- c) the suspect committed an offence referred to in Schedule 1 of the CPA; and
- d) the suspicion must be reasonable.

[15] The arresting officer did not give oral evidence regarding the information that he had at his disposal when he arrested the complainant. However, all the facts which he had at his disposal and to which he would have testified had he given oral evidence are common cause. These common cause facts are evident from the exhibits admitted into evidence by agreement, as well as the plaintiff's own evidence during examination in chief and the concessions he made during cross-examination.

[16] It is clear from these common cause facts that the arresting officer was a peace officer that held a suspicion that the plaintiff committed robbery. Robbery is an offence mentioned in Schedule 1 of the CPA<sup>4</sup>. Therefore, at least three of the four jurisdictional requirements to justify an arrest without a warrant, have been met. The question which should be determined is whether the suspicion was objectively reasonable.

[17] In *Biyela v Minister of Police*<sup>5</sup> the Supreme Court of Appeal held that:

---

<sup>1</sup> *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

<sup>2</sup> Robbery is an offence mentioned in Schedule 1.

<sup>3</sup> 1986 (2) SA 805 (A) at 818G-H.

<sup>4</sup> Schedule 1 of the CPA.

<sup>5</sup> 2023 (1) SACR 235 (SCA) at paras 33-35.

‘The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasized that the suspicion need not be based on information that would subsequently be admissible in a court of law.

The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed, based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.’

[18] It was suggested during argument by the plaintiff’s counsel that the arresting officer should not have merely accepted the statement and identification made by Unathi. It was contended that he should have done some further investigation before arresting the plaintiff. I was referred to various authorities where the courts have found that a police officer is expected to analyse and weigh the quality of information critically and only after he has checked what can be checked, would he be able to form a suspicion.<sup>6</sup>

[19] These authorities rely on *Mabona and another v Minister of Law and Order and others* (“Mabona”)<sup>7</sup> where the court held as follows in relation to how a reasonable suspicion is formed:

‘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 his information, a

---

<sup>6</sup> See for instance *Minister of Police v Dhali* (CA327/2017) [2019] ZAECHC 16 (26 February 2019) at para 13.

<sup>7</sup> 1988 (2) SA 654 (SE) at p 658G-H.

reasonable many 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, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess 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 justify an arrest.'

[20] However, in *Mawu and another v Minister of Police*<sup>8</sup> the court held that *Mabona* cannot be regarded as authority for the proposition that for a reasonable suspicion to be formed, it is necessary that the arresting officer should, in all cases, analyse and assess the quality of the information on which his suspicion is found prior to arresting the suspect. I agree.

[21] In this regard, it must be borne in mind that the statement by the court in *Mabona* regarding the need to analyse information, was made in the context of a police officer relying solely on information he received from a secret informer. The court held that the police officer should have treated the information received from an informer with caution. The court stated the following:

'Every reasonable policeman knows that our courts regard the evidence of informers with caution. Informers are categorised with accomplices, quasi accomplices and police traps as witnesses whose evidence must be subjected to close and careful scrutiny before it is accepted at all unless it is corroborated.'<sup>9</sup>

[22] It should also be borne in mind that the court in *Mabona* went further and stated that:

'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.'<sup>10</sup>

---

<sup>8</sup> 2015 (2) SACR 14 (WCC) at para 31.

<sup>9</sup> *Mabona (supra)* at p 658I-J.

<sup>10</sup> *Mabona (supra)* at p 658H.

[23] The facts of *Mabona* are clearly distinguishable from the facts in this matter. In *Mabona*, the arresting officer relied solely on information received from a secret informer. In this matter, the plaintiff walked past the scene of an armed robbery which occurred early that same evening and was identified by an eyewitness, in the presence of the arresting officer, as one of the men who carried out the armed robbery.

[24] There is no evidence that the plaintiff gave any potentially exculpatory version that would have given the arresting officer cause to do further checks and verification. Under these circumstances, where the arresting officer was relying on the direct evidence of an eyewitness, I cannot find that he ought to have done more analysing or investigation before arresting the plaintiff.

[25] The fact that the magistrate in the criminal proceedings did not find the complainant's evidence sufficiently reliable to sustain a conviction of the plaintiff does not mean that the information the arresting officer had was insufficient to harbour a reasonable suspicion that the plaintiff committed the offence. Questions about the reliability and credibility of a complainant's identification need not be determined by the arresting officer with the same degree of certainty (beyond reasonable doubt) which is required for conviction in criminal proceedings.<sup>11</sup>

[26] In my view, viewed objectively, the information that the arresting officer had at his disposal justified a reasonable suspicion that the plaintiff committed the robbery reported to have occurred on 4 February 2022.

[27] Once the jurisdictional requirements for an arrest have been met, a discretion arises.<sup>12</sup> Arresting officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality.<sup>13</sup> The party who alleges that the discretion has been improperly exercised bears the onus of proof.<sup>14</sup> The offence which the plaintiff was suspected of having committed was a serious offence. No

---

<sup>11</sup> *Minister of Safety and Security v Bothma and another* 2016 (1) SACR 632 (ECG) at para 17.

<sup>12</sup> *Minister of Safety and Security v Sekhoto and another* 2011 (5) SA 367 (SCA) at para 28.

<sup>13</sup> *Minister of Safety and Security v Sekhoto and another (supra)* at para 36.

<sup>14</sup> *Minister of Safety and Security v Sekhoto and another (supra)* at para 49.



evidence was placed before me from which I could conclude that the arresting officer did not exercise his discretion within the bounds of rationality.

[28] During closing argument, the plaintiff's counsel indicated that the plaintiff does not persist with claim 2. This concession was correctly made. In this regard it was evident from the plaintiff's own evidence and the concessions made during cross-examination, that the successive remand orders in terms of which the plaintiff was detained from his first appearance to his release from custody, did not breach the provisions of section 12(1)(a) of the Constitution.<sup>15</sup>

[29] In this regard, it should be noted that the plaintiff was charged with a Schedule 6 offence.<sup>16</sup> The magistrate was therefore obliged to:

'...order the accused be detained in custody until he or she is dealt with in accordance with law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.'<sup>17</sup>

[30] The plaintiff was given an opportunity to apply for bail and was legally represented during the bail proceedings. After hearing both the state and the plaintiff, the magistrate refused bail. It is evident from the contents of Exhibit A that the magistrate considered all the facts and circumstances relevant to bail in accordance with section 60(5) to (9) of the CPA. It was not suggested that the investigating officer or the prosecutor withheld any information from the magistrate which was relevant to the determination of bail.

---

<sup>15</sup> Section 12(1)(a) of the Constitution affords every accused person with a right not to be deprived of freedom arbitrarily without just cause. Every encroachment on physical freedom must be carried out in a procedurally fair manner and should be substantively justified by acceptance reasons. A breach of section 12(1)(a) of the Constitution may render detention unlawful for the purposes of a delictual claim for damages even where the accused was detained in terms of an order issued by a magistrate. See *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) at paras 43-53.

<sup>16</sup> 'Robbery involving (a) the use by the accused or any co-perpetrators or participants of a firearm;..or (c) the taking of a motor vehicle', is mentioned in Schedule 6 of the CPA.

<sup>17</sup> Section 60(11)(a).

[31] The remand orders in terms of which the plaintiff was detained from the date of his first appearance were therefore granted in a procedurally fair manner and for substantially justifiable reasons.<sup>18</sup> Accordingly, no delictual claim for damages can arise from his detention after his first appearance in court.

[32] Claim 3 was withdrawn during the course of the trial. In respect of claim 3, the plaintiff bore the onus of proving that the second defendant instigated the proceedings, acted without reasonable and probable cause, acted with malice and that the prosecution failed. The plaintiff only proved that a) the second defendant instigated the proceedings and b) that the prosecution failed. No evidence was presented that the prosecution was instituted without reasonable and probable cause, nor was there any evidence that the prosecutor acted with any malice.

[33] In the circumstances, counsel for the plaintiff ought to be commended for not persisting with Claims 2 and 3.

## **Conclusion**

[34] I find that the defendant has discharged the onus of justifying the arrest of the plaintiff in terms of section 40(1)(b) of the CPA. No evidence was presented to suggest that the discretion to arrest was improperly exercised. Accordingly, claim 1 as set out in the particulars of claim ought to be dismissed.

[35] Claim 2 and Claim 3 have been withdrawn by the plaintiff during the trial. Had these claims not been withdrawn, they would have been dismissed for the reasons set out above. Therefore the entire action falls to be dismissed with costs.

## **Order**

[36] The following order is issued:

1. The plaintiff's action against the first and second defendants in respect of claims 1, 2 and 3, are dismissed.

---

<sup>18</sup> *Zealand v Minister of Justice and Constitutional Development and another (supra)*.

2. The plaintiff is ordered to pay the costs of the first and second defendant, including the costs of counsel, taxed on scale B.

---

**G APPELS**  
**ACTING JUDGE OF THE HIGH**  
**COURT**

**APPEARANCES:**

For the Plaintiff:  
Instructed by: Adv. Z Bangani  
Magqabi Seth Zita Attorneys  
14 Market Street  
North End  
GQEBERHA

For the Defendants  
Instructed by: Adv. N. Mullins SC  
State Attorney  
29 Western Road  
Central  
GQEBERHA

**Heard:** 10 November 2025, 11 November 2025 and  
12 November 2025

**Delivered:** 10 March 2026