

LESOTHO / JUDGMENT

Maieane Khaketla V COMPOL (CIV/T/0114/2017) [2024] LSHC 133 (10 July 2024) [2024] LSHC 133

COURT

High Court

CASE / FILE NUMBER

CIV/T/0114/2017

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IN THE HIGH COURT OF LESOTHO

In the matter between:

CIV/T/0114/2017

MAIEANE KHAKETLA

PLAINTIFF

V

COMMISSIONER OF POLICE

THE ATTORNEY GENERAL

1ST DEFENDANT

2ND DEFENDANT

JUDGMENT

CORAM DATE OF HEARING

JUDGMENT

::: JUSTICE M. P. RALEBESE 07 FEBRUARY 2024 AND 24 MAY 2024 10 JULY 2024 Neutral citation:-
Maieane Khaketla vs Commissioner of Police & one [2017] LSHC Civ 133 (10th July 2024)

SUMMARY Delict – Claim for damages for unlawful arrest and detention and contumelia -Police arrested plaintiff who committed contempt of court in their presence – Bifurcated nature of civil contempt means that it has retained its criminal nature – Contempt proceedings can be instated civilly or criminally – If an offence is committed in the presence of the police they do not need a warrant of arrest to effect the arrest – Where the plaintiff refused to voluntarily go with the police and they carried him out of the church the manner of the arrest was not wrongful.

ANNOTATIONS CASES SOUTH AFRICA Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

Pheko and Others v Ekurhuleni Metropolitan Municipality (No.2) 2015 (5) SA 600 (CC) STATUTES

Constitution of Lesotho 1993 Criminal Procedure and Evidence Act No. 17 of 1981 High Court Rules Legal Notice No.9 of 1981 Police Service Act No. 7 of 1998 BOOKS Neething, Potgieter, Visser, Law of Delict, 7th Edition, Lexis Nexis.

Background

- [1] This matter centers around the bifurcated nature of the civil contempt of court and the role of the police in the enforcement of the civil contempt of court.
- [2] The plaintiff in this matter is a priest of the Anglican Church of Southern Africa in the diocese of Lesotho. He was arrested and detained on 28th August 2016 by members of the Lesotho Mounted Police Service who were at the time acting as the agents of the Commissioner of Police, the 1st defendant herein. It was against that arrest and detention that the plaintiff instituted the instant action in terms of which he sought compensation against the defendants in the following terms:-
 - (a) M500,000.00 for unlawful and or malicious arrest and detention.
 - (b) M1,500,000.00 for contumelia and impairment of dignity. The action was defended and the defendants denied liability for the delicts sought by the plaintiff.
- [3] The background and the facts of this case are mostly common cause. They are briefly that some time in 2012, one Bishop Adam Taaso Mallane, the Bishop of the Lesotho Diocese of the Anglican Church of Southern Africa, instituted the motion proceedings against the plaintiff (then the respondent) in the Magistrate Court of the district of Maseru in CC154/2014. The Bishop sought that the plaintiff be interdicted from violating the terms of his suspension from taking his seat at the sanctuary of the church during church services at the Anglican Church of Southern Africa in the diocese of Lesotho. The parties seemed to be ad idem that the application culminated in an interim Court Order which was granted by Her Worship Mrs Motebele on 14th June 2012. The terms of the interim court order were that the plaintiff was restrained and interdicted from violating the terms of his suspension by taking his seat at the sanctuary of the church during the church services of the Anglican Church of Southern Africa in the diocese of Lesotho pending the outcome of that application. It is not clear however whether the interim order was ever confirmed on the return date, which was the 21st of June 2012, but it turned out during the course of the instant proceedings that none of the parties disavouched the existence and subsistence of the court order that restrained the plaintiff as aforesaid.
- [4] On the morning of 28th August 2016, the plaintiff arrived at St. James Cathedral in Maseru preparing to preside over a Mass. He was met by two police officers who were the agents of the 1st defendant and one of them, identified as Inspector Lerotholi, informed the plaintiff that the Commissioner of Police wanted to have a word with him and that they had come to take him to the Commissioner. The plaintiff informed them that he could not go with them as he was preparing to preside over a church service. The police officers showed the plaintiff the Interim Court order that barred him from entering the sanctuary at the Cathedral. The

plaintiff insisted that he was going into the church service, and he left the police officers.

- [5] Soon after the introit had been sung, and while the plaintiff was already in the sanctuary in full vestments, one Mr. Litelu Ramokhorro who was the church elder made an announcement to the congregation of about six hundred (600) people that the police were present in the church to do their duty, and they would thereafter leave. Soon thereafter, Inspector Lerotholi approached the plaintiff at the sanctuary and whispered to him that he should go with them. The plaintiff refused saying he was in the church service. Inspector Lerotholi then issued a command to other police officers who were with him to carry the plaintiff out of the church, and they obliged. These police officers took the plaintiff to their vehicle that was parked outside, and they drove with him to Maseru Central Charge office where he was put in a police cell. It is not in issue that the police were at the time of the arrest unarmed with a warrant of arrest. When the plaintiff asked the police officers for the warrant of arrest, Inspector Lerotholi said they were the warrant unto themselves.
- [6] The plaintiff was later released from the cell when his lawyer, Advocate Haae Phoofolo KC arrived. The police released the plaintiff from custody after his lawyer had made an undertaking that he would take him to Maseru Magistrate Court on the following day. On the following day, the plaintiff reported at Maseru Central Charge Office with his lawyer, and he was told to proceed to Maseru Magistrate Court. He went there with one police officer from Maseru Central Charge Office. The plaintiff was never charged at Maseru Magistrate Court and he remained there until the Clerk of the Court told him to go home. The issues
- [7] The primary issues in this case are whether the plaintiff's arrest and detention were unlawful, and consequently whether he suffered any contumelia as a result of the unlawful arrest and detention. Directly flowing from these issues is whether the plaintiff is entitled to the amounts of compensation that he has sought for the unlawful arrest and detention and contumelia. Unlawful Arrest and detention [8] In order to determine whether the plaintiff's arrest and detention were unlawful, it is apposite to first look at the circumstance that led to the arrest. As earlier indicated, it is common cause between the parties that the plaintiff was arrested for allegedly violating the terms of the Maseru Magistrate Court interim court order that barred him from taking his seat at the sanctuary of the Cathedral. The defendants in their plea alluded to this fact though they alleged without any proof that the court order was final. The plaintiff on the other hand in the written submissions made on his behalf (at para 2.2 thereof) did not disavow the fact that he was arrested for allegedly violating the court order in CC/154/2012. His submission in that regard being that:- "During the plaintiff's cross-examination it was clear that the plaintiff was arrested for the alleged violation of the court order referred to above. The order was evidently granted in civil proceedings between the private citizens of the Kingdom of Lesotho in their personal capacities." At para 3.2 of the written submissions the plaintiff further says:- "The arrest without warrant of arrest appears under part V of the Criminal Procedure and Evidence Act of 1981(CP&E), and relevant to the present case, section 24 thereof. The Peace Officers in terms of the relevant section are permitted to arrest people without the warrant of arrest upon reasonable suspicion of

commission of the offences under Part II of the First Schedule. It is not in dispute that the offence allegedly committed by the Plaintiff in this matter does not fall under Part II of the First Schedule.” [9] It is apparent from the foregoing submissions that the parties in this case were ad idem regarding the existence of the court order that barred the plaintiff from entering the sanctuary at the Cathedral. Without more, it is not within the powers of this court to question the veracity or otherwise of the said interim court order. It was also common cause between the parties that by being in the sanctuary at the material time of the arrest, the plaintiff was in contempt of the said court order. The plaintiff conceded under cross examination that he was aware of the court order; that he had not done anything to reverse it; that the court order was still in force at the material time; and that he intentionally defied it.

- [10] The court order in issue being a civil one, the question then is whether the police officers had any role to play in the circumstances, and whether they were justified in arresting and detaining the plaintiff. The foregoing issue is contrived against the backdrop that in terms of the Police Service Act¹, the police service is the authority empowered to initiate a criminal process within the criminal justice system. Section 24(1)(c) of the Police Act provides that the police have the authority to “detect offences, apprehend offenders and bring them to justice” This now takes me to the analysis of the legal nature of the civil contempt of court and whether it fall within the purview of offences in the criminal justice system.
- [11] Section 6 (1) (b) and (c) of the Constitution of Lesotho 1993 authorises an arrest or detention of any person who is suspected or found to have committed a contempt of court. These provisions are to the following effect:- “Right to personal liberty 6(1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorised by law in any of the following cases, that is to say –
- (a) 1 Police Service Act No. 7 of 1998
 - (b) in execution of the order of the court punishing him for contempt of that court or of a tribunal;
 - (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law”. The foregoing provisions authorise an arrest and detention of a contemnor, which processes are criminal in nature. This therefore suggests that contempt of court even if it is civil contempt, is criminal in nature. This view lends support from the decisions such as *Fakie NO v CCII Systems (Pty) Ltd*² wherein Cameron JA clarified that while civil contempt of court follows the rules of civil procedure, it has not forfeited or divested itself of its criminal dimension. It was further indicated in *Fakie*³ that the state (and in our case the Crown) is free to prosecute the contemnor for civil contempt wherein the contemnor will plainly be an accused person. The other decision is *Pheko and Others v Ekurhuleni Metropolitan Municipality (No.2)*⁴ where the Constitutional Court of South Africa indicated that a wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The court further opined that if civil contempt is prosecuted in criminal

proceedings, all the elements of criminal contempt should be satisfied, which may categorically lead to imprisonment.

- [12] It can therefore be inferred from the foregoing discussion that contempt of court proceedings can be instituted either through a civil process or the criminal route. In the first case, the private party affected by the disobedience of the order will be the applicant while in the latter, the process will be initiated by reporting the offence to the police who will 2 Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 334 3 Supra at 338 D 4 Pheko and Others v Ekurhuleni Metropolitan Municipality (No.2) 2015 (5) SA 600 (CC) at paras 28 and 30 arrest the contemnor and hand him over to the public prosecutor to initiate the criminal proceedings. In casu, it appears that the church authorities elected to follow the criminal route and reported the contempt to the police and that cannot be faulted.
- [13] This now brings us to whether the police ought to have been armed with a warrant of arrest. It was the plaintiff's submission that the police were not authorised to arrest him without a warrant because the offence that he was suspected to have committed was not part of those listed in Part II of the First Schedule of the Criminal Procedure and Evidence Act⁵. Arrests without warrants are governed by part V of the Criminal Procedure and Evidence. The relevant section for purposes of this case is section 24 which reads as follows:- "Arrest by peace officer without warrant
24. Every peace officer and every other officer empowered by law to execute criminal warrants may arrest without warrant-
- (a) every person who commits any offence in his presence;
 - (b) every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in part II of the First Schedule; and
 - (c) every person whom he finds attempting to commit an offence or clearly manifesting an intention to do so."
- [14] In the instant case, the police found the plaintiff in the sanctuary contrary to the order of court to that effect. The police therefore acted pursuant to section 24(a) above as the plaintiff committed the contempt of court in their presence. The police therefore did not need to have the warrant of arrest. It 5 Criminal Procedure and Evidence Act No. 17 of 1981 was submitted for the plaintiff that the arrest was unlawful since contempt of court was not among the offences listed in Part II of the First Schedule. It is inconceivable why the plaintiff elected to premise his case on section 24 (b) and ignore the provisions of section 24 (a) unless he deliberately misquoted the scripture to favour his case in order to deceive the court.
- [15] Having found that the police did not need a warrant of arrest, the presumption would be that the arrest was lawful, but the inquiry does not end there as other factors can still render the arrest unlawful. It is not in dispute that the plaintiff was shown the court order now in issue before he got into church. DW1 (Fusi Ramakau) who was part of the group that

arrested the plaintiff testified that Sub Inspector Lerotholi cautioned the plaintiff immediately prior to his arrest in the sanctuary and this evidence was not disputed. This means that the plaintiff was, in compliance with section 6(2) of the Constitution and section 32(4) of the Criminal Procedure and Evidence Act, informed of the reason for his arrest.

- [16] It is trite that the purpose for arresting a person on a suspicion of having committed an offence should either be to continue with the investigations following which a person should either be released or brought to justice (section 6 (3) of the Constitution read with section 32 (2) of the Criminal Procedure and Evidence Act). An arrest of a person for any other motive unrelated to furthering the investigations or bringing the arrestee to justice will be unlawful. In the instant case, the plaintiff was released to his lawyer four hours after his arrest and detention, and he was warned to report to the Magistrate Court on the following day. He did go to the Magistrate Court with one police officer on the following day, only to be released later by the Clerk of Court who told him to go home. The plaintiff was never charged or prosecuted for the offence of contempt of court. The defendants submitted that the police had done their part of arresting the plaintiff and referring him to the prosecutors to be charged, but he was released for the reasons unknown to the police. I agree with the defendants in this regard and failure to charge or prosecute the plaintiff could not be blamed on the police.
- [17] On the conspectus of the foregoing considerations, the court finds that the plaintiff's arrest was in all respects lawful. It follows therefore that where the arrest was lawful, the resultant detention was also lawful. Where the act forming the basis for the delict is lawful, the plaintiff's claim should fail for failure to prove the wrongfulness element which requires that the conduct complained of must be legally recognised as wrongful, and not justified or excused (Law of Delict⁶). Contumelia
- [18] The plaintiff's claim for impairment of dignity arose from the manner in which he was arrested. It is common cause that the plaintiff was arrested in front of the congregation at the commencement of the church service. It is also common cause that the police carried him out of the church on their shoulders. The question is whether the police acted wrongfully. It is not in dispute that the police approached the plaintiff while he was in the sanctuary, they cautioned him and asked him to go with them but he refused. This was after the police had earlier shown him the court order barring him from entering the sanctuary. That was when the police decided to carry him on their shoulders out of the church. In terms of section 41 of the Criminal Procedure and Evidence Act a peace officer effecting an arrest shall actually touch or confine the body of the person being arrested⁶ Neething, Potgieter, Visser, Law of Delict, 7th Edition, Lexis Nexis at page 33. unless there be a submission to the custody by word or action. In this case, the police did what was necessary in the circumstances to effect the arrest of the plaintiff. The police had witnessed him entering the sanctuary and thereby defying the court order. He refused to go with the police upon being told to do so. The court is unable to find any wrongfulness in the way the police arrested and later detained the plaintiff. It follows therefore that where the act that gave rise

to the impairment of the plaintiff's dignity was not wrongful, the claim for contumelia should fail.

[19] The plaintiff's claims for damages arising from unlawful arrest and detention and for humiliation and impairment of dignity are dismissed with costs.

M. P. RALEBESE JUDGE For the Plaintiff : Advocate Lebakeng For Defendants : Advocate Khoboko
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