

SOUTH AFRICA / JUDGMENT

Malinga v Minister of Police (49213/2012) [2016] ZAGPPHC 825 (8 September 2016)

[2016] ZAGPPHC 825**COURT**

North Gauteng High Court, Pretoria

BEFORE

Kekana

CASE / FILE NUMBER

49213/2012

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****PROVINCIAL DIVISION, PRETORIA****CASE****NO: 49213/12****DATE:**

8/9/2016

In

the matter:

MESHACK.MALINGAPLAINTIFF

and

THE

MINISTER OF

POLICE

DEFENDANT

JUDGEMENT**KEKANA AJ:**

1.The Plaintiff instituted action against the Defendant for payment of the amount of R1 000 000.00.

2. The Plaintiff's claim is for unlawful arrest which was effected on the 06th March 2012 by Constable Phala, a member of the South African Police Services.

3. The Defendant assumed the onus to prove that the arrest was lawful and within the ambit of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977. Section 40 (1) (b) requires that the four jurisdictional factors has to be satisfied for the lawfulness of the arrest without a warrant namely:-

- (i) the arrest officer must be a peace officers;
- (ii) he must entertain suspicion that a crime has been committed;
- (iii) suspicion must rest on reasonable grounds;
- (iv) the crime committed must fall under the ambit of Schedule 1.

4. The Defendant called Ms Ntshalintshali to testify. She testified that she is a senior African National Congress official in the Mpumalanga Province responsible for the property of the organisation. She was called upon to intervene on the 06th March 2012 when members of the public demonstrated against the Plaintiff at the Parliamentary Constituency Offices, in Middleburg. She stated that the incident of public violence arose as a result of nomination documents which were taken by the Plaintiff from a certain Mr Gift Sebeloane and which documents the Plaintiff was neither authorised nor entitled to possess. Ms Ntshalintshali further testified that she approached the Plaintiff and pleaded with him to return the documents in the presence of the police. She failed to persuade the Plaintiff to return the documents and she then called the chairperson who advised her that if the Plaintiff refuses to return the documents, she must lay a criminal charge against him. It is at that stage when she called the police who were present at the scene to arrest the Plaintiff. She laid a charge of theft against the Plaintiff with MAS No 161/03/2012 at the Middleburg Police Station.

5. The Defendant's second witness was Constable Phala, who was the arresting officer. Constable Phala testified that he reacted to a

radio control complaint and rushed to the Parliamentary Constituency Office of the African National Congress. Constable Phala, testified that when he arrived at the scene, he found Constables Du Preez, Steward and Thema. In an attempt to curtail further incidents of violence he, together with the other police officers, entered the Parliamentary Constituency Offices to resolve the issue of the alleged stolen documents. He stated that inside the offices, he attempted to mediate between the complainants and Plaintiff so that an amicable solution could be reached. He testified that he arrested Plaintiff when he realised during mediation that documents were stolen. He further testified that they handcuffed him and put him at the back of the police van.

Constable Phala testified that the Plaintiff told him that he did not have the document with him but advised that they were in a safe place.

6. The Plaintiff testified that he is the member of Provincial Legislature and was a former Member of the Executive Committee of Agriculture in Mpumalanga.

7. He testified that on the 06th March 2012, he went to get food at Nandos and noticed that Gift Sebeloane was in possession of the

African National Congress documents. He testified that he took the documents from Gift and advised him that he was not authorised to be in possession of those documents as he was not an appointed regional deployee to deal with the branch nomination.

8. Plaintiff stated that Gift called other members of the African National Congress and an argument ensued. A mob attacked him and a

certain Selolo. He was rescued by Constable and Sergeant Du Preez, who were driving in the police van and escorted him back to the Parliamentary Constituency Office to fetch his car and his laptop.

9. Plaintiff testified that Gift Sebeloane was amongst the people who attended the meeting with Ms Ntshalintshali and the police at the Parliamentary Constituency Office.

10. Plaintiff further testified that when he was asked to give back the documents, he told them that he was not in possession of them but Didi was. It was at that stage when Constable Phala read him his rights and proceeded to arrest him.

11. Plaintiff testified that he was taken to the police station at about 18h45 where he was formally charged with theft and released at 20h05.

12. Plaintiff further testified that his arrest was reported in the Middle Observer and City Press newspapers on the Sunday following

the incident.

13. It is common cause that the Plaintiff was arrested by Constable Phala without the warrant of arrest and as a result, the arrest was Pima facie unlawful.

14. As a defence, the Defendant relied on the provisions of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977.

15. The issue for determination in this trial is whether the arrest of the Plaintiff was lawful.

16. In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 SECLD, the following is stated at page 657 E - H regarding a suspicion reasonably entertained "the test is whether a suspicion is reasonably entertained within the meaning of section 40 (1) (b) is objective. Would a reasonably 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 be to have been stolen. It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, is something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of

information at his disposal critically and he will not accept it lightly or without checking it where it could be checked. It is only after the examination of this kind that will allow himself to entertain a suspicion which will justify the arrest. This is not to say that the information at his disposal must be 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 highly or arbitrary

and not a reasonable suspicion".

17. In *Minister of Safety and Security v Sekhoto and Another* 2010 (1) SACR, the Court per Harms JA, dealt with the interpretation of the provisions of Section 40 (1) (b) and (g) of the Criminal Code. There the respondents were arrested by police officers without a warrant and on suspicion of a contravention of Section 2 of the Stock Theft Act 57 of 1959. At paragraph
- [28] of the judgement, the Court said "once the jurisdictional facts for an arrest, whether in terms of any paragraph of Section 40 (1) or in terms of Section 43 are present a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering of statute in a matter that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this Court in relation to Section 43 in *Groenewald v Minister of Justice*.
18. In applying the legal principles to the facts in this matter, the question to be determined is whether Constable Phala had a reasonable suspicion in exercising his discretion to arrest the Plaintiff.
19. There is no evidence that Constable Phala took steps to ascertain what exactly was stolen by the Plaintiff in order to satisfy himself that the documents could be the subject of theft.
20. Constable Phala testified that after affording the complainant and the Plaintiff an opportunity to state their cases when he attempted to mediate between the parties, he was satisfied that the Plaintiff have stolen documents which belonged to the African National Congress. These documents that gave rise to the public violence and subsequent arrest of the Plaintiff, were in possession of Gift Sebeloane when Plaintiff took possession thereof. Gift Sebeloane was not called to testify despite the fact that he was in Court at the hearing of the matter.
21. In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 AD, the learned Judge a quo drew an inference adverse to the Plaintiff from its failure to call Gerson as a witness notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, i.e. what was discussed at the meeting which took place on 4 August 1972.

22. In the present case, it was not disputed that the public violence was politically motivated. The complainant and the Plaintiff were senior member of the African National Congress who were at variance as to who was entitled to be in possession of the branch nomination forms. It is also not disputed that Constable Phala had not satisfied himself of which documents of the African National Congress were stolen by Plaintiff. In these circumstances, and based on the legal principles set out by Harms JA in Sekhoto and other authorities, I am convinced that the police officer, Constable Phala, acted unlawfully and did not exercise his discretion reasonably.
23. Factors which plays a role in the assessment of the amount of damages are the following: the circumstances under which the deprivation of liberty occurred; the presence or absence of malice or an improper motive on the part of the defendant, the direction of the deprivation of liberty; and whether the defendant apologizes or provides a reasonable explanation for what happened. In addition, inflation may be taken into account if in addition to the deprivation of liberty other personality interest such as honour especially reputation are affected, the amount of satisfaction will obviously be increased.
24. In *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707 B Van Rensburg J, held that "in considering quantum, sight must not be lost of the fact that the liberty of an individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into freedom and the rights of individual. In the words of Broome JP in *May v Union Government* 1954 (3) SA 120N at 130F "Our law has always regarded deprivation of personal liberty as a serious injury."
25. In *Takawira v Minister of Police* 2013 JOL 30554 at paragraph 36, Spilg J, held that "the invasion of a broad category of rights which may be distilled to include the right to personal liberty, the right not to be arbitrarily arrested without lawful cause, the right to dignity and the right to one's reputation which includes the right to be defamed".
26. In *Takawira* at paragraph 42, Spilg J held that "it is trite that an enquiry into unlawful detention (as with arrest) seeks to determine the extent to which the various affected rights of personality were impaired and their duration. The enquiry involves both a subjective element based on the emotional effect of the wrong committed to the Plaintiff (such as humiliation or anguish of suffering injustice, the loss of self-esteem and self-respect) and an objective impairment based on external effects of the wrong (such as loss of reputation in the eyes of others)".

27. In *Mofokeng and others v Minister of Police* 2014/ A3084 (unreported) paragraph 14 Spilg J, stated that "while the Court can make assumptions as to the general extent of humiliation and degradation suffered by a person wrongfully arrested and detained, it should also receive evidence that deals in detail with the arrest, the subsequent detention and their actual effect on the individual claimant.

This would include the extent of degradation experience, the extent of helplessness endured and how he or she subjectively felt about others such as family, friends and work colleagues might think.

28. Plaintiff described in his evidence in chief how he was handcuffed by the police and put at the back of the police van. Plaintiff also testified that he was arrested at his place of employment, in full view of his colleagues and a crowd that initially attacked him when he was rescued by Constable and Sergeant Du Preez. Plaintiff further described how on a Sunday, following the incident, he walked into a grocery shop and saw a picture of himself handcuffed and being led to a police van. He testified that his 11 year old daughter, who had accompanied him to the shop, requested him to buy all the City Press Newspapers so that people should not read about his arrest. Plaintiff explained how he was embarrassed as his dignity as a Member of the Provincial Legislature and a former MEC of Agriculture was lowered, and he felt humiliated and distressed by the incident.
29. On the other hand, from the evidence presented by Constable Phala and Ms Ntshalintshali, it appears that Constable Phala arrested the Plaintiff at the instance of an advice received by Ms Ntshalintshali from the chairperson. Certainly Constable Phala did not investigate the complaint as he himself testified that it was the first time in his service to arrest a person for stolen documents.
30. The failure by Constable Phala to explain why he arrested the Plaintiff on that day, must also have an aggravating effect when

considering the appropriate award.

31. Having regard to the comparable cases on the subject, consider an amount of R120 000.00 justified in respect of the unlawful arrest.
32. I accordingly order the following:-
1. The Defendant to pay to the Plaintiff the sum R120 000.00;
 2. The Defendant is to pay 15.5%/of interest on the aforesaid amount from date of judgement;
 3. The Defendant to pay the costs of suit including counsel's costs.

KEKANA, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION,

PRETORIA

Attorneys for the Applicant/ Plaintiff: Martin Terblanche Attorneys

Attorneys for the Respondent/ Defendant: The State Attorneys

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