

SOUTH AFRICA / JUDGMENT

Mandonsela v Minister of Police (63126/12) [2019] ZAGPPHC 988 (12 December 2019) [2019] ZAGPPHC 988

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

63126/12

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IN

THE REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 63126/12

REPORTABLE:

NO/YES

OF

INTEREST TO OTHER JUDGES: NO/YES

REVISED

DATED:12/12/2019

BONGANE

DANIEL MADONSELA

PLAINTIFF

and

MINISTER

OF POLICE

DEFENDANT

JUDGMENT**KHUMALO J****Introduction**

- [1] This is an action instituted by the Plaintiff: claiming damages in an amount of R750 000 against the defendant, alleging to have been unlawfully arrested, detained and assaulted by the members of the South African Police Services (“SAPS”)
- [2] It is common cause that the Plaintiff was arrested by Constabel Fortunate Edith Shobete (“Shobete”) on 23 May 2011 on a suspicion of housebreaking and theft of laptops, a complaint that was laid by his employer, a Mr Ramodike (“Ramodike”). The Plaintiff was in Ramodike’s employ for six months at the time. He was detained at the Garsfontein Police Station. He was then taken to court upon which he was released without appearing in court.
- [3] The Plaintiff avers in his particulars of claim that he was unlawfully and intentionally arrested by Shobete and 2 other members of the SAPS. Whilst at the police station he was assaulted, tortured and badly beaten with a hard wood material. He was thrown and locked in the boot of a police van. He was after a while taken out of the boot and poured with water, beaten with a wire and a hard wooden material. He was put back into the boot and sprayed with an unknown chemical. Later he was taken out, poured with water and taken back into custody until the next day when he was taken to court.
- [4] The Plaintiff allege to have been humiliated, tortured, degraded, assaulted and badly injured by the SAPS members and therefore injured in his dignitas, fama and corpus.
- [5] The Defendant denies that the arrests and detention were unlawful and pleads that Shobote was acting within the course and scope of her employment with the Defendant being a peace officer as defined in s 1 of the Criminal Procedure Act 51 of 1977 (“the Act”), hence the detention was not unlawful.
- [6] According to Defendant’s Plea the Plaintiff was arrested after Shobote reasonably suspected him of having committed offences referred to in Schedule 1 of the Criminal Procedure Act, to wit, an offence of Housebreaking and theft. The Plaintiff was lawfully arrested in terms of s 40 (1) (b) of Act 51 of 1977 and thereby lawfully detained pursuant to the lawful arrest.
- [7] The parties agreed to a separation of the issue of quantum from the merits of the matter. The matter at this stage is accordingly only for adjudication of the merits.
- [8] The parties had agreed as per their pre-trial minute that in view of the arrest and detention being admitted by the Defendant, the Defendant has the duty to begin and bears the onus of proof that the arrest and detention of the Plaintiff was indeed lawful.

9.

Facts

- a) The Defendant commenced its case in order to justify the arrest and detention by calling Shobote and Colonel Kevin Deslin Solomon (“Solomon”), the acting Commander at Garsfontein Police Station who is the one that interviewed the Plaintiff at the police station.
- b) The Plaintiff testified in support of his case.
- d) Shobote's testimony was briefly that:
 - i) She was duty on 23 May 2011, doing a preliminary investigation of a reported case of housebreaking and theft with intent to steal committed at a house in Waterkloof. She visited the crime of scene and interviewed the complainant, Mr Ramodike, the Plaintiffs employer. She arrested the Plaintiff on the strength of the information she got from his employer, the complainant who had told her that when he phoned the Plaintiff he promised to bring the laptops that was stolen to work the next day.

ii) The Plaintiff was at his employer's house on the day, working.

The employer made the allegations in his presence. The Plaintiff said that he could not hear the employer very well when he responded that he will bring the laptops.

iii) The Plaintiff has been working in the yard, so after questioning the Plaintiff she waited for him to bath and change. She arrested the Plaintiff because she had reasonable grounds to suspect that the Plaintiff was involved in the reported crime. They drove together to the police station with the Plaintiff sitting in front with the constable with no cuffs, where he was detained.

iii) On 24 May 2011, the Plaintiff was taken to Solomon who conducted the interview. Solomon excused her from the interview, she therefore left the Plaintiff with Solomon.

iv) The preliminary investigation at the scene indicated that a shading door that was installed the previous day was removed to gain entry to the house. The Complainant informed her that Plaintiff was the only person that was aware of the recently installed door.

v) She denied that she was instructed by Solomon to get people who will force the Plaintiff to talk or produce the stolen laptops.

vi) Under cross examination she confirmed that she after the incident saw the Plaintiff again at the police station and he told her that he has come to open a case of assault against the police who assaulted him on 24 May 2011. She asked him the identity of these police and he said he does not know them. He did not say to her that it is the police that she brought in that assaulted him or anything about her having been sent to call these people who had beaten him.

b) According to Solomon's testimony:

- i) the Plaintiff was brought to his office for the interview by Shobote. the arresting officer around 14h00 on 24 May 2011. They had discussed the previous day that Shobote will bring the Plaintiff to his office on that day. When Shobote telephoned him on 23 May he had already left. hence the arrangement for the next day
 - ii) he was the senior person at the very small and busy station being the station commander. The alleged incident is alleged to have happened at a parking lot, a public area which then would have been witnessed by the public.
 - iii) He pointed out that he knew neither of the parties involved and had no interest in the matter to the extent that he would force the Plaintiff to produce the laptop,
 - iv) he was disappointed and pained to hear that the Plaintiff alleges that he instructed Shobote to fetch the people who will make the Plaintiff produce the laptop.
- (c) According to the Plaintiff:
- (i) Shobote was in the company of two other male officers when she arrived at his employer's house. He was busy plastering the wall at the time. Shobote walked to him and told him that she need to take him to the police station for questioning about the stolen laptops and the breaking in. She thereafter waited for him to bath before taking him to the police station. He was not handcuffed. They took him to the police station where he was asked if he was aware of the break in and the stealing of laptops at his place of employment. He told them that he heard about it from his employer when he called him that morning.
 - (ii) Under cross examination he did not respond to the version that was put to him that the reason he was arrested was because of the employer's complaint who suspected him to be involved in the housebreaking and the stealing of the laptops.
 - (iii) Shobote left him in the office, came back and told him that the person who was to interview him had already gone home. She told him he was going to sleep at the station. She then booked him in.
 - (vi) The next day at about 14h00 he was fetched by Shobete who told him that the guy who is supposed to interview him was there. He was taken to an office where he found Solomon. Solomon asked him where the laptops /computers were. When he told him he does not know, Solomon sent Shobete to fetch these unidentified individuals who will make him talk the truth. She was sent to fetch a cable that was used to tire his hands.
 - vii) The 4 SAPS members came into the office and handcuffed him. They took him to the back of the police station to a parking lot during daylight, where they assaulted him, asking him of the whereabouts of the laptops. They paper sprayed him whilst the other police officers were passing by and forced him in the boot of a police van. He screamed and was taken out after a while, sprayed with water. beaten with a wood and a wire and suffocated with a plastic bag that was put over his head.

- v) He was then taken back to Solomon. They told him that he was not talking, he was taken back to the cells. The next day he was taken to court where he was released without appearing in court.
- (c) It was argued by the Defendant's Counsel that according to the particulars of claim the Plaintiff was released on the next day after his arrest and the evidence led by the Plaintiff is that he was released two days after his arrest. The days of detention would be regarded as per the particulars of claim that state that Plaintiff spent one night in detention, since there was no amendment of the pleadings. The argument is valid, notwithstanding Plaintiff's testimony the time spent in detention would be one night.
- (d) Defendant's Counsel also argued that Plaintiff said nothing regarding the arrest being unlawful or without a justifiable reason. It was however for the Defendant to prove lawfulness as arrest per se without a warrant is unlawful except unless proven to have been under s 40.

10. Legal issues

- (i) The first point to be considered is whether or not the first defendant has established that the arrest and detention was lawful and justified.
 - a) Section 40 (1) (b) of the Criminal Procedure Act sets out the basis upon which an arrest may be justified where it is effected without a warrant. The arrestor would need to establish[4]:
 - (i) That the arrestor must be a peace officer;
 - (ii) The arrestor must entertain a suspicion;
 - (iii) The suspicion must be that the suspect (the arrestee), committed an offence referred to in schedule 1; and
 - (iv) The suspicion must rest on reasonable grounds.

See Minister of a Safety and Security v Sekhoto 2011 (1) SACR 315SCA at paragraph 6

- b) In ,Mabana v Minister of law and Order 1988 (2) SA 654 (SE) Jones J held that:-

"It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action.

It authorises an arrest at the strength ,of suspicion and without the need to swear out al warrant, that is. something which would

otherwise he 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 will justify an arrest.

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 a suspicion but not certainty. However the suspicion must be based on solid grounds otherwise, it will be flighty and arbitrary and not reasonable suspicion.”

c) In this case:-

(i) The Complainant had indicated that when he spoke to the Plaintiff on the phone he undertook to bring the laptops with him the next day to work. According to Shobete that created a reasonable suspicion that Plaintiff had stolen the laptops. However the Plaintiff has explained to her that he was not hearing the employer properly when he agreed to what his employer was saying. Shobete also did not follow up if the employer had asked the Plaintiff when he arrived at work if he had brought the laptops. if he did not. the reason why. Shobete was also told by the Complainant that only the Plaintiff was aware that the shading door that was removed to gain entry was installed the previous day and not yet steady. The constable seems not to have asked the Complainant as to why the Plaintiff would be the only one and who had installed the door because that person would also be amongst the people who would have been aware that the door was recently installed. If also the Plaintiff had agreed to have taken the laptops and to bring them back the next day why would he come back to work and just continue working as if everything is normal. Also, Shobete did not say anything about following up with the Complainant to find out if he confronted the Plaintiff or spoke to him when he arrived at work without the laptops and why he left him to continue working even though he had admitted to having stolen the laptops. It is obvious that the Complainant was just speculating and conjecturing. Shobete's decision to arrest the Plaintiff on such flimsy facts was not in conformity with the actions of a reasonable man whose duty required her to analyse and assess the quality of the information at his disposal critically and not accept it lightly or without checking it where it can be checked.

(ii) The reasons for the arrest were insubstantial and did not justify an arrest without a warrant that could also justify or for the purpose of detention, perhaps just questioning as it was Shobete's initial intention. Plaintiff evidence was that he was told that he was being taken in for questioning. Indeed at the station Shobete was to call the person who was supposed to question him, therefore Plaintiff is correct. Shobete was also supposed to have made an objective assessment of the quality of the information at her disposal so as to decide whether in the absence of the interviewee she should now detain the Plaintiff.

(iii) The fact that the Plaintiff is a single witness did not detract from the fact that the onus is on the Defendant to prove the lawfulness of the arrest and detention. Even on Shibote's evidence there was no sufficient basis to find that her arrest of the deceased was justified and thus the plaintiff is entitled to damages for the unlawful arrest and detention.

(vi) The defendant has in the circumstances failed to establish that the arrest and detention of the Plaintiff was warranted.

11. The next issue is whether or not the plaintiffs have established their claim based on assault.

i) The Plaintiff's case is dependent on the evidence of the doctor and the Plaintiff from which it should be established if it suffices to sustain an allegation of assault.

ii) It was argued that the Plaintiff testified that he was assaulted in broad daylight at a parking lot by 4 unknown police men who were invited by Solomon the Acting Station Commander and fetched by Shobete. They assaulted him using a plank, a wire and a sjambok to force him to talk, which is a very unlikely scene to happen in public. Actually Plaintiff said Solomon sent Shobete to fetch these people, however when he went to open an assault case he was asked by Shobete who these people were, and his response was that he cannot identify them. He did not say to Shobete that it is the people that she was sent to call by Solomon.

iii) The behaviour attributed to Shobete was also unlikely, taking into consideration Plaintiff testimony confirming the polite manner in which she treated him when she took him to the police station and explaining to him at the police station why he would be detained due to the absence of Solomon (which I am not agreeing was a good reason to arrest and detain him).

iv) Solomon was also visibly disturbed by these allegations and since Plaintiff was also alleging that he sent Shobete to call these unidentified officers. The calling for cables to cuff him does not make sense as well when there are handcuffs at the police station. Why introduce himself and go through the procedure if he was at the end going to sanction this unconventional manner to force him of produce the laptop.

e) No medical evidence was led to indicate if the Plaintiff was indeed injured and the extent of his injuries and that he indeed received medical care. He also did not mention to the court where he was exactly hit and what type of injuries he sustained.

f) The Plaintiff has failed to discharge the onus resting upon him to establish the deceased claim in respect of the assault. The whole story sounds like a fabrication that might have added so that it would be convenient if the arrest is found to have been unlawful

g) That part of the Plaintiffs testimony looking at all the other evidence is implausible.

h) The discrepancies impact adversely on the credibility of the first plaintiff and on the issue of whether or not her version is more probable than that of the Defendant's witnesses who allege that there was an altercation not an assault.

- i) The Plaintiff has in the circumstances not discharged the onus resting upon him to establish on a balance of probabilities that she was in fact assaulted as alleged.
- j) The Plaintiffs claim in this regard is accordingly dismissed.
- k) The Plaintiffs succeeded against the first defendant in respect of the unlawful arrest and detention but not that in respect of that claims pertaining to assault. In light of their partial success I am disposed to awarding them half of their costs of suit in respect of the trial on the merits.

12. In the result the following order is made.

1 The Defendant is held liable to the Plaintiff for their agreed or proven damages consequent upon the plaintiff's unlawful arrest and detention by members of the SAPS, from 23 May 2011 to 24 May 2011

2 The Plaintiffs claim in respect of assault is dismissed.

- 3. The quantum of damages to which the plaintiffs are entitled shall be determined on a date to be arranged with the registrar of this court.
- 4. The Defendant is directed to pay 50 (fifty) percent of the Plaintiffs costs of suit in respect of the determination of the merits of this matter.

NV KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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