

SOUTH AFRICA / JUDGMENT

Maseko and Another v Minister of Police and Another (145/2017) [2017] ZAGPPHC 815 (20 December 2017)

[2017] ZAGPPHC 815

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

145/2017

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HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING

AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

CASE

NUMBER 145/2017

REPORTABLE:

YES/NO
OF
INTEREST
TO
OTHER

JUDGES:

YES/NO
DATE
: 20/12/2017
KHATHAILE
MARIA MASEKO
1st
PLAINTIFF
ELPHAS
MASHELE 2nd
PLAINTIFF
And
MINISTER
OF
POLICE 1st
DEFENDANT
THE

DIRECTOR OF PUBLIC
PROSECUTIONS 2nd
DEFENDANT

JUDGMENT

LEGODI J,

[1] The handing over of an identity document belonging to one Mr Mlotshwa by the plaintiff, (Mr Khathzile Maria Maseko) to the daughter of the said Mr Mlotshwa after the latter had disappeared during 2014 without a trace to date, resulted in the arrest of the plaintiff on a charge of kidnapping.

[2] The arrest and subsequent detention aforesaid were based on a statement which was made to the police by the daughter of Mr Mlotshwa

in which she stated that two weeks after her father had disappeared the plaintiff arrived at her home and handed over her father's

identity document.

[3] In her statement made under oath she further stated as follows:

"According to Khathazile Ngwenya the ID document as well as the passport were given to her by my father and that she should keep them as he would collect them from her (Khathazile Ngwenya) whenever he would go and get his pension. I asked her as to how could my father had done that as Dorah Maziya was staying with him. Khathazile Ngwenya did not give me a straight answer."

[4] Having obtained the statement aforesaid, the investigating Captain Mkhaliphi on 6 January 2016 whilst in the area where the plaintiff is staying, decided to go and arrest the plaintiff. The decision to arrest her was so taken before the side of the plaintiffs story could be obtained from her. Subsequent to the plaintiffs arrest she was detained at Ermelo Police Station until when released on bail on 19 January 2016 and subsequent thereto, the charges were withdrawn against her on 28 January 2018.

[5] On 31 January 2017 the plaintiff instituted the present proceedings in terms of which she sued for unlawful arrest and detention, past and future loss of earnings and loss of dignity and respect.

[6] The defendant, the Minister of Police, seeks to justify the arrest and detention aforesaid on the following basis: That plaintiff was arrested by a police officer who was a peace-officer, that at the time of the arrest the police officer in question had a reasonable

suspicion that the plaintiff had committed the offence of kidnapping

- and that the arresting officer was therefore entitled to arrest the plaintiff as contemplated in section 40 (11) (b) of the Criminal Procedure Act.
- [7] Section 40 (11)(b) provides that a peace officer may without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.
- [8] Captain Mkhaliphi's suspicion on his own words said he arrested the plaintiff because she had no valid ground as to how she (referring to the plaintiff) became in possession of the identity document aforesaid. The timing of the arrest is very important in every case where the arrest and subsequent detention is challenged as being unlawful.
- [9] In this case, the decision to arrest was taken before the plaintiff was interviewed. Captain Mkhaliphi who had obtained the statement upon which he relied in arresting the plaintiff, on the evening in question, was in the area where the plaintiff leaves looking for another suspect when he there and then decided to go and arrest the plaintiff.
- [10] The real question is whether part of the statement quoted in paragraph [3] above and the following averments by the daughter

of Mr Mlotshwa constituted reasonable grounds upon which an arrest was justified:

"It came as a surprise what Khathazile Ngwenya had just said because my father used his thumbs print to get his pension. Secondly why or rather how could my father had given a stranger my mother's passport. This did not add up at all. That made me to the suspicions of Khathazile Ngwenya that maybe she could be somehow involved in the kidnapping of my father". (My emphasis).

- [11] Few comments need to be made about the statement: ""Thumb print" without identity document would not have entitled Mr Mlotshwa to access his old pension money. His identity document would have been necessary. That coupled with the statement that the documents were given to the plaintiff to "keep them as he would collect them from her", in my view, does not constitute reasonable suspicion of the commission of the offence and could not have justified the decision to arrest the plaintiff without interviewing her. Secondly, the plaintiff was not a stranger to Mr Mlotshwa. They had known each other and were apparently not staying far from each other and this could have been established without having to arrest the plaintiff more so that the statement did not in any way implicated the plaintiff. The underlining in paragraph [10] above speak to that lack of evidence.
- [12] As it turned to be, the plaintiff in her evidence alluded to the fact that Mr Mlotshwa indicated that his things were been taken by people and that it was safe for his documents to be kept with the plaintiff. Secondly, insofar as Captain Mkhaliphi wanted to question why would Mr Mlotshwa give the identity document to the plaintiff to keep whilst he was staying with one Dora, this version, was not in line with the evidence of Mr Mlotshwa's daughter. According to her, at the time of the disappearance of Mr Mlotshwa, the latter was staying

alone.

[13] As regards, the passport of Mr Mlotshwa's wife, the plaintiff denied that she ever handed over such a passport to Mr Mlotshwa's daughter. Clearly the arresting officer on any information provided to him by the daughter of Mr Mlotshwa, could not have had a suspicion based on reasonable grounds that the plaintiff has committed an offence of kidnapping without having first interviewed the plaintiff.

[14] The evidence of Colonel Mkhali is actually telling: It was common cause during trial that he solely arrested the plaintiff based on the statement he obtained from the daughter of Mr Mlotshwa. He arrested the plaintiff on the basis that she gave the identity document belonging to Mr Mlotshwa and his wife's passport to Thamari (the daughter of Mr Mlotshwa). After having arrested the plaintiff and whilst still at her home he asked the plaintiff about the documents. First, it is said she denied any knowledge, but later, there and then admitted for having given the documents to the daughter of Mr Mlotshwa.

[15] His evidence in chief proceeded as follows:

"You say she admitted to have knowledge, did she explain how she came into possession?--- She explained my Lord and she told me that they were given to her by the missing Timothy Mlotshwa.

Did she say when given to her? -- Though could not recall, she said that it was prior to missing period.

Did she tell you for what purpose?--- No.

Why did you arrest her?---My Lord, Timoty Mlotshwa had gone missing. And here we find the person with some of the property of the missing person. And there is a sworn statement that she really had the documents in her possession. My Lord, she does not dispute that she had these documents in her possession. And there is no clear explanation as to when they were given to her by the missing person.

And what about her explanation how she came in possession of the documents? --- My Lord she was not clear enough to say why the documents ended in her possession, but according to Tamari if my memory serves me well, the plaintiff told her that it was for safe-keeping.(My emphasis).

According to you on the information she volunteered on her own to hand over the documents to the daughter of the missing person? - That is correct.

COURT: Was it not strange that a person who might be suspected to have been involved in the disappearance will volunteer to hand over the documents?

- My Lord it is indeed strange to me, because the disappearance of Timothy Mlotshwa, why did she not give the documents to Tamari on their initial searching and waited until late. What is late? --- It was after a couple of months already".

- [16] The defendant's case falls or rises on the evidence quoted above. Starting with the latter question and answer, Tamari's evidence was that she did not immediately report to the police the handing over of the documents by the plaintiff because at that time they were still busy searching for the deceased in the mountains and therefore suggesting that it was at an early stage of the disappearance of her father when the documents were handed over to her. Colonel Mkhaliphi as it appears from his answer quoted above, actually sought to evade the essence of the question why would a guilty person in the circumstance, that is, who kidnapped a victim, caused the victim to disappear and thereafter go to the children of the missing person to hand over his belongings. In any event, I do not think it did matter whether or not the documents were handed over a couple of months or not.
- [17] The point is that to take a decision to arrest and thereafter actually arrest the plaintiff and asked questions after the horse has bolted, in my view, signifies an element of not acting bona fide. On his own version, Colonel Mkhaliphi conceded that the case was 50-50. That being the case, he should never have taken a decision to arrest the plaintiff before obtaining the necessary information or before obtaining the plaintiff's side of the story or without having obtained a warrant.
- [18] Entitlement to arrest without a warrant pursuant to the provisions of section 40 (1)(b) requires of the arrestor to entertain a suspicion based on evidence which points to the fact that a suspect committed an offence referred to in schedule 1 and that the suspicion rested on reasonable grounds[1].
- [19] What is quoted in paragraph [15] above, does not satisfy these requirements set out in section 40 (1) (b) seen also in the context of what is clarified in Sekhoto's case cited in the footnote above. The defendant's defence is that of a justification and therefore it was incumbent on the defendant to establish on the balance of probability that the facts of the present case, supported the move to arrest the plaintiff and also to take a decision to arrest her without hearing the plaintiff.
- [20] There is another issue which worries me. It was in the middle of the night when Col Mkhaliphi seeing that he was in the area looking for another suspect, decided there and then to pass by the plaintiff's house with the sole purpose of arresting her. That can never be the purpose of the legislature in section 40 (1) (b).
- [21] Justification for arrest without a warrant places the defendant on a defensive mode. That is, the defendant must justify why it resorted to such an act of infringement of a person's constitutional right to freedom of movement and in the present case, including the right to privacy without a warrant. It cannot be right to by an accident decide in the middle of the night, about 23 to 24 hours to bounce on an individual without a warrant. When that happens, a sufficient and adequate excuse or explanation must be offered to show that an act that is otherwise unlawful is lawful. In the present case, it was expected of the defendant to justify why it arrested the plaintiff without warrant.

- [22] For the purpose stated above, it is important to examine what acts are justifiable. The acts alluded to in paragraphs [18] and [19] above as contemplated in section 40(1) (b) of the Criminal Procedure Act, must be established before a defence of justification can be upheld. Absence establishment of the relevant requirements, there can be no justification for the arrest without a warrant.
- [23] It is not like Col Mkhali did not know about the need for a warrant in certain circumstances. For the kidnapping charge aforesaid, the plaintiff was not arrested alone, although on different dates. Her case in the present proceedings was consolidated together with one of Mr Elphas Mashele who also instituted civil proceedings against the police for unlawful arrest and detention. His case was postponed sine die on the date of hearing of this matter after his attorney withdrew. In Ms Maseko's case a warrant of arrest was secured and executed. That apparently made the attorney to withdraw when copy of the warrant was provided on the date of trial.
- [24] Col Mkhali in the present case regarding the plaintiff had enough time to apply and secure warrant of arrest if facts so justified. Having obtained the statement from the daughter of the missing person on 17 August 2015, and without explanation, the plaintiff was only arrested on 6 January 2016. If Col Mkhali genuinely believed in the statement as implicating the plaintiff, which according to him could have led to a murder charge been preferred against the plaintiff in addition to the kidnapping charge, one would have expected him to have acted promptly. On his own evidence he was in the area looking for another suspect when he decided to go for the plaintiff. It looks like, he would not have gone for the plaintiff on that day or anytime soon, had it not have been for the fact that he was looking for another suspect around the area whom he apparently did not find. I find the police conduct in arresting the plaintiff to have been unlawful and the subsequent detention thereof.
- [25] Just in passing, I need to say this: One wonders whether proper attention was given to the investigation of Mr Mlotshwa's disappearance. As on the date of trial on 14 November 2017, there was still no progress on his disappearance. This brought the daughter of Mr Mlotshwa who was testifying on behalf of the defendant to tears as she testified. Speedy investigation of cases and reporting of progress or challenges in the investigation to the victims of crimes, inspire confidence in the police ability to detect crimes on their own. And, on the other hand, delay and sloppy investigation of criminal cases brings the police ability to pursue crimes into disrepute.
- [26] I now come to deal with the amount damages payable to the plaintiff or unlawful arrest and resultant detention thereof. The plaintiff was arrested on 6 January 2016 and detained for five days and on her first appearance in court on 11 January 2016 she was reminded in custody. From this date onwards, the defendant, (the police) cannot be held liable. The public prosecutor, being the dominus litis took over the case and the decision whether or not to withdraw charges due to insufficient evidence or to ask for the remind of an

accused person in this case, the plaintiff in custody is that of the prosecution. There was no evidence that the police on the first appearance of the plaintiff in court played any role in ensuring that the plaintiff was not released nor to have the charges not been withdrawn against the plaintiff.

- [27] Therefore for the purpose of quantifying damages for unlawful arrest and detention, two days of the detention is to be considered. The plaintiff was not led on the condition of her detention. Similarly for her damages based on loss of dignity and respect, no material facts were given. For example, what factors affected her dignity and respect and to what extent has she been so affected. Anyone who is arrested and detained unlawfully and charged with the commission of an offence where there are no facts and justification for such conduct, like in the present case, will feel hurt and lowered in his or her esteem and dignity.
- [28] The plaintiff is a traditional healer who has single handed raised and educated her children, one of whom attended the hearing. Since her arrest and detention, she is no longer enjoying the same treatment and companionship as she used to. Sometimes she will greet members of the community with no response, something which she never experienced before her arrest. She is no longer enjoying interacting with members of the public at functions and she is no longer receiving a welcoming reaction from people.
- [29] Infringement of an individual's right to freedom of movement contrary to section 12(1) of the Constitution which provides that everyone has the right to freedom and security of a person which includes - (a) not to be deprived of freedom arbitrary or without just cause. Before the democratic and constitutional era in South Africa, the police randomly and violation of rights to freedom of movement with impunity was a daily occurrence against innocent and unassuming members of our society. Therefore in a South African context, the culture of arbitrary and without cause deprivation of freedom by our police officials ought to be discouraged and rooted out to ensure that the wounds of the past are not skirmishly opened up and that rights as enshrined in the Constitution are respected and adhered to.
- [30] It was deplorable in the present case to bounce on an obviously elderly woman in the middle of the night and caused her to be detained for two days on flimsy information that Mr Col Mkhaphi regarded as "50-50" case. In other words, not having reasonable grounds upon which he could say there was a reasonable suspicion that plaintiff had committed an offence of kidnapping.
- [31] Unlawful arrest and detention in the circumstances of the case should worth R75 000.00 per day. Right to dignity is also a right entrenched in the constitution. Section 9 of the constitution deals with human dignity. It provides that everyone has inherent dignity and right to have their dignity respected and protected. Arrest and detention of a person without just cause is clear disrespect to that right of dignity entrenched in the constitution. Anyone who infringes such a right should be liable to "clean the heart". In other words, to satisfy the hurt caused to that person. It cannot be underestimated. Treatment of every person with respect and dignity is what makes us a better society. Disregard of respect for other people

and their dignity has the potential to erode the moral fabric of our society. Any conduct leaning towards infringement of the right to dignity and respect ought to be discouraged with vigour, if ordinary members of our society were to be protected. One way of doing it is to not underestimate the value of the hurt caused by infringement thereof. In the circumstance of the case I find that R100 000.00 will be appropriate. I do so being mindful of the principle not to unduly enriched.

[32] This then brings me to the other head of damages. That is, loss of earning, past and future. The claim for loss of earning seems to be premised on the fact that subsequent to her arrest and detention, her livelihood as a traditional healer was brought to an end. There is context to this: According to the plaintiff on the night in question, a group of community members arrived at her home. She was taken, told that one Lupede was looking for her. Thereafter she was taken to a training centre. Her phone was then taken. Lupede is said to be a member of Crime Prevention Forum (CPF). They looked for the name of Dabula in her phone. When they found the name, they asked which Dabula it was and she said Ntobela, the person from whom she graduated as a traditional healer. There at the training centre she was assaulted. She was accused of having killed someone for muti. Whilst at the training centre, Col MkhaliPhi came and took her to Ermelo Police Station. According to her, people do no longer come for treatment or for help as she is regarded as a murderer. This has got nothing to do with the police or the prosecution. It is, in my view, something unrelated to the arrest, detention and charge of kidnapping being preferred against her. It looks like people stopped coming to her for help because there was a rumour of her using human parts to strive her healer-ship practice. I therefore find that she did not establish a case against the police for loss of earnings.

[32] Coming to the other aspect of the case, the Director of Public Prosecutions (DPP) has also been cited as the second defendant in these proceedings. According to the plaintiff in her pleaded particulars of claim, the NPA is held liable based on the following

averments:

"7. After the illegal arrest and detention, plaintiff was taken to Ermelo Police Station and detained there. On the 11th January 2016, plaintiff appeared before the Eerstehoek Magistrate's court and as a result of the wrong information furnished by the police to the Prosecutor, plaintiff was not admitted to bail nor released on her own recognizance. At the proceedings, both the police and the Public Prosecution vehemently opposed the bail application and plaintiff was further remanded in custody due to appear on the 19th January 2016.

8. 8.1 On the 12th January 2016, plaintiff was taken to Nelspruit prison and detained there. On the 18th January 2016, plaintiff appeared before the Eerstehoek Magistrate's court and was released on the payment of R500.00 (Five Hundred Rand) bail and the matter was then remanded to 28th January 2016.

8.2 On the 2Bfh January 2016, plaintiff appeared before the Eerstehoek Magistrate's court and the Director of Public Prosecution withdrew the charges against Plaintiff due to the fact that they were baseless, unsustainable and were motivated by malice.

9. At all material times hereto, the police and the Prosecutor were acting within the course and scope of their employment with the

1st and 2nd defendants respectively.

10. 10.1 Plaintiff further submits that her arrest, detention, charging her with kidnapping and murder as well as subsequent detention was unlawful.

10.2 Plaintiff submits further that during the thirteen (13) days, counted from 61h January 2016 to the 19th January 2016, plaintiff suffered damages by being deprived of her rights as enshrined in Chapter 2 of the Constitution of the Republic of South Africa, Act no 108 of 1996; loss of income due to her inability to practice her profession as well as future loss of income due to being blacklisted by the Defendants by being labelled a murder and a kidnapper.

[33] The plea to the essence of the averments made as quoted above, is a bare denial. So, the onus is on the plaintiff to prove the averments made as quoted above. The prosecution is entitled to ask for a postponement for the purpose of further investigation or enabling it to decide whether or not to oppose the release on bail. This often happens when it is not clear about the prima facie case or where the investigation is not complete to which as suspect, is said to be connected to the commission of an offence.

[34] The allegations that the public prosecutor vehemently opposed bail and that the charges were motivated by malice on the part of the prosecution without more or proof thereof, when the plaintiff had the opportunity to do so, should be found to be fatal to the plaintiffs case, insofar as it was intended to hold the prosecution liable for further detention starting from 11 to 19 January 2016. No malice on the part of the prosecution is shown. The granting of bail on 19 January 2016 and subsequent withdrawal of the charges on 28 January 2016 does not signify such malice or bad faith. I therefore find that no case has been made against the prosecution.

[35] Consequently an order is hereby made as follows:

35.1 Judgment is hereby granted against the first defendant (Minister of Police) in the amount of R375 000.00 for unlawful arrest and detention.

35.2 Judgment is hereby granted against the first defendant in the amount of R100 000.00 for infringement of the plaintiff's dignity and respect.

35.3 The action against the second defendant (Director of Public Prosecutions) is hereby dismissed with costs.

35.4 The first defendant to pay the costs of the action for the plaintiff, Mrs Maseko.

M F LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING:

14 NOVEMBER 2017

DATE OF JUDGMENT:

20 DECEMBER 2017

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[1] Minister of Safety and Security v Sekhoto [2010] 2 SA SCA 141 (19 November 2010) at para 28

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