

SOUTH AFRICA / JUDGMENT

Matsoso v Minister of Police (415/2019)

[2024] ZAFSHC 68 (29 February 2024)

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COURT

Free State High Court, Bloemfontein

BEFORE

P.R. Cronjé

CASE / FILE NUMBER

415/2019

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 415/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MAHLOMOLA MATSOSO and THE MINISTER OF POLICE Plaintiff Defendant

CORAM: P.R. CRONJÉ, AJ

HEARD ON: 9 MAY - 10 MAY 2023; 12 MAY 2023; 10 – 14 JULY 2023; 28 JULY 2023; 31 JULY 2023; 8 AUGUST 2023; 13 DECEMBER 2023

DELIVERED ON: 29 FEBRUARY 2024

DELIVERED BY: P R CRONJÉ, AJ

- [1] The plaintiff instituted action against the Minister alleging unlawful arrest,[1] detention and assault by members in employment of the Minister. He, inter alia, alleges that the Minister did not take into account rights afforded to him in section 12 of the Constitution[2] and that the police officers had no reasonable and/or justifiable grounds to interfere with his constitutional rights.

[2] The Minster does not deny vicarious liability. The Minster pleads that the plaintiff aggressively demanded that Sgt. Molaoa, the driver of the police minibus (referred to as “the Quantum”) stopped the vehicle and he thereupon forcefully opened the door whilst it was still in motion. plaintiff thereafter, allegedly,

assaulted Capt. Mandla who tried to stop him from exiting the Quantum, who then used reasonable force under the circumstances to

prevent the plaintiff from leaving. In respect of the detention, the Minster pleads that the plaintiff committed the offence of assaulting Capt. Mandla and obstructed the police in the execution of their duties. It is also pleaded that the plaintiff was a known criminal who had been arrested on previous occasions and posed a risk to the community, and would on probabilities have evaded a Court hearing.

Evidence for the plaintiff

[3] The plaintiff resides at Kopanong, Odendaalsrus. On the morning of the engagement between him and the police, he went to Senwes in Welkom.[3] He left the building, stopped a 4+1 taxi (“taxi”), and got into the seat next to the driver. In the backseat were three passengers. The Quantum then parked at a 450 angle in front of the taxi. Capt. Mandla got out, pointed his finger at him and said that he must step inside the Quantum. Mr Thabole was also told to get out of the taxi and got into the Quantum. When the plaintiff got into the Quantum, he saw Mr Mantsoe and other police officers. Mr Thabole took the seat behind Sgt. Molaoa. The plaintiff himself sat in the middle of the first seat behind Sgt. Molaoa. None of the police officers were in uniform but were known to him. He was not told why he must get into the vehicle and was not told that he was under arrest and needed to be searched.

[4] The Quantum then drove in the direction of a circle in Jan Hofmeyer Street whereafter it turned into Fuel Street. He asked Capt. Mandla where they were going and what did he do? He received no answer and he told Sgt. Molaoa to stop the vehicle as he wanted to leave. Sgt. Molaoa stopped the vehicle, opened the door and stepped out of the Quantum. He walked towards the back of the Quantum and Capt. Mandla, who was seated next to Sgt. Molaoa, got out and followed

him. Capt. Mandla then touched him on the shoulder whereupon he turned around. After he turned around, Capt. Mandla started beating him with a baton which he held in his right hand. He enquired from Capt. Mandla what the reason for the assault was, but received no reply. The plaintiff stepped back and felt a wall behind him. He blocked the assault with his arms and hands to protect his face. When his arms got tired, he let them down and he was then hit on the head. Blood ran from the wound. He received stitches at the hospital later that day.

[5] The other police officials alighted from the vehicle and tried to stop Capt. Mandla from continuing the assault. There were six

- (6) police officers in total in the Quantum before he got out. After Capt. Mandla saw blood running over his face, he stopped hitting him and told him to get into the Quantum. Capt. Mandla then turned to face Mr Mantsoe who in the meantime also got out, and assaulted him too.
- [6] They then went to the police station. There, Capt. Mandla told Mr Mantsoe and Mr Thabole that they may leave. He was taken to the hospital. At the hospital he received stitches for the wound, his hands and forearms were treated and scans were taken. Mr Mantsoe was also at the hospital, receiving attention for the assault. There were no beds in the holding cells at the police station, it was overcrowded and people were smoking. He is a non-smoker. His fingerprints could not be taken as his hands were too swollen. When he went to Court the following Monday, he was told to go home.
- [7] In cross-examination he stated that he was self-employed selling food and vegetables. He is married, has three (3) children, and is the breadwinner. He went to Senwes to buy “many things”. He had no bag with him. He knew Capt. Mandla as he arrested him before. He knew Mr Thabole before they got into the taxi. The Minister’s version that he, Mr Thabole and Mr Mantsoe were all on foot together was denied. He

denied that he carried a bag and that when they saw the Quantum they ran in different directions. He could not run as he had an injury to his ankle that he suffered when he played soccer in 2014. He denied that Capt. Mandla told him to enter the Quantum as the police were looking for them. According to him it was a coincidence that he, Mr Thabole and Mr Mantsoe were all together in the Quantum that afternoon.

- [8] The Minister’s version is that they were tracked in the directions in which they ran and picked up as they got hold of them. Sgt. Molaoa told them that they were looking for a black bag that the plaintiff discarded.
- [9] He denied that Sgt. Molaoa did not bring the Quantum to a standstill when he requested it. He denied that he was the aggressor. The other police officials shouted at Capt. Mandla to stop beating him. Sgt. Molaoa was still seated in the Quantum but Sgt. Phakoe and another officers were next to the plaintiff when he was hit. He denied that he pushed Capt. Mandla and tried get hold of his firearm to disarm him. The baton was not used to prevent him from disarming Capt. Mandla and he was not obstructing the duties of the police. He saw when Capt. Mandla hit Mr Mantsoe with the baton. It was put to him that the reason why Mr Mantsoe was injured was as a result of Mr Mantsoe trying to stop the plaintiff from beating Capt. Mandla. Mr Mantsoe told him at the hospital that his hand was broken. It was put to him that Mr Mantsoe was not at hospital that day.

- [10] Mr Mantsoe testified that he was at Manny's buying bearings for his car on that day. He was alone and as he walked in the road linking Jan Hofmeyer Road and Fuel Street, six police officers got out of the Quantum, held him by the belt and put him inside the Quantum. He was told that he will see "what is happening". The Quantum thereafter stopped in front of the taxi.
- [11] In Fuel Street, the plaintiff told Mr Mantsoe to stop the vehicle and when it stopped, plaintiff went outside telling the police that he does not know why they arrested him.
- [12] The plaintiff walked towards the back of the Quantum whereafter Capt. Mandla opened the front door, took a baton from the back of his seat and followed the plaintiff. He grabbed the plaintiff from behind and when plaintiff looked back, Capt. Mandla started beating him with the baton. Sgt. Molaoa then asked Mr Mantsoe why does he not stop Capt. Mandla from assaulting the plaintiff as Sgt. Phakoe and Mr Sempe already tried. They tried to pull Capt. Mandla from the plaintiff but he continued beating the plaintiff.
- [13] He then got out and stood next to the door whereafter the other police officers succeeded in containing Capt. Mandla. He did not say anything but Capt. Mandla came to him, said "and you too", and then started beating him with the baton. He was hit on the bony protrusion at the wrist of the left arm.

The plaintiff was bleeding over his face whereafter they went to the police station. A police officer said that he cannot book the plaintiff into the cells as he was injured. He himself had a lot of pain on his left wrist. Capt. Mandla then shouted at him whether he was to open a case against him whereupon he said that he would not and just want to go home as he was in pain. He and Mr Thabole was told to leave. His wife took him to Bongani hospital where he saw the plaintiff, Sgt. Phakoe, Mr Sempe, and Sgt. Molaoa.

- [14] In cross-examination he admitted that he knew Capt. Mandla, Sgt. Phakoe, Mr Sempe and Sgt. Molaoa before the incident. After the incident Capt. Mandla and Sgt. Molaoa met him in the parking area of the Spar in Riebeeckstad. Sgt. Molaoa said that he brought Capt. Mandla to sort things out and to ask for forgiveness. Capt. Mandla apologized for what he did to him. Capt. Mandla said he acted out of anger and said he was "sorry". He denied that he was injured after he tried to prevent the plaintiff from attacking Capt. Mandla. He denied that he carried a bag. He knows Mr Thabole as a taxi driver but they were not friends. He could not himself drive after the attack as his hand was broken and his wife had to drive him to hospital.
- [15] Mr Thabole testified that he got into the taxi and saw the plaintiff. He did not have any business with the plaintiff on that day and was told to get into the Quantum. Whilst driving in Fuel Street, the plaintiff asked to get out of the Quantum as he does not know where they were going. plaintiff asked Sgt. Molaoa to stop, whereafter Sgt. Molaoa stopped the vehicle. plaintiff opened the door and got out. The plaintiff took a few steps after he alighted and Capt. Mandla then took the baton and followed the plaintiff placing his hand on his left shoulder and started beating the plaintiff with the baton. The plaintiff did not assault Capt.

Mandla. The other police officers made something like a circle around the plaintiff and Capt.. Mandla. Mr Mantsoe was asked by Sgt. Molaoa to help to separate the plaintiff and Capt. Mandla but they already separated when he went outside. Capt. Mandla then hit Mr Mantsoe on his hand. No one was searched. He and Mr Mantsoe was told that they may go home.

Evidence for the Minister

- [16] Constable Ngake is employed at Jan Hofmeyer Road Police Station. She works in the Criminal Records Division. Her duties are inter alia to process all arrested suspects, take warning statements and prepare dockets to be sent to Court. When she interviewed the plaintiff he told her what happened and she wrote it down. Before he signed it, she asked him whether there was anything that he was not satisfied with and he did not indicate the contrary. She confirmed that plaintiff was injured but fingerprints were taken of the fingers that were not injured.
- [17] In cross-examination she testified that the plaintiff indicated that he seeks legal representation and that there was no necessity to wait for such as the plaintiff was willing to make a statement. She did not take the fingerprints and only completed the form. When put to her that his hands were swollen and that the fingerprints were only taken the following day, she stated that she does not know. She and Sgt. Khatoe dealt with the plaintiff. She confirmed that the plaintiff stated that he was assaulted.
- [18] Capt. Mandla testified that on the day of the incident, he was the Relief Commander of the Task Team: Crime Prevention Unit. They focus on theft of motor vehicles and robberies. He, Sgt. Molaoa, Sgt. Phakoe and Const. Khubedu reported for duty at 12h00 on the day. He saw three persons walking from Power Road towards Jan Hofmeyer Road. He informed them that he wants to see what was in their bag. He knew the plaintiff ("Loubser"), Mr Mantsoe ("Willie") and Mr Thabole. He arrested them in the past for motor theft and robbery. They worked as a group. The police had meetings with them before, discussing challenges that the police were having with crime. The discussions then revolved around the possibility of assisting them with the needs for their children as they said that they were involved in criminal conduct to care for their families. On that day the plaintiff carried a bag and when they started to run, he developed a suspicion that something was wrong and that they committed a crime. The bag raised his suspicion.
- [19] The Quantum was clearly visible as a police vehicle as it had blue lights on the dashboard, which are generally switched on. When they gave chase it was him, Sgt. Molaoa, Mr Junior, Mr Sempe, Sgt. Phakoe and Const. Khubedu. Sgt. Phakoe and Const. Khubedu followed the plaintiff and Mr Thabole while he chased Mr Mantsoe. They picked Mr Mantsoe up and drove to where they stopped the taxi at Senwes. According to him they went to the plaintiff and Mr Thabole in the taxi and requested them to join them in the Quantum. He asked Mr Thabole where the bag was and requested them to accompany them to do an investigation on the whereabouts of the bag.

[20] The plaintiff and Mr Thabole voluntarily joined them in the Quantum. He asked the plaintiff why he changed his jacket. When he asked about the bag, Mr Thabole said nothing but the plaintiff asked him where they were being taken to. He told him that he was looking for the bag. When they arrived in Fuel Street, plaintiff said that he wanted to leave the Quantum and then opened the door whilst the Quantum was still moving and Sgt. Molaoa stopped the Quantum. He got out to stop the plaintiff from leaving and pushed the plaintiff to get back in the Quantum. The other police officials also tried to stop the plaintiff but he forced himself out of the door. As he pushed the plaintiff back to the Quantum, the plaintiff hit him with a fist on his left jaw. The police is issued with batons and pepper spray and he decided to defend

himself with the baton. He denied that the plaintiff walked towards the back of the Quantum when he was outside or that he

touched his shoulder. He only pushed the plaintiff back towards the Quantum and was then hit on the jaw. plaintiff thereafter punched him on his forehead and chest and said that they must kill each other.

[21] The plaintiff tried to take his firearm from him and he then realized that it has become serious. When the plaintiff reached out for the firearm, he targeted his hands. The use of the baton stopped the plaintiff from continuing his assault. He did not deny that the plaintiff's hands were injured and stated that he himself was also injured.

[22] He arrested the plaintiff for assaulting him and hindering the police in the execution of their duties whilst looking for the bag. He recalls that Mr Mantsoe tried to intervene and also later indicated that he was injured. According to him, Mr Mantsoe wanted to stop the plaintiff from assaulting him. Sgt. Phakoe and Khubedu was not at the scene yet. He denied that the police made a semi-circle around them to stop the fighting. After Sgt. Phakoe and Khubedu arrived, the other members in the Quantum also came out to keep them apart. He denied that he threatened Mr Mantsoe and assaulted him.

[23] The plaintiff was handcuffed before he was placed back in the Quantum and they went to the police station. He informed the plaintiff of his constitutional rights. They did not continue with the investigation as the plaintiff needed medical assistance. He confirmed that he told Mr Mantsoe and Mr Thabole that they may leave. He denied the meeting at the shopping centre and only met Mr Thabole and Mr Mantsoe at Court. There was never an apology.

[24] In cross-examination, he conceded that persons may carry a bag and they are not always stopped to be searched. When they saw the bag, they believed it to have been stolen. They believed that a crime was committed. When the three ran, he believed it was a joint operation. If a person runs, there are grounds for suspicion and there may be something wrong. When they do patrol, they would receive WhatsApp messages telling them where the plaintiff and the other two were. He received information on that day that the three were up to no good. This was never put to plaintiff. He arrested them previously for theft out of motor vehicles and robbery.

- [25] It was clear from his evidence that there was no information of any crime committed where the three were involved. From the history that he painted there was no confrontation or physical interaction before.
- [26] It is of importance to state that various aspects of Capt. Mandla's testimony was not put to the plaintiff or his witnesses. It was never put to the plaintiff that he changed his jacket or that he and Mr Thabole were confronted inside the taxi about the bag. Capt. Mandla initially gave an explanation of the seating arrangement of the persons in the Quantum but in cross-examination eventually conceded that he could not remember. According to him he got out before the plaintiff left the Quantum and pushed him back. If he remembers well, the other police officers in the vehicle also tried to pull the plaintiff back - "they did something". This was also not put to the plaintiff. He stated that as the fighting continued, other members tried to separate them. He has no recollection that he hit Mr Mantsoe.
- [27] On a question that it was not put to Mr Thabole or the plaintiff that the plaintiff's rights were explained, he wanted to continue to look for the bag, and that the plaintiff was handcuffed, he stated that he believes that it was important and that he was now placing his version on record. It was not necessary for him to go to the doctor even though the plaintiff, on his version, assaulted him.
- [28] The basis of suspicion against them was that they used the same modus operandi twice before and they then recovered something from them. He did not harbour a reasonable suspicion as a result of the previous incidents but on that day he wanted to see the contents of the bag.
- [29] In re-examination he stated that there were a number of engagements between the three and the police and when the police approached them, they cooperated. It was not the first time they ran away.
- [30] On my questions he testified that it was the first physical altercation between them and that he did not go to the hospital on the same day. He confirmed that his statement does not say on what day it was prepared.
- [31] Sgt. Molaoa testified that he worked with Capt. Mandla since 2017. On the day he was performing crime prevention duties with Capt. Mandla, Sgt. Phakoe and Const. Khubedu. He was the driver of the vehicle. The plaintiff apparently carried a black bag and it was perplexing that the three ran away as they never did before. They stopped in front of the taxi and Capt. Mandla and he got out of the Quantum. Capt. Mandla told the plaintiff and Mr Thabole to get out and he asked Mr Thabole where the black bag was. Capt. Mandla told them to get into the Quantum to look for the bag. The plaintiff later became aggressive, stood up and went to the sliding door whereupon he stopped. He did not stop the Quantum on the instruction of the plaintiff. Capt. Mandla got out too whereafter the plaintiff pushed Capt. Mandla against the vehicle and punched him on his chest and said that one of them will die that day. He tried to get out to try to pull the plaintiff from Capt. Mandla. Mr. Sempe and Mr Junior were still in the vehicle. He phoned Sgt. Phakoe to come and help. They

cuffed the plaintiff and drove to the police station. He did not see what caused the injury to the plaintiff's head. Mr Mantsoe got out of the Quantum and managed to stop the altercation and thereafter got back in. He did not observe injuries to Mr Mantsoe.

- [32] The plaintiff was placed under arrest at the police station and Mr Mantsoe and Mr Thabole were informed that they may go home. He denied that he and Capt. Mandla saw Mr Mantsoe after that day and there was no apology conveyed. It was the first time that he saw the plaintiff carrying a black bag.
- [33] According to him both the plaintiff and Mr Thabole sat in the back seat of the taxi. Compared to Capt. Mandla's version in respect of this, his version is correct. When it was put to him that it was not put to Mr Thabole or Mr Mantsoe that the plaintiff became aggressive, he stated that they would have seen it. The plaintiff was freely in the Quantum whilst they were driving in Fuel Street and could leave the Quantum at any time as he was not deprived of his liberty at that stage. Capt. Mandla should be asked why he stopped the plaintiff from leaving the vehicle.
- [34] When he went around the Quantum, the plaintiff was aggressive and holding Capt. Mandla on his clothes, pushing him towards the Quantum. He got his cell phone and called his colleagues. There were three officers behind the plaintiff to get him off Capt. Mandla. The plaintiff "pushed" with two fists towards Capt. Mandla which he later qualified to be "punches". He did not see Capt. Mandla using the baton. He could not recall who sat where in the Quantum. Capt. Mandla told him that he was ill afterwards and saw a doctor. He confirmed that he saw Mr Mantsoe at the left back side of the Quantum. He denied that Mantsoe was injured. Capt. Mandla thereafter informed the plaintiff that he is arrested and his rights were read. He denied that he and Capt. Mandla approached Mr Mantsoe to apologize for what happened. When it was put to him that it was not disputed he simply said it did not happen. Capt. Mandla told him that the plaintiff tried to reach for his firearm. He was surprised as there was no reason for it.
- [35] Sgt. Phakoe testified that they met the three when they were close to the circle and when Capt. Mandla called them they ran away. He went to a guesthouse in Fuel Street to look at camera footage to see in what direction the plaintiff and Mr Thabole went and then received a call from Sgt. Molaoa to request assistance as the plaintiff was in a fight with Capt. Mandla. On arrival they managed to stop the plaintiff and heard Capt. Mandla said that he now found plaintiff and

got him this time. When he arrived where the altercation took place everything stopped. Mr Mantsoe was outside the Quantum and tried to calm the plaintiff down and implored him not to fight. There was no encirclement. He was not sure who carried the bag but thought it was the plaintiff.

Evaluation of evidence

- [36] With the exception of Ms Nkage, all the witnesses knew each other. I accept that there were engagements between the parties before. One may describe the two groups as the Three and Four Musketeers respectively. All of them had reason to protect each other. I specifically ruled that I would not hear evidence of previous convictions as it is not relevant to the question that I need to determine, namely, whether the plaintiff was assaulted, arrested and kept in custody.
- [37] Both sides presented evidence of how the engagement started on that day. It eventually became clear, notwithstanding the attempt by the plaintiff and his witnesses to water it down, that he, Mr Thabole and Mr Mantsoe knew each other and the police knew them to function as a group. I also accept that they were walking together that day. I accept that a bag was carried. I cannot find that it was the plaintiff who carried the bag. Sgt. Molaoa testified that Capt. Mandla asked Mr Thabole where the bag is and Capt. Mandla testified that he asked the plaintiff. There are variances between Capt. Mandla and Sgt. Molaoa of how the plaintiff and Mr Thabole came to be in the Quantum. Capt. Mandla states that he showed them to come whist Sgt.
- Molaoa says that Capt. Mandla opened the door where Mr Thabole sat and told him to get out.
- [38] In view of my acceptance that they walked together and that there was a bag, I accept that the reason for the plaintiff and his partners to be in the Quantum was to search for the bag.
- [39] On all accounts, the plaintiff and his colleagues were not arrested, their rights were not explained, and they were suspects who were merely asked to help to find the bag. They were free to leave the Quantum at any stage.
- [40] None of the witnesses' versions were that there was any aggression or animosity between them or threats of violence before that day. The question then to be answered is what caused the incident?
- [41] The plaintiff was free to leave the Quantum, as conceded by the police. On the plaintiff's version he got out. He was entitled to do so. Capt. Mandla then on his own account restricted the plaintiff's freedom of movement and restrained him from leaving. This was before he was informed that he was a suspect or that he is arrested for the notional crime of carrying a bag or running away.
- [42] The plaintiff entered the Quantum voluntarily and made an election to leave. He was perfectly entitled to do so. I find that Capt. Mandla arrested the plaintiff without warning him of his rights when he stopped him. The arrest, at least prior to the altercation, was unlawful.

- [43] When Capt. Mandla, on his own version, pushed the plaintiff back towards the door of the Quantum, he committed unjustifiable assault. The plaintiff was at that stage no threat to him. Even if the plaintiff was aggressive, there is no evidence that the plaintiff at that stage assaulted Capt. Mandla. The Minister carries the onus to prove that the action was lawful. I find that he failed to discharge that onus.[4]
- [44] The persons who were able to see the use of the baton was the plaintiff, his two partners and Capt. Mandla. None of the other officers saw at what stage it was used. The history of the engagements before that day gives no hint that the plaintiff would go as far as to attempt to disarm a police officer or would physically engage with the police. To the contrary, everyone cooperated with each other, no force was used to place any person in the Quantum.
- [45] I find that Mr Mantsoe was assaulted by Capt. Mandla. Capt. Mandla, nor any other officer could give an explanation as to how Mr Mantsoe was hit. I accept the evidence of Mr Mantsoe that Capt. Mandla came to him and told him "and you too". Mr Mantsoe was now outside the Quantum, as was the plaintiff, and this clearly did not satisfy Capt. Mandla. I find that Mr Mantsoe was asked to assist to get Capt. Mandla off the plaintiff. I therefore also accept that the other police officers tried to get Capt. Mandla away from the plaintiff. The plaintiff was unarmed and Capt. Mandla had a potent weapon. The injuries to the plaintiff's hands and arms were not disputed and it is hard to see how the plaintiff would have been able to attack Capt. Mandla when he had no similar or proportional weapon. Mr Thabole also saw what happened. I reject Capt. Mandla's version is that the plaintiff wanted to get to his firearm. It does not fit the history of the engagements and the disproportion between what was available to the plaintiff to achieve the goal.
- [46] I accept the evidence of Mr Mantsoe that he had to visit the hospital for attention that day after Capt. Mandla assaulted him. I accept that he could not drive his vehicle as a result of the assault and that the engagement at the shopping centre where Capt. Mandla apologised took place. Mr Mantsoe had no reason to relay this other than that it happened. It did not support the plaintiff's case and he took no steps against Capt. Mandla.
- [47] The versions of what happened before the plaintiff and his partners got into the Quantum are diametrically opposite. I accept the Minister's version up to the point where the Quantum stopped the taxi. The evidence is credible and reliable. This implies that the version of the plaintiff and his witnesses cannot be credible and reliable.
- [48] From there on, there are various discrepancies regarding how the plaintiff and Mr Thabole got out of the taxi and who asked whom about the bag. I cannot accept that evidence of the Minister.
- [49] When it came to how the assault commenced and what exactly happened, the Minister only has the evidence of Capt. Mandla. The other officers were not materially involved and did not see everything. In respect of this portion of the evidence I find that the version of the Minister's witnesses is not credible and reliable.

[50] In respect of the sequence of events from the moment that the plaintiff got up to leave the Quantum to the point where he was taken to the hospital and later to Court, I accept the version of the plaintiff and his witnesses.

Lawfulness of arrest and the onus

[51] In *Lawu and Another v Minister of Police*[5], the principles are summarised with reference to a number of judgments on the requirements as follows:

“[72] The principles regarding an unlawful arrest are trite:

72.1 an arrest or detention must be constitutionally and statutorily justified and the reason for this is obvious: it deprives a person of their liberty and dignity;

72.2 where an arrest takes place without a warrant, once the arrest and detention are admitted the onus rests on the State to prove the lawfulness thereof;

72.3 to discharge this onus, the defendant must show that

- a) the arrestor was a peace officer;
- b) that he or she entertained a suspicion;
- c) that the suspicion was that the arrestee had committed a Schedule 1 offence and
- d) that the suspicion rested on reasonable grounds;

72.4 an honest belief in the legality of the arrest or detention is no defence.”

[52] The plaintiff need not allege or prove wrongfulness – it is for the defendant to allege and prove the lawfulness of the arrest and detention. The test as to whether the arresting officer’s suspicion is reasonable is assessed objectively.[6] Once the required suspicion exists, an arresting officer is vested with a discretion to arrest, which he must exercise rationally. The Minister’s challenge is that there was no arrest on a reasonable ground that the bag contained stolen property or was

stolen. There was a mere subjective suspicion as the three ran. The suspicion in any event did not lead to an arrest. Both Capt. Mandla and Sgt. Molaoa conceded that the plaintiff was free to leave, at least up to the point of the plaintiff’s alleged assault on Capt. Mandla. It is trite that when the police assume control over a person’s movements s/he is under arrest.[7]

[53] To be able to arrest the plaintiff for obstruction of the police in the execution of their duties, the test to satisfied is that:

- (i) the arrestor must be a peace officer, (ii) an offence must have been committed, or an attempt have been made to commit an offence, (iii) in his/her presence. Similarly, the jurisdictional facts necessary to be proved in respect of section 40(1)(j) of the Criminal

Procedure Act (CPA)[8], namely

- (i) the arrestor must be a peace officer, (ii) there must be a wilful obstruction of the officer, (iii) in the execution of his duties.[9] It is difficult to envisage how the plaintiff could have intentionally obstructed the police when he was in fact free to go, where there was no bag in his possession, where it was not known what was in the bag or that it was stolen. No reasonable suspicion could therefore have been formed. When they were picked up to look for the bag, they were suspects and entitled to be warned of their rights. It is my view that the police took shortcuts, which now costs the Minister dearly.

[54] In *Biyela v Minister of Police*[10], Musi AJA affirmed that the test whether a suspicion is reasonable, is objectively justiciable:

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

[35] 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.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration. [my emphasis]

[55] In *State v Lubaxa*[11], albeit in the context of malicious prosecution, and analogous to the detention of the plaintiff it was held:

“Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated . . . and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”

[56] Ms Mofokeng, for the Minister, is correct in submitting that s. 36[12] of the Constitution places limitations on s 12.[13] She refers to *Magajane v Chairperson, North West Gambling Board*. [14] The Court, however also stated:

“[63] This Court in Mistry described the essential nature of the right to privacy as protected in section 14 of the Constitution and the means through which section 14 repudiates repugnant past practices and re-affirms others consistent with the new constitutional values:

“The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.”

[57] The wording of s 36, however, has to be considered carefully. It specifically provides that the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the limitation has to be considered. There can be no question about the importance of the right to freedom and due process. Allowing the police to pick persons up against whom they have no reasonable grounds to believe that an offence has been committed or may be committed, and in order to help the police to incriminate themselves cannot justify a limitation on the basis of a notionally important purpose, which in this case was limitless and where there were less restrictive means available. The plaintiff and his partners were well known to the police and arresting them when they found what they were looking for was not impossible. I am afraid that, on the facts before me, the case Magajane is of no assistance to the Minister.

[58] Reference is made to *S v Murphy and Others*[15] where the Court dealt with the legality of search and seizure with reference to ss 20 to 22 of the CPA. This case too is not of

assistance to the Minister. By the time that the plaintiff and his partners were picked up, they were no longer in possession of the bag. I refer to the question of whether a common purpose was established when only one carried a bag and nothing was found. They were not searched and the purpose of picking them up was not to search them. I already found that on the evidence I could not find that reasonable grounds existed even if there was a search of their person.

[59] It is correct that s 205(3) of the Constitution empowers the police to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These are broad descriptions that are given body in various other pieces of legislation such as the CPA, POCA[16] and the Police Service Act[17].

[60] In *Ralekwa v Minister of Safety and Security*[18] it was held that “[t]o decide what is a reasonable suspicion there must be evidence that the arresting officer formed a suspicion which is objectively sustainable”. The phrase ‘reasonable suspicion’ has often been considered particularly within the context of s 40(1)(b) of the CPA. The section permits an arrest by a police officer without a warrant where the arrestor “reasonably suspects” the arrestee of having committed an offence.

[61] In *Minister of Safety and Security v Sekhoto and Another*[19] it was held that “peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. This standard was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court.

The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached”.

[62] In both the decisions above the objective standard is reaffirmed.

[63] The facts in *R v Zackon*[20] is clearly distinguishable from the facts before me. The different forms of the crime of obstruction of justice was summarised in *S v Mene and Another*[21].

[64] On a conspectus of all the facts, I am satisfied that the plaintiff discharged the onus on all the elements where it rested on him. The Minister, however, failed to discharge his onus.

Quantum of damages

[65] In *Minister of Safety and Security v Tyulu*

[22] it was held:

"In the assessment of damages for unlawful arrest and detention it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the award they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our law ... Although it is helpful to have regard to awards made in previous cases to serve as a guide, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."

[66] In *De Klerk v Minister of Police*[23] the plaintiff was held in custody, without any infringement of his physical integrity for a period of 8 days. the Constitutional Court granted R300 000.00 in 2018.

[67] In *Phefadu v Minister of Police*[24] the plaintiff was severely assaulted by members of the police and he suffered, inter alia, severe bruising to the left eye; severe bruising, abrasions and lacerations to the face; a ligamentous injury to the left arm and shoulder; bruising and muscular injuries to the left arm and shoulder; a deep laceration to the left shoulder; a concussive type head injury; emotional shock and trauma; and loss of earnings as well as future loss of earnings and general damages. He was kept in custody for one day. The Court granted the present day value of R468 000.00

[68] Mr Matsoso did not give a comprehensive exposition of the sequelae of the prejudice he suffered. The facts of his case is distinguishable as it was not as comprehensive as that in *Phefadu supra*. He was, however kept in custody for a longer period.

[69] In *Wigg v Minister of Police*[25], the plaintiff was in custody for 20 minutes but also strip searched. The Court made reference to *Mandleni v Minister of Police*[26] where it was stated:

“[13]: “In Masisi v Minister of Safety and Security 2011 (2) SACR 262 Makgoka J very wisely in my view described the purpose of an award of general damages in the context of a matter such as the present as a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore struck at the very fundament of such ethos. Those with authority to curtail that right had to do so with the greatest of circumspection, and sparingly. Where members of the Police transgressed in that regard, the victim of the abuse was entitled to be compensated in full measure for any humiliation and dignity which resulted. To this may be added that where an arrest was malicious, the plaintiff was entitled to a higher amount of damages than would be awarded, absent malice.”

[70] In *Wigg supra* the court ordered R579 000.00. In *Lamola v Minister of Safety and Security*[27] the injuries consisted of a gunshot wound through the left side wall of the chest at the 8th intercostal space in the posterior auxiliary line. Internal damage was caused by the penetrating bullet. Both the diaphragm and the liver were lacerated and internal bleeding occurred. In the emergency surgery that followed, a drain was inserted after a medial laparotomy was performed to clear the abdomen of free fluids. He was left with scarring at the sites of the bullet wounds, the drain and the abdominal incision. In due course he developed two incisional hernias that are significantly prominent in addition to the permanent unsightly scarring. Serious pain was experienced throughout the wounding and the subsequent medical treatment. He was hospitalised for two weeks, whereupon he was taken to police lock-up for two months. he was held in a prison awaiting trial for another 9 months. The Court awarded R704 000.00.

[71] In *Fisa v Minister of Police*[28] the assaults were more serious than those perpetrated in *Peterson and Poswa*[29]. What was of concern to the court was the brazen and cruel manner in which the assaults were perpetrated by the police officers. The plaintiff was detained for about 5 to 6 hours; was severely traumatised during that period; and the sequelae of the

assaults were serious and would undoubtedly be long-lasting. His post-traumatic stress resulted in an irrational fear of police, which he would probably endure for the rest of his life. The Court granted the present day value of R427 000.00.

[72] In *Van der Laarse v Minister of Police*[30] the plaintiff was treated cruelly and kept under horrifying circumstances from the moment of his illegal arrest, which took place

in the presence of acquaintances of him, tourists and the general public. He was detained for a period of approximately three day in a hopelessly overcrowded container under filthy conditions. The court ordered payment of R467 000.00.

[73] Ms Mofokeng refers to *Toloane v Minister of Police*[31] where the plaintiff was in custody for a period of 66 days. He said that he did not have warm clothes to wear; the cells were dirty; the blankets were dirty; the water was cold and he could not wash himself; the food was bad and they were six (6) up to seven (7) people in one cell. He did not have visitors while in custody. He was transferred to Grootvlei Correctional Centre, where the living conditions were even worse as they were up to 70 in one cell. The Court awarded R250 000.00.

[74] In *Mahlangu and Another v Minister of Police*[32] the plaintiff was in custody for more than 8 months. The quantum was considerably increased from what the SCA ordered to R500 000.00 and R550 000.00 in respect of the two plaintiffs.

[75] The cases of *Minister of Safety and Security v Seymour*[33] and *Ndlovu v Minister of Safety and Security*[34] are disguisable on the facts.

[76] I conclude that the plaintiff was severely beaten with an instrument issued to the police to handle with responsibility. It became a dangerous and potent weapon to assault the plaintiff. I accept that his hands were swollen to the extent that fingerprints could not be taken immediately and that he was taken to hospital for a wound to his head that was inflicted by the baton. The conduct of Capt. Mandla was wholly unjustified, not in compliance with any legislative powers and a flagrant disregard of the protection granted to all citizens by the Constitution. It was uncalled for, especially where the plaintiff was, on all accounts, free to leave. The fact that he assaulted Mr Matsoso who was an innocent bystander makes it even worse.

[77] Having considered the facts, the attempt to justify it, the injuries sustained by the plaintiff; the period that the plaintiff was held in custody, and case law, an amount of R350 000.00 would be fair and justified.

[78] There is no reason why costs should not follow the result.

ORDER:

1. The Minister of Police is ordered to pay the plaintiff an amount of R350 000.00.
2. The amount shall run interest at the prescribed rate from the date of judgment to the date of payment.

3. The Minster pays the plaintiff's costs.

P R CRONJÉ, AJ

Counsel for Plaintiff: Adv A Sander Attorneys for Plaintiff: VZLR Inc Du Plooy Attorneys

Bloemfontein Counsel for Defendant: Adv R B Mofokeng Attorneys for Defendant: State Attorney Bloemfontein

[1] The requirements were confirmed by the Constitutional Court in *De Klerk v Minister of Police*

[2019] ZACC 32.

[2] Act 108 of 1996 - "12. Freedom and security of the person.—(1) Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources; ..."

[3] Although there were differences in respect of the location of Senwes on the map, it did not play a critical role in the trial.

[4] *Pillay v Krishna and Another* 1946 AD at 952-3; *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC).

[5] (12400/17; 12401/17) [2021] ZAGPPHC 290.

[6] *Le Roux and Another v Minister of Police, Republic of South Africa and Another* (1340/2018;1343/2018) [2022] ZAFSHC 316.

[7] *State President v Tsenoli; Kerchhoff and Another v Minister of Law and Order and Others* 1986(4) SA 1150 (A) at p1186 C-D.

[8] Act 51 of 1977.

[9] *Willie v Minister of Police and Others* (A170/2019) [2020] ZAFSHC 122.

[10] (1017/2020)

[2022] ZASCA 36; see also *Minister of Safety and Security v Sekhoto* 2011(5) SA 367 (SCA).

[11] 2001

(2) SACR 703 (SCA) para 19; *Minister of Police and Another v Du Plessis* (666/2012) [2013] ZASCA 119; 2014 (1) SACR 217 (SCA).

[12] "36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

[13] Referred to above.

[14] (CCT49/05)

[2006] ZACC 8; 2006 (10) BCLR 1133 (CC) ; 2006 (5) SA 250 ; 2006 (2) SACR 447.

[15] (CC27/2018)

[2023] ZAWCHC 184; 2024 (1) SACR 138 (WCC).

[16] Prevention of Organised Crime Act, 121 of 1998.

[17] 68 of 1995.

[18] 2004

(2) SA 342 (T) at 347D-E.

[19] 2011

(5) SA 367 (SCA).

[20] 1919 AD 175.

[21] (349/86)

[1988] ZASCA 66; [1988] 2 All SA 482 (A).

[22] 2009 (5) SA 85 (SCA) at 93 d-f.

[23] De Klerk v Minister of Police

[2019] ZACC 32.

[24] (65249/2012) [2017] ZAGPPHC 583.

[25] (2187/2019) [2022] ZAMPMHC 6.

[26] Unreported judgment dated 24 April 2017, case number 37539/14.

[27] (2007/26594)

[2012] ZAGPJHC 120.

[28] (1263/2012)

[2016] ZAECELLC 1.

[29] 2009 6 QOD K6-1 (ECG).

[30] (31378/2012)

[2014] ZAGPPHC 614.

[31] (433/2019) [2023] ZAFSHC 3.

[32] (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).

[33] (295/05)

[2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA).

[34] 2013 JOL 29840 (ECG).

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