

SOUTH AFRICA / JUDGMENT

Mkhutyukelwa v Minister of Police (2789/2013) [2017]

ZAECMHC 34 (8 August 2017)

[2017] ZAECMHC 34

COURT

Eastern Cape High Court, Mthatha

BEFORE

SM Jolwana

CASE / FILE NUMBER

2789/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

{EASTERN

CAPE LOCAL DIVISION –MTHATHA}

CASE NO

.2789/2013

In

the matter between:

THANDOLWETHU

MKHUTYUKELWA Plaintiff

And

THE

MINISTER OF POLICE

Defendant

JUDGMENT

JOLWANA A J

- [1] This is a claim for damages suffered following an arrest and detention as well as assault.
- [2] The Plaintiff was on his way from Elubhacweni Location in Mount Frere to his place of residence in Sophia. It was in the morning at about 07h00 on the 04 August 2013 when he was shot at by a policeman, Constable Jeme.

[3] He jogged past two girls that were walking in the same direction as he was. After passing those girls he continued jogging past a vehicle and thereafter crossed a small river. He then heard a loud bang and noticed that his arm was numb and bleeding. He realised that he had been shot. He looked back and saw a policeman in full uniform pointing a firearm at him. He

approached this policeman to ask him why he shot him. The policeman asked him why he was running and he wanted to search him. The policeman was with another young man in his vehicle and he asked the young man to pick up a plastic bag that was lying there to bandage him as he was bleeding profusely. After bandaging him the policeman asked the young man to leave and the young man drove away with the vehicle.

[4] While he and the policeman were standing there on the side of the road they saw a long wheel base bakkie coming from the direction of Lubhacweni. The policeman stopped it and asked for a lift for both of them from that vehicle. The bakkie took them to Mount Frere police station. They were both on the back of the bakkie which did not have a canopy.

[5] The bakkie parked outside the police station premises. The policeman went inside the police station leaving him and the driver in the vehicle. Thereafter four police officers excluding the policeman that shot him jumped into the back of the bakkie and asked the driver to take them to Madzikane Hospital.

[6] On arrival at the Hospital he was attended to by the nurses. The nurses established that the bullet had not exited and he was admitted and taken to a ward. He was handcuffed, one arm to the bed and one leg shackled to the bed. He was told that he was under arrest by the Policeman who had shot him as he had later arrived at the hospital. He was told that he was arrested for possession of drugs and a resisting arrest.

[7] He testified that this was the first time that drugs and knife were mentioned. The policemen left and he was seen by a doctor the following day. His relatives were not allowed to see him on the basis that he was under arrest. The bullet was only removed four days later.

[8] He was woken up from sleep by two gentlemen who introduced themselves as police officers and one of them told him that he was the investigating officer of the case. They asked him some questions after which they left. Because of the handcuff and shackles he was not able to go to the toilet until the police arrived.

[9] He was discharged on 12 August 2013 and the police were called and they took him to the police station where he was detained. He stayed there in the police holding cells until the investigating officer, captain Nofuma came to charge him. In the late

afternoon of the third day of waiting in the police holdings the investigating officer released him on warning on the 14 August 2013.

[10] The defendant admitted the arrest and detention. The defendant's case was that the shooting was reasonably necessary

and proportional to the threat posed by the plaintiff to the arresting officer. The defence called the arresting officer,

constable Jeme. His evidence was that two days before the arrest he had received information from an informer that the plaintiff was dealing in drugs in Mount Frere and that he travels every morning from Lubhacweni Location to Mount Frere to sell drugs.

He knew the plaintiff as somebody who had been arrested on charges of dealing in drugs before. When he saw him that morning he was convinced that he was on his way to sell drugs and that he probably had drugs in his possession. The Plaintiff was walking rather suspiciously and even though he already knocked off duty he felt it was his responsibility to search the plaintiff. When he stopped his vehicle and asked to search the plaintiff he ran. He chased him and as he was closing in on him the plaintiff turned around and pulled out a pocket knife. He opened the knife with his teeth and charged at him. It is this threatening behaviour that caused him to pull out his police service firearm and shot the plaintiff in the arm. The intention was to disarm him and neutralize the threat to his life.

- [11] He asked to search the plaintiff and found two plastic money bags containing boss pills which from his experience he knew to be drugs. He confirmed that he was off duty but still in full uniform when he saw the plaintiff. Because of what the informer had told him about the plaintiff he decided to search him. He did this with the assistance of his friend who is not a policeman. He understood it to be police policy to search everyone who is suspected of committing an offence.
- [12] The pills that he recovered from the plaintiff were sent to Port Elizabeth for testing and it was confirmed that those pills were indeed drugs. He confirmed that he had taken a lift for himself and plaintiff from a bakkie that was coming from Lubhacweni which took them to the police station. Plaintiff was then entered into police records as standard procedure. He and his colleagues took plaintiff to hospital using the same bakkie that he had used in bringing the plaintiff to the police station. After entering plaintiff in police records and taking him to hospital his role in the arrest and detention of the plaintiff ended and the investigating officer was allocated who took over the investigation of the case.
- [13] He testified that in the circumstances there was no time to apply for a warrant of arrest and his suspicions entitled him to search the plaintiff and if he found the drugs as indicated by the informer, to arrest him. The next defence witness was captain Nofuma, the investigating officer. His evidence was simply that he visited the plaintiff in hospital and after that he only dealt with the plaintiff at the police holding cells where he realized that he had been in custody for longer than 48 hours, which was unlawful and decided to release him on warning. While the plaintiff was in hospital he had taken the docket to court but he was told to bring it back after plaintiff's release from hospital.

[14] The defence then called warrant officer Lengisi who took over as investigating officer from captain Nofuma. His evidence was that the matter was struck off the roll because of the delay in getting the results from the laboratory in Port Elizabeth.

Eventually he got the results but could not re instate the matter as he struggled to get hold of the plaintiff to serve him with summons to appear in court. He never found the knife that was said to have been used by the plaintiff in trying to attack constable Jeme. Furthermore the plaintiff was never charged in relation to it, but was charged for resisting arrest.

[15] It is common cause that the plaintiff was arrested without warrant. He was searched without warrant. He was shot in the arm and was taken to hospital by police. He was discharged from hospital on the 12 August 2013 and was taken to Mount Frere police station where he continued to be in detention until he was released on warning without appearing in court on the 14 August 2013. The reason for his release was that the period of 48 hours within which he should have appeared in court had expired. At some stage the matter was struck off the roll due to the delay in obtaining the results of the drugs from the laboratory. He was never summoned to appear in court again.

[16] The issue for determination by this court is whether the arrest and detention as well as the assault were lawful. In other words, whether the defendant has been able to justify his actions on the evidence before court. This arrest was preceded by a search without a warrant. It therefore seems to me that it does need to be determined first whether the search itself was lawful. If the search was lawful, the arrest and detention consequent upon a lawful search have to be lawful as a general premise. The converse holds true.

[17] Section 22[1] of the Criminal Procedure Act “the Act” deals with warrantless searches and provides as follows:

“A police officer may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

- (a) if the person concerned consents to the search for and the seizure of the article in question ,or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes-
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
 - (ii) the delay in obtaining such warrant would defeat the object of the search”.

This provision of the Act has to be viewed against the background of the Constitution[2]. Section 14 of the Constitution reads as follows:

“Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

[18] It is therefore clear that the search of the plaintiff was in itself a violation of his constitutional rights which are entrenched.

Therefore, such violation had to be justifiable under section 22 of the Act. Constable Jeme testified that he believed that if he had applied for a search warrant, it would have been issued to him and that the delay in applying for it would have defeated the object of the search. His evidence was that he had received the information about the plaintiff’s involvement in dealing in drugs late on the Friday before the incident and therefore had no time to investigate and confirm the correctness of the information that he received from the informer.

[19] I find it very difficult to accept that there could have been an objective basis for believing that the information from the informer was correct. This is because he simply had not had time to do his own investigation that would have been the basis of an objective belief that the informer’s information is reasonably possibly true. I have to mention that section 22 (b) (i) of the Act does not only require a police official’s belief to be there but it requires that belief to be on reasonable grounds.

[20] This means that there must be some objective facts on which the belief rests. It goes without saying that there has to be some form of investigation that would have as its purpose, the verification of the information. This could not have been aptly put than in the words of Lord Devlin in the case of Hussein[3] where it was stated that:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. ‘I suspect but I cannot prove’.

Suspicion arises at or near the starting point of an investigation of which the obtaining of the prima facie proof is the

end”.

[21] Reasonable suspicion is the *conditio sine qua non* for a search without a warrant. Without a reasonable suspicion or simply with subjective suspicion, a search without a warrant is simply unlawful. The purpose of the search is the seizure of any article which in terms of section 20 of the Act is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence. There has to be information which objectively leads to the conclusion that the article that is the object of the search is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence.

- [22] Suspicion received further judicial attention in the case of *Mabona and Another v Minister of Law and Orders and Others*.^[4] The court stated that:

“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 guilty. The section required suspicion but not certainly. However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion”.

- [23] In this case all that constable Jeme had was the information from the informer which he had obtained a few days earlier. By his own admission, at the time that he decided to search the plaintiff he had not had time to investigate the information so as to have a reasonable grounds for the suspicion. He acted on the spur of the moment when he saw the plaintiff. Again by his own admission the plaintiff had done nothing or was not doing anything that would have objectively confirmed his suspicion. The search was therefore unlawful.

- [24] Even in cases where there has been evidence of criminal conduct our courts have not shied away from upholding the constitutional rights to privacy. In the case of *Minister of Police and Others v Grace Nomazizi Kunjana*,^[5] the Constitutional Court declared invalid section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992. Therefore the fact that the conduct or warrantless search by constable Jeme resulted in the discovery of drugs on the body of the plaintiff, which the plaintiff denies irrelevant to the question of whether constable Jeme was justified to search the plaintiff or not.

- [25] To conclude otherwise would result in an untenable situation of treating similar cases differently on the technical basis that in one case illegal substance was found while in another it was not. This could potentially encourage police officials to embark on fishing expedition in violation of the entrenched constitutional rights to privacy in unjustifiable circumstances. It is accepted that justification of violation of a constitutional right cannot be found in illegality. Once a conduct is illegal for want of compliance with a legislative provision the limitation of rights under section 36 of the Constitution cannot come to the aid of the police official as the investigation as to whether the infringement of the right is justifiable or not in term of section 36 of the Constitution can simply not be embarked upon.

- [26] Because of my conclusion with regard to the search, the arrest and detention that followed that the search were also unlawful. It defies logic to say that the search was unlawful but the arrest and detention it produced are themselves immune from the legality of the search. However something needs to be said about the assault. The defendant justified the assault on the basis of section 49(2) (b) of the Act which provides for the use of force in effecting an arrest if the arresting officer believes on reasonable grounds-

“that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed.”

- [27] The other defence raised by the defendant in its plea is section 1 (2)(a) of the Criminal Procedure Amendment Act 9 of 2012 which provides that:

“if any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees or resists the attempt and flees when it is clear that an attempt to arrest him or her is being made and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. [Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable ground-

- (a) That the force is immediately necessary for the purposes of protecting the arrestor or any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is substantial risk that the suspect will cause immediate or future death or grievous body harm if the arrest is delayed.”

[28] The first difficulty with this defence is that it is only available to the arrestor. According to constable Jeme’s evidence, when he approached the plaintiff the intention was not to arrest him but to search him.

[29] I already found that the search was in any event unlawful. Secondly the definition of an arrestor in terms of section 1 (a) of this Act is any person authorised under this Act to arrest or to assist in arresting a suspect.

[30] Constable Jeme was not authorised to arrest the plaintiff under this section in that the search of the plaintiff which led to the arrest was itself unlawful. To the extent that he justified his actions under section 40(1) (a) and (b) such justification cannot stand. Section 40(1) (a) (b) of the Act provides that

“(1) A peace officer may without a warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;
- (b) who he reasonably suspects of having committed an offence referred to in schedule 1 other than the offence of escaping from lawful custody”..

[31] Section 40 (1)(a) can find no application in this case as the plaintiff was not committing any offence at the time constable Jeme decided to search him.

Secondly section 40 (1) (b) also does not apply as there was no basis for a suspicion of the plaintiff having committed an offence. As indicated above the test is an objective one and the suspicion must be on solid grounds. No evidence was led to show the basis on which a reasonable police officer in his position would have come to the conclusion that the plaintiff may have committed an offence referred to in schedule 1.

[32] Constable Jeme's own evidence shows that the plaintiff was walking towards the direction of Mount Frere. He testified that he was looking around. If a person who is looking around must be subjected to the warrantless search by police, abuse of public power would occur. Police cannot and should not be allowed to embark on fishing expeditions. In any event the Act has set a standard and that standard must be met as a matter of law.

[33] In its plea the defendant also sought to justify the arrest on the allegation of the plaintiff having been in contravention of section 4 of the Drugs and Drug Trafficking Act. Section 4 of the Drug and Drugs Trafficking Act provides as follows:

"no person shall use or have in his possession-

- (a) any dependence-producing substance; or
- (b) any dangerous dependence-producing substance or any undesirable dependence – producing substance....."

[34] This section cannot avail the defendant of any defence for the reason already alluded to above. Most importantly, at the time of the decision to search constable Jeme needed to comply with section 22 of the Criminal Procedure Act. Even if it were to be accepted that indeed drugs were found in the plaintiff's possession, which the plaintiff denied, the discovery was as a result of an unlawful violation of the plaintiff's constitutional right and therefore cannot be the basis for a lawful arrest.

[35] The last issue to deal with is that of the period of the plaintiff's hospitalisation. The plaintiff claims that the whole period of his stay in hospital should be treated as detention up to the period of his release on the 14 August 2013. The defendant argues that the hospitalisation cannot be treated as detention in circumstances in which the plaintiff could not appear in court within 48 hours because of hospitalisation. As a general principle, I agree with the defendant. There is no basis for believing that the defendant would not have brought plaintiff before court to appear within 48 hours if he had not been hospitalised. There is no basis for the conclusion that the plaintiff would not have been released on bail or on warning. To conclude otherwise would be tantamount to speculation on what the defendant would or would not have done. In any event one of the heads of damages that the plaintiff is claiming relates to the assault and the pains he suffered as a results of the assault during the whole period of hospitalisation.

[36] The plaintiff was arrested on the 4 August 2013 and had be to admitted in hospital as a result of the shooting. On his

discharge from Hospital on the 12 August 2013 he was taken to the police cells in Mount Frere where he was detained until he was

released on warning on the 14 August 2013. The defendant conceded that that the detention from 12 August 2013 to the 14 August

2013 was unlawful.

[37] The assessment of damages for unlawful arrest and detention is matter of discretion as no two cases are alike in every important and relevant aspects. The Supreme Court of Appeal stated the approach as follows in Minister of Safety and Security in Tyulu[6]:

“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 attempt be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infraction reflect the importance of the right to personal liberty and the seriousness with which the arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages of this kind of injuria with any mathematical accuracy. Although it is always 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 determine the quantum of the damages on such facts.”

[38] In this case the plaintiff was going to his place of residence in Sophia from checking on his elderly grandparents. His

grandfather is wheel chair bound. All he heard was a loud bag and he felt numbness in his arm. This would result in him being handcuffed in one arm and shackled in one leg. He had to wait until police arrived if he needed to relieve himself or else relieve himself in the ward using hospital utensils. This must be humiliating. The bullet could only be removed some four days later after the swelling had subsided. All this time he was in excruciating pains until he was discharged on the 12 August 2013. On being discharged he was taken to police cells where he was detained in appalling conditions and was released on 14 August 2013 without appearing in court. The knife that he allegedly used to threaten the police officer was never seen by the investigating officer even though it should have been kept safe as an exhibit. This leads to a situation in which the possibility exists that no such knife was ever found on him and that the knife story was an after thought carefully designed as an excuse for the negligent shooting of the plaintiff. To date the charges have not have been pursued more than three years after the incident. Therefore, the plaintiff must succeed in his claim for damages.

[39] In the result the following order will issue:

1. The defendant is directed to pay to the plaintiff on amount of R280 000.00 as and for damages in respect of all heads under which damages were claimed.
2. The Defendant is directed to pay interest on the amount of R280 000.00 to be calculated at the prescribed rate of interest from a date fourteen days after date of judgment to date of payment.

3. The defendant is directed to pay the plaintiff's costs of suit together with interest hereon, such costs to be calculated at the prescribed rate of interest from a date fourteen days after allocatur to date of payment.

SM JOLWANA

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the Plaintiff: Adv Melane

Instructed by

Ntayiya & Associates

MTHATHA

Attorney for the Defendant: Mr Mdzanga

Nkele Attorneys

Matter heard on: 07 June 2017

Judgment

delivered on: 08 August 2017

[1] Section 22 of the Criminal Procedure Act 51 of 1977

[2] The Constitution of the Republic of South Africa; 1996

[3] Shabaan Bin Hussein & Others v Chong Fook Kan & Others 1963(3)ALLER1627(PC) at 1630

[4] 1988

(2) SA 654 at 658

[5] 2016 (2) SACR 473 (CC)

[6] 2009 (5)SA 85 (SCA) at 930

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