

SOUTH AFRICA / JUDGMENT

Mlilwana v Minister of Police (2212/2012)

[2017] ZAECMHC 9 (22 May 2017)

[2017] ZAECMHC 9**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M S Jolwana

CASE / FILE NUMBER

2212/2012

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 2212/2012

JONGUMZI MLILWANA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

JOLWANA AJ

- [1] This is a claim for damages suffered following an unlawful arrest and detention.
- [2] The Plaintiff was arrested without a warrant of arrest at Highway Butchery in Mthatha on 05 May 2012. He was detained at Central Police Station, Mthatha on suspicion of stealing from a motor vehicle. He was, however, released from detention on the 07 May 2012 without being charged due to insufficient evidence.
- [3] The arresting officer, Warrant Officer Nombe, testified on behalf of the Defendant. His evidence was that he was driving a state vehicle near Madeira Police Station Mthatha when he was stopped by a man who introduced himself as Mr. Mapongwana, the complainant. The complainant told him that he had opened a case of theft from a motor vehicle the day before and showed him the case number. He told him that he had parked his vehicle next to PEP Stores at Sutherland Street opposite Jimmy Spar. He was told by certain ladies that his

car had been opened by certain young men and something was removed from the boot of his car. On inspection he noticed that his laptop was missing. He told him that the suspects were at Highway Butchery and asked him to go and arrest the suspects. He together with his colleagues went to Highway Butchery near St Johns High School to arrest the suspects.

[4] On arrival there the complainant pointed out the suspects and he arrested them after explaining to them why he was arresting them. He then took them to Mthatha Central police station, police cells. The arresting officer testified that at the time of the arrest he knew nothing about the case and had, had no access to the docket. He proceeded to arrest the plaintiff on the basis that they had been pointed out to him.

[5] It is clear from the above that he had not verified the information given to him. The complainant was not called to testify but the statement that he made when he opened the case was read into the record. The statement was very short and it reads as follows:

“When I came I started the engine to pull off, somebody called me telling me that the boot of my car is open. I stopped the car and checked what was going on. I noticed that the laptop that was inside the boot is no longer there. I asked the people that were around what they saw. In their response they knew nothing”.

[6] The second witness for the defence was Warrant Officer Matanda, the Investigating Officer allocated to investigate the complainant’s

case. He testified that on Sunday 06 May 2012 he received a phone call in which he was told that suspects had been arrested and are in police cells at Central Police Station. He went to the cells to interview them about the case. They told him that they knew nothing about the case. All they knew was that the complainant pointed them out after which they were arrested. They were taken to court on the 7th May 2012 and the “matter was struck off the roll” by the prosecutor due to insufficient evidence. They did not actually appear in Court as the prosecutor declined to prosecute them. The investigating officer did not go to court on the day they were taken to court.

[7] The plaintiff testified and largely confirmed the version of the defence in most material respects. He testified that he had gone to Highway Butchery to have a braai with his friends at about 10:00 when the complainant came, and pointed him and another man and they were arrested by the police who were with the complainant. They were thereafter detained at Central Police Station holding cells.

[8] They were taken to the court cells in Mthatha magistrate’s court, on the 07th May 2012. They were kept there waiting. After lunch they were told that the prosecutor had declined to prosecute and that they were free to go. They were, therefore, released without appearing in court.

[9] The issue before court is a very crisp one being whether the arrest and detention of the plaintiff by the police were lawful. If the arrest and detention were unlawful it follows that the plaintiff is entitled to compensation.

[10] It is trite law that the onus to prove that the arrest and detention were lawful rests on the defendant. In *Minister of Law and Order v Hurley and Another*[1] the court put the legal portion as follows:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person, should bear the onus of proving that his action was justified in law”.

[11] Police are entitled to arrest without a warrant under certain circumstances. In this case the relevant provision is Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 which provides that:

“A peace officer may without a 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”

The warrantless arrest by police officers has received judicial attention and the provisions contained in Section 40 (1) (b) above have been clarified. In the case of *Lentikile Patrick Seleko v Minister of Police*[2] the court listed the requirements provided for in Section 40 (1) (b) and said that the arrester must be a peace officer, the arrestor must entertain the suspicion, the suspicion must be that the arrestee committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody and the suspicion must rest on reasonable grounds. I should interpose here and state that suspicion should never be equated with proof. The delicate balance between suspicion resting on reasonable grounds and proof that the suspect actually committed the offence needs to be struck so that police officers are able to arrest suspects they reasonably suspect of committing an offence.

[12] In the case of *Duncan v Minister of Law and Order*[3] the court quoted with approval the words of Lord Devlin in *Hussein v Chong Fook Kam and Another*[4] where the court said:

“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”.

The question of suspicion was analysed in *Mabona & Another v Minister of Law and Order & Other*[5] where the court said 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 in fact guilty. The section required suspicion but not certainty. However, the suspicion must be

based on solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion”

- [13] The question before court in this case is whether Warrant Officer Nombe had a reasonable suspicion which rested on solid ground when he decided to arrest the Plaintiff. I believe that he could not adopt a dismissive attitude to the complainant who told him that the suspects who stole from him were at Highway Butchery. He had every right and duty to take the suspects in for questioning. This would help prevent a situation in which if he starts by investigating, the suspects disappear and are never seen again. Taking them in for questioning would have given him time to access the docket and establish thoroughly from the complainant whether he had any basis for saying that the Plaintiff had anything to do with the theft from his motor vehicle.
- [14] However the arresting officer seems to have made up his mind that he was arresting the Plaintiff and that he would detain him for the investigating officer to continue with the investigation that would lead to a conviction in court. He even boldly stated that he did not have to investigate anything, all he needed to do was to respond to the complainant who claims to have seen the suspects by arresting them. It is clear by his own admission that the arresting officer did not have a reasonable suspicion at the point of arrest. He also did nothing to satisfy himself subjectively that there was a basis for detaining them. In these circumstances, the arrest of the plaintiff on 05 May 2012 and his detention until he was seen by the investigating officer on Sunday the 06 May 2012 were both unjustified and therefore unlawful. I now come to the investigating officer, Warrant Officer Matanda who went to see the plaintiff in the police cells on Sunday 06 May 2012. He interviewed the plaintiff who told him that he knew nothing about the theft from the complainant's vehicle. The investigating officer did not even try to establish from the complainant the basis for the pointing out. This is important because the complainant made it clear when he made a statement to the police that he did not see the crime when it was committed because he was not there. He was only told later when he returned to his vehicle that some young men had tampered with and removed something from his vehicle.
- [15] The question that must be asked is on what basis did Warrant Officer Matanda decide to keep the plaintiff in detention for court appearance on the following day. What did he hope the prosecutor would base the decision to prosecute on when his own docket was virtually empty? He also failed to put himself in a position in which he would have a reasonable ground to continue to keep the plaintiff in detention. This is more so that he could have released the plaintiff and warned him to appear in court on 07 May
2012. This would be a more humane and reasonable way of dealing with the matter. This is because he needed time to investigate how the plaintiff came to be implicated in the crime. The docket revealed nothing on the basis of which it could have been said that the plaintiff was implicated. Even when they gave evidence, both the arresting officer and the investigating officer still could not enlighten the court about the 'solid grounds' and 'reasonable suspicion' on which their individual decisions were based in the arrest and detention of the plaintiff. The best way to describe it is the words of Jones J in the case of Mabona[6] where the court said "the suspicion will be flighty or arbitrary and not a

reasonable suspicion”. This is also

battered by the fact that not only did the investigating officer not attend on the day of plaintiff’s court appearance in court but he also did not do anything to further investigate the case.

- [16] If the decision could be described as having been flighty and arbitrary it should be fair to say it was an abuse of public power. The constitutional court did express itself on the exercise of public power in cases of arrest and detention in the case of *Minister of Justice v Zealand*[7]. The court said that:

“The right to freedom is entrenched in the Constitution of the Republic of South Africa, 1996. When a person is arrested and detained public power is being exercised by the executive administration of the State which may not exercise any power or perform any function beyond what is conferred by law. This is in accordance with the doctrine of constitutional legality, an incident of the rule of law which is a foundational value of the Constitution”.

- [17] By any interpretation Section 40 (1) (b) requires the arresting officer to have a reasonable suspicion that the arrestee committed an offence referred to in Schedule 1. In this case it is clear that Warrant Officer Nombe relied on the suspicion of the complainant and not his own suspicion. In turn Warrant Officer Matanda relied on the suspicion of Warrant Officer Nombe when he decided to further detain the Plaintiff. This is so because both the arresting officer and the investigating officer did not have even a shred of evidence other than the pointing out of the complainant whose statement makes it clear that he did not personally witness the incident. There was also no statement at all from a person who witnessed the crime being committed. This was clearly an abuse of public power which is obviously unconstitutional and should therefore not be countenanced.

- [18] In the premise the plaintiff’s claim must succeed.

- [19] The plaintiff testified that he was 37 years old married with two children at the time of the arrest. He lived at Ziphunzana

Administrative Area, Libode a few kilometres from Mthatha. He was self-employed, having a contract with Premier Bookshop in Mthatha. Because of the suddenness of the arrest and the refusal of the police to let him make phone calls he could not make any arrangements for his car which was parked near Mthatha Market not far from Highway Butchery. When he came back from detention the car had been stripped of some of its parts. He described his relationship with his wife as having been strained because he had disappeared without phoning his wife and telling her his whereabouts. The holding cells in which he was detained were not only overcrowded but were also filthy and unhygienic. In the court holding cells where he spent about half a day on Monday 07 May 2012 the ablution facilities were not working. As a result he could not even eat that day because of the unhygienic state of the holding cells. It is clear that the plaintiff unnecessarily spent about two days in less than humane conditions. This was a direct result of the arbitrary use of public power by the arresting officer to whom the plaintiff’s

constitutional rights appeared to be an irrelevant consideration.

[20] In the circumstances I am of the view that the plaintiff's claim for damages should succeed. I therefore make the

following order:

1. Judgment is given in favour of the plaintiff in the sum of R60 000.00 (Sixty Thousand Rand).
2. The defendant is ordered to pay interest on the said sum of R60 000.00 (Sixty Thousand Rand) at the legal rate from the date of judgment to the date of payment
3. The defendant is ordered to pay costs of suits on a scale between party and party.

M.S JOLWANA

ACTING JUDGE OF THE HIGH COURT

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Date heard:

20 April 2017

Date delivered:

22 May 2017

- [1] Minister of Law & Order v Hurley and Another 1986(3) SA 568 A at 598 E-F
- [2] Lentikile Patrick Seleko v Minister of Police (931/2011) ZANWHC 40
- [3] Duncan v Minister of Law & Order 1986 (2) SA 805 A at 818 G-H
- [4] Shabaan Bin Hussein and Others v Chong Fook Kam and Another 1963 (3) ALLER 1627 (PC) at 1630
- [5] Mabona & And v Minister of Law & Order & Ors 1988 (2)SA 654 at 658
- [6] See 4 supra
- [7] Minister of Justice & Constitutional Development and Another v Zealand 2007 (2) SACR 401 (SCA)at 404 F-G

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