

SOUTH AFRICA / JUDGMENT

Morakile v Minister of Police (2601/2018)

[2023] ZANWHC 122 (21 July 2023)

[2023] ZANWHC 122**COURT**

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

2601/2018

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****CASE****NO: 2601/2018****Reportable:**

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In

the matter between:

DANIEL

GOMOLEMO MORAKILE

PLAINTIFF

and

MINISTER

OF POLICE

DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to be 15h30PM on 21 July 2023.

ORDER

In

the result, it is ordered that:

(i)

The defendant is liable for the unlawful arrest and detention of the plaintiff for such damages as may be agreed upon or determined by the Court.

(ii)

The defendant shall pay the plaintiff's costs in respect of the merits of the action.

JUDGMENT

PETERSEN J

Introduction

- [1] The plaintiff instituted an action against the defendant for his alleged unlawful arrest and detention by a member of the South African Police Service (SAPS) on 1 March 2017 on a charge of possession of suspected stolen cattle. The detention endured until 4 March 2017.
- [2] The action which is defended by the defendant proceeded only on merits with quantum having been separated in terms of Uniform Rule 33(4).
- [3] The defendant adduced evidence of two witnesses, Constables Kgositlou ("Kgositlou") and Sehoru ("Sehoru"). The plaintiff testified in support of his claim and relied on the evidence of Chief Tsayanthebe.

Issues

of common cause

- [4] It is common cause that the plaintiff was arrested on 1 March 2017 by Captain Molefe ("Molefe") of Ganyesa SAPS in the presence of Constable Mathe ("Mathe") and that he was detained until his release on 4 March 2017. The defendant relies on sections 40(1)(b) and (g) of the Criminal Procedure Act 51 of 1977 ('the CPA') as justification for the arrest.

The onus of proof

- [5] In the circumstances, the onus of proof is on the defendant to prove or justify the lawfulness of the arrest. The position in this regard is trite having regard to Minister of Law and Order v Hurley[1]:

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

The defendant's plea

[6] The essence of the defendant's plea is as follows:

“4.1 The defendant pleads that the police officers, Molefe and Mathe, arrested the plaintiff on the 01 March 2017 in terms of S 40(1)(b) and (g) of the CPA (the Act) because they had a reasonable suspicion that the then plaintiff had which punishment may be a period of imprisonment exceeding six months paragraphs and the plaintiff was reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce; in that:

4.1.1 On 01 March 2017, the police officers Molefe, Mathe and Kgositlou stationed at Ganyesa police station were performing rural safety operation (stock theft operation) around Ganyesa, when they received a tip-off that a certain vehicle was transporting suspected stolen stock or produce;

4.1.2 The police officers drove to the direction where the alleged vehicle drove, which led them to the Plaintiff's cattle post.

4.2 At the plaintiff's cattle post the police officers came upon;

4.2.1 Three men including the plaintiff;

4.2.2 An Audi A4, white in colour with registration numbers D[...] with a white Isuzu LDV with registration number D[...];

4.2.3 a brown calf, with a removed earmark;

4.3.4 the Charlene bull, which was earmarked by the plaintiff; and

4.2.5 Heifer Charlene calf.

4.3 Upon investigation the police officers discovered that:

4.3.1 the plaintiff had already earmarked the Charlene bull with his mark;

4.3.2 the Charlene bull was bleeding on the ear;

4.3.3 The police officers, thereupon interviewed the plaintiff and the men he was with.

4.4 The interviews unearthed that the plaintiff had:

4.4.1 Helped tow the LVD Bakkie with cattle inside, to his cattle post without a removal certificate which is in contravention of section 8 of the Stock Theft Act 57 of 1959 (herein referred to as Stock Theft Act);

4.4.2 The plaintiff acquired or received in his possession produce from another person without satisfying himself that such person has been duly authorised by the owner to dispose of it in terms of section 3 of the Stock theft Act.

4.4.3 The plaintiff also failed to produce a document certifying that such stock is the property of the person who sold him the stock with his full names and particulars in terms of section 6 of the Stock Theft Act.

4.5 Based on the above, the police officers formulated a reasonable suspicion that the plaintiff had committed an offence as contemplated in paragraph 4 above;

4.6 The police officers informed the plaintiff of his constitutional rights and arrested him.

4.7 He was taken to Ganyesa police station where he was detained.

4.8 He was brought before court within forty-eight hours as envisaged in Section 50(1)(c) of the CPA.”

[7] An application by the defendant to adduce the affidavit of Captain Molefe who had passed away by the time the trial commenced, was dismissed by this Court. The defendant following this ruling by the Court did not call Constable Mathe who was present at the time of the arrest of the plaintiff to testify. As indicated supra the only evidence relied on by the defendant was that of Constables Kgositlou and Sehoru. Does the evidence of the said witnesses advance the defendant’s defence in dispensing with the onus on the defendant on the arrest of the plaintiff and more specifically on the issue of a reasonable suspicion to justify the arrest of the plaintiff. A brief overview of their evidence should suffice.

The defendant’s evidence

Constable Kgositlou

[8] Kgositlou was drawn into the matter when Captain Molefe called for backup upon receiving information regarding stolen cattle from an informant. Molefe met the informer at Tlakgameng after calling for backup. On Kgositlou’s evidence he was present at the cattle where the plaintiff and one Gabanatlhake were found. Molefe introduced himself to the plaintiff and Gabanatlhake. When asked about the cattle, Gabanatlhake claimed ownership of the cattle and explained that he and the plaintiff were in the process of exchanging cattle which the plaintiff confirmed. The plaintiff further explained to the police officers the nature of the exchange agreement which in brief would be verified and confirmed by the tribal authority. This explanation, was however, not followed up with the tribal authority.

[9] Molefe instead informed the plaintiff and Gabanatlhake that the explanation given for the possession of the cattle and the removal of the ear tags was not a reasonable explanation and proceeded to arrest the plaintiff and Gabanatlhake. Under cross examination Kgositlou testified that he did not speak to the

plaintiff as Molefe was his senior and he remained silent during Molefe's engagement with the plaintiff and Gabanatlhake.

Kgositlou further conceded that both the plaintiff and Gabantlhake informed them that Gabanatlhake was the owner of the cattle. He further conceded that none of the police officers requested proof of ownership of the cattle by way of documents from Gabanatlhake as he claimed to be the owner and as a result did not ask the plaintiff for proof of ownership.

Constable Sehoró

[10] Sehoró's involvement in the matter came about when he was informed by Kgositlou about a vehicle loaded with suspected stolen cattle, as received from an informant. Kgositlou at the time was at court whilst Sehoró was at the police station. This information relayed to Sehoró by Kgositlou was received before Molefe interviewed the informant.

[11] When Sehoró arrived at the cattle post Molefe was already in the process of interviewing Gabanatlhake. He was therefore not fully acquainted or appraised of the discussions prior to his arrival. At most what he heard was Gabanatlhake informing Molefe that he was the owner of the cattle. Contrary to the evidence of Kgositlou, he testified that he heard Molefe ask Gabanatlhake for documentation for the cattle. No such request was, however directed to the plaintiff. As with Kgositlou, Sehoró also did not speak to either the plaintiff or Gabanatlhake.

Further proceedings

[12] At the close of the case for the defendant, an application was brought for judgment in favour of the plaintiff, without closing the plaintiff's case which was dismissed. The reasons need not be engaged in this

judgment.

[13] The plaintiff subsequently testified in support of his claim and relied on the evidence of Chief Tsyanthebe. The evidence of the plaintiff and Chief Tsyanthebe against the background of the onus which the defendant is saddled is dealt with in brief, only insofar as it impacts on the issue of the alleged ownership of the cattle.

Evidence for the plaintiff

The plaintiff and Chief Tsyanthebe

[14] The evidence of the plaintiff accords with the evidence of Kgositlou regarding Gabanatlhake's claim to ownership of the cattle; the agreement with Gabanatlhake to exchange cattle, save for the plaintiff specifically referencing two cattle and the fact that the plaintiff was never requested to produce any documentation for the cattle.

- [15] According to the plaintiff he did not doubt that Gabanatlhake was the owner of the cattle as he professed and therefore did not make enquiries as to whether the cattle was stolen or not. Further thereto, Gabanatlhake showed him the documents with his brandmarks for the cattle which he had in his motor vehicle, which included permits to transport the cattle.
- [16] The evidence of the plaintiff regarding completion of the agreement on the basis that it would be complete upon the occurrence of two events, inspection of the cattle offered by the plaintiff in the exchange agreement and attendance at the tribal authority for inspection, confirmation that the cattle had not been stolen and authorisation of the necessary documents of ownership. The evidence of the plaintiff leading to his meeting Gabanatlhake and the discussions leading to the exchange agreement need not detain this Court.
- [17] Chief Tsayanthebe's evidence in a nutshell spoke to the process at the tribal authority. The relevance thereof in conjunction with the evidence of the plaintiff in my view did not nothing advance the matter for the plaintiff on the issue of ownership. This is for the simple reason that the procedure testified to is in conflict with the Stock Theft Act which in the absence of any constitutional challenge is law of general application which binds tribal authorities without any limitation as envisaged in section 36 of the Constitution.
- [18] In a nutshell the only relevance of the plaintiff's evidence is implicated in the circumstances of his arrest.

The law

Unlawful arrest and detention

- [19] The defendant relies on sections 40(1)(b) and (g) of the CPA to justify the arrest of the plaintiff. Sections 40(1)(b) and (g) of the CPA provides as follows:

"40(1)(b) A peace officer may without a warrant arrest any person –

whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from custody.

....

- (g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce."

- [20] Section 40(1)(b) of the Criminal Procedure Act implicates four (4) jurisdictional facts or requirements which must be present before an arrest without a warrant can be effected. These jurisdictional

facts

or requirements were explained as follows in *Duncan v Minister of Law and Order*[2]:

“The so called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.
- 2) He must entertain a suspicion.
- 3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act.
- 4) The suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect.”

[21] Section 40(1)(g) of the Criminal Procedure Act ties in with section 2 of the Stock Theft Act which provides that:

“Failure to give satisfactory account of possession of stock or produce.

Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it had been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.”

[22] The submission from Adv Smit that the defendant does not reference section 2 of the Stock Theft Act is neither here nor there, considering the fact that the defendant specifically relies of section 40(1)(g) of the Criminal Procedure Act. To my mind the central issue in this matter turns on the aspect of the suspicion which led to the arrest of the plaintiff and lack of investigation by Molefe and his colleagues of the explanation put forward by Gabanatlhake that he was the owner of the cattle.

Discussion

[23] That Molefe was a peace officer acting within the course and scope of his employment of the defendant is common cause. Much is made by the plaintiff about Molefe, Kgositlou and Sehorro having suspected theft of the cattle when information was received from an informant and that they could not have formed the suspicion at that stage. The information from the informant was hearsay information. In *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA), Musi AJA stated as follows:

“[32] It is common cause, in this matter, that the arrest was effected by a peace officer. It is further common cause that the appellant was allegedly suspected of having committed a Schedule 1 offence. The only controversies in this matter are whether the arresting officers could have formed a reasonable suspicion based on hearsay evidence and the credibility of the arresting officers.

- [33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.
- [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...
- [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.
- [38] I, therefore, agree with the majority's characterisation of the issues and its conclusion that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not. Furthermore, I agree with the conclusion that the court of first instance erred in its conclusion that the police officers could not form a reasonable suspicion because such suspicion was based on inadmissible hearsay evidence."

(my emphasis)

- [24] The ratio in *Mabona v Minister of Law and Order and Others*[3] resonates with the facts of the present matter. There the Court said:

"Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen goods knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction

that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

(my emphasis)

- [25] That Molefe and his colleagues could rely on the hearsay information from the informant should therefore be laid to rest. However, on the defendant's own version, Gabanatlhake claimed ownership of the cattle and Molefe did nothing to verify this version in circumstances where it could be checked. Nothing implicated the plaintiff in the possession of suspected stolen property based on Gabanatlhake's explanation as to ownership. The details of the information received from the informant by Molefe is also unknown. More telling is that on the defendant's own version the plaintiff was not asked for any explanation but summarily arrested with Gabanatlhake.
- [26] The arrest of the plaintiff constituted a blatant disregard for the liberty of an individual recognised in our legal system in circumstances where the prevailing circumstances at the time inherent in the explanation given by Gabanatlhake could have averted the arrest of the plaintiff, at the very least.

Conclusion

- [27] The arrest of the plaintiff in the circumstances was unlawful as the defendant has failed to demonstrate that the arrest was lawful in accordance with its pleaded case predicated on section 40(1)(g) of the Criminal Procedure Act. >

Costs

- [28] Cost follow the result. The defendant is therefore liable for the plaintiff's costs in the prosecution of the action of the merits.

Order

- [29] In the result, it is ordered that:

(iii) The defendant is liable for the unlawful arrest and detention of the plaintiff for such damages as may be agreed upon or determined by the Court.

(iv) The defendant shall pay the plaintiff's costs in respect of the merits of the action.

AH PETERSEN

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE PLAINTIFF: ADV. D SMIT Instructed by: Maree & Maree Attorneys 11 Agate Avenue Riviera Park MAHIKENG FOR THE DEFENDANT: ADV. N MATIDZA Instructed by: The State Attorney Cnr Sekame & Dr James Moroka 1st Floor East Gallery, Mega City MMABATHO DATES OF HEARING: 06 & 07 March 2023 Heads of Argument filed 05 & 11 April 2023 DATE OF JUDGMENT: 21 July 2023

[1] 1986

(3) SA 568 (A) at 589 E-F.

[2]

[1986] ZASCA 24; [1986] 2 All SA 241 (A). See too: Minister of Safety and Security v Sekhoto and Another 2011

(1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011

(5) SA 367 (SCA).

[3] 1988

(2) SA 654 (E) at 685 E-H.

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