

SOUTH AFRICA / JUDGMENT

Moses v Minister of Safety And Security (6983/2013) [2015]

ZAGPJHC 35 (20 February 2015)

[2015] ZAGPJHC 35

COURT

South Gauteng High Court, Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

6983/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE

NO.: 6983/2013

DATE:

20 FEBRUARY 2015

In the matter

between:

RICHARD

MOSES.....Plaintiff

And

MINISTER OF

SAFETY AND

SECURITY.....Defendant

JUDGMENT

BALOYI AJ:

INTRODUCTION

[1] The plaintiff's claim against the defendant consists of two parts.

[1.1] The first claim is for an amount of R25 000, for the unlawful arrest and R25 000 for the subsequent detention of approximately 2½ hours that occurred on the 24 September 2011.

[1.2] The second claim is for the unlawful arrest and detention that took place at 07h30, on 25 September 2011 until his release on 27 September 2011 at approximately 10h00. In this regard, the plaintiff is claiming R25 000 for the unlawful arrest and R100 000 for the detention, which lasted for two days.

[2] At the time when the incident took place in 2011, the plaintiff was 25 years old.

[2.1] Abie Mohapi (“Mohapi”) is a policeman, stationed at Lenasia and lives not far from the plaintiff’s residence. He accused the plaintiff of being involved in a housebreaking incident at his mother’s residence on the morning of 19 September

2011. The plaintiff denied any knowledge or involvement in the housebreaking. He was taken by Mohapi to his mother’s residence, where the plaintiff enquired from Mohapi’s sister what had transpired that morning and she informed the plaintiff that someone had knocked on their door but nothing had been stolen from the premises. However, despite lack of incriminating evidence against the plaintiff, he became a victim of constant harassment and reported Mohapi to Captain Sibiya of Sebokeng Police Station. Regrettably, the police did not provide him with the necessary protection that he needed against Mohapi and he was subsequently beaten up by Mohapi and his friend Neo Nkafu, causing him serious injuries. He laid charges against them and they were subsequently found guilty and sentenced to three years’ imprisonment. These facts are not disputed by the defendant.

CLAIM 1

THE ARREST ON 24 SEPTEMBER 2011

[3] Whilst the assault charges were pending against Mr Mohapi for assaulting the plaintiff, he went to the plaintiff’s house at 62514 Zone 17 Sebokeng in a police van together with two police constables namely Maluleke (“Maluleke”) and Mukwevho. They found the plaintiff and his two friends inside the house. Mr Mohapi pointed at the plaintiff and indicated that he is the person they were looking for.

[3.1] The police proceeded to search the plaintiff and his friends as well as the premises. While they were busy searching Mr Mohapi went to the toilet and upon his return he produced a plastic packet containing dagga and shouted possession. When the plaintiff enquired from him as to where did he get the dagga, instead Mr Mohapi slapped him with an open hand on his face. The plaintiff then complained to Maluleke and Mukwevho that Mohapi had assaulted him before and he had laid criminal charges, and the case was pending against Mohapi and that the injuries were still visible.

[3.2] That notwithstanding, Constable Maluleke told the plaintiff that he was under arrest, handcuffed him and ordered him into the police van. The two friends that were with the plaintiff were also arrested and ordered into the police van. This incident took place at approximately

13h30. The plaintiff further testified that they were taken to Sebokeng Police Station. At the police station, the plaintiff together with his two friends, were requested to remove their shoes and belts, and the plaintiff signed a document when he handed in his shoes and belt. They were taken to a holding cell.

[3.3] At approximately 16h00, the plaintiff and his two friends were released from custody. They were detained for approximately 2½ hours.

[3.4] During cross examination by the defendant's counsel, it was put to the plaintiff that he was only taken for questioning and his response was that at the police station they did not ask him anything. It was further put to the plaintiff that when they took him away, there was no need to explain to him his constitutional rights because he was not arrested. However, the plaintiff was adamant that he was cuffed, put in the back of the police van and Constable Maluleke told him he was under arrest.

[3.5] His evidence in this regard is supported by that of his sister Rachel Motsepe who testified that she went to the police station approximately 13h45, after receiving a phone call from her brother, Mr Richard Moses, that he has been arrested and is being held at Sebokeng Police Station.

[3.6] At the police station, she confronted the police that had arrested her brother, namely Mukwevho, Maluleke and Abie Mohapi. The three policemen told her that her brother was arrested for possession of dagga, which was found by Abie Mohapi in the plaintiff's house.

[3.7] She queried the fact that Abie Mohapi was allowed to search the premises and take over the scene, when charges of assault laid by the plaintiff were pending against him. She was also surprised to find that the three policemen, who arrested her brother for possession of dagga, did not make statements regarding the charge of possession of dagga against her brother. When she asked the three policemen why they did not write statements to that effect; Abie Mohapi, who was stationed at Lenasia Police Station, became angry and said he will not write a statement regarding where and how he found the dagga in the plaintiff's house.

[3.8] She also observed that Abie Mohapi was under the influence of alcohol and was becoming very aggressive saying whether she likes it or not the plaintiff will remain in custody. She was dissatisfied with the conduct of the three policemen and approached the Commander of the Community Service Centre (CSC), who agreed with her that Constable Mukwevho and Maluleke were wrong in allowing Abie Mohapi to take over the scene and instructed the two constables to release the plaintiff from the holding cell. At that point, Abie Mohapi became furious and stated that he will report the matter to the Station Commander and the Minister of Police.

[3.9] The (CSC) Commander told Abie Mohapi that he is at liberty to report him to the Station Commander or the Minister and instructed the two Constables once again to release the plaintiff. He was then released from the holding cell and his sister saw him coming out of the cells.

SUMMARY OF THE EVIDENCE OF THE DEFENDANT

CONSTABLE TIYANI MALULEKE

[4] On 24 September 2011 at approximately 13h00, he was performing patrol duties in Sebokeng, together with his crew member Constable Mokwevho. At that time, they received a call from a police officer, Abie Mohapi, who alerted them about people who were busy smoking dagga. The two constables drove to Abie Mohapi's residence, and thereafter Mohapi took them to the plaintiff's residence which was a few houses away from his house. Mohapi started searching the plaintiff's house however Constable Maluleke restrained him from searching the house further because he was off duty. Mohapi became upset for being told to stop searching the house and pointed a finger at the plaintiff saying: "you Moses, you have caused a police officer to be arrested".

[4.1] Maluleke became suspicious and thought there seemed to be bad blood between Mohapi and the plaintiff since they reside in the same area and knew each other well. Maluleke and Mokwevho searched the house, as well as the occupants and the plaintiff, and did not find any illegal substance. They all went outside the house and Mohapi remained inside. After a short while Mohapi came out of the house shouting: "Nyaope! Nyaope! Inside the house" and at that stage he was holding a plastic bag which he said contained Nyaope. He gave this plastic bag to Maluleke so that he could open a case of possession of drugs at the police station. However, Maluleke was surprised and asked him where in the house he found the drugs. Instead Abie Mohapi started shouting at the police officers. Constable Maluleke told Mohapi to open a case of possession of drugs because he is the one who found the drugs. According to Maluleke the plastic bag contained a white powder-like substance and he was not certain whether the powder was illegal substance or not. Despite the conduct of Mohapi, Maluleke decided to take the plaintiff to Sebokeng Police Station for questioning. He placed him at the back of the police van but he was not cuffed. At the police station, he parked the police van outside the station and asked the plaintiff if he knew about Nyaope and the plaintiff denied any knowledge regarding Nyaope. Maluleke explained that he did not open a case of possession of drugs or illegal substance, because he did not find drugs in the plaintiff's house. He also sought advice from Captain Nhlapo, who told him to release the plaintiff. He then told the plaintiff to go home.

[4.2] During cross-examination by the plaintiff's legal representative, Constable Maluleke reiterated the fact that Abie Mohapi was uncooperative and violent at the plaintiff's house, and he told plaintiff that he has caused a police officer to be arrested and he will pay for it.

[4.3] Maluleke also conceded during cross-examination that the plaintiff was told to go home at 16h00.

[4.4] Constable Lufuno Mukwevho corroborates the evidence of Constable Maluleke to a large extent regarding the following:

[4.5] That he also searched the plaintiff's house and did not find drugs. The plaintiff, together with his friends, was searched and no illegal substance was found in their possession. All of them vacated the house, except for Abie Mohapi who remained inside. After a short while, Abie came out shouting saying he found dagga and it belongs to Moses (the plaintiff). Mukwevho was

surprised as well; he became suspicious because he did not see where Abie Mohapi found the dagga. However they decided to take the plaintiff to Sebokeng Police Station for questioning. The plaintiff sat in the front seat of the police van between the two police officers, and they drove to the police station and parked the van outside. The plaintiff denied any knowledge regarding the dagga allegedly found at his premises by Mohapi.

[4.6] At the police station, Mohapi refused to open a case of possession of dagga against the plaintiff, and that prompted Constable Maluleke to release the plaintiff. Maluleke registered the dagga allegedly found at the plaintiff's house on the SAP 13 register as lost and found property.

[5] The evaluation of evidence reveals that there was indeed bad blood which existed between Mr Mohapi and the plaintiff, in that whilst at the plaintiff's residence Abie Mohapi pointed a finger at the plaintiff saying: "You Moses you have caused a policeman to be arrested you will pay for it ". His conduct also supports the contention that he had a feeling of intense hatred towards the plaintiff.

[5.1] Furthermore, the plaintiff also alerted the two arresting officers at the time they were at his house that Mohapi assaulted him on a previous occasion, that he sustained injuries which were still visible and that he had laid charges of assault, which were pending against Mr Mohapi.

[5.2] Both arresting officers also testified that they became suspicious when Abie Mohapi shouted to them that he had found a plastic bag containing dagga in the house belonging to the plaintiff. What surprised the two officers is the fact that they initially searched

the plaintiff's house and nothing illegal was found in the house or in possession of the occupants. That notwithstanding,

Maluleke told the plaintiff that he was under arrest, handcuffed him and ordered him into the police van, and transported him to the police station.

[5.3] What is rather strange is that at the police station, the two arresting officers declined to make arresting statements and Abie Mohapi also refused to make a statement regarding the dagga allegedly found by him at the plaintiff's house. The plaintiff's sister, who arrived a short while later at the police station, insisted that Maluleke release his brother from the holding cells, however, Abie Mohapi, who was drunk and aggressive at the time, told her whether she likes it or not the plaintiff will remain in custody. Clearly the police officers made themselves guilty of a gross abuse of the power entrusted to them. The plaintiff's sister was aggrieved by the unbecoming conduct of the police officers and reported the matter to the CSC Commander who berated the two officers for allowing Abie Mohapi to take over the scene and searched the plaintiff's house. The Commander instructed the two police officers to release the plaintiff from the holding cell.

[5.4] What is disturbing is the fact that Abie Mohapi was out on bail in a criminal matter, where the plaintiff was the complainant and he went to the plaintiff's residence, harassed and threatened him thereby breaching his bail condition. Plaintiff's evidence is that Mohapi assaulted him with an open hand, when he enquired from him as to where did he find the dagga in the house.

[5.5] The two police officers maintained throughout their testimony that they took the plaintiff to Sebokeng Police Station. However, he was not detained in the holding cells but was held outside the station inside the police van for questioning. This version is disputed by the plaintiff and his sister. Plaintiff testified that the police removed his belt and other belongings and he was locked up in a cell. His sister testified that when he was released he came from a cell in the CSC area. Warrant Officer Motsepe, a witness called by the defendant, testified that there was indeed a room with a burglar door in the CSC area and police would keep suspects in this room whilst deciding to charge them or not. However he cannot say if plaintiff was held in that room.

[5.6] I have carefully considered the evidence of the plaintiff and his sister and could find no indication that their evidence is fabricated. However, evidence of Maluleke and Mukwevho is contradictory and unreliable. Mukwevho stated that he was held for 20 minutes but Maluleke testified that he only asked him one question, viz does he use dagga. The plaintiff's version is reliable and he came across as a trustworthy and reliable witness. He was corroborated by his sister and I accept their version as the truth, namely that he was detained in a holding cell in the CSC area. I therefore reject the version of the two police officers that he was kept in a police van outside.

[5.7] It is abundantly clear that the police had a motive to falsely implicate the plaintiff regarding the dagga allegedly found by Abie Mohapi, and their intention was clearly to punish him for laying assault charges against Mohapi. This is demonstrated by their refusal to make sworn statements regarding the charge of possession of dagga, which turned out to be a fabrication. This is fully supported by the fact that he was later released without being charged with any crime.

[5.8] I therefore find that his arrest and subsequent detention for a period of approximately 2½ hours was indeed unlawful.

CLAIM 2

[6] With regard to the second claim, the defendant does not dispute that the plaintiff was arrested and detained from 25 to 27 September

2011. However, the defendant pleaded a justification and maintained that the arrest was in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act").

[6.1] In terms of Section 40(1)(b) of the Act, an arrest without a warrant is only permissible where the peace officer is entertaining a reasonable suspicion that the person he is arresting, has committed an offence listed in Schedule 1.

[6.2] The jurisdictional facts for a Section 40(1) (b) defence are that:

- (I) The arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- (iv) The suspicion must rest on reasonable grounds.

[6.3] Once these jurisdictional facts are present, the discretion whether or not to arrest arises. See *Duncan v Minister of Law and Order* 1986(2) SA 805(A) at 818 G-H and *Minister of Safety and Security v Sekhoto and Another* 2011(1) SACR 315 (SCA).

[6.4] In order to determine whether these jurisdictional facts are present, it is important to analyse the evidence of Maluleke and Mukwevho and what follows is a summary of their evidence.

[6.4.1] That on the morning of the 25 September 2011, while they were performing patrol duties in Sebokeng, Maluleke received a call from Mrs Alinah Mohapi who is Abie Mohapi's mother, telling him that she has opened a case of housebreaking with intent to steal and theft and knows the whereabouts of the suspect. The two Constables drove to her residence. Upon arrival she further explained that she had laid a charge of housebreaking against a person who helps her with gardening, and suspects that this person took her items. She further explained that she saw this person entering and leaving her premises. She also mentioned that the stolen items were a microwave, iron and kettle and the suspect resides at house number 62480 in Sebokeng.

[6.4.2] At approximately between 07h00 and 08h00, Mukwevho, Maluleke and Mrs Mohapi proceeded to the said address and found the plaintiff in the house. Mrs Mohapi pointed out the plaintiff as the suspect and he was arrested by Maluleke.

[6.4.3] During his testimony, Constable Maluleke admitted to arresting the plaintiff, without verifying the existence of the docket. He further testified that at the time he arrested the plaintiff, he had not seen or read the sworn statements of Mrs Mohapi. He stated that he arrested the plaintiff on the strength of being shown a case number by Mrs Mohapi and did not confirm or verify if the docket was indeed opened: "I told myself there is case number and I can arrest the plaintiff." What is interesting is that Maluleke did not go to Mrs Mohapi's house to ascertain how entry was gained.

[6.4.4] One of the jurisdictional prerequisites for section 40(1) (b), is that the arresting officer must have a reasonable suspicion that the suspect has committed a Schedule 1 offence. (See *Mvu v Minister of Safety and Security & Another* 2009(2) SACR 291 (GSJ) at [9]; *Minister of Safety and Security & Another v Swart* 2012 at SACR 226(SCA))

[6.4.5] Accordingly, the reasonableness of the suspicion must be assessed objectively; would a reasonable person, confronted with the same set of facts, form the suspicion that the arrestee has committed a Schedule 1 offence. In *R v Jones* 1952(1) SA 327 (EDL), a constable received a report from a responsible person that a man had hit a girl in the face with a sjambok causing an open wound. The constable arrested the man without further ado, but the open wound was not “dangerous” as required by the Schedule. The Court held that the Constable should have obtained more information about the wound before he could have had sufficient grounds for a reasonable suspicion.

[6.4.6] Similarly in this matter as well, Maluleke arrested the plaintiff upon being shown a case number by Mrs Mohapi, without further ado. The information given by Mrs Mohapi was clearly insufficient to cause a reasonable person to believe that the offence has been committed. It is also evident that Maluleke did not form his own suspicion that the plaintiff had committed the housebreaking with intent to steal and theft as required by Section 40(1) (b) of the Act, but relied on the suspicion of Mrs Mohapi. In general, the person effecting the arrest is also the person who must harbour the reasonable suspicion. See *Minister of Justice vs Ndala* 1956(2) SA 777(T) 780.

[7] Constable Maluleke should have obtained more information about the manner in which the housebreaking was committed, how entry was gained and how did the suspect carry the stolen items.

[7.1] Furthermore, Maluleke confirmed during cross-examination that Abie Mohapi told the plaintiff on the previous day, that he had caused a policeman to be arrested and will pay for it. Therefore, when Maluleke arrested the plaintiff for the second time on the 25 September 2011, he already knew about the bad blood that existed between Mohapi and the plaintiff. In fact, the plaintiff complained to him the previous day that Mohapi had assaulted him before and he had laid criminal charges which, at the time, were pending against him. Quite frankly, this factor should have raised alarm bells prompting him to conduct thorough investigation before effecting an arrest. In the case of *Louw & Another v Minister of Safety and Security & Others* 2006(2) SACR 178(T) 183 j – 184d, it was held that police officers who purport to act in terms of Section 40(i) (b) should investigate exculpatory explanations offered by a suspect, before they can form a reasonable suspicion for the purposes of a lawful arrest.

[7.2] The flagrant disregard for the provisions of Section 40(1)(b) by Constable Maluleke, coupled with the fact that he was not a reliable witness in the witness stand, with a marked propensity to fabricate his evidence where it suited him, confirms the suspicion that he was used by Abie Mohapi and his mother to harass and punish the plaintiff for having laid criminal charges of assault against Abie Mohapi. He succeeded in doing so on two consecutive days i.e. 24 and 25 September 2011. He unjustifiably arrested and detained the plaintiff, despite protestations by the plaintiff that there was bad blood between him and Mr Mohapi. Constable Maluleke also conceded under cross-examination that the plaintiff’s arrest and detention on the 25 September 2011 was unlawful.

[7.3] I therefore find that there was no justification by the defendant in arresting the plaintiff and his arrest and the subsequent detention was also unlawful.

[8] I now turn to the issue of quantum. In the assessment of damages for unlawful arrest and detention regarding Claim 1 as well as Claim 2, 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 the damages awarded are commensurate with the injury inflicted. However, our Courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. It is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide to 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 quantum of damages on such facts. See: *Minister of Safety and Security v Tyulu* 2009(5) SA 85 (SCA). The parties' counsel referred me to a number of judgments, which I shall for the purposes of this judgment only consider as a guide. I also considered the fact that the time spent in detention should not be the only factor to consider when awarding damages of this nature and that all the circumstances must be considered. The plaintiff testified that he felt he was abused, oppressed and deprived of his freedom arbitrarily and without just cause. He was restricted in his freedom of movement and he was detained by Maluleke without him having properly investigated the charges against him. He was treated

in a degrading manner by being detained in conditions that were uncomfortable and dirty. It was very cold in the cell and he was only given one thin blanket which was very dirty. He was in pain and could not wash his sores properly from the injuries sustained after he was assaulted by Abie Mohapi. He was not allowed medication for his injuries.

[8.1] I however find it important to take into account that the police failed to have regard to the plaintiff's complaint that he was being harassed by Abie Mohapi. The cumulative effect of these arrests on 24 and 25 September, as well as the subsequent detentions reveal that Mr Mohapi was bent on having the plaintiff arrested without any probable cause. The police failed to protect the plaintiff from the abuse and harassment by Abie Mohapi.

[8.2] An amount of R30 000 as suggested by the defendant's Counsel regarding Claim 2 would not reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.

[8.3] I am of the view that a fair and appropriate award of damages in the circumstances should be R30 000 for the unlawful arrest and detention of 24 September 2011, and R100 000 for the unlawful arrest and detention of 25 to 27 September 2011.

ORDER

In the result the defendant is ordered to pay the plaintiff the following amounts:

(i) Claim 1 – R30 000 (Thirty thousand rands).

(ii) Claim 2 – R100 000 (One hundred thousand rands).

TOTAL - R130 000 (One hundred and thirty thousand rands).

(iii) Interest at the rate of 15, 5% per annum on the aforesaid amounts from the date of judgment to date of final payment.

(iv) Costs of suit: These to include costs occasioned by the postponement on the 14 August 2014.

J BALOYI

ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

Date of Hearing: 14 August 2014, 29 September and 01 October 2014

Date of Judgment: 20 February 2015

Appearances:

For the Plaintiff: MR LN NAIDOO FROM LOGAN NAIDOO ATTORNEYS

For the Defendant : MR T HIGA

Instructed by : THE STATE ATTORNEY JOHANNESBURG

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