

SOUTH AFRICA / JUDGMENT

Mosinki and Others v Minister of Police (CIV APP RC01/2020) [2020] ZANWHC 34 (22 May 2020) [2020] ZANWHC 34

COURT

North West High Court, Mafikeng

BEFORE

GURA, DJAJE

CASE / FILE NUMBER

CIV APP RC01/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO.: CIV APP RC01/2020

In

the matter between:

LUCKY
M. MOSINKI
1st Appellant
KAREL
J. XOLOLI
2nd Appellant
IVAN
P. MOKALENG
3rd Appellant
and
MINITSER
OF
POLICE
Respondent
CIVIL
APPEAL
Coram
GURA and DJAJE J J
DATE
OF HEARING

08 MAY 2020
DATE
OF JUDGMENT
22
MAY 2020
FOR
THE APPLICANT
ADV H.J SCHOLTZ
FOR
THE RESPONDENT
ADV H.S.J DREYER

JUDGMENT

GURA J.

Introduction

- [1] The three appellants sued the respondent for damage-s based on unlawful arrest and detention. The case served before the Regional Court in Potchefstroom and the claim was dismissed with costs. The appellants are now before this Court on appeal.

Factual

background.

- [2] On 25 June 2014, Sergeant Mathwayi ("Mathwayi") and Warrant Officer Kgokong ("Kgokong") who were based at Potchefstroom, travelled to Ventersdorp whilst on police duty. Upon their arrival at Ventersdorp Police Station, these two police officers received a report through the police radio to the effect that they must keep a lookout for a Toyota Tazz sedan car which is white in colour with no registration numbers and with four black males inside. The police radio message concluded by saying that the four occupants of the said vehicle had been robbing people at Blinkwater, between Klerksdorp and Ventersdorp and that they were armed.
- [3] Not long after receiving that radio message, the two police officers saw a vehicle which matched the description as aforesaid, travelling in Ventersdorp. It had no registration numbers and there were four black males inside it. The police pulled it over and it stopped next to the road. Sergeant Mathwayi and W/O Kgokong searched all the occupants of this vehicle. They also searched the vehicle itself. No weapons were found. Nothing at all was found either on the four people or in the car which could link them to the armed robbery allegations. During this search, members of the community started to converge there. The police then decided to drive to the police station of Ventersdorp in order to continue the search there.

- [4] The four occupants of the Toyota Tazz travelled in their vehicle, followed by the police vehicle up to Ventersdorp Police Station. That was a distance of about 300 meters. The occupants of the Toyota car were the three appellants and one Mr Isaac Makgale ("Makgale"). Upon their arrival at the police station, before the second search could ensue, Makgale asked to go to the toilet. Mathwayi escorted him to the toilet which was situated at the back yard of the police station.
- [5] Before Makgale could enter the toilet, Mathwayi checked it and there was nothing inside. After Makgale had entered the toilet, the door was closed but Mathwayi stood next to the toilet door. The latter then heard something like a thud - it was the sound like that of someone knocking against something. Mathwayi entered the toilet and asked Makgale: What is happening now? The two men actually met at the threshold of the toilet door.
- [6] Mathwayi checked the rubbish bin which was inside the toilet. This is the bin in which one throws the paper towels after drying one's hands. Mathwayi saw a firearm protruding from this rubbish bin and he told Makgale: "This is what you actually wanted the toilet for." Makgale's response was "Eish my brother". He then warned Makgale that he was under arrest for robbery and possession of an unlicensed firearm. Since no one of the four occupants of the Toyota Tazz claimed responsibility for this firearm, they were all arrested and detained for possession of the same firearm. The

police testified that the four suspects were detained so that the detectives could investigate to whom this firearm belonged.

The appellant's version.

- [7] The first appellant did not give evidence, but the second and third appellants testified. Here is their version. The second appellant borrowed the said vehicle (Toyota Tazz) from its owner, Mr. Moje. When he borrowed the said vehicle as aforesaid, he was with the third appellant. They used the vehicle as a thambai (taxi) to pick up hitch-hikers and transport them between Klerksdorp and Rustenburg. On 25 June 2014, they picked up the first appellant in Klerksdorp at the Rustenburg hiking spot. Later they met Makgale in Ventersdorp at the Rustenburg hiking spot and picked him up as they were both hitch-hiking for Rustenburg
- [8] On the said date, after picking up Makgale, the second appellant who was driving, stopped at the garage (filling station) to pour petrol. They were exiting the garage with the vehicle when the police stopped them within the vicinity of the filling station. The appellants were body searched and the vehicle was also searched by members of the police and nothing was found either on them or in the vehicle. Thereafter, the appellants and Makgale were taken to Ventersdorp Police Station for questioning.
- [9] Upon their arrival at the Police Station, the police searched them for the second time and the vehicle was also searched. Nothing was found on them. Makgale was then taken to the toilet by the police and during this time the appellants were taken into the police station

building. Makgale was later brought back from the toilet and taken to the police cell. The appellants were also placed in a holding cell. A police official then arrived after thirty minutes and called Makgale. He took him out of the cell and went outside with him. Thereafter, the appellants were searched for the third time in the police holding cell and were asked about a fire-arm, of which, they were not aware. They were then informed that they would all be arrested for being in possession of an unlicensed firearm.

- [10] The appellants confirm that they do not know this firearm as they were searched on three occasions: at the scene where they were initially stopped, in front of the police station building and inside the police holding cells. They did not know anything about the firearm and they were surprised that it was found. They could not say to whom it belonged. They were all detained for being in possession of the firearm and were kept in custody for different periods of time. The second appellant was detained for fifteen days, the third appellant for twentyone days and first appellant for fourteen days.
- [11] They testified that no identity parade was held and they were never pointed out by the complainant in the alleged robbery matter. As far as they are aware, they were informed that they were being arrested for being in possession of an unlicensed firearm and not armed robbery. No stolen property belonging to the complainant in the robbery matter was found in their possession prior and/or after their arrest.

Legal principles.

- [12] Section 40 (1) (b) of the Criminal Procedure Act[1] ("the Act") provides:

"(j) A peace officer may without warrant arrest any person-

- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody"

The requisites for a lawful arrest without a warrant are therefore that:

(1)

the arrester must be a police officer, (2) the police officer must entertain a suspicion, (3) it must be a suspicion that the arrestee

committed a Schedule 1 offence (other than escaping), and (4) that suspicion must rest on reasonable grounds[2].

- [13] It is trite law that the question as to whether a suspicion of an arrester is reasonable must be approached objectively, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee has committed a Schedule 1 offence. It is important to note that this provision (sec 40 (1) (b)) requires reasonable suspicion.

When then is the reasonable suspicion test satisfied? See in this regard *Ralekwa v Minister of Safety and Security*[3] where it was stated that a reasonable suspicion test is satisfied if a reasonable person in the position of the police official, with the same information, would have believed that there were sufficient grounds for suspecting that the arrestee committed a Schedule 1 offence other than escaping from lawful custody.

[14] An arresting officer must exercise a discretion before effecting an arrest. In the case of *Raduvha*[4], the Constitutional Court stated the following in this regard:

"[42] Section 40 (1) of the CPA states that a police officer " may " and not " must " or " shall " arrest without a warrant any person who commits or is reasonably suspected of having committed any of these offences specified therein. In its ordinary and grammatical use, the word " may " suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime.

As section 40 (1) grants police officers a discretion whether or not to arrest, the two courts should have gone further in their evaluation of the evidence to determine whether the facts justified an arrest. This is so because an arrest is a drastic invasion of a person's liberty and an impairment of their rights to dignity, both of which are enshrined in the Bill of Rights.

In other words the court should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan* or as per *Sekhoto* where the court, cognizant of the importance which the Constitution attaches to the right to liberty and one's dignity in our constitutional democracy, held that the discretion conferred in section 40 (1) must be exercised " in light of the Bill of Rights " .

[15] The onus of proof that the arrest was lawful rests on the respondent (the arresting officers) . The onus arises from the fact that an arrest constitutes a deprivation of freedom and is regarded as *prima facie* unlawful. Justification for the arrest is therefore required from the arresting officer. In this regard in *Minister of Law and Order and Others v Hurley and Another*[5], the Court said;

" I consider it to be good policy that the law should be as there stated. 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. "

Evaluation of evidence.

[16] The evidence of the police officers who arrested the appellants is that they (appellants) together with Makgale were arrested and detained for unlawful possession of the firearm which was found at the toilet because no one of them claimed responsibility for it. This scenario is almost similar to the situation in *Majaca v Minister of Safety and Security*[6] , where dagga was found inside a combi in which six people were travelling. The constable arrested all six of them including the combi driver. His evidence was that he was not able to establish who the owner of the dagga bag was. His suspicion was that one of the combi occupants was the dagga bag owner. The Court said:

"It seemed to me he was obviously ignorant of the fact that for his suspicion to be reasonable it had to relate to the reason why he suspected the arrestee in particular. He repeatedly emphasized in evidence that he formed a reasonable suspicion that an offence of dealing in dagga had been committed. On the facts of this case, an offence had been clearly committed. For the arrest of the plaintiff to be justified, Constable Commons had to suspect (reasonably) that the plaintiff was the offender. "

[17] The same conclusion (as in *Majaca*) is inevitable in the current case. The police could not say whose firearm was this, hence, they ensnared all the three appellants and Makgale. Clearly, section 40

(1)

(b) cannot be used as a wide open blanket through which to corner all the suspects under the circumstances. In the current case, Makgale was the one who, at best had to account for the firearm. He never implicated any of the appellants. When he was asked to account for this weapon, all he said was: " Eish my brother". In my view, the respondent failed to prove that the arrest of the appellants was lawful. It is worthy to note that Makgale is not one of the appellants.

Conclusion.

[18] Under the circumstances, the arrest and consequent detention of the appellants was unlawful and respondent cannot escape liability for the wrongful acts of its servants.

Order.

[19] In the result, the following order is made:

1.

The appeal by all the appellants is upheld with costs;

2.

The decision of the Regional Court Magistrate, dismissing the appellants' claim with costs, is set aside;

3.

The respondent is wholly liable for the appellants' proven or agreed to damages;

4.

The matter is referred back to the Regional Court Potchefstroom for the trial to proceed on quantum, before a different Regional Court Magistrate.

SAMKELO GURA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

I agree

JT DJAJE

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[1] Act 51 of 1977

[2] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818F-H.

[3] 2004

- (1) SACR 131 (T). See also Duncan, *supra* at 812A & 819; Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG).
- [4] Raduvha v Minister of Safety and Security and Another CCT 151/15 (2016] ZACC 24
- [5] 1986 (3) SA 568 (AD) at 589E-G
- [6] Majaca v Minister of Safety and Security (1721/2011) [2012] ZAECHGHC 94 (21 November 2012), at para 11
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