

SOUTH AFRICA / JUDGMENT

Mphasa v Minister of Police (47242/2018) [2024] ZAGPPHC 1317 (18 December 2024)

[2024] ZAGPPHC 1317

COURT

North Gauteng High Court, Pretoria

BEFORE

Mathunzi AJ

CASE / FILE NUMBER

47242/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 47242/2018

(1) Reportable:

No.

(2)

Of interest to other judges: No

(3) Revised.

Date

18 December 2024

Signature

In the matter between:

KOLOBETSO ISAAC

MPHASHA

and

MINISTER

OF POLICE

JUDGMENT

MATHUNZI AJ

- [1] The plaintiff approached this court on the 28th of May 2024 with a claim for damages against the Minister of Police regarding an incident alleged to have taken place on 25 August 2017 at or near the Watloo area at Silverton in Pretoria. The incident is alleged to have resulted in the arrest of the plaintiff which the plaintiff alleges to have been unlawful. It is the arrest thereafter which is the subject of determination at the heart of the merits of the claim by the plaintiff against the defendant.
- [2] With the defendant having admitted the arrest of the plaintiff concerning the incident, what is trite in our law is that the onus then shifted from the plaintiff to the defendant which then meant that the defendant carried the duty to begin in court.
- [3] The defendant then called three witnesses in court who took to the witness stand as follows:
1. The first witness is Constable Nomsa Lina Mndawe. She testified that at the time of the incident she was a constable in the South African Police Services stationed in Silverton. On the day of the incident on 25 August 2017 she had attended to a complaint by one Mr Sepato who had initially explained to her verbally the nature of the complaint and then handed to her a statement in writing. She was further shown some more documentation in which it was stated to her that there were seven bags carrying cash which were signed for by four persons and the four persons were pointed out as detained by the complainant as Makwela, Mahlangu, Mpete and the plaintiff. The complainant further informed the witness that an amount of R782 000,00 was missing from the three bags which were carrying cash and it sounded as if the statement was completed at the time the complaint was laid by the complainant as the witness testified that, her colleagues only effected the arrest after the affidavit was completed with the witness.
- Under cross examination she was asked if she had verified who specifically signed for which bags and she replied that she did not and only relied on what she was informed by the complainant that she was informed that it was four persons who signed for the missing bags. She was also asked who was the protection officer and the treasure custodian when she answered that she did not check or verify any of that save only to verify that the affidavit when it was eventually handed to her was signed.
2. The next defendant's witness was Mulalo Makondo. His evidence is that on the day of the incident he was also in the service of the SAPS at the time also stationed in Silverton posted together with the previous witness on duty and he attended the scene together with the previous witness. On arrival they found the complainant Sepato who was with another person who was introduced as an Investigating Officer of the company of the complainant. The complainant introduced himself as an ATM manager of the SBV. He testified that a copy of an affidavit composed by the two officials and four annexures were handed to them and

four suspects were pointed out in the office as they were kept there as persons who signed for the money with the plaintiff also cited not only as a suspect but as a custodian for the day. The complainant informed them that a total of twenty-nine bags of cash went out but on return three of them were missing.

The witness then testified that on the basis of this information shown to him by the complainant he informed the four suspects inclusive of the plaintiff that they were under arrest and read them their constitutional rights, put them inside a police van and detained them in the Silverton police station and also stated that he detained them lawfully as he also made an entry of their detention in the occurrence book.

Under cross examination, evidence came out that the witness actually found that the affidavit was already completed when the witness arrived at the scene. The witness testified under cross examination that he did not investigate who actually of the four suspects signed for the cash but that he was satisfied that a crime was committed when he arrested the four suspects. He was then shown a document which contained only two signatures in the annexure documents, namely the treasure custodian and the protection officer and not four and still he stated that he was well aware that he had arrested four persons and that he believed they were involved in the commission of the crime further that he based his arrest on the content of the affidavit which stated that the four persons were involved and also stated that it is the complainant who knew who is involved in the crime and who is not. He was asked if he found out if the complainant had made any preliminary investigation and he replied that it was the complainant who knew about the money. He then also gave evidence that he went to the scene of crime without any warrant of arrest. During re-examination it was revealed that the affidavit was completed but only signed in the presence of the witness.

3. The next defendant's witness was Daphney Nkosi. She testified that at the time she was a detective sergeant in the

service of the South African Police Services stationed in Silverton. She had received a docket with four suspects who were detained on Friday and they were due to appear in court the Monday that followed. When she took the docket to a senior public prosecutor, she was informed that the evidence was short for the matter to be enrolled. She then made efforts to follow up with the complainant who did not co-operate or come back to her. With the result that the matter was dropped against the plaintiff or charges thereof.

4. After the evidence of the witness the defendant closed his case without leading any other witnesses.

- [4] The plaintiff opened his case by taking the witness stand and testifying as his own witness. He testified that on the day of the incident he was employed by the SBV, Standard Bank Volskus stationed in Watloo Silverton with his duties being to load cash into ATMs. His evidence of the events on 25 August 2017 is that he was in a team with Mpete, Mahlangu and Makwela and as they put their armory of bullet proof vests and firearms that morning, management called him into the office and then his colleagues went to fetch the money bags

as he went to management and his colleagues called him through the radio informing him that they were done and ready after which he went down the stairs found his colleagues already in the car in the street waiting for him. Their first trip was in Forest Hill mall where they had to drop off cash at Spar. They then proceeded to Reitz Spar ATM

when they learned that the bag for the ATM was actually missing. The plaintiff then took his cellphone called the Head Office and informed them about the situation after which they were all instructed to come back. On arrival they were disarmed, made to write statements about what happened. He was asked that in his absence as a custodian who was supposed to sign for the bags to which he replied that Mpete was also a custodian for the day. He was then asked if he was present when they received papers from treasury to sign for the bags, his reply was that he was not present at that time as he was with management and that as he returned, he did not check if the number of bags accord with the entries on the treasury papers or documents. He testified he and his team were kept in the premises and informed that the police were on their way. They were then arrested and taken to Silverton police station where they were detained and they were released the Monday. He was then suspended by the SBV or his employer until November of 2017, when he returned to work again and left early in January of 2024 of his accord. Cross examination revealed evidence that prior to the day of the incident the plaintiff had been employed at the SBV for seven years. He was asked that if any of the seven

years prior to the incident if there had been any instance where the cash bags were loaded into the van in his absence and he replied in the negative. But stated that on that day of the incident it was done in his absence but then he stated that the shift had not changed hands and to this he testified that he was due to take over from Mpete who was the treasure custodian from the previous shift who was going to hand over the shift to him but he said the handover of shift had not been completed. The plaintiff denied signing for any of the bags stating that he was at that specific time with management who had called for him to their office. His evidence was that he did not take over the shift before or after he was called by management that morning.

4.1 After his testimony the plaintiff never called any further witnesses and decided to close his case.

- [5] At the beginning of the trial itself the plaintiff was clear in their preliminary address that the arrest itself was not placed in dispute but only the lawfulness thereof and that is the part that shifted the burden of proof to the defendant.
- [6] On a scale of evidence before this court it appears that the defendants had arrested the plaintiff on allegations of theft of the three bags which contained a total amount of R782 000,00. On evidence that the arrest was done without a warrant that then brings the provisions of section 40(1) (b) of the Criminal Procedure Act[1] which provides as follows:

“a peace officer may without warrant, arrest any person whom he reasonably suspect of having committed an offence referred to in

Schedule 1, other than the offence of escaping from lawful custody.”

6.1 In defining theft: the more cumbersome yet famous definition of Gardiner and Lansdown Criminal Law and Procedure 2 of 1652 reads as follows:

“theft is committed when a person fraudulently and without claim of right made in good faith takes or converts to his use anything capable of being stolen with intent to deprive the owner thereof of his ownership or any person having any special property or interest therein of such property or interest.”

6.2 The offence of theft is straightforward and unambiguous in that the conduct requires that the person should be in possession of a movable property that does not belong to them and which they have taken without consent of the owner of the said property under fraudulent, intentional and unlawful circumstances.

1. In the matter before this court the plaintiff’s evidence is undisputed and unchallenged on a number of aspects namely: that none of the bags containing the alleged stolen money was found in his possession, that he is the person who contacted the Head office through telephone and informed them about the missing bags as soon as he noticed that whilst they were in Reitz Spar, that he did not sign for the bags of cash that were loaded in the van before they took off that morning as he was called into the office by management, that there was another treasure custodian Mpete who had not yet handed over the shift to him, that when he came out of the meeting with management the bags were already signed for and loaded in the van and the van was waiting for him in the street ready for take-off.

2. The principle in *Duncan v Minister of Law and Order*[2] is that the jurisdictional facts or requirements for an arrest in terms of section 40(1)(b) 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 committed an offence referred to in schedule 1

(iv) The suspicion must rest on reasonable grounds.”

3. In *Mabona and another v Minister of Law & Order and Other*[3] the court held the view that the test whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) of the criminal procedure act is objective in that the question to be asked is, would a reasonable man in the position of the defendant and possessed of the same information have considered that there were good and sufficient ground for suspecting plaintiff were guilty of the offence for which he sought them. The reasonable man will therefore analyse and assess the quality of information at his disposal critically and will not accept it lightly or without checking it where it can be checked. It is only after an examination

of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information

at his disposal has to be sufficiently high quality and cogency to engender him a communication that the suspect is in fact guilty, the section requires suspicion not certainty but it must be based on solid ground otherwise it will be flighty or arbitrary and not a reasonable ground.

- a. The principle in Mabona supra was ratified by the Supreme Court of Appeal in Minister of Safety & Security and Another v Swart^[4] when the court adopted the view that the jurisdictional requirement that the suspicion must rest on reasonable ground was

that the reasonableness must be approached objectively i.e. the question to be asked is whether any reasonable person acting or

contracted with the same set of facts would form a suspicion that the plaintiff has committed a schedule 1 offence in terms of section 40(1)(b) of the criminal procedure act.

[7] In examination in chief of the first witness of the defendant this was the position in court:

“Question: what happened about the affidavit?”

Answer: he first explained to me verbally and afterwards I read what was contained Question: was there any other documents which supported the affidavit?

Answer: Yes, it was explained to me that the bags of money were seven and were signed for by the four suspects

Question: did the complainant identify the four persons who were suspects?

Answer: Yes, he identified them as he pointed them out as they sat in the room.”

1. Under cross exam the following scenario ensued:

“Question: You were referred to annexures given to you, did you verify who signed for the bags?”

Answer: I was informed that it were the four persons whose names appear on page 65 of the docket

Question: So you were informed about the persons who were the crew and who signed?

Answer: Yes

Question: Did you verify who was the treasure custodian?

Answer: No

Question: As a police officer were you not supposed to verify?

Answer: I only verified that the document handed to me was signed.”

2. The second defendant witness testified the complainant informed him that the plaintiff signed for the money and twenty-nine bags were out but on return three bags were missing. He informed court that he then arrested the four suspects after he searched them personally. Under cross examination it was put to the witness that the annexure documents only provided for two spaces for signatures to be attached and not four yet he arrested four persons and he replied that he was well aware that he had arrested four and not two.

“Question: were you satisfied that they have committed the crime?”

Question: did you investigate who signed for the cash of the four suspects which were pointed out to you?

Answer: Not myself, I based my arrest on the affidavit in which it was said all four suspects are responsible, it is the function of the complainant to prove who is who

Question: did you on arrival find out if the complainant made any preliminary investigation?

Answer: He is the one who knew about the money

Question: when you searched the plaintiff, did you find anything in his possession?

Answer: No.”

- [8] In the matter of Minister of Safety and Security and another v Swart supra; where the court ratified the principle of reasonableness facts were that the plaintiff’s vehicle had left the road while he was driving and landed in a ditch, when he saw a police vehicle he ran towards them, used a torch to flag them and when he got them to stop he asked them to drive him home to get his other van and he spoke with them in a friendly and coherent manner. There was no evidence that he was unsteady on his feet, or that his speech was slurred, or that his eyes were bloodshot, or that he could not walk on a straight line. The defendants have arrested the plaintiff on the suspicion that he was driving under the influence of alcohol only because he smelt lightly of alcohol and the court held the view that the arrest was unlawful. In the matter before court the two witnesses of the defendant seem to have acted on the arrest without making any investigation about details of who actually were signatories or who signed for the cash bags out of the four suspects. It would appear as though the fact that the complainants have already placed the four suspects together had made it easier for the defendant to arrest them and more aptly stated the defendants were literally there to arrest them.
- [9] When looking into the nature of the alleged crime itself, it seems it require that a number of questions be asked as part of investigation, for example, who signed for the cash bags on the annexure to the purported affidavit since for the larger part of the trial and during cross examination it emerged that there were only two signatures. This is also particularly so given that the plaintiff had on the other hand testified that, he did not himself sign for any cash bag during that morning as he was called by management before, he could do that.

- [10] It appears to be the kind of crime which requires an arrestor to follow the sequence of every movement of everyone and every document before making a suspicion capable of resting in reasonable ground but instead the defendant's witness state that "it is the complainant who knows who is who".
- [11] Where there are allegations that only two persons signed for the cash bags and the complainant points out four then there must be an enquiry as to who exactly are the two that actually signed for the cash out of the four.
- [12] Furthermore, the plaintiff's evidence is undisputed and unchallenged on a number of aspects as I have already referred to earlier in this judgment. It is my view that it cannot be said that the two witnesses of the defendant entertained a suspicion which rested on reasonable grounds when they arrested the plaintiff in this matter and it therefore follows that the arrest and the subsequent detention of the plaintiff should be held unlawful.
- [13] As a result I make the following order:
1. The plaintiff is entitled to such damages as he may be able to prove he sustained due to the unlawful arrest and detention by the defendant.
 2. Defendant is to pay costs of the trial.
 3. Quantum is postponed sine die.

Mathunzi AJ

Judge of the High Court, Pretoria

Heard On: 30 May 2024

Delivered On: 18 December 2024

APPEARANCES:

For the Plaintiff: M.C Netshiendeulu Instructed by: Ndambakuwa Attorneys, Pretoria
For the State Attorney: H Nkabinde Instructed by: Office of the State Attorney, Pretoria

[1] 51 of 1977

[2] [1986] 2 ALL SA 241(A)

[3] 1988

(2) SA 654 (SE)

[4] 2012

(2) SACR 226 (SCA)

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