

SOUTH AFRICA / JUDGMENT

Mteli v Minister of Police (322/2016)

[2017] ZANWHC 27 (8 June 2017)

[2017] ZANWHC 27**COURT**

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

322/2016

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Source record**IN****THE NORTH WEST HIGH COURT, MAHIKENG****Case****Number: 322/2016****In**

the matter between:

SANDILE
GORDON
MTELI PLAINTIFF
And
MINISTER
OF
POLICE DEFENDANT
DATE

OF HEARING :

18 & 19 APRIL 2017
DATE
OF

JUDGMENT :

08 JUNE 2017
COUNSEL

FOR PLAINTIFF :

ADV. G. MAREE
COUNSEL

FOR DEFENDANT :

ADV. D. SMIT

JUDGMENT

DJAJE J

- [1] The Plaintiff issued summons for unlawful arrest and detention against the Defendant. The Plaintiff claims for damages in the amount of nine hundred thousand rand (R900 000-00). The Defendant pleaded that the arrest of the Plaintiff was lawful. The onus was on the Defendant to prove the lawfulness of the arrest and started calling its witnesses to testify. This matter only proceeded on merits.
- [2] The evidence presented in this matter was that the Plaintiff was charged with murder. On 27 October 2014 the police were called at Joe Morolong hospital where the deceased had died just died. The police proceeded to the scene of the incident where no one saw what happened to the deceased. At the scene the police found Plaintiff's sister who showed them where the deceased was lying. At that time, the Plaintiff passed by and the sister asked him in the presence of the police what he had done to the deceased and he did not respond. Upon inspecting the premises the police found a pick handle next to the Plaintiff's room. Upon enquiry about the pick handle the police were informed that it belonged to the Plaintiff and the Plaintiff was then taken to the police station. The Plaintiff appeared in court on 29 October 2014. The case was postponed for formal bail application. On the day of the bail application the case was removed from the roll at the instruction of the Senior Public Prosecutor.
- [3] Constable Eric Jacobs was the arresting officer. He testified that he obtained a statement from the Plaintiff's girlfriend in which she made mention of a pick handle which was found next to Plaintiff's room. According to him the girlfriend stated that there was a pick handle in the Plaintiff's room and she did not know how it ended up outside and who took it there. Constable Jacobs was never at the scene of the incident and he only saw the Plaintiff in the morning at the police station when he was handed over to him by Officer Sibi. He asked the Plaintiff about the pick handle and did not get a reasonable explanation. On that basis he decided to arrest the Plaintiff without a warrant of arrest. He explained that the reason for arresting the Plaintiff was that he could not give an explanation why the pick handle was outside his room. The police officers who testified had not made any statement about what took place at the scene. Constable Jacobs as well did not make an arresting statement.
- [4] At the end of the case for the Defendant counsel for the Plaintiff made an application for judgment in favour of the Plaintiff without the Plaintiff having testified. This application is similar to that of absolution from the instance where the Plaintiff has not discharged its onus. In arguing the application the Plaintiff's counsel referred to the case of *Pather v Minister of Police* (14512/13) [2016] ZAGPPHC 215 (31 March 2016) at paragraph 31.1-31.3 where the following was stated:

“31.1 Plaintiff is entitled to apply for judgment at the close of the Defendant’s case without leading evidence and without closing its case. It was submitted on her behalf that the test to be applied is similar to that of absolution from the instance where a Plaintiff has not discharged its onus. It was further submitted that if a Defendant upon whom the onus of proof rests has failed to lead such evidence in discharge of that onus to the effect that a reasonable man could have not come to the conclusion that it might be accepted, the court would be entitled to give judgment for the Plaintiff.

31.2 This proposition of an application for judgment, where the Defendant bore the onus and before the Plaintiff closing its case or leading evidence, was introduced in the old case of Siko vs Zonsa 1908 (T) 1013 where the court held that it would be a useless (exercise) waste of time to proceed with the matter further.

31.3 The Siko case was confirmed as an applicable principle in the case of Hodgkinson vs Fourie 1930 TPD 740 at page 743 where it was held as follows: ‘At the close of the case of the one side upon whom the onus lies, the question which the judicial officer has to put to himself is: Is there evidence on which a reasonable man might find for that side’”

- [5] It was argued by the Plaintiff that the Defendant had not discharged its onus. The submission on behalf of the Plaintiff was that the Defendant has failed to establish that the arresting officer entertained a reasonable suspicion. It was argued that the arresting officer did not act on his own suspicion but rather relied on what he was informed by his colleagues. Further that failure by him to make an arresting statement led to him referring to facts which were not within his personal knowledge. This led him to rely on the affidavits of the girlfriend and the sister which had inconsistencies to make an arrest without a warrant as he was not at the scene of the incident.
- [6] On the evidence of Officer Sibi, the argument on behalf of the Plaintiff was that his version of what transpired at the scene was not supported by any affidavit and he could not recall the names of the people at the scene. Therefore his suspicion was based on unfounded facts.
- [7] In opposing the application by the Plaintiff, counsel for the Defendant argued that the court is not in a position to determine

whether the defendant’s onus has been discharged when the Plaintiff has not testified. The submission for the Defendant was

that the Plaintiff put a version to the witnesses and therefore must testify to confirm his version. It is the Defendant’s case that a reasonable suspicion was formed by the arresting officer as the Plaintiff was mentioned as a person of interest. Further that the Plaintiff’s girlfriend informed the police that the pick handle belonged to the Plaintiff and when asked about it, Plaintiff did not give a reasonable response. It was therefore argued that it was for the above stated facts that the police had a reasonable suspicion and arrested the Plaintiff.

- [8] The issue to be determined in this matter is whether the Defendant has discharged its onus and there is a possibility that the court can find in its favour.

[9] In dealing with this application it is important to look at the jurisdictional facts as provided for in section 40(1) (b) of the Criminal Procedure Act 51 of 1977 (“CPA”) as amended. The plea by the Defendant was that the arrest of the Plaintiff without a warrant was lawful. Section 40 (1)

(b) CPA provides as follows:

“40 Arrest by peace officer without warrant

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

(a)

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

[10] A close reading of section 40 (1) (b) of CPA indicates that the following jurisdictional facts have to be present to justify an arrest without a warrant:

(a) the arresting officer must be a peace officer;

(b) the arresting officer must entertain a suspicion;

(c) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and

(d) the suspicion must be based on reasonable grounds.

[11] In this matter the issue is centred on the suspicion by the arresting officer. The submission by the Plaintiff was that the arresting officer’s suspicion was not based on solid grounds and was not reasonable as required in terms of section 40 (1) (b) of the CPA. In the matter of *Naidoo v Minister of Police* 2016 (1) SACR 468 (SCA) the following was stated at paragraph 40:

“And, as was explained by Van Heerden JA in Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H, once the jurisdictional requirements of the section are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s40 (1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace

officer.”

[12] It is trite that the onus rests on a defendant to justify an arrest. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) Rabie AJ explained:

‘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 person should bear the onus of proving that his action was justified in law.’

[13] As to whether the discretion is exercised properly the following was stated in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) :

"[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached."

[14] The following was laid down by Bertelsmann J in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) at 186a – 187e, about an arrest where an offence listed in schedule 1 has been committed:

"I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. . . . Police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest."

[15] "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle." See: *Pharmaceutical Manufacturers Association of South Africa: in re Ex parte Application of President of the RSA*

[2000] ZACC 1; 2000 2 SA 674, 2000(3) BCLR 241 (CC) paragraphs

[85] to [86].

Analysis

[16] It has not been disputed that the Plaintiff in this matter was arrested and charged by Constable Jacobs on 28 October 2014. The arresting officer testified that in arresting the Plaintiff he was acting on the information contained in the affidavits of the Plaintiff's girlfriend and that of the sister. Further that the Plaintiff refused to answer the question about the pick handle found outside his room. The affidavits referred to by Constable Jacobs were both discovered as part of evidence. None of the affidavits makes reference to any altercation between the deceased and the Plaintiff. There is nothing in the affidavits that the Plaintiff was seen doing something to the deceased. The affidavit by the girlfriend does not

explain if the pick handle found outside Plaintiff's room was the one that was in his room.

- [17] Officer Sibi when testifying made no mention of any blood found on the pick handle for him to conclude that it was the weapon used to assault/murder the deceased. According to him, whilst outside with the Plaintiff's sister, the Plaintiff passed by and his sister asked him what he had done to the deceased. On the other hand the girlfriend's affidavit indicates that when the police came to the scene the Plaintiff was in his room and he opened the door for the police. This is a contradiction with what Officer Sibi testified about that the Plaintiff actually passed by as they were outside with the sister. The sister in her affidavit stated that when she asked Plaintiff what he had done to the deceased, the police were not there. These are the contradictions found in the affidavits and the evidence of Officer Sibi. According to Officer Sibi, the reason he asked Plaintiff to accompany them to the police station, was that he was suspicious of him for failing to answer the sister when she spoke to him. It is not clear as to when that took place in the light of all the contradictions. As a result, his suspicions could not have been based on any facts.
- [18] Constable Jacobs went on further to say that his suspicion was also formed as a result of the Plaintiff failing to give a reasonable explanation about the pick handle. There is no evidence by the Defendant what the response was from the Plaintiff for the police to conclude that it was not reasonable. He went on further to say that the other reason for him to arrest the Plaintiff was because he refused to answer the sister. This is based on what he was told by Officer Sibi which is not supported by any affidavit and amounts to hearsay.
- [19] It seems the police in arresting the Plaintiff only relied on affidavits which did not contain any incriminating information about the Plaintiff. There were contradictions between what the police said they observed and what was contained in the affidavits. In par 28 of Minister of Safety and Security v Sekhoto and Another (supra) the following was stated:

"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s40 (1) or in terms of s 43, are present, a discretion

arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest."

- [20] It requires no argument that in arresting the Plaintiff, both Constable Jacobs and Officer Sibi did not exercise their discretion

reasonably as required by law. It is my view that they acted unreasonably before satisfying themselves that the correct person had been identified as the perpetrator. Their evidence is unpersuasive and lacks corroboration.

[21] In assessing the evidence, the Defendant has not made out a prima facie case which warrants evidence in rebuttal by the Plaintiff. Therefore, application by the Plaintiff should be granted and the Defendant is found to be liable for 100% of the Plaintiffs damages resulting from his arrest and detention.

ORDER

Consequently, I make the following order:

1. The Plaintiff's application for judgment is granted.
2. The Defendant is liable for 100% of proven damages resulting from unlawful arrest and detention.
3. The Defendant is ordered to pay the costs of suit.

J T DJAJE

JUDGE OF THE HIGH COURT

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