

SOUTH AFRICA / JUDGMENT

Mtola v Minister of Police (CA23/16) [2017] ZAECMHC 56 (29 June 2017)

[2017] ZAECMHC 56

COURT

Eastern Cape High Court, Mthatha

BEFORE

J.E Smith, S.M Mbenenge, R.W.N Brooks

CASE / FILE NUMBER

CA23/16

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – MTHATHA

Case

no: CA23/16

Date

Heard: 15/06/17

In

the matter between:

PEACE
HASSAN MTOLA
APPELLANT
And
MINISTER
OF POLICE
RESPONDENT

JUDGMENT

SMITH J:

Introduction

- [1] This appeal is with the leave of the court a quo and against its judgment wherein the appellant's claim for damages arising out of his contended unlawful arrest and detention

was dismissed. The court a quo, per Dawood J, found that the appellant's detention after the expiry of the statutory period

of 48 hours mentioned in section 50(1) of the Criminal Procedure Act, 51 of 1977 ("the Act") was unlawful; awarded damages in the sum of R10 000 in respect of that period of detention; and ordered the respondent to pay costs on the Magistrate's Court scale.

- [2] The appeal is predicated mainly on the contention that the learned judge erred in finding that the respondent discharged the onus to prove that the appellant's arrest and subsequent detention were justified in terms of section 40(1)(b) of the Act. The appellant also contends that the learned judge had erred in awarding costs on the Magistrate's Court scale.

The pleadings

- [3] The appellant's particulars of claim contain the following averments regarding his arrest and detention:

"4.1 On the 8th of November 2012 at Mthatha, Eastern Cape, Plaintiff was arrested by the members or employees of the Defendant without a warrant and without good cause and thereafter detained him at Mthatha Central Police Station for a period of five (5) days. Plaintiff was only released from police custody on 12th November 2012 at 16h00.

4.2 The arrest and detention was unlawful in that the time limit within which the Plaintiff was suppose (sic) to have been either released or appeared in Court exceeded and lapsed without him being brought before a court of law.

4.3 The purpose of arrest in this case was never achieved or the arrest was used in this matter for the purpose it was not meant for.

- [4] The respondent pleaded as follows to these averments:

"The contents of these paragraphs are to the defendant unknown and cannot be admitted or denied."

- [5] Prior to the hearing of the appeal my brother, Mbenenge ADJP, caused a letter to be sent to the parties' respective legal representatives inviting them to address us on the issues as to whether the respondent's plea disclosed a defence and, if not, the legal implications for the adjudication of the appeal.

- [6] Where a party relies on an issue which has not been properly pleaded, the trial court has wide discretion to nevertheless pronounce upon that issue, provided that it had been sufficiently canvassed during the evidence. In *Shill v Milner* 1937 (AD) 101 at 105, de Villiers JA said the following:

"The object of pleadings is to define issues; and parties will be kept strictly to their pleading where any departure would cause prejudice or prevent full enquiry. But within those limits the court has wide discretion. For pleadings are made for the court, not the court for pleadings. Where a party has every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instant, there is no justification for interference by an

Appellate Tribunal merely because the pleadings of the opponent has not been as explicit as might have been”

- [7] Mr Bodlani, who appeared for the respondent, conceded that the plea was vague and embarrassing in these respects. This concession was in line with the following remarks made by Harms DP (as he then was) in *Minister of Safety and Security v Sekhoto and Another* 2011

- (1) SACR 315 (SCA), at 333:

“[52] One can test this with reference to the rules of pleading. A defendant who wishes to rely on the s 140 (1) (b) defence, traditionally has to plead the four jurisdictional facts in order to present a plea that is not excipiable... This requires that the

facts

on which the defence is based must be set out...”

- [8] Mr Bodlani submitted, however, that the appellant did not except to the respondent’s plea and that the parties had in any event agreed

at the pre-trial meeting that the respondent bore the duty to begin and the onus to justify the appellant’s arrest and detention.

- [9] It appears from the record of the proceedings that there was consequently no clearly defined justiciable lis between the parties, despite the aforementioned agreement reached at the pre-trial meeting. This much is evident from the following

statement during Mr Kunju’s opening address:

“Mr Khunju: It appears that the attorneys in the matter had prepared some pre-trial conference, I mean some pre-trial minutes. I have read them but I may point out that I do not believe that they resonate what is contained in the pleadings. But be that the case at it may I mention this because a look on the pleadings does not reveal any dispute about arrest, or that is pleaded is absence of knowledge about the arrest. But one when he reads the pre-trial minutes it presupposes that an arrest is admitted.

Court: There was an arrest.

-Mr Khunju: And for that reason I would then agree that the plaintiff – the defendant would have to start justifying the arrest.

(My underlining.)

- [10] It was also evident from the record that the matter indeed proceeded on that basis and that the issue regarding the contended justification for the appellant’s arrest had been properly ventilated at the trial. This is so regardless of the fact that no reference was made to section 40 (1) (b) of the Act as being the section that was being relied on by the investigating officer. It redounds to Mr Khunju’s credit that he did not contend that the issue regarding the

adequacy of the respondent's plea should be revisited on appeal, but accepted that the appeal should be decided on the basis that the issue regarding the lawfulness of the appellant's arrest had been properly ventilated at the hearing and that the trial judge accordingly had a discretion to pronounce on it. It bears mentioning, however, that the issue relating to his continued detention for the period from after his arrest until the time of his release was not ventilated at all. I shall revert to this latter issue later in my

judgment.

The evidence

- [11] The respondent called the arresting officer, Constable Sinethemba Sigodi and the investigating officer Mhlangabezi Mbarhana, to testify on his behalf. Their testimonies can be summarised as follows.
- [12] Sigodi is stationed at the Madeira Police Station and attached to the Community Service Centre. He testified that the complainant, one Simon Banda, had arrived at the police station on 8 November 2012 and reported that the appellant, accompanied by Banda's

former girlfriend, had gone to his home, there threatened him by saying that there would be "some spilling of blood", and pointed to a knife that was attached to his waist. The appellant had demanded payment of money that Banda owed him, and when Banda failed to pay, took all his clothing and other items. Sigodi opened a case of "common robbery" and thereafter summoned the appellant to the police station. Upon questioning by Sigodi the appellant "admitted that he had taken Mr Banda's goods and further that he was not going to bring them back at all up until the time that he gets paid his money". Sigodi then arrested the appellant on a charge of "common robbery".

- [13] Mbarhana testified that he had received the docket on the Monday following the appellant's arrest. He thereafter went to the police cells where he took a statement from the appellant. Upon perusal of the docket he was of the view that there were other witnesses that may have to be interviewed. He then decided to release the appellant on warning. After obtaining a statement from Banda's girlfriend, one Pumeza Gladile, he referred the docket to the prosecutor for decision. It is common cause that the prosecutor declined to prosecute.
- [14] The appellant testified and also adduced the evidence of Pumeza Gladile. Their testimonies were to the effect that the appellant had gone to Banda's place because he had heard that Banda was about to leave and wanted to enquire regarding payment of the money that he had lent him. The appellant had requested Pumeza to accompany him. According to them Banda had agreed that the appellant could take possession of his goods and only return them upon repayment of the loan. They both denied that the appellant had threatened Banda in any manner and that he had carried a knife.

Findings by the trial court

- [15] Dawood J was clearly impressed with the respondent's witnesses and described them as "credible and reliable". The learned judge also accepted Sigodi's version regarding what had transpired between him and the appellant and the latter's responses to his questions. She found that he was "forthright and honest and did not appear to be attempting to mislead the court".
- [16] She was, on the other hand, acerbically critical of the appellant's and Pumeza's testimonies. She found that Pumeza was untruthful and unreliable and that she "clearly appeared to be fabricating her testimony". She consequently had no hesitation in rejecting her testimony.
- [17] The learned judge also found that the appellant was an unimpressive witness whose testimony-in-chief differed from his evidence under cross-examination and from the version put on his behalf to the respondent's witnesses. She concluded that his testimony consequently "favours the findings of a forced removal by means of self-help of goods rather than a voluntary handing over because it is evident that he went there wanting his money or security".
- [18] The learned judge, however, correctly found that despite her adverse credibility findings in respect of the appellant and his witness, she was nevertheless required to consider whether the respondent discharged the onus to establish the lawfulness of the appellant's arrest and detention. In this regard she had found that the complainant's statement to Sigodi provided reasonable grounds to justify the arrest. She appeared to have found succour in "plaintiff's conduct confirming that he indeed had the goods and his refusal to return the goods", which concession she considered to have "furthered the officer's suspicion."

Discussion

- [19] It is established law that a court of appeal is only at liberty to interfere with the findings of fact and inferences drawn by the trial court if there is a clear misdirection on the facts and the court of appeal is satisfied that the trial court had reached a wrong conclusion. Jones J explained this principle as follows in *Meintjies v Oosthuizen and Another*, ECD 8 November [2003] JOL 12335 (E):

"A trial judge who has not disqualified himself by misdirection is in a better position than a court of appeal to make a correct

determination of the facts because, being steeped in the atmosphere of the trial, he has had the opportunity of seeing, hearing and appraising the witnesses. He is best able to assess the credibility of the witnesses and the reliability and honesty of their versions. This advantage is not necessarily confined to the fact finding process, but may also extend to the correct inferences to be drawn from the facts. The result is that the trial judge's findings of fact are presumed to be

correct, and it is only in exceptional circumstances that a court of appeal will interfere with this evaluation of oral testimony. It will only do so when, after making due allowance for the trial judge's advantages, it is quite satisfied that the evidence taken as whole cannot support his conclusions."

[20] In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), at para. 40, the Constitutional Court, however, cautioned that this rule should not be overstated, and that if it emerges from the record that the trial court misdirected itself on the facts or that it came to wrong conclusions, the appellate court is duty-bound to overrule those findings or inferences drawn from them. (See also: *Bernard Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC), at para. 106)

[21] While Dawood J's comprehensive summary of the evidence cannot be faulted in any manner, I am in respectful disagreement with her finding that the proved facts constituted reasonable grounds for Sigodi's suspicion.

[22] Despite the serious shortcomings in the respondent's plea, the main thrust of Sigodi's testimony was to the effect that, on the basis of Banda's statement, he had reasonably suspected that the appellant had committed an offence mentioned in Schedule 1 of the Act, namely that of robbery. This defence finds support from the provisions of section 40(1)(b) of the Act which reads as follows:

"1. 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."

[23] It is trite that the power to effect an arrest without a warrant in terms of that section is granted to a peace officer, who holds a suspicion that the arrestee committed an offence referred to in Schedule 1, and which suspicion must be based on reasonable grounds. Once these jurisdictional grounds have been satisfied, the peace officer has a discretion whether or not to effect an arrest. The discretion must, however, be exercised in good faith and not arbitrarily. (*Duncan v Minister of Law and Order* 1986 (2) SA 805 at 818F-H.)

[24] The respondent bore the onus to justify the appellant's arrest and detention on a balance of probabilities. (*Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008

(2) SACR 1 (CC)) The burden that rests on the arresting officer does not only relate to the initial arrest but also the period of detention up until the arrestee's first appearance in court or his or her release. And where it appears clear that prima facie proof of the detainee's guilt is unlikely to be discovered, the police have a duty to release him or her from custody. (*Duncan* (supra) 821A-C; also *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at 223, para. 17)

[25] It must have been evident from my summary of the evidence that Sigodi's testimony was aimed solely at justifying the appellant's arrest, and that no attempt whatsoever was made also to justify the period of detention leading up to his release. It is evident from the record that this issue had not been raised by either party, nor has Dawood J pronounced on it. Mr Bodlani has accordingly correctly conceded that the appellant's detention, from the period immediately after his arrest until his release by the investigating officer, was unlawful and that regardless of the finding in respect of the lawfulness of his arrest, he was in the event consequently entitled to reasonable damages in this regard.

[26] The requirements for a lawful arrest in terms of section 40(1)(b) was explained as follows by Jones J in *Mabona v Minister of Law and Order and Others* 1988

(2) SA 654 (SECLD), at 658 E-H:

"It seems to me that in evaluating this 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 a need to swear out a warrant, ie something which otherwise would be an invasion of private right and person liberty. The reasonable man would 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. 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 its disposal must be of sufficient high quality and cogency to engender 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."

[27] When considered in the light of the above-mentioned test, it is manifest that the reasons provided by Sigodi for the appellant's arrest do not pass muster. First, it must have been clear to Sigodi, upon a consideration of Banda's statement, that his complaint essentially related to a civil dispute between him and the appellant, namely his alleged failure to refund money lent to him by the appellant. This aspect of Banda's statement was subsequently confirmed by the appellant. Second, apart from Banda's laconic claims of intimidation by the appellant, there was nothing else before Sigodi suggestive of criminal intent.

And on Sigodi's own version Banda unequivocally disavowed any criminal intent when he declared that he had taken Banda's

goods and would only return them when the loan was repaid. Mr Bodlani has correctly conceded that that statement by the appellant soundly disavowed any criminal intent. Under these circumstances there was a duty upon Sigodi to proceed with caution, carefully to analyse and assess the information at his disposal, and not simply to effect the arrest on the basis of Banda's ipse dixit. It is clear from his testimony that Sigodi did not make any attempt to analyse the information at his disposal objectively and critically. In the result I am of the view that the respondent failed to prove that Sigodi's had reasonable grounds for his suspicion that the appellant had committed a Schedule 1 offence. I accordingly find that the appellant's arrest on the 8 November 2012 and his resulting detention until his release from police custody on the 12th

of November 2012 at 16h00, were wrongful and unlawful.

[28] In considering the question of quantum, I am mindful of the following dictum in *Zealand v Minister of Justice and Constitutional Development and Another* (supra), at para. 24:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom.”

[29] I also take into account that apart from the humiliation suffered as result of his arrest, the appellant was also deprived of his liberty for a period of five days, was detained under unhygienic conditions in police cells, and had been separated from family and friends for that period. And having had regard to previous awards made in comparable cases, I am of the view that damages in the amount of R125 000 would be fair and reasonable.

Costs

[30] Dawood J’s decision to award costs on the Magistrate’s Court scale was no doubt mainly motivated by the relatively meagre sum of damages she awarded. In *Ronald Dean Brander v The Minister of Safety and Security* [Case no: CA 110/2007; Eastern Cape Division; Delivered on 6 December 2007] Kroon J (Jones J concurring), held that where a case concerns an important constitutional right, such as the right not to be deprived of freedom arbitrarily, the court has a discretion to award costs on a High Court scale regardless of the quantum of damages awarded. This matter concerned the appellant’s right to personal liberty and the quantum of damages awarded by this court is by no means insignificant. I am accordingly of the view that costs should be awarded on the High Court scale notwithstanding the fact that damages still fall within the jurisdiction of the Magistrate’s (Regional) Court.

Order

[31] In the result the following order issues:

1. The appeal succeeds, with costs;
2. There is judgment in favour of the appellant against the respondent in the sum of R125 000;
3. The respondent is ordered to pay the plaintiff’s costs of suit;
4. The capital and costs will bear interest at the prescribed rate from a date 14 days from the date of the judgment in the court a quo and the date of Taxing Master’s allocatur.

J.E SMITH

JUDGE OF THE HIGH COURT

I agree.

MBENENGE ADJP,

S.M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

BROOKS J,

R.W.N BROOKS

Appearances

Appearance for the Appellant : Advocate Khunju

Attorney for the Appellant : Mantyi Attorneys

1 Floor Clublink Building

28 Madeira Street

Mthatha

Tel: 047 531 1364

Counsel for the Respondent : Advocate Bodlani

Attorney for the Respondent : S Booi & Sons Attorneys

Office no 3 Clublink Building

Ref: SM/zm/CIV-465

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