

SOUTH AFRICA / JUDGMENT

Ndiyalwa v Minister of Police (EL1605/21) [2023] ZAECELLC 16 (18 July 2023)

[2023] ZAECELLC 16**COURT**

Eastern Cape High Court, East London Local Court

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

EL1605/21

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IN THE HIGH COURT OF
SOUTH AFRICA
(EAST LONDON CIRCUIT
DIVISION)

CASE NO: EL1605/21**In**

the matter between:

THEMBELA
NDIYALWA
PLAINTIFF
and
MINISTER
OF POLICE
DEFENDANT

JUDGMENT**CENGANI -MBAKAZA AJ:****Introduction**

- [1] On 05 December 2019, the Plaintiff was arrested and detained by the police on allegations of attempted murder. On 02 January 2020, he was released on bail. Following the said events, he instituted action against the Minister of Police. He demands payment in an amount totalling R1 300 000. 00 (One Million Three Hundred Thousand Rand only) for damages that he allegedly suffered as a result of his arrest and his subsequent detention.

The pleadings

- [2] On 23 November 2021, the Plaintiff issued a combined summons in this court, the particulars of which are formulated as follows:
- (a) In relation to Claim A, Plaintiff avers that he was unlawfully and wrongfully arrested without a warrant of arrest in circumstances where the police did not entertain any reasonable suspicion that he had committed a Schedule 1 offence. As a result, he suffered damages in the sum of R800 000 00 (Eight Hundred Thousand Rand only).
 - (b) In respect of Claim B, Plaintiff alleges that he was detained unlawfully and as a result thereof his freedom of movement was violated. He further contends that he was detained in a cell where he was not allowed to move as he wanted; he was taken away from his family; he was detained in an environment which is not suitable for him; the cells were dirty and full of lice; was forced to share smelly blankets with other inmates and was caused to sleep on cold cement floor during cold winter nights. As a result, thereof, he suffered damages in the sum of R400 000, 00 (Four Hundred Thousand Rand only)
 - (c) In the specificity of Claim C, the Plaintiff asserts that he was arrested in full view of the general public and family members who consequently held a belief of him being a criminal of the highest degree, not deserving to be amongst the members of the public and be subject to legal proceedings. According to the Plaintiff's allegations, the conduct of the police resulted in severe impairment of his reputation and feelings of grievance, embarrassment, and humiliation. Following the claims, the Plaintiff seeks an amount of R400 000 00 (Four Hundred Thousand Rand only).
- [3] On 04 March 2022, the Defendant filed a notice of appearance to defend and subsequently filed his plea on 25 August 2022. In his plea, Defendant admits that Plaintiff was arrested without a warrant. However, his arrest was justified in terms of Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [4] The parties agreed to apply for separation of the merits and quantum in a pre-trial conference minute dated 25 August 2022. On the date of the trial, the court, on application, made an order that the merits be separated from quantum in terms of Rule 33(4) of the Uniform Rules of Court.
- [5] The trial proceeded on the basis that Defendant had a duty to begin and bore the onus to prove that arrest and subsequent detention were justified.

The evidence

- [6] Constable Mandilakhe Makapela (the arresting officer) testified that he received a police docket containing a complaint of assault by the complainant. He visited the complainant at the hospital and noticed that he was badly injured. Despite his injuries, he could speak, so the arresting officer interviewed him. The complainant informed him that he was assaulted by two males, one of whom he identified as Terra, Themabela. When questioned about the

identity of Terra, the complainant mentioned that his girlfriend knew the suspect and where he could be found. The arresting officer recorded a statement, but the complainant could not endorse his signature due to severe injuries on his hands.

- [7] The arresting officer proceeded to the residence of the complainant's girlfriend, who gave him directions to Terra's location. When he arrived at Amalinda, he apprehended the Plaintiff, whom the complainant's girlfriend identified as Terra. The arresting officer testified that he informed him of the allegations he was facing. The Plaintiff did not deny them. He further informed him of his Constitutional rights and detained him at the Cambridge police station. The arresting officer further testified that he entertained a suspicion which, according to him, was reasonable in that the Plaintiff allegedly committed an offence of attempted murder and was identified by the complainant's girlfriend after he had consulted the complainant at the hospital.
- [8] In cross-examination, the officer was asked about the sufficiency of the information which led to the arrest in so far as it related to the identification of the perpetrator simply as 'Terra'. In his response, he informed the court that Plaintiff was identified by the complainant's girlfriend and that people knew each other by nicknames in the residential area, according to his experience. It was suggested to the arresting officer that he failed to inform the Plaintiff of the allegations he was facing. However, the arresting officer maintained that he did advise the Plaintiff of the charges against him.
- [9] In their quest to discharge the onus of proof, the Defendants also relied on the evidence of Sergeant Nompendulo Qwede (the investigating officer). She testified that upon the Plaintiff's arrest, she charged him with attempted murder on 07 December 2019. In a later instance, the case was subsequently withdrawn after the Public Prosecutor consulted with witnesses. When asked why the case was withdrawn, the investigating officer testified that the complainant had lost interest in the matter. With this evidence, the Defendant closed his case.
- [10] The Plaintiff gave testimony that on the day of his arrest, he was busy with his braai at the car wash, minding his own business. He stated that he was chatting with a certain gentleman when another man approached and asked for the car keys to the vehicle he was driving. Following this, he was suddenly handcuffed by another man when the second man took the car keys. They all drove off to Cambridge Police Station.
- [11] Upon arrival, he was caused to stand outside of the car. The police officers took his belongings and put them on the trailer of his car. One of the officers asked him to produce the firearm he had used to shoot Bridge. He informed them that he did not know who Bridge was, to which the police asserted that Bridge was one of his friends. Police asked if he knew Lelethu, and he informed them that Lelethu was his neighbour who worked at Boxer Supermarket. They all drove to Boxer Supermarket. Police entered the Supermarket leaving him in the car, and he was later taken back to the police station. Plaintiff testified that police repeatedly questioned him about a firearm that he claimed to be unaware of.

- [12] He was then detained and kept in police cells with two other young men unknown to him. When questioned whether he knew the other young men, he answered in the negative. When police, considering their knowledge, informed him that he was working with the young men at a taxi rank, he confirmed recognising them by sight. The other young man, who was identified as Lelethu, confirmed that he knew the Plaintiff. They were then informed that they had attacked Bridge. He did not respond to the allegations. In his testimony, the Plaintiff testified that, the following day, they were charged, fingerprints were taken, and they were given certain papers and advised that they would appear in court at a later stage.
- [13] On the following Monday, 09 December 2019, they were offered soap to bathe and some meals. A police van came and took them to court. He then spotted Bridge in the court cells. Bridge was singled out from that group, and he was advised that Bridge had caused his arrest. The Plaintiff testified that he was advised to apply for bail. On 02 January 2020, they were granted bail of R1000 00 each (One Thousand Rand only). On 20 March 2020, the case was withdrawn against him. Asked why the case was withdrawn, he testified that one Lelethu could not be found.
- [14] Under cross-examination, Plaintiff testified that at the time of his arrest, he became aware of the accusations against him. Police informed him that he was accused of shooting Bridge. When the complainant's statement was made known to him during cross-examination, it was highlighted that the complainant had named Terra Thembela as his attacker. Plaintiff said he could not comment on that; however, at a later instance, he became aware that he was implicated in the crime in question. He admitted to knowing the complainant's girlfriend as Zintle and was advised not to interfere with her upon his release on bail. Furthermore, under cross-examination, Plaintiff stated that he was a well-known DJ in the area, he works at the taxi rank and that the majority of people are familiar with him. Given this, he elaborated, it would be highly unlikely for people to confuse his identity. With this evidence, Plaintiff closed his case.

The Issues

- [15] The issue for determination is whether Plaintiff's arrest and his subsequent detention were lawful. This will be analysed through legal principles and in a discussion that will be presented below.

Applicable Law and Evaluation

- [16] I proceed to deal with the lawfulness of the arrest. [1] In *Minister of Law and Order and Others v Hurley and Another*[1], it was said,

“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”

[17] Section 40(1) (b) of the Criminal Procedure Act[2] provides that –

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

Schedule 1.”

[18] In *Duncan v Minister of Law and Order*[3], it was held there are so-called jurisdictional facts which must exist before the power conferred by section 40(1) (b) of the Criminal Procedure Act, and these are:

- (a) the arrestor must be a peace officer;
- (b) he must entertain a suspicion;
- (c) it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Criminal Procedure Act (other than one particular offence); and
- (d) that suspicion must rest on reasonable grounds.

[19] The ruling in *Mabona*[4] demonstrates how a reasonable suspicion is formed. Jones J explained what the concept of reasonable suspicion entailed. First, he held, the test is an objective one involving an enquiry into whether a reasonable person in the arrestor’s position and having the same information would have considered that there were ‘good and sufficient grounds for suspecting that the arrestee had committed a Schedule 1 offence. Secondly, the arrestor is required to analyse and assess the quality of the information critically and not accept it without checking it where it can be checked. Thirdly, while the section requires ‘suspicion but not certainty’, that suspicion must be based ‘upon solid grounds’ because if it is not, it is ‘flighty or arbitrary, and not a reasonable suspicion’.

[20] In *Biyela v Minister of Police*,[5] the court affirmed that the test of whether a suspicion is reasonable is objectively justiciable. Musi AJA said,

“[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an

unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. (Emphasis added)”

Legal submissions by the parties

[21] In his heads of arguments, counsel for Defendant argues, briefly, that the claim against Plaintiff should be dismissed on the basis that the police verified the information they had at their disposal. He argues that the Plaintiff was arrested after being identified as a perpetrator of a Schedule 1 offence. Counsel for the Plaintiff argues that the wrong person was arrested. Furthermore, the arrest was conducted unlawfully because the

arresting officer failed to comply with the required standing orders in affecting the arrest, which further flows to the detention of the Plaintiff.[6]

[22] Gleaning from the evidence presented, it has been established that Constable Makapela was a peace officer. Subsequent to his interview with the complainant, he entertained a suspicion that a Schedule 1 offence had been committed. The fact that the offence falls under Schedule 1 was never placed in dispute.

Was the wrong person arrested?

[23] On the issue of identity, both versions are mutually destructive. In Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others[7], a case that I was referred to by counsel for the Plaintiff, the following was said:

"The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may

be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility

of the various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal

contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".

- [24] Sergeants Makapela and Qwede corroborated each other, that the person whom the complainant identified as his attacker was the Plaintiff. The statement that Sergeant Qwede had, which was enclosed in the police docket mentioned the Plaintiff's name. Sergeant Qwede informed the court that the complainant, his girlfriend and the Plaintiff reside in the same area, and they know each. Cross-examination of the two witnesses bore no fruit because both stuck to the versions of their stories.
- [25] The nickname Terra was never placed in dispute. Instead, Plaintiff acknowledged that he is a well-known person in the taxi industry as well as a DJ of the area. Most importantly, he mentioned that there would be no chances of mistaken identity. In addition to the information that the police had at their disposal, the fact that the Plaintiff saw the complainant in the cells and was advised that he had caused his arrest might have strengthened the police's belief that the correct person was detained. In the Plaintiff's version, police knew that he worked in the taxi industry. It is, therefore, safe to conclude that police verified the quality of information they had, especially with regard to the identity of the perpetrator of the alleged offence. The evidence of the Defendant, which is corroborated by Plaintiff on the issue of identity, is credible and reliable. The police had sufficient justification for the arrest because they had reliable and trustworthy information from the complainant himself. It is common cause that the arresting officer observed how badly injured the complainant was. This then settles the factual disputes between the parties. I agree with the assertions made by the Defendant's counsel that under the circumstances, it was reasonable for the arresting officer to suspect that the Plaintiff had attempted to kill the complainant. I am, therefore, satisfied that all the jurisdictional facts were established.
- [26] It is trite that once jurisdictional facts are established, the question of discretion should be scrutinised. In *Biyela*, [8] at para [36] per Musi AJA,
- "The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has discretion. The discretion must be exercised properly."*
- [27] The general requirement is that any discretion must be exercised in good faith, rationally and not arbitrarily.[9] Once the jurisdictional facts have been established, it is for the Plaintiff to prove that the discretion was exercised in an improper

manner.[10] Counsel for the Plaintiff argues that the arresting officer failed to fulfil the standing orders. With respect, counsel omits to substantiate this argument. I find this feature quite unsettling. In *Minister of Safety and Security v Van Niekerk*, [11] the Constitutional Court referred at [19], to the following portions of the Police Standing orders (G) 341 issued under Consolidated notice 15/99:

"Background

The arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996(Act 108 of 1996), the Criminal Procedure Act, 1977(Act 51 of 1977), the other legislation and this order concerning the circumstances when a person may be arrested and how such person should be treated, must be adhered to.”

- [28] The only fact that was challenged on the manner of arrest was that the Plaintiff was never made aware of the allegations against him. It must be remembered that Plaintiff contradicted what was put to the Defendant’s witnesses on this aspect. Although it was claimed during cross-examination that Plaintiff had never been aware of the accusations against him, this fact flew right in his face. In contrast to the information provided to the arresting officer, Plaintiff testified that the police told him he had shot Bridge and further questioned him concerning a firearm he had never used. Even if reliance were to be placed on the standing orders, as suggested by counsel for the Plaintiff, there is nothing to suggest that the arresting officer exercised his discretion improperly. What appears on the evidence tendered is that police followed the correct procedures[12] when effecting the arrest. There is no hint of proof that police actions were motivated by malafides or by ulterior motives at the time the arrest was executed. I, therefore, conclude that the Plaintiff’s arrest was lawful, and police exercised their discretion to arrest properly.
- [29] In the Plaintiff’s particulars of claim, the issue of detention is pleaded separately from arrest. In my view, it is imperative that this issue be scrutinised and dealt with separately. What was said in *M R v Minister of Safety and Security*[13] finds relevance in this matter. The court held that arrest and detention are separate legal processes, so much that while the arrest may be lawful, the detention may be unlawful; the fact that both result in someone being deprived of her or his liberty does not make them one legal process.
- [30] It is trite that detention is, in and by itself, prima facie unlawful. The onus rests on the detaining officer to justify the detention. The constitutional right guaranteed in Section 12(1) of the Constitution to not be arbitrarily deprived of one’s freedom and security of person shall serve as the lens through which liability for unlawful arrest and detention should be viewed. The right not to be deprived of freedom arbitrarily or without a just cause applies to all persons in the Republic.[14] In *Minister of Safety and Security v Magagula*,[15] the Supreme Court of Appeal emphasized the need to distinguish between the period of arrest and an accused’s first appearance

in court, on the one hand, and the period between first appearance and ultimate release, on the other. The case for unlawful detention

in respect of the first period, said Lamont AJA, is dependent upon the failure of the authorities to establish that the arrest was lawful. In respect of the second period, however, the legality of detention depends upon the court’s orders.

[31] In the case under consideration, it is common cause that the Plaintiff faced a Schedule 1 offence which is regarded as a very serious offence. In *Banda v Minister of Police*[16] at para 61 per Mbenenge JP

“The circumstances under which an arrested person may be released from custody before their first court appearance are circumscribed. Both Sections 59(1) (a) and 59 A (1) of the CPA deal with the police bail and prosecutor’s bail, respectively. These sections fetter the discretion of the police. They render it well nigh impossible for police to grant bail in terms of section 59 of the CPA, as attempted murder is listed under Part 11 or Part 111 of Schedule 2 to the CPA.”

[32] I am mindful that in casu no reference was made to Sections 59(1) (a)[17] and 59A (1)[18] of the CPA. However, reference to the relevant sections will not change the essential ingredients of this case. The arresting officer testified that upon his arrest, the Plaintiff was left in the hands of the investigating officer to pursue further processes. Evidence brought by the investigating officer remains unchallenged, stating that due to the Plaintiff being formally charged on 07 December 2019, a date which fell on a Saturday, it was not feasible to bring him to court for his first appearance. On Monday, 09 December 2019, Plaintiff appeared for the first time in court. It was at this moment that the investigating officer got her first opportunity to discuss the matter with the Public Prosecutor and deliberate a strategy on how to deal with the matter going forward. Although bail was later granted, she never objected to the release of the Plaintiff on bail; hence he was granted bail in the amount of R1000. 00 (One Thousand Rand). Considering the above, I conclude that the purpose of detention was to bring the Plaintiff to justice. Following the events as demonstrated above, I find that the detention of Plaintiff was lawful. In the result the claims brought against the Defendant must fail.

Costs

[33] The general rule is that costs follow the result. This is a case of a delictual claim for damages arising out of arrest and detention. I see no reason why I should deviate from the general rule.

Order

[34] The Plaintiff’s claims are dismissed with costs.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES: Counsel for the plaintiff: Adv L Magadlela Instructed by: N. Tyatyeka Plaintiff’s Attorneys Short Mill House Victoria Crescent The Quarry office Park EAST LONDON Counsel for the defendants: Adv M Rili Instructed by: The State Attorney Defendants’ Attorney Old Spoorinet Building 17 Fleet Street EAST LONDON

Date heard: 20 and 23 June 2023

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 18 July 2023 at 10:00.

[1] 1986(3) SA 568(a) at 589 E-F

[2] Act 51 of 1977, The Act

[3] On SAFLII(38/1985)[1986]ZASCA 24[1986] ZASCA 24; ; [1986] 2 All SA 241 (A) (24MARCH 1986)

[4] Mabona & another v Minister of Law and Order & others 1988 (2) SA 654 (SE) at 658E-H,

[5] (1017/202)

[2022] ZASCA 36 (01 April 2022)

[6] Plaintiff's heads of arguments para 7.2(filed on 23 June 2023)

[7] 2003

(1) SA 11 (SCA);2003 (1) SA p11

[8] Foot note 5 supra

[9] Masethla v President of the RSA [2007] ZACC 20; 2008 (1) SA 566 (CC) At para 23; The Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA)

[10] Minister of Safety and Security v Sekhoto footnote 9 supra

[11] 2008(1)SACR 56 (CC)

[12]. Section 39 of the CPA (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

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[13] 2016

(2) SACR 540 (CC) at para 39

[14] Mahlangu and Another v Minister of Police 2021(2) SACR 595 (CC) at para 25

[15] (991/2016)[2017] ZASCA103(6 September 2017) at para 13

[16] (CA 99/2020) [2021] ZA ECGHC 55(8 June 2022) at para 61

[17] Section 59 of the CPA, (1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

[18] An Attorney-General, or a prosecutor authorised thereto in writing by the Attorney-General concerned, may, in respect of the offences

referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

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