

SOUTH AFRICA / JUDGMENT

Ngobeni v Minister of Police (1838/2017) [2025] ZAGPPHC 553 (21 May 2025)

[2025] ZAGPPHC 553

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

1838/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 1838/2017

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 21 May 2025

Signature:

In

the matter between:

KEDIBONE
SIPHO NGOBENI
Plaintiff
And
MINISTER
OF POLICE
Defendant

JUDGMENT

NYATHI J

A.

Introduction

- [1] This is an action for damages against the defendant arising from an incident on the 21 April 2014 at Mamelodi Township in Pretoria when the plaintiff was allegedly unlawfully arrested without a warrant, detained and assaulted by members of the South African Police Service (“the SAPS”).
- [2] At the commencement of the trial, the plaintiff’s counsel Ms. Nako raised a preliminary issue of condonation for the plaintiff’s non-compliance with the requirement of serving the defendant and its legal representative with a notice in terms of section 3 (1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. The defendant’s counsel did not object, and condonation was granted by the court.
- [3] The common cause facts between the parties were that:
- 3.1 on 21 April 2014, the plaintiff was arrested without a warrant by members of the SAPS acting within the course and scope of their employment with the defendant on a charge of being in possession of a substance suspected to be drugs; and
- 3.2 the plaintiff was subsequently detained until the 23rd of April 2014.
- [4] The plaintiff’s case is that:
- 4.1 the arrest and subsequent detention were unlawful;
- 4.2 he was assaulted by the arresting officers and sustained various injuries such as facial lacerations, a facial fracture, his upper and lower lips was swollen and bruised, a head injury and that he suffers from impotence as a result of the injuries.
- 4.3 He subsequently opened a case of grievous bodily harm against the arresting officers.
- [5] The defendant has pleaded that the plaintiff was lawfully arrested in terms of section 40(1) (a) read with section 40(1)(h) of the Criminal Procedure Act 51 of 1977 (“the CPA”), alternatively, section 40(1)(b) of the CPA. During the trial, the defendant denied the assault and submitted that at the time when plaintiff was arrested, there was reasonable cause to do so. He was found in possession of dagga.

B. The plaintiff testified under oath as follows:

[6] Two police officers being Mampane and Nkosi came to his shack. They were travelling in a Hyundai bakkie accompanied by his wife and one Bennet. Sgt Nkosi said they were accompanying his wife to collect household goods. His wife is Lucy Maphoto. He assisted her to collect the goods as the police officers said that they could not enter the shack. When they were done and were about to

leave, he asked Nkosi for a protection order. Nkosi said the plaintiff should rather come with them if he wants to see where his

wife now stays. The plaintiff's wife was in the front cab of the Hyundai while the plaintiff was at the back with the goods. The police were driving ahead of them in a state-owned van. Along the way both vehicles came to a halt and Nkosi and Mampane ordered everybody to alight.

[7] At that point the plaintiff went to buy food at a Chisanyama (a place at which braaied meat is sold). At that moment a second police van arrived. The plaintiff then realized that things were about to get bad and jumped over a fence and ran away.

[8] The plaintiff was apprehended by two police officers at the yard of a certain household. He did not sustain injuries when he ran, he got hurt when the police caught him and assaulted him. The lady at the said household saw him and the police who were looking for him. The lady pointed him out to the police. Nkosi and Mampane apprehended the plaintiff and hit him with fists and open hands. Nkosi picked up a brick and hit him on his head with it.

[9] The plaintiff was feeling weak, yet the police officers started kicking him with booted feet. They loaded him onto a van and drove away with him. He thought that they were taking him to a police station. The plaintiff does not know the people of the community who witnessed the assault on him. The name of the lady at the household where he was arrested is Germinah or Wilhemina.

[10] The police officers took him to a plot at what is now a cross-road to Cullinan and Kwa Mhlanga. They alighted from the two police vans being Constables Nkosi and Mampane and two others. Nkosi produced a hosepipe and a wire and ordered the plaintiff to remove his belt from his waist. Nkosi then hit him with the belt, striking him with the buckle, kicked him and hit him with open hands.

The plaintiff sustained injuries to his head, eye, chest and private parts because one of the officers stomped on his private parts.

[11] Constable Nkosi picked up a stone and struck him with it on his head, he thinks he has a scar from this blow. After the assault, he was taken to a police station. He did not receive any medical treatment before being taken to the police station even though he was bleeding. He was detained for three days being: Monday, Tuesday and Wednesday, when he appeared in court. He was called out

and taken to court where he was told that his case has been withdrawn. He was then released without appearing before a Magistrate. He was taken from the holding cells and told to go.

- [12] The plaintiff alleged that he tried to open a case but was not assisted by the police. He insisted and a case was eventually opened. That matter was never taken to court up to now.
- [13] The plaintiff was shown a sworn statement by his erstwhile attorney, but denied that it was made by him or on his behalf.
- [14] He alleged that a statement was taken from him by one Sergeant Makhura some two or three days after he was released. He was not informed of his Constitutional rights.
- [15] He eventually received treatment for his injuries at Steve Biko and Johannesburg Hospitals after he was released from detention. The injuries have affected him and his work life. He sometimes fails to go to work due to bodily aches and pains and his private parts are sometimes sore.
- [16] On his version, the plaintiff disputed that any dagga was ever found at his house, and he further testified that he refused to sign the notice of rights due to fact that he disputed the charge of possession of dagga that was reflected therein. He stuck to this narrative even under cross-examination.
- [17] This concluded the plaintiff's case.

C. The defendant's version of events

- [18] Sergeant Pontsho Kobane Mampane was a constable stationed at Mamelodi East police station in 2014 assigned with duties of crime prevention, visible policing, patrol and attending to complaints.
- [19] He recalls that he was in the company of then Constable Nkosi doing patrol duty in a marked closed bakkie when they were stopped by a member of the community. This person pointed out a household in Stoffel Park and reported that dagga was being sold at that place. They let the person go to avoid him being identified by other people as an informer.
- [20] The officers went to the identified place and knocked at the door. A male person opened the door in response. They explained to him that they had information that he is dealing in dagga. He kept quiet, and they then requested permission to search his premises, and he agreed. They asked him with whom was he staying and he said that he stayed alone.
- [21] They entered the one-roomed shack with him and searched in his presence. They searched cupboards, under the bed and elsewhere. As they were busy searching, Constable Nkosi found behind the door, a transparent Tupperware container. They could see that it contained something. Constable Mampane opened it and found what looked like dagga and immediately called the plaintiff nearer.

- [22] The witness testified that he knows dagga due to its pungent smell which is unique to it. He has encountered dagga many times before. They asked the plaintiff whose dagga it was, but he kept quiet. The witness then told the plaintiff that it was illegal to possess dagga and that they were arresting him for possession of dagga. He then read the suspect his rights from his pocketbook. They took the plaintiff outside and locked him in the back of the police van.
- [23] The officers were proceeding to the police station with Sgt Nkosi driving. Whilst en route, they encountered two Quantum mini-bus taxis blocking the road. They tried to negotiate with the taxi drivers to move their vehicles from the road to enable traffic to move. Sgt Nkosi alighted and approached the drivers but only one moved his vehicle out of the way. The second driver was not cooperating with them, necessitating them to arrest him forcefully. As Sgt Nkosi opened the door to the rear hatch of the bakkie to load the taxi driver, the plaintiff jumped out and fled.
- [24] The officers then let go of the taxi driver and focussed on pursuing the plaintiff as he was fleeing, jumping fences and walls.
- [25] Sgt Nkosi called for backup over the radio and a van with two members arrived. Sgt Nkosi and the two extra members gave chase to the plaintiff. The witness followed them driving in their original police van. He could see how his colleagues were pursuing the plaintiff who was running, stumbling and falling, and appeared drunk.
- [26] He watched as the plaintiff tried to jump the large high wall still under construction. The plaintiff was reaching up to the wall and as he fell, dislodged some loose bricks at the top, which fell onto him. Sgt Nkosi and the others managed to apprehend him. At this point, the plaintiff appeared to be cooperating with the members of the SAPS, telling them that he will go and show them where the owner of the dagga is, with even more dagga.
- [27] The plaintiff, instead, took them to an open veld where some housing was under development. The witness saw that the plaintiff was bleeding from his head, presumably from the bricks that fell on him earlier. He also had a bandage on one of his hands.
- [28] At the open veld where the plaintiff took them, the officers found nobody, the place appeared as if it was being prepared for a new development. They then realized that Mr. Ngobeni was lying to them. He is also lying to the court when he says that they assaulted him and struck him with the buckle of a belt. There had been no reason for the police officers to assault him.
- [29] Sgt Mampane and his colleagues then left with the plaintiff and drove to the Mamelodi Police Station. There they took him to the cells and recorded that fact into the books since he needed to be taken to the clinic to receive medical attention. That was done and on return he was detained in the cells after Sgt Mampane had read him his notice of rights, which Mr. Ngobeni refused to sign.

[30] The plaintiff was taken to a clinic by Sergeants Mampane and Nkosi. After the plaintiff was treated, they took him back to the cells for detention. The dagga was recorded in the SAPS 13 under 755/2014.

[31] The defendant did not call further witnesses, including the other officers who provided backup. No documentary evidence supporting the recording and storage of the dagga was tendered.

D. Discussion

[32] As regards the contested issue of the arrest and subsequent detention of the plaintiff, the defendant bore the onus to prove that the arrest and detention of the plaintiff without a warrant was justified.

[33] There follows a consideration of what has become known as the jurisdictional prerequisites for an arrest as set forth in section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 (hereinafter “the Act”).

[34] Section 40(1)(b) of the Act provides that:

"A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

[35] In *Hiemstra's Criminal Procedure*,^[1] the law pertaining to arrest without a warrant is summarized with reference to the matter of *Minister of Safety and Security v Sekhoto*^[2] as follows:

1. The jurisdictional prerequisites for subsection 40(1)(b) must be present;
2. The arrestor must be aware that he or she has a discretion to arrest;
3. The arrestor must exercise that discretion with reference to the facts; and
4. There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[36] The arresting officer exercises a discretion when he decides to arrest a suspect in circumstances where he has no warrant. It is trite that this is informed by a reasonable suspicion. In *Olivier v Minister of Safety and Security and Another*,^[3] the court held that: “when deciding if an arrestor’s decision to arrest was reasonable, each case must be decided on its own facts.”

[37] In *Biyela v Minister of Police*^[4] the Supreme Court of Appeal questioned whether the arresting officers could have formed a reasonable suspicion based on hearsay evidence and the credibility of the arresting officers. [emphasis added]. In *Biyela*, the arresting officers were directed to a suspicious vehicle by a CCTV camera operator via radio communication.

[38] The court held that 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.[5] The court found that the arrest was unlawful.

[39] In the current case, the suspicion was formed pursuant to the arresting officers receiving information from a member of the community, who had stopped them on the street, who has to date not been identified in any way.

[40] If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.[6]

[41] In *Minister of Safety and Security v Glisson*[7] it was held that:

“Police authority to arrest without warrant is an extremely valuable protective measure for the community. At the same time great juristic value is placed upon the liberty of the individual. What has to be found is a balance between the protection of individual liberty on one hand and avoidance of unnecessary restriction on the police in the execution of their duties on the other. Where the two are evenly balanced, the scales in a modern constitutional state will fall on the side of individual liberty.”[8]

[42] In *Du Toit* (supra)[9], a timely warning is given, which foreshadows this action, that:

“It will be expected of the police, before effecting an arrest, to approach the signs of possible involvement in crime with an open mind. Where an arrest without warrant is effected by a peace officer and is not permissible under s 40 or 41, the arrestee might lawfully resist or flee. Moreover, such arrest might form the basis of a civil action for damages.”

E.

Conclusion

[43] Absent the jurisdictional factors as made clear above, the plaintiff’s arrest is unlawful. There is no explanation whatsoever as to the curious release of the plaintiff from custody. At any rate, as was stated above, the resultant detention of the plaintiff was unlawful as well.

[44] In the result, the defendant is found to be liable for the plaintiff’s proven damages as a result of unlawful arrest, assault and detention. The defendant is ordered to pay the plaintiff’s costs on a party and party scale, including costs of counsel to be taxed at scale B.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 19/11/2024, 20/11/2024 and 5 December 2024 Date of Judgment: 21 May 2025 On behalf of the Plaintiff: Ms. Z. Nako Plaintiff's attorneys: T.F. Matlakala Inc. Attorneys, Pretoria Incorporated; Pretoria. e-mail: obakeng@tfmlaw.co.za ; legal@tfmlaw.co.za On behalf of the Defendant: Mr. D.D. Mosoma Defendant's attorneys: The State Attorney, Pretoria Ref: 896/2015/Z49 e-mail: Kmeier@justice.gov.za

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- [1] Pages 5-8.
- [2] [2010] ZASCA 141 (19 November 2010).
- [3] 2009
- (3) SA 434 (WLD).
- [4] (1017/2020)
- [2022] ZASCA 36 (01 April 2022).
- [5] Ibid para [34].
- [6] Minister of Safety and Security v Tyokwana 2015 (1) SACR 597 (SCA) at 600G.
- [7] 2007
- (1) SA 131 (E) at para [6] on 134.
- [8] Excerpt from Du Toit – Commentary on the Criminal Procedure Act – RS 71, 2023 ch5-p12A.
- [9] RS 73, 2024 ch5-p13.

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