
SOUTH AFRICA / JUDGMENT

Ngwenya v Minister of Police (924/2016) [2017] ZANWHC 78 (2 November 2017)

[2017] ZANWHC 78

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

924/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 924/2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

CLEMENT NGWENYA Plaintiff

and

THE MINISTER OF POLICE Defendant

DATE OF HEARING: 11 OCTOBER 2017

DATE OF JUDGMENT: NOVEMBER 2017

COUNSEL FOR THE PLAINTIFF: ADV. MONTSHIWA

COUNSEL FOR THE DEFENDANT: MS. SEBEKEDI

JUGDMENT

HENDRICKS J

Introduction

[1] This is an action for damages as a result of the wrongful arrest and detention of the plaintiff by members of the South African Police Services (“SAPS”). The arrest occurred without a warrant on allegations of malicious injury to property. The merits and quantum are separated and this Court is called upon only to determine liability, if any, on the part of the defendant. It is common cause that the plaintiff was arrested on 28th August 2015 by Warrant Officer Kiameditse and Constable Andries Letsoalo without a warrant and detained for four (4) days. It is alleged by the plaintiff that the arrest and subsequent detention was unlawful.

[2] The defendant pleaded that the arrest and detention was lawful and couched its plea in the following terms:

“AD PARAGRAPH 4

Save to admit that the Plaintiff was arrested and detained, the said arrest and detention was not wrongful and in amplification of the denial, the Defendant submits that same was lawful based on the following reasons:-

4.1 The arrest and detention were justifiable in that the offence of malicious damage to property was committed by the Plaintiff and arrested in that regard.

4.2 The Defendant submits that the plaintiff was pointed out by the complainant as the culprit who committed the alleged offence in his presence.

4.3 The Plaintiff failed or refused to provide the arresting officer with an explanation when questioned about the alleged offence.

4.4 The Defendant submits that a reasonable suspicion existed at the time of the Plaintiff's arrest since circumstances necessitated an arrest and moreover efforts were taken by the members of police to verify such information prior to arresting the Plaintiff.

4.5. The Arresting officer did apply his discretion to determine whether he should arrest the Plaintiff or not since there was sufficient evidence implicating the Plaintiff in the commission of the offence hence the Plaintiff was arrested and detained in accordance with section 40 (1)(b) of the Criminal Procedure Act 51 1977, and such discretion was judicially exercised.

4.6 The Arresting officer could not have avoided the arrest for the Plaintiff committed a Schedule 1 offence.”

The lawfulness or otherwise of the arrest and detention is therefore the crux of the dispute that this Court is called upon to adjudicate.

The

Facts

- [3] Mr. Thabo Mokgosi and Mr. Clement Ngwenya (the plaintiff) were embroiled in a dispute over a stand. Both of them alleged that they occupied and are entitled to the stand since 2009. According to the plaintiff, Mr. Mokgosi was occupying the adjacent stand. The plaintiff allege that he was staying in a shack on the stand until his shack burnt down which caused him to move temporarily to Vryburg. He received information that Mr. Mokgosi was occupying the stand. This caused him to return to Mahikeng to re-occupy the stand. Upon his return, he discovered that Mr. Mokgosi fenced the stand with wires and iron poles. He opened the wires of the fence to gain entrance onto the stand in order to rebuild his shack.
- [4] Mr. Mokgosi testified that the plaintiff cut the fence on 05th August 2015. The plaintiff approached him, insulted and even threatened him about the stand, which the plaintiff allege belongs to him. He approached the Headman at the Tribal Office. The plaintiff was summoned to the Tribal Office but failed to appear. Mr. Mokgosi was advised to approach the police in order to resolve the matter, seeing that he complaint that the plaintiff cut his fence.
- [5] Acting on the advise he obtained, Mr. Mokgosi went to the police station to lay a charge on 07th August 2015. The police approached the plaintiff in an attempt to resolve the dispute amicably. This did not yield any positive

results. On 17th August 2015 the police approached the plaintiff at a taxi rank in order to resolve the impasse between him and Mr. Mokgosi because of the complaint. Yet again, the attempt proved to be fruitless.

- [6] On 28th August 2015 (the day of the arrest) Mr. Mokgosi again approached the police for assistance. He alleged that the plaintiff, who was in the company of two other gentlemen, threatened to assault him. He, in the presence of police officers Warrant Officer Kiameditse and Constable Andries Letsoalo, went to the stand. They found the plaintiff and the two gentlemen busy erecting a shanty on the stand. The police officers confronted the plaintiff about the incident that occurred.

- [7] According to the two police officers and Mr. Mokgosi, the plaintiff admitted that he cut the fence because he told Mr. Mokgosi that the stand belongs to him. He also threatened to assault Mr. Mokgosi in the presence of the two police officers. This, together with the fact that a criminal complaint was already laid and a case had been registered, prompted the two police officers to affect an arrest on the plaintiff.

The Law

- [8] It is well established that the onus rests on the arresting officer (the defendant) to prove the lawfulness of the arrest. This is so because, as Rabie CJ stated in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F:

“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.”

[9] Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended, states:

“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; ”

Malicious injury to property is listed as an offence in Schedule 1 of the Criminal Procedure Act.

[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 s 40(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.

[41] It is now settled that the purpose of the arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial. (See *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011

(5) SA 367; [2011] 2 All SA 157; [2010] ZASCA 141) paras 30 – 31.) Thus it goes without saying that an arrest will be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law.”

See: *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ).

Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at
page 818G – H;

Minister of Safety and Security v Sekhoto and Another 2011

(1) SACR 315 (SCA) or 2011

(5) SA 367 (SCA) at paragraph [6].

[11] In *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) it was held:

"[42] Section 40(1) of the CPA states that a police officer 'may', and not 'must' or 'shall', arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word 'may' suggests that police officers have a discretion whether to arrest or not. It is permissive, and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime.

- [43] As s 40(1) grants police officers a discretion whether to arrest, the two courts should have gone further in their evaluation of the evidence to determine whether the facts justified an arrest. This is so because an arrest is a drastic invasion of a person's liberty and an impairment of their rights to dignity, both of which are enshrined in the Bill of Rights.
- [44] In other words, the courts should enquire whether, in effecting an H arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in Duncan or as per Sekhoto where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in s 40(1) must be exercised 'in light of the Bill of Rights'.
- [45] Although both the High Court and full court traversed the discretion embedded in s 40(1), as elucidated in Sekhoto, in their respective judgments - they did not appropriately evaluate the facts to determine if the arrest were justified.
- [46] As far back as 1986, the Appellate Division (now the Supreme Court of Appeal) enunciated the correct legal approach in Duncan as follows:

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power ... No doubt the discretion must be properly exercised.'

This salutary approach was confirmed in Sekhoto as follows:

'Once the jurisdictional facts for an arrest ... in terms of any paragraph of section 40 (1) ... 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 E in a manner that is consistent with the Constitution. In other words, once the required jurisdictional

facts

are present the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest.'

[Emphasis added.]

[47] Having established that police officers are not obliged to effect an arrest, despite all the jurisdictional facts being present, the next questions arise: what amounts to a proper exercise of discretion? Does the Bill of Rights have an impact on the common-law

understanding of how police discretion should be exercised? These are the questions that the paragraphs which follow seek to address.”

Analysis

[12] It is necessary to have regard to the timeframes of this matter. The plaintiff cut the fence on 05th August 2015. Unhappy about the fence being cut, Mr. Mokgosi approached the Headman at the Tribal Office. The plaintiff was summoned to the Tribal Office but did not attend. Acting on the advice of the Headman, Mr. Mokgosi went to the police station to lay a charge of malicious injury to property on 07th August 2015. The police attended to the complaint on 07th August 2015. Although they got hold of the plaintiff, they did not deem it necessary to affect an arrest on him on that day.

[13] On the 17th August 2015 the police met with the plaintiff at a taxi rank. Mr. Mokgosi was also present. They attempted to resolve the dispute. At that stage they once more did not deem it necessary to affect an arrest on the person of the plaintiff.

[14] On the 28th August 2015 the police attended at the disputed stand and found the plaintiff in the presence of two gentlemen, busy erecting a shack. The police then affected an arrest on the plaintiff. It is quite apparent that the fence was cut once and it happened as far back as 05th August 2015. It is when the offence of malicious injury to property in terms of Schedule 1, was allegedly committed by the plaintiff. On the 07th and the 17th August 2015 the police did not deem it necessary to arrest the plaintiff. They were aware where the plaintiff reside because Mr.

Mokgosi knew the residential place of the plaintiff. Having already on two previous occasions (07th and 17th) deemed it unnecessary to affect an arrest on the plaintiff for an offence which was committed on the 05th, there was no justifiable ground to do so on the 28th August 2015.

[15] According to Mr. Mokgosi, the main reason why he again went to the police station on the 28th August 2015 was as a result of the threats of assault on his person by the plaintiff and not about the complaint of malicious injury to property. The arresting officers therefore did not arrest the plaintiff on the reasonable suspicion that he committed a Schedule 1 offence (malicious injury to property by cutting the fence). They were concerned about the safety of Mr. Mokgosi as a result of the threats of assault and because the plaintiff refused to give them his address, which was in any event known to Mr. Mokgosi. The arrest was therefore not based on a reasonable suspicion that the plaintiff had committed a Schedule 1 offence.

[16] In the result, I am of the view that the arrest of the plaintiff on 28th August 2015 was unlawful. So too, was the detention that followed upon the arrest unlawful. It was not disputed that the plaintiff was detained for four (4) days (from Friday to Monday), although the exact time is unknown.

ORDER

[17] Consequently, the following order is made:

- (1) The arrest and subsequent detention of the plaintiff for four (4) days were unlawful.
- (2) The defendant is liable for 100% of the plaintiff's proven damages.
- (3) The defendant is ordered to pay the plaintiff's costs of suit.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2017/78.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ngwenya-v-minister-unknown-topic-anwhc-2017>

Prepared on 26 October 2026 · Esheria