

SOUTH AFRICA / JUDGMENT

Nsele v Minister of Police (CIV APP RC:04/18) [2018] ZANWHC 74 (6 December 2018)

[2018] ZANWHC 74

COURT

North West High Court, Mafikeng

BEFORE

Kgoele, Petersen

CASE / FILE NUMBER

CIV APP RC:04/18

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CIV APP RC: 04/18

In
the matter between:-
MUZIKAYISE SAMUEL
NSELE

Appellant

And

THE
MINISTER OF
POLICE

Respondent

CIVIL
APPEAL JUDGMENT

KGOELE
J, PETERSEN AJ

DATE
OF HEARING
: 19 October 2018

DATE
OF JUDGMENT

:

6 December

2018

COUNSEL

FOR APPELLANT : Adv. Scholts
 COUNSEL

FOR RESPONDENT : Adv. Williams

JUDGMENT

- [1] The appellant in this matter, Mr Muzikayise Samuel Nsele, is appealing against the whole judgment of the Regional Court Klerksdorp, dismissing his claim against the Minister of Police.
- [2] The appellant issued summons against the Minister of Police claiming damages in the amount of R400 000-00 on the basis that he was unlawfully arrested without a warrant by Sergeant Mocumi and unlawfully detained. The record of proceedings reveals that the duty to begin rested on the respondent because of its admission that the arrest and detention was without a warrant of arrest.
- [3] The evidence before the Court a quo summarised is as follows:-
- Sergeant Mocumi testified that on the 8th January 2015 he and Constable Boyi attended to a complaint by Mr Rossouw (Rossouw) who was a security guard at the site where the Matlosana Mall was still being built. When they arrived at the Matlosana Mall site, they found Rossouw who told them that he saw the appellant going around the cement bricks with a grinder. According to Rossouw, the appellant was cutting something with the grinder behind the cement bricks, but he could not see what the appellant was cutting.
- [4] Shortly after he heard the grinder sound stop, he saw the appellant taking some pieces of copper cable to one of the storerooms. Rossouw explained further that he followed the appellant to the storeroom and asked him as to what he was doing with these cables. Further that, according to his knowledge these cables had been there for a period of six months without them being moved away or being cut. Lastly that appellant responded by saying that it is just some scrap metals and he was busy cleaning the area as he was told to by the Supervisor.
- [5] Sergeant Mocumi also indicated that Rossouw informed him that according to him, the appellant's intention was to cut the cable off in order to go and sell it. After speaking to Rossouw, he opened the case docket and then continued with his own investigation and spoke to the appellant's

Supervisor, Mr Maleme, who confirmed what Rossouw was saying that he had not given anybody instruction to cut off or to move the cable and further that, the cable was as a result, worthless to the company.

- [6] After listening to both Rossouw and the appellant's Supervisor, Mr Maleme, he came to the conclusion that the appellant took the cable and intentionally cut it off so that he could benefit from it by taking it to the scrap yard and exchange it for money. After these investigations, he came to the conclusion that the appellant would have to appear before Court as he was charging him with theft. Appellant was informed that he is charged with theft. He eventually detained the appellant because he could not believe that the appellant indeed stays at the house he pointed out as there was no proof in the form of a Municipal Account.
- [7] It was further testified by Sergeant Mocumi that when he went to the plaintiff's Supervisor, he did not take the plaintiff along, he was only accompanied by Rossouw. He lastly testified that, although the Supervisor admitted to him that he requested the appellant to clean the site on that particular day and time, he was adamant that he did not give him instruction to cut the cable.
- [8] The appellant testified that on the 8th of January 2015, he was busy cutting concrete slabs for paving purposes. When he was done with the cutting, he took the concrete slabs to the labourers working at the paving section. He indicated further that prior to the concrete slabs being cut, he was told by the Supervisor that he should clean the premises once he has finished cutting the slabs.
- [9] After delivering the concrete slabs, he started cleaning the area and amongst others, moved the 3 metre cut cable into the store room which he found under/amongst the rubble next to where he was cutting. He was busy taking the cable into the store room when he was approached by Rossouw. Rossouw then left the store room and went outside and spoke to some of the other labourers/ colleagues of the appellant enquiring from them as to who cut the copper cable.
- [10] The appellant was then informed by one of his colleagues that he is being suspected of cutting copper cable and that he wanted to steal same. Rossouw thereafter called the police. Sergeant Mocumi arrived and spoke privately with Rossouw without involving him and thereafter went to the Supervisor. Rossouw and his colleague came to him and told him that he was a suspect because they were told that he was cutting a copper cable. He explained to them that he was cutting bricks and the cement blocks. Further that the blade on the grinder cannot cut anything else except the bricks. He brought the grinder and showed it to them, he was nevertheless arrested.
- [11] The following facts were regarded by the Court a quo as common cause between the parties:-

11.1 That appellant was arrested on the 8th January 2015, at his work place on a site at the Matlosana City Mall, Klerksdorp by Sergeant Mocumi;

11.2 That Mocumi was acting within his scope of employment and was on duty on the said day;

11.3 That the appellant was detained for a period of 9 days;

11.4 That the appellant was arrested for a charge of theft;

11.5 That Rossouw was a senior security officer in charge of the site and was the complainant in the matter;

11.6 That the cable at the time of arrest was found in a store room belonging to the Construction Company Murray and Roberts situated on the site of the Company, where the Company's property is stored;

11.7 That Rossouw indicated in his statement that he did not see what the appellant was cutting on the day of the alleged incident, but he suspected that the appellant was cutting a copper cable;

[12] The question which the Court a quo had to decide was whether the arrest and detention was lawful or not. It is clear from the evidence adduced that there was a dispute as to whether the appellant did cut the copper cable on the aforesaid date. It was also for the Court a quo to decide whether the police on that disputed issue, formed a reasonable suspicion that a crime had been committed. It was furthermore for the Court a quo to decide, based on Rossouw's statement, whether Sergeant Mocumi had reasonable grounds to arrest the appellant. The

Court a quo was also requested to consider the quantum to be awarded to the plaintiff. The Court a quo as indicated above, dismissed the appellant's claim after finding that the arrest and detention was lawful.

[13] It is trite law that the question as to whether a suspicion of a person effecting the arrest is reasonable or not must be approached objectively, and that the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee has committed a Schedule 1 offence.

[14] It is also trite law that police officials who purport to act in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA) should investigate exculpatory explanations offered by the suspect before they can form reasonable suspicion for the purposes of a lawful arrest. See: - Louw & Another v Minister of Safety and Security & Others 2006 (2) SACR 178 (T).

- [15] A peace officer who suspects that a crime has been committed must first, if he has the opportunity, take the trouble to either confirm his suspicion or allow it to dissipate. This must be done especially where the suspicion is somewhat unfounded. A peace officer who fails to substantiate his suspicion even though he has the opportunity to do so does not act reasonably following that his suspicion will not be reasonable. See: *State v Purcell-Gilpin* 1971 (3) SA 548.
- [16] Counsel appearing on behalf of the appellant submitted that from perusal of the record it is clear that the arresting officer had no reasonable suspicion to arrest the appellant due to inter alia, the reasons that Sergeant Mocumi based his suspicion squarely on the hearsay evidence of Rossouw, who did not even testify during the hearing. The totality of evidence which the arresting officer apparently relied upon according to him also constituted hearsay evidence and it is clear from the record that he did not form his own suspicion.
- [17] He furthermore argued that it is also significant to note that the arresting officer solely relied on the evidence of Mr. Rossouw, but that Rossouw only deposed to a statement after the arrest of the appellant had been made. Accordingly, he argued that the suspicion was made prior to any evidence on oath by the complainant was made. According to him, this strengthens the inevitable conclusion that the suspicion if ever it was made, was not reasonable.
- [18] In response to the above submissions the respondent's Counsel submitted that Sergeant Mocumi testified that he proceeded to the area where the cutting was allegedly done after listening to both Rossouw and the appellant's Supervisor. He observed the area and could not find anything else that was cut there and then formed a suspicion that the appellant indeed committed the offence of theft of the copper cable. From the foregoing facts and information relied upon by Sergeant Mocumi Counsel representing the respondent argued, it is clear that a reasonable man in Sergeant Mocumi's position, and possessed with the same information, would have suspected that the appellant indeed committed the offence of theft of copper cable.
- [19] It is therefore clear from the above submissions that the gist of the matter in this Appeal boils down to whether Sergeant Mocumi formed a reasonable suspicion to arrest the appellant for the offence of theft as is required in terms of the provisions of section 40(1) (b) CPA and whether such suspicion rested on objective reasonable grounds.
- [20] The evidence that was before the Court a quo reveals that the arresting officer relied heavily on what he was told by Rossouw when he made the decision to arrest. This reliance was in my view insufficient if regard is had to the following:-
- The goods were still in the premises of the employer (the Construction Company) and not in the possession of the appellant when it was found;

- The appellant never took complete possession of the copper cable, to the contrary he had put it in a container (storeroom) which belongs to his employer;
- It was not clear, to even Rossouw (Complainant), that the appellant was cutting the copper cables with the grinder;
- The arresting officer has not properly consulted with the appellant in respect of an explanation in order to formulate his suspicion;
- From perusal of the evidence of the arresting officer, it is clear that he already formulated his suspicion only on the version of Rossouw prior to any consultation with the appellant.
- There are no objective facts from which Mocumi could conclude that the appellant had the requisite intention to steal as he concluded except from Rossouw's assumption.

[21] What is also disturbing from the facts of this matter is that the nature of the offence he suspected the appellant committed, is not supported by the facts or any circumstances of this matter. It does not even appear from the record that he even considered whether the facts established a charge of attempted theft or malicious damage to property. The arresting officer in this matter wrongly assumed that theft was committed. It is quite clear that Mocumi did not apply his mind as a police officer to the facts of the case. The facts are clear that there was no reasonable grounds and/or suspicion formed by him at all to the fact that a crime was committed without the hearsay evidence that was provided by Rossouw, who also

was not sure as to what was the appellant actually cutting there. It appears that he was under pressure to arrest the appellant despite his explanation because there are clearly no reasonable grounds that any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed an offence of theft. This test was succinctly summarised in the case of *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ).

[22] There is nothing in the record that suggest that what the appellant alleged he was doing on that particular day was not amongst his daily routine duties. In my view, to conclude or form an opinion on these facts that he committed theft is more of a quantum leap in logic. In my view, the appellant succeeded to prove that Sergeant Mocumi did not form his own opinion, and further that if it was ever formed, it was not based on reasonable grounds. The discretion to arrest the appellant was therefore exercised capriciously. The Court a quo should have found that the arrest of the appellant and the detention thereof was not lawful.

[23] Coming to the issue of quantum, the appellant submitted that this Court is in addition requested to award the appropriate quantum in this matter, and not return the issue to the Court a quo. Further that, the appellant has already led the testimony on quantum and both parties filed comprehensive heads thereto. According to him this will be convenient for the Court and the parties and will also avoid the matter being set down again in the Court a quo. He urged the Court to consider that this approach will also expedite the legal proceedings in this matter to come to its finality.

[24] Awards made by the Courts in our Court in respect of deprivation of liberty cases reveals a disparity regarding whether the Minister of Police is liable for the whole period of detention or not, especially in cases where the further detention of the suspect was interrupted by an Order of Court. There are two schools of thought that comes out of these decisions. One is that the Minister is liable only up until the suspect is brought to Court, thereafter it solely rests on the Courts. The other is that the authority of the police to detain a person is inherent in the power of arrest. Therefore, if the arrest is unlawful, the resultant detention is similarly unlawful. The disparity in the decisions made by our Courts has prompted litigants to take the matter to the Constitutional Court. In particular, we are reliably informed that the matter of *De Klerk v Minister of Police* (329/17) [2018] ZASCA 45, which dealt pertinently with this issue and was handed down on the 28 March 2018 by the Supreme Court of Appeal, was set down for hearing on the 15 November 2018 at the Constitutional Court to deal exactly with the same issue. It is our view that it will be prudent that the issue of quantum should be best left to be dealt with after the clarification has been made by the Constitutional Court. It is for this reason that the issue of quantum will be referred back to be determined by the Court a quo.

[25] The following Order is thus made:-

25.1 The Appeal against the judgment of the Regional Court Klerksdorp is hereby upheld;

25.2 The Order and judgment granted by the Court a quo is hereby set aside and substituted with the following:-

“The respondent / defendant in the Court a quo is held liable for the damages the appellant / plaintiff may prove for his unlawful arrest and detention at the hands of the member of SAPS”.

25.3 The issue regarding the quantum of the appellant’s / plaintiff’s claim is referred back to be determined by the Court a quo.

25.4 The respondent/defendant is ordered to pay the costs.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

A.H. PETERSEN

ACTING JUDGE OF THE HIGH COURT

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