

SOUTH AFRICA / JUDGMENT

Phasha v Minister of Police (25524/2011) [2012] ZAGPJHC 261 (21 November 2012)

[2012] ZAGPJHC 261**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Epstein

CASE / FILE NUMBER

25524/2011

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REPORTABLE

SOUTH

GAUTENG HIGH COURT

JOHANNESBURG

CASE

NO: 25524/2011

DATE:21/11/2012

In

the matter between

PHASHA,

THABO

SYDNEY.....Plaintiff

and

MINISTER

OF POLICE

.....Defendant

JUDGMENT

EPSTEIN AJ:

- [1] This is a claim for damages for wrongful arrest and detention. It is common cause that on 24 April 2010 the Plaintiff was arrested without a warrant by police officers who are members of the South African Police Services, on a charge of attempted theft. It is the Plaintiff's evidence that he was arrested at about 12h30 and taken to the Jabulani police station where he was detained until he was released at approximately 21h30. The period from the time of his arrest, including his detention until his release on bail of R1 000.00 was approximately 9 hours. The Plaintiff claims damages in the sum of R150 000.00 as a result of the injury to his privacy, dignity and bodily integrity. It is not disputed that notice was given in terms of section 2 (1) of Act 40 of 2002 prior to the institution of the action.
- [2] The Defendant pleads that the Plaintiff was lawfully arrested in terms of s.40 (1) of the Criminal Procedure Act 51 of 1977 ("the Act") on a charge of theft / attempted theft. However, in evidence, warrant officer Makuvhile who effected the arrest said that he arrested the Plaintiff on a charge of attempted theft.
- [3] The applicable provision is s.40 (1) (b) of the Act which provides as follows:
- "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;
- (c)"
- [4] Schedule 1 of the Act includes the offence of theft, whether under the common law or a statutory provision. In cross-examination it was suggested by the Plaintiff's counsel that attempted theft is not an offence listed in Schedule 1. However, Schedule 1 refers to "Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule". Therefore, attempted theft is a Schedule 1 offence.
- [5] The onus to justify an arrest rests on a Defendant.¹
- [6] Whilst the Defendant acknowledged the duty to begin, an interpreter was not available and the Plaintiff's counsel, by agreement with the Defendant's counsel, elected to begin by leading the Plaintiff.
- [7] The following is a summary of the Plaintiff's evidence:

The Plaintiff was born on 30 November

1969. He was 40 years old at the time of the arrest which forms the subject matter of this case. He lives in Dobsonville and has resided at the same address since 1998. He lives with his 3 biological children and 2 adopted children.

The Plaintiff works as a debt collector at the office of the State Attorney in Market Street, Johannesburg. He has been so employed since 1995.

On Saturday, 24 April 2010 the Plaintiff, accompanied by Mr Lebo Mokoto ("Mokoto") travelled in the Plaintiff's own car to Shoprite Checkers. His purpose was to buy a leash for his dog. The Plaintiff and Mokoto spent about 15 minutes in the shop looking for an appropriate leash but could not find one. As they were leaving the shop they were stopped by a security guard who said he wanted to speak to them. He requested them to accompany him to an office. The manager of the shop also came into the office to which they had been taken. The manager informed the Plaintiff and Mokoto that a woman alleged that she had been robbed of her money. Two women came into the office accompanied by a young boy. The boy is identified in the docket at M K ("K"). The complainant said that she had been told by Kula that he had seen the Plaintiff and Mokoto in a group, that the Plaintiff and Mokoto had cut the complainant's bag and that they had taken her purse.

The Plaintiff disputed this. It is apparent that there were cameras in Shoprite. The Plaintiff asked for the video footage to be replayed but the manager left the room saying he was going to another office to look at the footage himself. Thereafter the police arrived and informed the Plaintiff and Mokoto that they were being arrested.

The Plaintiff said that he and Mokoto were not searched by the security guards, nor by the police. The Plaintiff also testified that he asked the police who were arresting him to look at the video footage but they refused to do so.

The Plaintiff testified that he knew the police who arrested him. He said that they were once colleagues of his wife who was in the police and worked at Jabulani police station. She has since passed away. The Plaintiff said that the senior policeman, who he believed had the rank of captain, used to come to his house to fetch the Plaintiff's wife to take her to work.

The Plaintiff and Mokoto were handcuffed. They were then led through the mall and escorted to the police vehicle. It took about 5 to 10 minutes to walk from the shop to the vehicle. The Plaintiff felt humiliated and embarrassed and said that his dignity was impaired. He said that people who he knew were surprised to see what was happening.

The Plaintiff told the police that he had his own car. He handed the keys to them and someone drove his car to the police station.

At the police station they were made to sit on a bench and then made to sign a document. The document was identified in the bundle of documents handed in as “NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION”. (Section 35 of the Act no. 108 of 1996.) The document commences with the words: “You are being detained for the following reason – attempted theft”. The document reflects the time as 13:20.

After signing the document they were placed in a small cell. It was very dirty. There were approximately 7 other detainees in the cell who were smoking and there were cigarette stubs on the floor. It had a toilet which was filthy and there was no toilet paper. The blankets provided were dirty. The Plaintiff estimated the size of the cell. His indications reflected that it was approximately 2.5m x 2.5m.

The Plaintiff testified that he was in the cell until after 21h00. He requested the police to arrange an attorney who subsequently arrived. The Plaintiff and Mokoto were released on bail of R1 000.00 each and told to appear in court on Monday, 26 April 2010.

[8] In cross-examination the Plaintiff testified as follows:

- i) He was in the shop for about 15 minutes. He spent this time examining various leashing to see if he could find a suitable one but could not do so.
- ii) He confirmed that the complainant said in his presence that her purse had been lost but that she had not seen the Plaintiff and Mokoto take the purse. She heard this from K.
- iii) It was put to the Plaintiff that the rank of the officer who arrested him was warrant-officer and not captain. The Plaintiff said that he may be confused as to the rank but said that the fact of the matter is that the senior policeman who arrested him – (the other policeman is a constable) – was known to him.
- iv) The Plaintiff stated that his wife passed away in 2007. She worked at Jabulani police station in the detective branch from 1996 to 2007.

[9] After the Plaintiff’s evidence, the Plaintiff closed his case.

[10] The Defendant called two witnesses to testify. The first witness was warrant-officer Khathutshelo Eckson Makhuvile (“Makhuvile”).

He, together with constable Mutere (“Mutere”), arrested the Plaintiff and Mokoto. In summary, Makhuvile’s evidence was as follows: -

He has been a policeman for 26 years and a warrant-officer for 13 years. He has been at Jabulani police station since 1995. Mostly he is posted to the crime office and it is his responsibility to open dockets.

On 24 April 2010, a call was received from people at Shoprite at Jabulani Mall. They said that two people had been ‘arrested’ for trying to steal.

Makhuvile said that it is the duty of the police to go to a place where people have been arrested so that they can take the people to the police station.

When he and Mutere arrived at Shoprite at 13h00, the security guards pointed out the Plaintiff and Mokoto.

The complainant was present at the scene. The bottom of her handbag had been cut so that a purse can be taken out of the bag. The complainant was holding her bag.

After the Plaintiff and Mokoto had been pointed out to Makhuvile, he introduced himself and explained to them their rights. He said he was there to arrest them.

Makhuvile testified that the security guards told him that they had searched the Plaintiff and Mokoto. (The Plaintiff denied this.) Makhuvile said that the security guards told him that they did not find anything in the possession of the Plaintiff and Mokoto.

After hand-cuffing both the Plaintiff and Mokoto, he took them to the police vehicle and then took them to the police station. This was after 13h30. He said that the vehicle was approximately two minutes walk from the Shoprite building. The parking lot is a little distance away from Shoprite.

At the police station a case was opened against the Plaintiff and Mokoto.

Makhuvile said that he did not know the Plaintiff and the first time he saw him was at Shoprite when he was called to the premises.

Makhuvile said that he did not know the Plaintiff's wife. Later, in cross-examination, the name of the Plaintiff's wife, Julia Sigone, was put to Makhuvile by the Plaintiff's counsel. He said that he did know her and confirmed that she is deceased. He however persisted in his testimony that he did not know the Plaintiff.

[11] The following was Makhuvile's evidence in cross-examination:

He said that he arrested the Plaintiff on a charge of attempted theft.

Neither he nor Mutere searched the Plaintiff and Mokoto at Shoprite. They were searched on arrival at the police station but nothing was found.

Makhuvile denied that the Plaintiff had said to him that he wanted to see the video footage. However, Makhuvile was aware that there was video footage and said that the duty to see this falls on the investigating officer and not himself.

He confirmed that the complainant told him that she had not seen the Plaintiff and Mokoto cut her bag or take her purse. She had relied upon what K had told her.

Makhuvile spoke to K. The young boy said that he saw one of the two persons, that is the Plaintiff and Mokoto, cutting the handbag with a knife but he did not identify which of the two.

Makhuvile's decision to arrest the Plaintiff and Mokoto was based upon what K had said and the fact that the bag was cut. He said that he estimated that K was 15 or 16 years old.

When asked whether he did not consider other methods he could have used other than arrest, Makhuvile said he did not think of another way. He said that the person must be arrested and get a cell number and then be taken to court. He said if a person is not arrested he, Makhuvile, will be acting wrongly. If a person points out a suspect, he said they have to arrest him.

[12] The next witness called by the Defendant was the investigating officer, warrant-officer Mackson Alec Ngobeni (“Ngobeni”). His evidence was to the following effect:

He has been in the South African Police Services for 22 years and has been a warrant-officer for 12 years. He deals with general cases.

He was given the docket in this matter to investigate. He took it to the Protea Court. The Plaintiff was at court having been given bail over the weekend.

There was no statement from a security guard. He also considered that video footage was required.

The prosecutor required a statement from the security guard.

Ngobeni told the Plaintiff that he could get his bail back. The case was not enrolled on the court roll.

Ngobeni tried to get a statement from the security guard but was told by the manager of Shoprite that they do not have records of who the security guard was. He also could not obtain from Shoprite the video footage which he requires, where this exists, when doing this type of work. He said Makhuvile would know that he needed video footage.

After Ngobeni’s testimony, the Defendant closed its case.

[13] It is common cause that on 13 September 2010, the prosecutor decided not to prosecute the Plaintiff and Mokoto. The crime docket was endorsed “nolle prosqui”.

[14] To re-cap -

The Plaintiff was arrested on a report given by K who was not yet 13 years old.

It is not disputed that the Plaintiff asked the security guards and the manager to replay the video footage.

Before arresting the Plaintiff and Mokoto, they were not searched by the police.

On the evidence presented by the Defendant, the security guards did not find a knife or purse on either the Plaintiff or Mokoto. (It will be recalled that the Plaintiff disputes that they were searched by the security guards.)

The police were aware of the fact that there were cameras at Shoprite but decided not to see the video footage, leaving this to the investigating officer.

Despite the protestations of the Plaintiff, they were arrested.

The Plaintiff and Mokoto were hand-cuffed and they had to walk through the mall to the police car.

Makhuvile had not seen the cells on the day in question and could not dispute their condition, save to state that they are cleaned every morning.

Makhuvile left work at 18h00 and he had no personal knowledge as to when the Plaintiff was released.

The records as to when the Plaintiff arrived at Jabulani Police Station were not admissible as no witness was called to prove them.

The Plaintiff's evidence that it was approximately 9 hours from the time he was arrested until the time he was released could not be disputed.

[15] There are four jurisdictional facts for a s.40 (1) (b) defence, namely:

The arrestor must be a peace officer;

The arrestor must entertain a suspicion;

The suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1;

The suspicion must rest on reasonable grounds.²

[16] The first issue to be determined is whether the arresting officers in this case had reasonable grounds for the arrest. It is the Plaintiff's case that the police officers did not have reasonable grounds.

[17] The Plaintiff was arrested without a warrant for "attempted theft". Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.³ The arrestor's grounds must be reasonable from an objective point of view.

[18] There must be evidence that the arresting officer formed a suspicion that is objectively sustainable.⁴

[19] It is the peace officer himself who must form the suspicion. Importantly, if the arrestor acts on information received, it must be sufficient to make a reasonable person believe that the offence has been committed.⁵

[20] From the evidence, Makhuvile appears to hold the opinion that once a complaint is received, he has to effect an arrest and that there is no other way of bringing the suspect before court. Makhuvile hardly spoke to the Plaintiff and Mokoto. He did not search them and did not think that he should see the video footage which could have played a major role in forming the required reasonable suspicion. Makhuvile went so far as to state that he did not talk much to the Plaintiff because the complainant herself was, as he put it, complaining so much.

[21] Even if the security guards had searched the Plaintiff and Mokoto, (which I have already said was denied by the Plaintiff), no knife or implement was found which could have been used to cut the bag. Moreover, one would have expected Makhuvile and Mutere to at least have considered how the alleged offence was committed. All that he was faced with, according to his testimony, was that the complainant's bag had been 'cut' and her purse was missing. Surely this required an explanation. The implication was that somebody unseen had cut open the bottom of her bag – without an explanation as to whether the bag was being carried by the complainant or placed somewhere – with the intention of removing a purse from the bag. What is inexplicable is if the bag was cut at the bottom, why it would be expected that only the purse would fall out or be removed. Also, why was it necessary to cut the bag as opposed to simply opening it? None of this was explained by Makhuvile.

[22] In his heads of argument, the Defendant's counsel submitted that the Plaintiff's testimony was not credible, that he contradicted himself and that his version should therefore be rejected as it is not probable. These are indeed strange submissions

taking into account that there is no indication as to which part of the Plaintiff's testimony was not credible and where he contradicted himself. At no stage did the Defendant's counsel in cross-examination put to the Plaintiff any contradictions in his evidence or suggest to him that he was not telling the truth.⁶

[23] It must be remembered that the young eye witness could not say whether it was the Plaintiff or Mokoto who had taken the purse. The best that Makhuvile could offer was that he was told that they were together. If he was inferring that there was a common purpose, more would have been required to form the necessary reasonable suspicion.

[24] I find that applying the objective test, the arresting officers did not have reasonable grounds to suspect that the Plaintiff had attempted to steal the complainant's purse.

[25] Even if the arresting officers had formed a reasonable suspicion – which I find is not the case – it is still incumbent upon the officers to properly exercise their discretion as to whether or not to arrest the suspects. The question in this case is whether the arresting officers did so.

[26] Once the jurisdictional facts have been established, the discretion whether or not to arrest a suspect arises. As stated in Sekhoto⁷ the officer is not obliged to effect an arrest.⁸ The exercise of the discretion was dealt with in Sekhoto.⁹ Where a discretion has been bona fide exercised, the court will not interfere with the result. There are however circumstances in which interference would be possible and right. As stated in Sekhoto¹⁰ 'if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the court might grant relief'.

- [27] It must however be noted that in *Pharmaceutical Manufacturers Association of SA: In re ex parte application of President of the RSA*¹¹, Chaskalson P held that the Bill of Rights required that the exercise of a discretion must also be objectively rational otherwise it is in effect arbitrary.¹²
- [28] The question which therefore arises is whether the discretion was rational. Perhaps in this case, what should be asked is, was the discretion exercised at all? Makhuville seemed to believe that once there was a complaint, he should effect an arrest. There are other methods of securing the attendance of an accused in court for the purposes of trial, such as summons, written notice and indictment in accordance with the relevant provisions of the Act. It cannot be determined on the evidence whether Makhuville knew that Julia Sigone was the Plaintiff's wife and therefore knew where the Plaintiff lived. But he made no enquiries before arresting him as to where he lived and did not give any reasons as to why he believed the Plaintiff would abscond. There was no evidence that after the Plaintiff and Mokoto were taken to an office at Shoprite there was any attempt to escape. If an accused is not a danger to society, will not fail to stand trial, will not harm others or be harmed by them and may be keen to disprove the allegations against him, an arrest will not be an appropriate way of securing an accused's presence in court.¹³ It must be remembered that the accused tried to prove his innocence by asking for the video footage to be shown but this was not acceded to by the manager. Moreover, Makhuville should have considered whether the sentence likely to be imposed upon a conviction would be in the form of a fine or one other than imprisonment. If this was the likelihood, then he should not have been subjected to pre-trial detention.¹⁴
- [29] The police drove the Plaintiff's car and had details of its registration. He could have shown them where he lived and they could then have released him on warning to appear in court on Monday. There was in any event no reason to detain him until approximately 21h30.
- [30] It seems that the arresting officers simply did not exercise the discretion vested in them, based on the evidence of Makhuville. If any discretion was exercised, then it was not rational.
- [31] I turn now to the question of damages. The approach to the assessment of damages for wrongful arrest was summarized in *Ntshingana v Minister of Safety and Security*¹⁵ as follows:

"The satisfaction in damages to which a plaintiff is entitled falls to be considered on the basis of the extent and nature of the violation of his personality (corpus parma and dignites). As no fixed or sliding scale exists for the computation of such damages, the court is required to make an estimate ex aequo et bono. The authors of Visser and Potgieter's Law of Damages 2nd Edition, 475 have extracted from our case law factors which can play a role in the exercise:

The circumstances under which the deprivation of liberty took place, the presence or absence of improper motive or (malice) on the part of the defendant, the harsh conduct of the defendant, the duration and nature of the confinement of the deprivation of liberty; the status, standing, age

and health of the plaintiff, the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty; the affect of inflation; and the fact that the actual inuriarem also has a punitive function”.

[32] Whilst acknowledging that the facts in different cases are not the same, a comparison of other cases and previous awards is a guide to determining the quantum of damages.

[33] In the Plaintiff’s heads of argument, the following cases were referred to:

Louw v Minister of Safety and Security 2006 (2) SACR 178 (T)

Olivier v Minister of Safety and Security 2009 (3) SA 434 (W)

Van Rensburg v City of Johannesburg 2009 (2) SA 101 (W)

Murrell and another v Minister of Safety and Security ?

Saffli 22 / 2 / 2010 24152/2008 [2010] ZAGPPHC16 ?

[34] The Defendant’s Heads also referred to comparative cases:

Motsei v Minister of Safety and Security 2010 ZAGPPHC 14, 4 March 2010 (unreported)

Minister of Safety and Security; Jonathan Daniel v Johannes Swart 2012 ZASCA 16, 22 March 2012

Areff v Minister of Police 1977 (2) SA 900

Van Rensburg v City of Johannesburg 2009 (2) SA 101

[35] A number of comparative cases were referred to in *Sibiya v The Minister of Safety and Security*¹⁶. In *The Minister of Safety and Security v Seymour*¹⁷, the Plaintiff was unlawfully arrested and imprisoned for a period of 5 days. He was awarded general damages of R500 000.00 by the Johannesburg High Court but on appeal it was reduced to R90 000.00. In *Ngema v The Minister of Police*¹⁸, the Plaintiff was awarded a global amount of R40 000.00 for wrongful arrest and detention for less than 3 hours.

[36] As stated above, the Plaintiff testified concerning his humiliation and embarrassment at not only being arrested but being marched through the mall handcuffed, where people knew him. He said that his reputation has been affected and the whole incident has affected him very badly. He stated that he is involved in cultural activities like dancing and training children. However, he feels that the community no longer has confidence in him and they regard him as a robber. He testified that even at work, the incident has affected him. Sometimes colleagues would make some negative comments towards him. Notwithstanding that some comments were made in jest, work colleagues would utter hurtful words such as ‘we know you are somebody who robs people’s handbags’. It must be pointed out that the Plaintiff was not maltreated by the police and he was not assaulted. He however suffered the

indignity of being arrested, detained and placed in a cell which was in a filthy condition and where he was kept until approximately 21h30.

[37] The Plaintiff's counsel submitted that the award in this matter should be in the sum of R110 00.00.

[38] In my view, taking the cases I have referred to as a guide, an appropriate award is the sum of R80 000.00.

[39] Insofar as costs are concerned, a Plaintiff is required to make an estimate when issuing summons. Although the amount awarded falls within the jurisdiction of the Magistrate's Court, the Plaintiff was in my view entitled to bring this action in the High Court.

ORDER

[40] In the premises I make the following Order:

The Defendant is to pay the Plaintiff: -

The amount of R80 000.00;

Interest on the aforesaid sum of the rate of 15,5% from date of service of the summons to date of payment

Costs of the action.

EPSTEIN AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for Plaintiff – Adv N Adam

Attorney for Plaintiff – Bessinger Attorneys

Counsel for Defendant – Adv TJ Mosenyehi

Attorney for Defendant – The State Attorney

1 The Minister of Safety and Security v Sekhoto & Another 2011 (1) SACR 315 (SCA) at para [7];
Duncan v Minister of Law and Order 1986

(2) SA 805 (A) at 818 G-H.

2 Duncan, supra, at 818 G – H; Sekoto, supra at para [6]

3 R v van Heerden 1958 (3) SA 150 (T); Duncan, supra at 814 D – E: “...the test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion”.

4 Ralekwa v Minister of Safety and Security 2004 (1) SACR 131 (T) para [1]

5 R v Basson 1961 (3) SA 279 (T).

6 President of the RSA v South African Rugby Football Union 2001 (1) SA 1 (CC) at paras [33, 72, 124, 125]

7 Paragraph [28]

8 Groeneveld v Minister of Justice 1973 (3) SA 877 (A) at 883 G – 884 B.

9 Paragraphs [34], [35] and [36].

10 Paragraph [34]

11

[2000] ZACC 1; 2000 (2) SA 674 (CC) at paras 85-86

12 Sekhoto para[36]

13 Le Roux v Minister of Safety and Security 2009 (4) SA 491 (N)

14 S v Moeti 1991 (1) SACR 362 (B) at 463 H.

15 Unreported case no 1639/01, ECD, 14.10.2003

16 2008 JDR0821 (N)

17 2006 (6) SA 320 SCA 67

18 Unreported case no. 05081/2012 (SGHC)

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Prepared on 11 October 2026 · Esheria