

SOUTH AFRICA / JUDGMENT

Qondani v Minister Of Police (76015/2018) [2023] ZAGPPHC 1919 (17 May 2023) [2023] ZAGPPHC 1919

COURT

North Gauteng High Court, Pretoria

BEFORE

Oosthuizen-Senekal

CASE / FILE NUMBER

76015/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 76015/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

17/05/2023

In

the matter between:

JONGIKHAYA

QONDANI PLAINTIFF

and

THE

MINISTER OF POLICE DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

[1] Mr Jongikhaya Qondani, the plaintiff, issued summons against the Minister of Police, the defendant, based on his alleged unlawful

arrest and detention. The defendant filed a plea in terms of which the defendant relied on section 40(1)(b) of the Criminal Procedure

Act, Act 51 of 1977 (“the CPA”), claiming that the arresting officer, Sergeant Khoza (“Khoza”) held a reasonable belief/suspicion that the plaintiff had committed a Schedule 1 offence in order to justify the plaintiff’s arrest and detention.

[2] The matter proceeded on merits only.

[3] The parties agreed that the defendant bore the duty to begin and to justify both the arrest and the detention.

[4] The following facts are common cause between the parties;

1. On Tuesday, 8 December 2015, the plaintiff was arrested on a charge of murder by Sergeant Khoza who at the time, was on official duties in the Ekurhuleni Central area.

2. The arrest of the plaintiff was effected without a warrant.

3. At the time of the arrest, Sergeant Khoza acted within the course and scope of his employment with the South African Police Services

(“SAPS”).

4. The plaintiff was detained until 16 May 2016 when he was released by the. Palmridge Regional Court. He was released on warning and warned to appear on a future date.

5. The plaintiff attended to the Regional Court until 25 January 2018, when the charge of murder was withdrawn against him.

6. Juvenile, also known as Luthando Yanga Fatyela, who was arrested on 28 July 2016, was found guilty of the murder and was sentenced to 12 (twelve) years imprisonment on 25 January 2018.

[5] The main issue for determination in the present matter is whether the arresting officer entertained a reasonable suspicion based on reasonable grounds in order to arrest the plaintiff.

- [6] Counsel provided me with heads of argument before they could address me in argument. I am thankful for the extensive manner in which both counsel dealt with the issues in their heads of argument.

Background

- [7] Mr Msimango, the deceased fate was sealed on the day prior to his murder, namely 5 December 2015. On this day, Mfeseke, the brother of Ms Zandile Gqoshe (“Zandile”), was assaulted and robbed of a tablet by a group of unknown males. The tablet belonged to Zandile.
- [8] On the day of the incident, 6 December 2015, Zandile, Mfeseke and their friends proceeded the yard where the deceased was residing or visiting. On arrival at the yard, inside a house, Mfeseke pointed out the male persons who assaulted and robbed him the previous day. An argument ensued between the two groups, which escalated into a physical altercation during which the deceased was stabbed and as a result died on the scene.

The Defendant’s Case

- [9] The defendant called one witness, Sergeant Khoza.
- [10] Sergeant Khoza testified that he was employed by the SAPS for a period of 14 (fourteen) years and at the time of the incident stationed at Eden Park Police Station.
- [11] He stated that he was the arresting and investigating officer in the murder of Mr Msimango which occurred on Sunday, 6 December 2015 at 1437 Umtholo Crescent, Greenfield. He received the docket (CAS 38/12/2015) on 7 December 2015 from his Commander whereafter he proceeded with investigations in the matter.
- [12] Khoza testified that when he received the case docket, it contained the following sworn statements:
1. A1 - Warrant Officer Beje, who attended to the complaint and was the first police officer who responded to the complaint and to arrive on the crime scene at 1437 Umtholo Crescent, Greenfield.
 2. A3 – Ms Sisethu Siseto Masika (“Siseto”) – an eye witness, who was seated outside her house at the premisses where the incident occurred.
 3. A4 – Mr Mthleli Sidney Majokweni (“Sidney”), an eye witness, who was in the company of his friends, Calvin and Bonile inside his house at 1437 Umtholo Crescent, when a group of people entered his house. After the group of people entered the house, they took out knives and an altercation ensued. During the altercation, he managed to exit the house and he fled the scene.

4. A5 – Mr Calvin Mahale (“Calvin”) – an eye witness, who was with his friends, Bonile and Sidney when a group of people entered Sidney’s house and assaulted them with open hands and empty beer bottles. One of his friends was escorted out of the house, whereafter he managed to ran away.
- [13] After receiving the case docket, Khoza stated that he attended to the crime scene where he interviewed Calvin, a person named Titi as well as members of the community regarding the identity of the perpetrators. He was provided with the plaintiff’s name Tso, who later transpired to be the nickname of the plaintiff.
- [14] Khoza testified that prior to the incident he worked with the Crime Intelligence Unit as well as with registered informers during the course of investigations. During his investigation in the present matter and through various sources, he received information that 5 (five) male persons and a female person were involved in the murder. The names he provided to him by his sources were;
1. Tso (the plaintiff),
 2. Zandile (a lady),
 3. Juvenile, also known as Luthando Yanga Fatyela,
 4. Mavela, and
 5. Bond.
- [15] Khoza stated that prior to the arrest of the plaintiff, he also interviewed Abongile Sgonondo (“Abongile”), a registered informer who provided him with the names of 6 (six) perpetrators and their respective addresses. The names provided by Abongile included the name of the plaintiff.
- [16] On 8 December 2015, Khoza took a witness statement from Nkosinathi Titi (“Titi”), which he filed in the case docket as A8. Subsequent in taking the said statement, he proceeded to the address of the plaintiff where he arrested the plaintiff for murder. At the time of the arrest the plaintiff admitted being present at the crime scene, however, the plaintiff denied his involvement in the attack on the deceased, Mr Msimango.
- [17] Khoza testified that he arrested the plaintiff because he had a reasonable suspicion that the plaintiff was involved in committing the following crimes, assault, attempted murder and murder, which are schedule 1 offences. The said suspicion was based on the information received from informers, Calvin and Warrant Officer Beje.

- [18] The witness stated that following the arrest of the plaintiff, he received an instruction to attend a course in Hammanskraal commencing in January until May 2016. As a result, he never attended court when the plaintiff appeared in court. He also went on leave following the arrest of the plaintiff as he had to rest before attending the course in January 2016. Khoza further testified he did not arrange a formal identity parade in order for the eye witnesses to point out the perpetrators.
- [19] Khoza was unable to provide the court with information regarding the date when the plaintiff was released on warning, he furthermore was unable to provide evidence as to whether the plaintiff was a section 204 witness. He was aware that the charges against the plaintiff were withdrawn on 25 January 2018.

The Plaintiff's Case

- [20] The plaintiff as well as Abongile testified in the matter.
- [21] Abongile testified that on 6 December 2015 he was employed as a security guard at a shop across the yard where the incident occurred. He stated that while on duty he noticed a group of people moving in the direction of the shop, he immediately instructed the shop owner to close the shop because he thought the group of people was on their way to loot the shop.
- [22] While he was standing at the yard, he witnesses the group of people entering the opposite yard, where an altercation ensued with a Mozambican male person ("the deceased"). The deceased was chased by the group of men. However, the deceased failed and was stabbed with a knife by a person named Juvenile. He died on the scene.
- [23] Abongile testified that during the incident, he called the ambulance services, and instructed a person to call the Police. Shortly thereafter, the SAPS arrived on the scene.
- [24] He further stated that during the incident the plaintiff was standing on the opposite side of the road where the incident occurred and the plaintiff was not involved in the attack and stabbing of the deceased.
- [25] The witness told the court that the following day, 7 December 2015, Khoza approached him regarding the incident. He informed Khoza what had transpired and who the perpetrator was. Abongile further testified that he told Khoza he would approach the plaintiff for more information regarding the whereabouts of the perpetrator, because the plaintiff was friends with the perpetrator and he might know where the perpetrator could be located.
- [26] Abongile stated that he was surprised when Khoza phoned him on 8 December 2015 and told him that the plaintiff was arrested for the murder of the deceased. During this discussion he again informed Khoza that the plaintiff was not involved in the attack on the deceased.

[27] The plaintiff testified that on 6 December 2015 at around 16h00, he was in the company of his friends, Zandile, Abongile, Titi and Juvenile. While they were walking on the street, he entered Madolo's tavern to relief himself. As he exited the tavern, he noticed that Calvin and Juvenile were involved in an altercation and fight in another yard. Calvin came running towards him and requested his assistance and to reprimand the person chasing him, Calvin. The plaintiff told Calvin he should rather ran away as

he, the plaintiff could not intervene as he was not involved in the altercation between them.

[28] The plaintiff stated that thereafter he went home. Subsequently, he received a message that Juvenile had stabbed a person and the person has died. He was also informed that Juvenile has left the area after the incident.

[29] The plaintiff testified that on the Monday following the incident, Khoza arrived at his place of residence and enquired about the whereabouts of Juvenile. He informed Khoza that he does not know where Juvenile was and that he, the plaintiff would give Khoza's details to Juvenile in order to phone Khoza.

[30] After Khoza departed, the plaintiff proceeded to the house where Juvenile was renting prior to the incident. The plaintiff provided Khoza's details to Juvenile and he told Juvenile to contact Khoza.

[31] However, on Wednesday, Khoza arrived at his workplace and arrested him on a charge of murder. At the time of his arrest, he was promised that he would be released on bail. He was never release on bail as promised.

[32] Only during May 2016, he was released on warning by the Court, however, prior to his release, Khoza instructed him not to leave the area as his testimony would be required in the matter seeing that Juvenile was arrested for the murder.

The Applicable Law

[33] It is trite that an arrest or detention is prima facie wrongful. It is for the defendant to allege and prove the lawfulness of the arrest or detention.[1]

[34] The CPA, provides for the arrest of any person without a warrant in a number of clearly circumscribed circumstances.

[35] Subsection 40(1)(b) of the CPA reads as follows: -

"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 custody."

[36] The jurisdictional facts for successful reliance on section 40(1)(b) as clearly set out in *Duncan v Minister of Law and Order*[2] are that:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect has committed an offence referred to in Schedule 1; and
- (iv) the suspicion must rest on reasonable grounds.

[37] It was stated in *Minister of Safety and Security and Another v Swart*,^[3] that:

"It is furthermore trite that a reasonableness of suspicion of any arresting officer acting under section 40(1)(b) must be approached

objectively. The question is whether any reasonable person, confronted with the same facts, would form a suspicion that a person

has committed a schedule 1 offence."

[38] In *Mabona and Another v Minister of Law and Order and Others*,^[4] Jones J stated:

"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980

- (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the

need to swear out a warrant, i.e., something which otherwise would be an invasion of private rights and personal liberty. The reasonable

man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[39] It is important to note that the arrestor's grounds for effecting a warrantless arrest, must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.^[5] It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a

court of law.[6]

[40] Musi AJA further stated in *Biyela*(supra):[7]

“[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. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly.[8] Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.”

[41] It is clear, that despite holding that the standard of a reasonable suspicion is “very low” the Supreme Court of Appeal

(“SCA”) in *Biyela* qualifies this by what is stated thereafter. In particular, that the suspicion must be based on “specific and articulable facts or information.” Of course, the ultimate caveat is that whether the suspicion was reasonable is determined objectively “under the prevailing circumstances.”[9]

[42] In *Lefa v Minister of Police and Others*[10], Wanless AJ said the following;

“In this manner, any danger whatsoever of lowering or potentially creating the incorrect perception of our courts lowering, the standard of reasonable suspicion, can and should be avoided. Furthermore, the fundamental principles of individual liberty as entrenched in our Constitution, together with the important responsibility that the police have in protecting that liberty, particularly having regard to the unfortunate history of our country, can continue to receive protection from our courts. At the same time, it is imperative that the police be able to effectively carry out their duties and, in this regard, the proper interpretation of the standard to be applied when considering a lawful arrest in terms of subsection 40(1)(b) of the Act, particularly in that each case should be decided on its own facts, provides a proper balance between the competing interests of individual liberty and the need for the police

to effect often speedy arrests in relation to serious crimes.”

Evaluation and Analysis

[43] In order to decide whether Khoza had a reasonable suspicion that the plaintiff had committed the alleged offence, murder, I find it imperative to refer to the witness statements referred to by Khoza, which seemed to form the basis for the arrest of the plaintiff.

[44] Warrant Officer Beje’s statement (A1) was dated 7 December 2015, 01h00. At paragraph 2 and 3 of the statement Beje stated the following;

“According to the information I got aa group of people came into the yard and they never asked anything but they started to attack everybody some people manage to run away but the deceased failed and he died on the spot. He was lying on the ground in a pool of blood wearing a black and navy stripe T-shirt and a grey pant trouser.

The name of the suspects is(sic) Juvenile, Tso and a girl by the name of Zandile. The suspects are staying in Greenfield, and they are well known by members of the community.”

[my emphasis]

[45] Khoza testified that Beje received the names of the attackers from community members. Furthermore, it was evident from the information received, the perpetrators were well known in the area, and Khoza could have readily established the identities of the perpetrators by arranging an identity parade, either formal or informal. This was not done. Be that as it may.

[46] The second statement referred to by Khoza on which he based a reasonable suspicion to arrest, was that of Siseto (A3). At paragraph 3 and 4 of the statement the following was noted:

“I saw a group of six (6) males and one (01) female entering our yard, they went at the back of our yard at one of the shacks at the back inside our yard. They assaulted everyone who was in the shack, and the people who were inside that shack managed to ran away.

At the very same time they came back they started to assault Timothy, one of them hit Timothy with open hand on the face and Timothy ran away and they chased him around the house and they caught him near the door of the other shack at the back of our house, I sis not see who stabbed him, I saw Timothy falling on the ground and he was still breathing and there was blood coming out from his mouth and there was a pool of blood around him where he felt. Those people they left after they have seen that they have stabbed Timothy. I have never seen those people before but amongst them I can be able to identify about two

(02) of those males if I can see them again and the lady also who was with them I can be able to identify her if I see her again.” [my emphasis]

[47] Once again, the witness, Siseto stated that she would be able to identify at least three (3) of the people in the group attacking the deceased. She did not refer to the perpetrators by name, nor did she describe the perpetrators in her statement. Khoza did not follow up on the information provided by Siseto pertaining specifically to the names and or the description of the perpetrators. He furthermore did not request her to accompany him in order to point out the attackers.

[48] Furthermore, Siseto referred to six (6) males and one (1) female being part of the group entering the yard on the day of the incident. Beje mentioned only three names, Juvenile, Tso and Zandile. Siseto also mentioned that the group of assailants left the yard chasing after the victims that managed to flee, whereafter they returned and attacked the deceased. Khoza did not investigate as to whether the whole group returned or not and who stabbed the deceased.

[49] Sidney deposed of a sworn statement on 7 December 2015 at 00:37, A4, wherein he stated the following:

“While we were busy enjoying our beers(sic) I noticed that a group of five (5) male/blacks together with an unknown black female arrived in the shack we were seated in.

I was seated on top of the bed together with Bonile and Calvin was seated on the couch. After the unknown black males entered into the shack one of them pointed at Calvin and said here its him, both of the unknown black males they took out their knives and I stood up from the bed and went straight to the unknown black male who was stood by the door and he gave me space, I then managed to escape and went to hide myself in the front opposite neighbour.

I closed the burglar door and opened the door so that I could see what is happening at the shack. At the time I saw Bonile running away behind the shacks I then saw one of the unknown black male(sic) running after Bonile but he could never managed to apprehend him. I did never saw the time Bonile was stabbed. I heard after that he felt down at the taxi rank. I saw the time the unknown black males confronted Timothy and one of them stabbed Timothy with a knife.

... After Timothy fell down the unknown black males and female they left the place, they never ran away they were just walking along the street.

In this matter I will be able to identify the suspects when I met them again...”[my emphasis]

[50] It is evident that Sidney was able to identify the perpetrators, in fact he gave descriptions of the assailants, the information was not clarified or followed up by Khoza.

[51] Calvin stated the following in his sworn statement, A5:

“On Sunday 2015-12-06 at about or between 16h00pm and 17h00pm I was inside the shack together with Timothy the deceased and two other

males. The unknown black males in a group of 6 six including an unknown black female arrived and entered into the shack without

saying anything they drawn their knives and started assaulting us with open hands also with empty bottle of beer which it was inside

the shack.

The unknown black males they took one of the person(sic) I was with outside the shack and it is the time I managed to ran away. I did rounded(sic) behind the shack and went to the next street when I saw that there were many people gathered...

In this matter I would like to state that I came across the suspect being the group of six black male six will be able to identify them.” [my emphasis]

[52] Calvin was a crucial witness in the matter. Noteworthy, Khoza did not requested Calvin prior to the arrest of the plaintiff to point out the perpetrators which he described in his sworn statement deposed of shortly after the incident.

[53] Titi stated the following in a statement (A8):

“The guy who assaulted me is not known to me but I can be able to point him out if I see him again. When he assaulted me I was grabbed with the t-shirt by one guy who is tall and thin. I manage to escape from the tall guy they were all assaulting me together with the lady.

... The suspects they are unknown to me I only know one of them who was standing at the door as I ones spoke to him he told me that he also comes from eastern cape Umtata where I come from.

Some of them I can be able to point them if I can see them again.” [my emphasis]

[54] Khoza once more did not confirm the identity of the perpetrator/s describe by Titi. Evident was evident from the averments made in the statement Titi did not know the names of the assailants, but he stated that he would be able to identify the assailants.

[55] The determination of the identity of suspected perpetrators in a criminal case is of decisive importance. Therefore, the collection of information and facts, in order to determine the identity of a perpetrator remains the crux of a criminal investigation and in my view whether or not to effect a arrest without a warrant. A perpetrator can be identified by witnesses by way of descriptions, sketches, identity parades and photo identity parades to mention a few. The witnesses can also accompany the investigating officer immediately after the incident to point out the perpetrator/s. It is the primary task of the investigating officer, in this matter, Khoza, to be certain that the person he arrested was indeed positively identified by witnesses as the perpetrator. At the very least, the investigating officer is required to confirm information relating to identification furnished by witnesses prior to warrantless arrest.

[56] In the present matter Khoza based his suspicion on what he heard from third parties, amongst others informers. Notwithstanding the fact that Siseto, Sidney, Calvin and Titi indicated that they would be able to identify the perpetrator/s even though they were unknown to them. Khoza made no effort to arrange for the witnesses, whom were clearly able and willing, to point out the perpetrator/s involved in the attack on the deceased. Khoza testified that he interviewed Titi shortly before the arrest of the plaintiff, the question remains, why did Titi not accompany him to the address of the plaintiff in order to make a positive identification?

- [57] Following the arrest of the plaintiff, Khoza did not consider the plaintiff's explanation that he was present at the crime scene, but was not involved in the attack on the deceased. The denial of the plaintiff being involved in the attack on the deceased was a clear indication to Khoza that he needed to further consider the identity of the perpetrator/s before the drastic step of arresting the plaintiff was taken. I am of the view that Khoza acted over-hastily and imprudently.
- [58] Khoza did not have personal knowledge of the commission of the alleged offence, he had to rely on statements contained in the docket when deciding whether to arrest or not. And, when he arrested the plaintiff, those statements were incomplete and needed further investigation. The arrest of the plaintiff was therefore effected by a police officer who did not properly comprehend the legal basis for the offence which the plaintiff had allegedly committed and whose knowledge of the factual basis for the arrest was sorely lacking.
- [59] The plaintiff's evidence cannot be criticised. During his testimony in open court, it was evident that the plaintiff struggled to understand questions put to him with the assistance of Ms Sithole, the interpreter. I have to consider this fact when evaluating the quality of his evidence. Overall, the plaintiff made a good impression and I did not get the impression that he fabricated evidence.
- [60] Furthermore, the plaintiff's version was corroborated by Abongile, the informant. It is evident that Abongile had no reason to provide false evidence in the matter. He stated that he had and still has a good relationship with Khoza because he continued to provide Khoza with information. I can find no reason to reject Abongile's evidence as false and unreliable.
- [61] To my mind, the evidence of the plaintiff, save his denial of having committed the offence, is not relevant, the question remains, whether a reasonable suspicion existed justifying his arrest. The information to be taken into account should only be that which was within the knowledge of Khoza, as the arresting officer, immediately prior to the arrest. No information obtained subsequent to the arrest should be considered.
- [62] The enquiry here should be, objectively speaking, what information Khoza had at his disposal when he made the arrest and did that information objectively speaking, empower him to arrest and further detain the plaintiff as he did. In the final analysis the question ought to be, would a reasonable police officer, armed with the same information which was within the knowledge of Khoza, at the time of arrest, have arrested the plaintiff?

Conclusion

- [63] When all the omissions I have alluded to hereinbefore are taken cumulatively, I find that Khoza cannot be said to have entertained a suspicion that rested on reasonable grounds, that justified the arrest of the plaintiff without a warrant. In this matter there is enough evidence pointing to the fact that the suspicion formed by Khoza was improperly formed and my reasons for such finding is based on the following.

- [64] Firstly, Beje was not present when the murder was committed, clearly, he received information from member/s of the community regarding the identity of the perpetrator/s. The information Beje received lacked in detail, Beje made no mention in his sworn statement, which Khoza relied upon, who the community members were that provided him with the name of the plaintiff. Beje further did not state what the plaintiff's involvement was during the attack on the deceased.
- [65] Secondly, Siseto, Sidney, Calvin and Titi, the eye witnesses, did not take the matter any further. It is evident from their sworn statements, that the attackers were unknown to them and they all indicated that they would be able to identify some of them. Khoza never made an attempt to accompany any of the witnesses to positively identify the perpetrators and for that matter the plaintiff.
- [66] Lastly, during Khoza's testimony, he did not testify that he was of the view that the plaintiff was a flight risk and or that the plaintiff would not attend Court. As a matter of fact, it was evident from the evidence presented, the plaintiff resided in the area, he was well known and he was arrested at his workplace. In the circumstances, I am of the view that there was no reason or urgent need for Khoza to arrest the plaintiff without conducting further investigations and obtaining positive evidence relating to the identity of the perpetrator/s.
- [67] Claassen J held as follows in *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino*: [11]

"Deprivation of one's liberty is always a serious matter. The contention is reflected in fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

"(1) Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial".

- [68] It is necessary for the police to have far reaching powers such as in certain circumstances to arrest a person without a warrant. However, the deprivation of liberty is a serious intervention in a person's life and the authority to arrest without a warrant must be exercised with the greatest care. It is important to note that in the present matter, the plaintiff's constitutional rights were violated and Khoza did not analyse and assess the quality of the information at his disposal critically prior in arresting the plaintiff.
- [69] I am satisfied that on the evidence before me, the decision by Khoza to arrest the plaintiff was made arbitrarily and/or premised on irrational reasoning.
- [70] It therefore follows that the defendant failed to satisfy this Court that his suspicion was reasonable when he decided to arrest the plaintiff. A reasonable police officer would have critically assessed the information of the witnesses professing to be eye-witnesses to the murder of Mr Msimango, and he would have analysed the quality of the information at his

disposal critically. He should not have acted as he did, he acting impulsively and without sufficient reason in arresting the plaintiff on the flimsy identification evidence at his disposal at the time of the arrest.

[71] . The above renders the plaintiff's detention unlawful.

[72] The situation is compounded further by the impassive way in which Khoza attended to the plight of the plaintiff following his arrest, he did not attend the first appearance of the plaintiff in court or the subsequent appearance. Furthermore, he ignored or neglected the state prosecutor's instruction to arrange a formal identity parade, in fact he went on leave shortly after the arrest of the plaintiff whereafter he attended a course until June 2016. The plaintiff was detained for nearly 6 (six) months, notwithstanding that the names of the assailants being available and eye witnesses being prepared and able to point the perpetrator/s out. I find that it would have been the prudent and/or rational thing to. Do and to there and then arrange a formal identity parade to support the fact that the plaintiff was indeed involved in the murder of Mr Msimango.

[73] I need to address the quality of the statements referred to in the present matter. All the statements are illegible and difficult to read. In my view, the quality thereof, could have negatively impacted on the dispensing of justice. During his testimony, Khoza was unable to read parts of the statements referred to by counsel during cross examination. One would expect that in a serious matter such as the present, care would be taken by officials to clearly and correctly record witnesses' recollections of what transpired during the commissioning of a crime.

[74] In conclusion, from the totality of the evidence before me, even from the defendant's version alone, the arresting officer, Sergeant Khoza, did not stay within the bounds of rationality when he exercised the discretion to arrest the plaintiff. An informer,

Abongile, told him that the person he arrested was not one of the men who accosted and murdered the deceased on 6 December 2015.

Furthermore, Sergeant Khoza chose to ignore this information contained in the witness statements that the perpetrators could be

identified by various available state witnesses. In my view Khoza did not exercise his discretion to arrest the plaintiff in the

circumstances of the facts place before me properly.

Costs

[75] The plaintiff seeks costs of the action as he is successful on liability. I find no reason why the costs should not follow the event and thus the plaintiff is entitled to costs of suit.

Order

[76] As a result, I make the following order:

1. The issues of merits and quantum are separated;
2. The plaintiff's arrest and detention of 8 December 2015 until 16 May 2016 were unlawful;
3. The defendant is liable for the plaintiff's agreed or proven damages suffered as a result of his arrest and detention from 8 December 2015 until 16 May 2016;
4. The defendant is to pay the plaintiff's costs regarding the claim relating to the plaintiff's unlawful arrest and detention;
5. The issue of quantum is postponed sine die.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to Case Lines and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 17 May 2023.

DATE OF HEARING: 2, 3 & 10 May 2023

DATE JUDGMENT DELIVERED: 17 May 2023

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[1] Lombo v African National Congress 2002

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- (5) SA 668 (SCA).
- [2] 1986
- (2) SA 805 (A) at 81BG-H.
- [3] 2012
- (2) SACR 266 (SCA).
- [4] 1988
- (2) SA 654 (SE) at 658E-H.
- [5] 1993
- (1) SACR 434 (TPD).
- [6] *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022) para [33].
- [7] *Ibid* footnote 6.
- [8] *Groenewald v Minister van Justisie* 1973
- (3) SA 877 (A) at 883G
- [9] *Lifa v Minister of Police and Others* (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) (17 October 2022) para [61].
- [10] *Ibid* 9 para [62].
- [11] 2000
- (4) SA 68 (WLD) at 86D.
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