

SOUTH AFRICA / JUDGMENT

Tomodi v Minister Of Police (2351/19) [2023] ZANWHC 16 (9 February 2023)

[2023] ZANWHC 16**COURT**

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

2351/19

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****Reportable:**NO
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CASE
NO: 2351/19
In**the matter between:**DAVID
TOMODI
PLAINTIFF
AND
MINISTER
OF POLICE
DEFENDANT
DATE
OF HEARING
09 NOVEMBER 2022
DATE
OF JUDGMENT 09 FEBRUARY 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for the hand- down is deemed to be 14h00 on the 09 FEBRUARY 2023.

ORDER
Order
The

following orders are made: (i)
The defendant is 100% liable for all agreed and or proven damages of the plaintiff.
(ii)
The quantum proceedings are postponed to date to be determined by the Office of the Registrar in conjunction with the Office of the Judge President.
(iii)
The defendant is ordered to pay the costs of the suit on a party and party basis on the High Court scale.

JUDGMENT

Reddy AJ

Introduction

- [1] This is delictual action against the Minister of Police. The cause of action arises from the warrantless arrest of the plaintiff Mr David Tomodi on 10 January 2019, by members of the defendant acting vicariously and the subsequent detention until his release on 14 January 2019. The charges against the plaintiff were ultimately withdrawn on 27 March 2019. The plaintiff contends that his arrest and resultant detention was unlawful and seeks payment of the amount of R500-000-00 as compensation for general damages.
- [2] The defendant, in an amended plea countered that the arrest was lawful pursuant to the application of section 40(1) (b) of the Criminal Procedure Act ("the CPA"). In addition, the defendant pleads that the plaintiff was arrested as he continued to threaten the complainant in the presence of the police when he allegedly uttered the words "that he is not finished he is going to continue damaging the property."
- [3] The issues of merits and quantum were separated by order of court in terms of Rule 33(4) of the Uniform Rules of Court on 26 January 2021. In the premises, it was only the question of merits that fell for adjudication.

Background

Facts

[4] On 10 January 2019, at about 20h50 a complaint was received regarding an allegation that a crime of malicious damage to property had been committed. Police officers, Sergeant Mogotsi (Mogotsi) and Constable Mohapi (Mohapi) attended the complaint at Morwatsidi, Huhudi, Vryburg. At the scene the complainant identified as Gloria Kegomoditswe Nkobeng (Nkobeng) made a report regarding the conduct of her neighbour the plaintiff. Nkobeng, however did not testify. Mogotsi spoke of two pangas that were found at the scene and of an averment that the mother of Nkobeng was in some way chased by the plaintiff. The scene was inspected and it was confirmed that windows at the property belonging to Nkobeng had been damaged. Nkobeng indicated a desire to register a criminal charge against the plaintiff, who was identified as the perpetrator. Mogotsi averred that the plaintiff was aggressive and did not show the police officers any respect, neither was the plaintiff remorseful. The plaintiff commented that in the presence of the police officers "he is not done with complainant".

[5] From the evidence of Mogotsi, it appears a Warrant Officer Sibi (Sibi) registered the case docket against the plaintiff at the South African Police Services, Huhudi. This followed Nkobeng having made a written statement commencing the investigation process. Once the case docket was registered the police officers returned to the scene where

the plaintiff was arrested. Mogotsi was emphatic in his evidence that he arrested the plaintiff. It appears after the arrest of the plaintiff, the plaintiff reported that Nkobeng had poured hot water at the plaintiff's person. Mogotsi enquired where on the plaintiff's person was the hot water poured. The plaintiff pointed to the affected area.

[6] According to Mogotsi the plaintiff was taken to Pudimoe Clinic as a result of the injuries which the plaintiff sustained. At the clinic, after recording of personal information the plaintiff was treated. Selective constitutional rights were explained to the plaintiff. The plaintiff was transported back to Huhudi Police Station where he was

detained. The basis for the arrest according to Mogotsi was that Nkobeng had pointed out the damages to the windows as well as the plaintiff.

[7] Mohapi the corroborating witness painted a factually different picture of the events leading to the plaintiff's arrest. On his version, on arrival at the scene in the company of Mogotsi, a report was made by Nkobeng that the plaintiff had chased Nkobeng's sister and her sister had to flee to a neighbour's yard to seek refuge. When the plaintiff was confronted about this conduct, the plaintiff placed a panga on the neck of Nkobeng. Mogotsi's evidence was silent on the latter. The plaintiff who was pointed out, was aggressive uttering that he was not done with breaking the windows, he is going to do "something". Nkobeng indicated that she poured hot water on the plaintiff to protect herself. Nkobeng wanted to register a criminal case against the plaintiff. The plaintiff was ferried to the South African Police Services,

Huhudi where a criminal case was registered. The police officers returned to the scene where the plaintiff was arrested.

- [8] Mohapi noticed that the plaintiff was injured and followed protocol dealing with injured arrestees. Both police officers confirm the plaintiff received treatment for his injury. The evidence of the police officers regarding the treatment of the plaintiff as to when, where and what treatment he received is at best incongruous. This was particularly evident when they were confronted with irrefutable documentary evidence that the plaintiff was not taken for treatment.
- [9] The collective evidence of the police officers are individually destructive and mutually contradictory. An elementary aspect as to which of the two police officers effected the arrest became blurred when Mohapi insisted that he effected the arrest of the plaintiff. This was exacerbated with a suggestion that both police officers executed a collective arrest of the plaintiff. After much probing of Mohapi, however, it became apparent that Mogotsi in fact effected the arrest. Mogotsi arrested the plaintiff on allegations of malicious damage to property and crimen inuria.

The Law

- [10] It is trite that any arrest, is prima facie unlawful. In our law the arrestor has to justify that the arrest is lawful. In *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 818 E-F Rabie CJ stated as follows:

"An arrest constitutes an interference with the liberty of an 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."

- [11] In *Minister of Justice v Hofmeyr* 1993(3) SA 131 (A) at 153 D-E it was stated that:

"The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are prima facie illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds for justification of the infraction."

- [12] In *Zealand v Minister of Justice and Constitutional Development* 2008(6) BCLR 601(CC) at paragraph

- [25] Langa CJ stated as follows:

"This is not something new in our law. it has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba* the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any

significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy. The simple averment of the plaintiffs ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.

[13] In *Duncan v Minister of Law* 1986 (2) SA 805 (A) Van Heerden JA set out the jurisdictional requirements that must be established for a successful defence under section 40(1)

(b) of the CPA:

(i) The arrestor must be a peace officer;

(ii) The arrestor must entertain a suspicion;

(iii) The suspicion must be that the arrestee committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody; and

(iv) The suspicion must rest on reasonable grounds

[14] With reference to the jurisdictional requirements as evinced in section 40 (1) (b) of the CPA, the following was stated in *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 367(SCA) :

"As was held *Duncan v Minister of Law and Order*, the jurisdictional facts for section 40(1) (b) defence 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 (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

Discussion

[15] It was common cause that both Mogotsi and Mohapi are police officers, who fall within the definition of peace officer. It is trite that the defendant bears the onus of establishing the lawfulness of arrest and subsequent detention of the plaintiff on a preponderance of probabilities. Confusion reigned in the case of the defendant as who of these two police officers arrested the plaintiff. Each claimed to have arrested the plaintiff. Mogotsi contended that he arrested the plaintiff, whilst Mohapi claimed it was him. Mohapi even went as far as suggesting that there had been a collective arrest.

[16] The identification of the arrestor is crucial to the determination of the jurisdictional requirements essential to justify the infringement of the plaintiffs liberty. The importance lies in the fact that the arrestor must comply with the salutary jurisdictional requirements of section 40(1) (b) of the CPA. Notwithstanding this material contradiction, the evidence as a whole demonstrates overwhelming on the probabilities that Mogotsi was the arresting

officer. An assessment of Mogotsi's evidence will therefore be determinative in finding whether the jurisdictional grounds in section 40(1) (b) of the CPA had been met.

[17] According to Mogotsi, the arrest was based on two cardinal grounds: the plaintiff had been pointed out by Nkobeng and he saw the damages. The two grounds at face value would be wholly inadequate to pass the muster of the jurisdictional grounds set out in section 40(1) (b) of the CPA.

[18] Advocate Maree for the plaintiff vigorously opposed the introduction of hearsay evidence in the overall conspectus of the defendant's case. In *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36, Musi AJA stated as follows in respect of inadmissible hearsay forming the basis of a reasonable suspicion by a police officer :

"[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. 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.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[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. 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.

[37]

"[38] I, therefore agree, with the majority's characterisation of the issues and its conclusion that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence regardless of whether that evidence is later found to be admissible or not. Further, I agree with the conclusion that the court of first instance erred in its conclusion that the police officers could not form a reasonable suspicion because such suspicion was based on inadmissible hearsay." (My underlining)

[19] It is so that Mogotsi entertained a suspicion that the plaintiff committed an offence referred to in Schedule 1 of the CPA. Malicious damage to property is a Schedule. 1 offence.

- [20] It is in respect of the final jurisdictional hurdle is where the defendant's case unravels. In terms of this jurisdictional requirement the question is whether Mogotsi reasonably suspected that the plaintiff had committed an offence within the ambit of section 40(1) (b) of the CPA. This is a question which is objectively justiciable. (See *Minister of Law and Order and Others v Hurley and Another* 1986(3) SA 568(A) at 579H)
- [21] In the matter of *R v Van Heerden* 1958 (3) SA 150 T, Galgut AJ (as he then was) stated that "these words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have suspicion. " This principle was followed in the matter of *Duncan v Minister of Law and Order* [1986] ZASCA 24; [1986] 2 All SA 241.
- [22] In *Mabona v Minister of Law and Order and Others* 1988(2) SA 654 E at 685 E-F, the following was stated as regards reasonable grounds for justifying an arrest:

"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 goods 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. 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. " (My underlining)

- [23] In the matter of *Louw v Minister of Safety and Security* 2006 (2) C SACR178 (T) at 186a — 187e, Bertelsmann J said the following:

"I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 Of 1977 has allegedly been committed, and even if the arresting officers believe that on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.

[24] The collective evidence of the defendants witnesses were of an unconvincing tenure. In the assessment of the evidence it proved an extremely difficult task to formulate a proper mosaic of proof on which the reasonable suspicion of Mogotsi was founded. Given the two grounds that Mogotsi relied on to effect the arrest, he could not have formed a reasonable suspicion. In addition, the defendant's witnesses evidence were littered with improbabilities coupled with a penchant for intentionally concealing material facts from ventilation. This stance would have no doubted effected the bona fides of a reasonable suspicion, assuming such existed. This is illustrated by way of the following:

(i) Mogotsi's evidence does not address the pertinent statutory jurisdictional requirement as regards the basis for him having formed a reasonable suspicion. It is undeniably that the plaintiff was arrested at his place of residence. There were a number of competing interests that necessitated further investigation when the police officers arrived at the scene. At some point when Sibi was present, the police officers would probably totalled three. With this policing experience, individually or collectively, none of the police officers sought to investigate the precise chronology of what had led to the breaking of Nkobeng's windows. It was apparent that the police officers were oblivious to this or simply did not have the will to investigate. On the arrival at the scene a report was made regarding the conduct of the plaintiff. None of the allegations that were made were even afforded a cursory investigation. The case for the defendant is that the police officers returned to the scene. Notwithstanding, the benefit of having read the written statement of Nkobeng and the benefit of hindsight none of the averments made by Nkobeng were investigated before the arrest of the plaintiff.

(ii) It is undisputable that boiling water was thrown at the plaintiff. This fact as per the case for the defendant was mentioned on the scene and in a written statement made later that evening by Nkobeng. Neither Nkobeng's sister nor any other witnesses were interviewed, even just superficially, to at least verify the veracity of Nkobeng's allegations. This would not have proved to be a cumbersome exercise considering that all the individuals mentioned would probably have been confined to the same location.

(iii) According to Mogotsi, after, the plaintiff was apprehended he was taken directly to Pudimoe Clinic. Mogotsi subsequently tailored his evidence to the effect that the plaintiff was first taken to the Police Station at Huhudi. Mogotsi rather awkwardly attempted to provide a plausible explanation for the decision to transport the plaintiff to Pudimoe Clinic, Vryburg which was estimated to be between 50-60 kilometres away, rather than seeking medical intervention at a clinic in Huhudi, a stone's throw away from the

physical arrest of the plaintiff.

(iv) To down play the injuries of the plaintiff and the inexplicable conduct of the defendants' witnesses as regarding securing medical treatment for the plaintiff, Mogotsi sought unsuccessfully to hide behind his averment that the injuries of the plaintiff was not clearly visible. On being presented with photographic evidence of the plaintiff's injuries, Mogotsi made a number of concessions which expose the absence of bona fides. Firstly, it was conceded that the

act of having boiling water thrown at one's person or poured over one's person would result in grievous bodily harm. Secondly, the injuries of the plaintiff were prima facie serious. Thirdly, given this background, Mogotsi chose not to proffer any explanation for the inhumane decision to transport the plaintiff approximately 50-60 kilometres away to seek medical attention. Mogotsi's silence was clearly brought about by his inability to defend a glaringly malicious decision.

(v) The decision, so it was reasoned, to travel with the plaintiff to Pudimoe Police Station was for administrative purposes to book the plaintiff in at Pudimoe Police Station. Mogotsi intentionally did not disclose that after the arrest of the plaintiff, they proceeded to the Police Station at Huhudi, where at the administrative details required of the plaintiff could have been completed. It was disingenuous to submit such an explanation which was out of kilter with the facts.

(vi) It appears that the allegations of Nkobeng was blindly accepted. The plaintiff's injury did not even warrant consideration. The probabilities suggest that in the police officers opinion, the plaintiff was disrespectful and did not apologize. It is expected of a reasonable peace officer to analyse and weigh the quality of the information available critically and only thereafter, and having checked what can be checked, to form a reasonable suspicion that will justify the arrest. Mogotsi's reasonable suspicion was probably influenced by what he perceived to be the disrespectful conduct directed at the police officers by the plaintiff coupled with the plaintiff's lack of remorse. The want of an apology by Mogotsi is enigmatic. The evidence of both police officers do not address what was the purpose of the apology and who was to be the recipient of this apology.

[25] Given the meagre facts on his own account, Mogotsi could not have entertained a reasonable suspicion that the plaintiff had committed an offence prescribed in Schedule 1 of the CPA. The decision to arrest the plaintiff was not based on "specific and articulable facts and information." There was no credible or trustworthy information on which Mogotsi could have formulated a reasonable suspicion. The secondary allegation of crimen inuria and the plaintiff's alleged threat as per the defendant's plea "that he was not finished he is going to continue damaging the property" does not avail the defendant.

[26] In *Raduvha v Minister of Safety and Security and Another* 2016 (2) SACR 540(CC), the Constitutional Court held as follows:

" [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 offences specified therein. In its ordinary and grammatical use, the word "may" suggests that the 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 based enquiry. As 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 and 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."

"[44] In other words the courts should enquire whether in effecting an 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 section 40(1) must be exercised "in light of the Bill of Rights"

[27] In Minister of Safety and Security v Sekhoto and Another, supra, the SCA had the following to say regarding the rationality of an arrest under section 40(1) (b) of the CPA:

[38]it remains a general requirement that any discretion must be exercised in good faith, rationality and not arbitrarily.

[39] This would mean that peace officers are entitled to exercise as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because the officer exercises a discretion in a manner other than deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum judged from the vantage of hindsight- so long as the discretion is exercised within this range, the standard is not breached."

[28] It is clear that no reasonable suspicion existed for Mogotsi to have arrested the plaintiff. Mogotsi did not exercise his discretion to arrest rationally and in good faith. The defendant therefore failed to justify the arrest of the plaintiff within the four corners of the jurisdictional requirements. The arrest and detention of the plaintiff was accordingly unlawful.

[29] Resultantly, the following orders are made:

- (i) The defendant is 100% liable for all agreed and or proven damages of the plaintiff.
- (ii) The quantum proceedings are postponed to a date to be determined by the Office of the Registrar in conjunction with the Office of the Judge President.
- (iii) The defendant is ordered to pay the costs of the suit on a party and party basis on the High Court scale.

A REDDY

ACTING JUDGE OF THE HIGH

COURT OF SOUTH AFRICA

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Date of Judgment: 09 February 2023

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