

SOUTH AFRICA / JUDGMENT

Tshangela v Minister of Police (31264/20171) [2022] ZAGPPHC 719 (21 September 2022)

[2022] ZAGPPHC 719

COURT

North Gauteng High Court, Pretoria

BEFORE

Mncube

CASE / FILE NUMBER

31264/20171

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IN

THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE

NUMBER: 31264/20171

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

DATE:

21/09/2022

In

the matter between:

ANDILE

VUSUMUZI TSHANGELA PLAINTIFF

and

MINISTER

OF POLICE DEFENDANT

SUMMARY:

Delict- Unlawful arrest and detention- Plaintiff instituted action against the Defendant for damages suffered for unlawful arrest, detention and assault while in the cells- Whether Plaintiff was assaulted while inside the holding cells at the Magistrate's Court Mmabatho- Whether arresting officer exercised the discretion reasonably.

ORDER

Held:	Judgment granted in favour of the plaintiff on merits for unlawful arrest, detention and assault.
Held:	Determination of quantum is postponed sine die.
Held:	Defendant is ordered to pay costs on party and party scale. This judgment was handed down to the parties' representatives by email.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

- [1] The plaintiff Mr Tshangela instituted action for damages in the sum of R150 000(one hundred and fifty thousand rand) against the defendant based on vicarious liability for unlawful arrest and detention as well as assault. The plaintiff claims for assault he allegedly suffered at the hands of fellow detainees at the holding cells of the Magistrate's Court Mmabatho following his detention.
- [2] By agreement between the parties, merits were separated from quantum in terms of Rule 33(4) of the Uniform Rules of Court and the trial proceeded on merits.
- [3] The issues for determination are the lawfulness of the arrest and detention as well as assault. The court is enjoined to examine whether the arresting officer exercised his discretion reasonably and to determine whether the plaintiff was assaulted while he was detained in the holding cells. The issue of arrest has raised a legal argument whether the offence that gave rise to the arrest resorts under Schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA). I deem it appropriate to give a brief background of the matter.

BRIEF

BACKGROUND:

- [4] The arrest of the plaintiff was precipitated by an incident of 6 November 2016 where a young girl was knocked by a motor vehicle driven by the plaintiff. The victim sustained a broken leg. The victim and some eye witnesses filed statements detailing how the accident took place. A case of hit and run was opened at Mahikeng Police Station. Constable Komane Jimmy Mnisi was assigned as the investigating officer of the case. The plaintiff was arrested on 14 November 2016 by Constable Mnisi and taken to Mmabatho Magistrate's court where he was released on bail. Constable Mnisi justifies the arrest by relying on the hit and run case and the discretion compounded by section 40(1) (b) of the CPA. The detention of the plaintiff at the police station is disputed.

DUTY TO BEGIN:

- [5] It is common cause that the plaintiff was arrested by Constable Mnisi, a police officer who was on duty at the time. It is trite law that the onus is on the defendant to justify the lawfulness of the arrest and detention thus assumes the duty to begin. The arresting officer Constable Mnisi testified on behalf of the defendant.

DEFENDANT'S CASE:

- [6] Constable Mnisi was on duty on the 14 November 2016 at Mahikeng Police Station. On that day the plaintiff presented himself at the police station in company of his legal representative after he learnt that the police were looking for him. The plaintiff was arrested for hit and run case immediately he identified himself. He informed the

plaintiff of his legal rights and obtained a warning statement from him. He denies that the plaintiff was detained and maintains the plaintiff was taken immediately to court. He maintains that he had reasonable grounds to arrest the plaintiff on the basis of the seriousness of the charge and for the plaintiff's failure to adhere to driver's duties after an accident. In cross examination Constable Mnisi states that the plaintiff was kept at the reception area at the police station. He concedes that the plaintiff was not free to leave but denies that the plaintiff was detained in the holding cells.

- [7] Under cross examination Constable Mnisi could not recall whether the plaintiff came to see him on a previous Friday preceding the day of the arrest. When confronted with the statements by three of the witnesses who stated that the driver of the car stopped after the accident, he concedes that he was aware. He further concedes that of all the eye witnesses' statements, only one witness who was not present at the scene alleged that the driver did not stop. When asked why the plaintiff was not warned for court appearance rather than an arrest, Mnisi explains that his view was that the decision to release the plaintiff belonged to the court. It was put to Mnisi that he was influenced by the family of the victim to arrest the plaintiff, this he denies. Mnisi further denies that he failed to exercise his discretion reasonably. Mnisi concedes that at the time he arrested the plaintiff he was well aware of the various witnesses' statements. He maintains that the explanation given by the plaintiff on the warning statement that he left the accident scene after feeling threatened was not reasonable. With that the Defendant's case was closed.

PLAINTIFF'S CASE:

- [8] The plaintiff testified that on 6th November 2016 he was a driver of a motor vehicle which was involved in an accident. A young girl who was allegedly walking in the middle of the road was hit by the car's

right side mirror. At the time he was in company of a female friend. Upon realising that he had bumped a child, he stopped the car and reversed it. At the scene of the accident he attempted to assist the child who was screaming with pain. The screaming caused the community to come to the accident scene. A relative of the victim refused the plaintiff's help to take the child to hospital.

The community hurled insults at the plaintiff, pushed him around and threatened to smash the car which made him feel threatened so he drove off. He drove home in shock and related the incident to his wife. The following day in the company of his wife he reported the accident at Mahikeng Police Station and spoke to police officers Molebatsi and Pheto.

[9] The police officers required the name of the victim. On seeing that he did not have details of the victim, he and his wife drove to the hospital. At the hospital they met the victim and her father and he extended apologies to them. After obtaining the victim's details they drove back to the police station. They found that the officers who assisted them earlier were not available. They waited for the officers until 24h00. The officers eventually arrived and he provided the details of the victim. The police officers, plaintiff and his wife all drove back to the scene of the accident for

investigations. The following day he received a short message service (sms) giving him the details of the reported case.

[10] On the 9th November 2016 he consulted with an attorney Mr Coetzer and informed him about the accident. Mr Coetzer contacted the investigating officer and arranged a meeting which was set up for the 11th November 2016 meeting took place. During the meeting of the 11th November Mr Coetzer requested the investigating officer to warn the plaintiff for court. An arrangement was made for the plaintiff to report at the detectives' branch offices on the 14th November

2016. When he reported at the detectives' branch offices on the arranged day he was arrested. He was placed inside the holding cells at the police station. He was made to sign documents. Later that morning around 8h45 he was transported to the court and placed inside

the holding cells. It was while he was inside the court holding cells in full view of the court orderlies that he was assaulted by fellow detainees who slapped him and manhandled him. The court orderlies did not intervene during the assault. At 11h20 he was called into court where he met his legal representative Mr Coetzer. Bail was granted and he was released. He explains that the reason he did not report the assault was because he felt helpless and thought that reporting would amount to nothing.

[11] Mr Coetzer testified that the first time he met the plaintiff was on the 9th November 2016 during a consultation. The plaintiff was seeking legal advice for injuring a young girl with the side mirror of the car. The plaintiff provided the number of the investigating officer Constable Mnisi. He telephonically contacted Constable Mnisi to make arrangements to meet. On 11th November 2016 he took the plaintiff to see Mr Mnisi who required a warning statement from the plaintiff. He helped to draft the warning statement on behalf of the plaintiff. He requested Constable Mnisi not to arrest but to warn the plaintiff who refused. Constable Mnisi instructed the plaintiff to report at the detectives' branch offices on the 14th November

2016. On the 14th November 2016 Mr Coetzer appeared in court. He went to the court's holding cells. After he was granted permission to speak to the plaintiff, he had a brief consultation with him. The plaintiff was eventually released on bail. The plaintiff did not disclose to him that he was assaulted. It was only during July 2022 during consultation with counsel that the plaintiff disclosed that he

was assaulted. Mr Coetzer was not cross examined. With that the plaintiff's case was closed.

APPLICABLE LEGAL PRINCIPLES:

[12] The plaintiff's claim invokes vicarious liability on the part of the defendant. Vicarious liability holds an employer liable for delicts committed by its employee where the employee is acting in the course and scope of the employment. The requirements for vicarious liability are threefold- there must be an employment relationship, there must be a commission of a delict and the delict must have been committed within the scope of employment. See *Mkize v Martens* 1914 AD 382 at 390. It is now settled that the common law doctrine of vicarious liability has been developed to reflect the spirit, purport and objects of the Constitution and has to be applied within the normative framework of the Constitution. See *K v Minister of Safety and Security* 2005(6) SA 419(CC) para [23].

[13] As stated supra Constable Mnisi relies on the provisions of Section 40 (1) of the CPA). This section confers on peace officers extraordinary powers to arrest. In order to escape liability for wrongful arrest and detention, a peace officer effecting an arrest without a warrant must fall squarely within the provisions of section 40(1). It provides that "(1) A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

[14] In all circumstances where there is an infringement of personal rights and freedoms by the exercise of state power, such must still be judged in accordance to the principle of legality using the Constitution as the yardstick.[1] An arrest is prima facie unlawful unless there are grounds for justification. In *Minister of Law and Order v Hurley* 1986 (3) SA 586 (A) at 589E- F Rabie CJ stated 'an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law'.

[15] A peace officer exercises discretion whether to arrest or not. There are four jurisdictional factors that must be satisfied before discretion to arrest arises. See *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para [28]. The jurisdictional factors are –

- (i) the arrestor must be a peace officer;

- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect (the arrestee) committed a Schedule 1 offence;
- (iv) The suspicion must rest on reasonable grounds.

[16] The purpose of an arrest is to bring a suspect before the court and an arrest will be unlawful if the arresting officer either fails to exercise the discretion or exercises the discretion for a purpose not contemplated by law. Simply put, once the jurisdictional factors are present and the discretion arises, the peace officer has to exercise such discretion rationally and not arbitrarily. See *Minister of Police v Claasen* [2020] ZAECGHC 115 para [16].

[17] When harm is a violation of a personality interest in a form of the deprivation of liberty, the delictual claim falls under *actio iniuriarum*. In order to succeed in a claim for *actio iniuriarum* the plaintiff must prove the following requirements[2]-

- [1] That his liberty has been interfered with;
- [2] That the interference occurred intentionally in depriving his liberty;
- [3] The deprivation of liberty must be wrongful while the onus is on the defendant to justify the deprivation;
- [4] That the conduct of the defendant must have caused both legally and factually the harm for which compensation is sought.

It is recognised that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivation. See *In Zealand v Minister of Justice and Constitutional Development and Another* 2008(2) SACR 1 (CC) para [33]

[18] In *Mabona v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) it was held

‘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’

[19] It is trite that suspicion must be based on reasonable grounds. The reasonable suspicion arises after the assessment of the information critically. This includes investigate exculpatory explanations offered by a suspect before forming a reasonable suspicion for the purpose of a lawful arrest. See *Louw and Another v Minister of Safety and Security and Others* 2006(2) SACR 178 (T) at 183J- 184D.

EVALUATION:

- [20] In these proceedings, the plaintiff gave evidence regarding the deprivation of his liberty as being intentional and unlawful which caused him harm. The arrest and detention of the plaintiff is common cause. The defendant bears the onus to justify the lawfulness of the arrest on the balance of probabilities. See *Pillay v Krishna* 1946 AD 946 952- 953. The defendant is relying on the evidence of Constable Mnisi to prove the four jurisdictional factors as well as the reasonableness of the exercise of discretion to arrest. By virtue of his office, Mr Mnisi at the time of the arrest was a peace officer. The jurisdictional factor that the arrestor must be a peace officer is not in issue.
- [21] The rest of the jurisdictional factors to be considered are that the arrestor must entertain a suspicion and the suspicion must be that the suspect committed a schedule 1 offence and the suspicion must be on reasonable grounds. The evidence clearly shows that Constable Mnisi relied upon the statements in the docket of the witnesses for the accident of the 6th November 2016. The issues are whether Constable Mnisi entertained a suspicion that the plaintiff committed Schedule 1 offence which suspicion must rest on reasonable grounds. If the jurisdictional factors are present, then the discretion arises. Simply put, did Mr Mnisi entertain reasonable suspicion that the plaintiff committed a Schedule 1 offence? This brings about the question how does reasonable suspicion arise?
- [22] The question is whether Constable Mnisi operated under reasonable suspicion. To my mind reasonable suspicion calls for the assessment of information to be done in a balanced manner with sound reasoning.
- [23] Constable Mnisi maintains that he exercised his discretion reasonably in accordance with section 40
- (1) (b) of the CPA. Whether the suspicion of the person who effects an arrest is reasonable or not must be approached objectively. The circumstances giving rise to the suspicion must be such that a reasonable person would form a suspicion. See *Mxolisi Mananga and Others v Minister of Police* 2021(2) SACR 225 (SCA) para [20]. Constable Mnisi was required to have regard to the facts at his disposal and to satisfy himself of the merits of the allegations. By his own concession, there were three witnesses statement that clearly indicated that the plaintiff had stopped the car as opposed to the one statement which alleged that he did not stop.
- [24] When Constable Mnisi was questioned about the rationale for believing the one witness who alleged that the plaintiff failed to stop his car, he explained that the plaintiff failed to adhere to the duties of a driver. This reasoning is with respect unreasonable simply because the plaintiff in his warning statement had explained the prevailing circumstances at the accident scene. I find it unreasonable for Constable Mnisi to apportion blame on the plaintiff when he alleged that he felt threatened. It appears to me that Constable Mnisi failed to consider holistically all the facts and the circumstances at the time. There is no evidence that the plaintiff's defence that he felt threatened was even investigated by Constable Mnisi. This is not surprising considering that Constable Mnisi regarded the allegations levelled

against the plaintiff as 'serious'.

He further considered the plaintiff's conduct as falling short of the standard required of a driver after an accident. It is clear that Constable Mnisi failed to regard and presume the plaintiff as innocent. He further failed to consider the plaintiff's

explanation that caused him to leave the accident scene.

[25] The victim herself stated that the driver came to see her at the hospital. This ought to have persuaded Constable Mnisi of the reasonableness of the explanation for leaving the accident scene. Constable Mnisi had all the statements in the docket and should have considered the totality of the evidence he had before he arrested the plaintiff. Instead it appears that Constable Mnisi operated under the preconceived view that the plaintiff had committed a serious offence of hit and run. The question is whether under those circumstances it can be said that Constable Mnisi exercised his discretion reasonably? In my view he did not. Would a reasonable person in the same position have acted in the same manner? In my view a reasonable man (police official) would have exercised restraint and acted differently.

[26] On the issue whether the offence of contravention of section 61(1) of the National Road Traffic Act 93 of 1996 (NRTA) falls under Schedule 1 of the CPA there is legal dispute. Adv. Mbhalati contends that it does on the basis that section 89 of NRTA makes provision for a sentence without an option of a fine which a court can impose. On the other hand Adv. Jacobs argues that it does not. The starting point is to have regard to the wording of section 89 of NRTA and Schedule 1 of the CPA and to give the correct interpretation. In order to get the correct interpretation thereto, it is important to have regard to

well- established interpretation principles which call for a contextual and normative approach.

Interpretation principles can be

summed up as follows-

[22.1] The statutory provisions should always be interpreted purposively; [22.2] The relevant statutory provision must be properly contextualised;

[22.3] All statutes must be construed consistently with the Constitution and where possible legislative provisions ought to be interpreted to preserve their constitutional validity and

[22.4] When interpreting legislation that implicates a fundamental right entrenched in the Bill of Rights, a court must read that particular statute through the prism of the Constitution.

[27] Schedule 1 lists various offences and then provides 'any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately

hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine'. Section 89 (4)(a) –(c) of NRTA provides for penal jurisdictions for the contravention of section 61 of NRTA by giving discretion to impose either a fine or different

imprisonment periods ranging from one year; three years up to nine years. I am in agreement with the legal arguments by Adv. Mbhalati that contravening section 61 of NRTA falls under Schedule 1. Applying purposive and contextual interpretation to section 89 of NRTA, it appears to me to give a sentencing court the discretion to impose direction imprisonment. The mere fact that in practice a fine is often imposed does not detract from the discretion to impose direct imprisonment. I reach this interpretation on the basis of the word “or” in the section 89. It follows that section 61 of NRTA falls within Schedule 1.

[28] Adv. Jacobs argues that Mr Mnisi failed to exercise his discretion based on his concession that upon identifying himself the plaintiff was arrested. She argues that the arrest was an act of malice and punishment for the crime that the plaintiff was alleged to have committed. There is merit to this argument. I make this assessment on the basis that despite Mr Coetzer’s attempt to provide sound legal advice to Constable Mnisi not to arrest the plaintiff was ignored. Lastly Adv. Jacobs contends that the defendant failed to satisfy the onus by failing to establish jurisdictional grounds in terms of section 40(1) (b) of the CPA. While I agree that the offence of contravening section 61 of NRTA falls under Schedule 1, I am not in agreement that Constable Mnisi’s suspicion was reasonable. It follows that I am in agreement with Adv Jacobs that the defendant has failed to discharge the onus. Even if it can be said that the suspicion was reasonable giving rise to the discretion, I am satisfied that Constable Mnisi failed to exercise the discretion. The averment by the plaintiff that the accident was reported to two police officers would have caused a reasonable police officer to first investigate it first. Similarly it is common cause that the plaintiff presented himself to the police station. Clearly he was no flight risk.

[29] Adv. Mbhalati argues that there is a material contradiction in respect to when the plaintiff’s warning statement was taken. I am not persuaded that the day when the statement was written is material. The evidence is that Mr Coetzer is the one who took down the warning statement after he advised the plaintiff to fully cooperate with the police. The submission by Adv. Mbhalati that the plaintiff’s credibility is questionable is with respect not correct.

[30] There is mutually destructive version in respect to whether or not the plaintiff was detained at the police cells. As trite the proper manner in resolving factual disputes is for the court to make factual findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. See *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para

5. I find it improbable that after the arrest Constable Mnisi did not detain the plaintiff. His attempt to explain that the plaintiff was placed in a cell building not a cell is with respect disingenuous. The plaintiff was not in a position to exercise his right to liberty at that moment. I am satisfied that the plaintiff was detained at the police station before being transported to the court. A reasonable police officer would not have placed the plaintiff who appeared on his own and was cooperative in detention. During cross examination it is apparent that Constable Mnisi also failed to exercise the discretion not to detain the plaintiff at the police cells.

- [31] On the issue whether or not the plaintiff was assaulted, I am aware that the plaintiff was a single witness and will approach with a measure of caution. Section 16 of Civil Proceedings Evidence Act 25 of 1965 provides that 'Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.' Evidence of a single witness must be credible to the extent that his uncorroborated evidence must satisfy the court that on probabilities it is the truth. See *Daniels v General Accident Insurance Co Limited* 1992(1) SA 757(C) at 760A-B. The plaintiff has given a plausible reason why he did not report the assault. He states that he did not think anything will be achieved by reporting. He has explained that he was more worried about the case than anything else. This view is consistent with the late amendment application to his particulars of claim. I find his explanation probable and the assault believable. There is no doubt that there was a legal duty on court orderlies to shield plaintiff from harm or injury. The defendant failed to rebut by credible evidence that the plaintiff was slapped and manhandled while in detention at court.
- [32] The plaintiff has created a favourable impression to the court. He gave his testimony in a clear and logical manner. He came across as both honest and confident. He was subjected to rigorous cross-examination which did not discredit him. I also found Mr Coetzer to be a credible witness who gave his testimony in a clear manner without any bias. On the other hand, Constable Mnisi who was the only witness for the defendant was not impressive as clearly demonstrated during cross examination. For example, he testified that the plaintiff was taken to the cells and later attempted to rectify the slip up by saying the 'cells' he meant the cell building. His evidence that the plaintiff was not detained is not acceptable. This talks to Constable Mnisi's credibility. The concession that the plaintiff was not free to leave after the arrest shifts the probabilities in favour of the plaintiff.

CONCLUSION:

- [33] In conclusion I make the finding that section 61 of NRTA falls within schedule 1 of the CPA. I am satisfied that Constable Mnisi arrested the plaintiff and detained him at the Mahikeng Police Station. I am satisfied that Constable Mnisi's suspicion was not based on reasonable ground. I find in addition that he failed to exercise the discretion to arrest and detain reasonably as compounded in section 40(1) of the CPA. He refused wise advice not to arrest. The decision to arrest the plaintiff was unlawful. I am satisfied that on a balance of probabilities the plaintiff

was slapped and mishandled by fellow detainees while he was in the court's holding cells. It follows that judgment must be granted in favour of the plaintiff on all the claims on merits.

COSTS:

[34] Costs are awarded at the discretion of the court which discretion is a wide, unfettered and equitable one and must be exercised judicially with due regard to all relevant consideration. In *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) it was held 'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.'

Order:

[35] In the circumstances the following order is made:

1. Judgment granted in favour of the plaintiff on merits for unlawful arrest, detention and assault.
2. Determination of quantum is postponed sine die.
3. Defendant to pay costs on party and party scale.

MNCUBE AJ

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Plaintiff: Adv. C. Jacobs

Instructed by: W.J.

Coetzer Attorneys Incorporated Office 4A, Ground Floor 457 Rodericks Road Lynwood, Pretoria.

On behalf of the Defendant: Adv. S. Mbhalati

Instructed by:

State Attorney Pretoria

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Corner Thabo Sehume and Francis Baard Streets Pretoria

Date of hearing :

24 August 2022

Date of Judgment : 21 September 2022

[1] See *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC).

[2] See *De Klerk v Minister of Police* 2021 (4) SA 585(CC) paragraph 14.

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