

SOUTH AFRICA / JUDGMENT

Tshesebe v Minister of Police (1334/2018) [2024] ZANWHC 59 (5 March 2024)

[2024] ZANWHC 59**COURT**

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

1334/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTHWEST
DIVISION, MAHIKENG
CASE NUMBER: 1334/2018

In the matter between: -

KENNETH**RANKALE TSHESEBE****Plaintiff****and****MINISTER****OF POLICE****Defendant****CORAM:**

MFENYANA J

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 10h00 on 05 March 2024.

ORDER

(1)

The arrest and detention of the plaintiff on 27 July 2016 to 03 August 2016 was unlawful.

(2)

The defendant is liable for 100% of the plaintiff's agreed or proven damages.

(3)

The issue of quantum is postponed to a date to be arranged with the Registrar, in consultation with the

office of the Judge President.
(4)
The defendant shall pay the costs,
on a party and party basis, to be taxed.

JUDGMENT

MFENYANA J

INTRODUCTION

- [1] The plaintiff in this matter instituted an action against the defendant for damages emanating from his arrest and detention. Following agreement between the parties, an order was granted on 30 May 2023 separating the issues of merits and quantum. The matter now serves before me only on the issue of liability.
- [2] The plaintiff alleges that on 27 July 2016 at approximately 13h35, he was arrested without a warrant, by Captain Ramakatsa (Ramakatsa), who at the time of the arrest was acting within the scope of his duties as a member of the defendant. He was charged with aiding an escape before incarceration, and harbouring / concealing an escaped person. The docket records that the plaintiff was also charged with obstructing the police in the execution of their duties. He was subsequently released on R500.00 bail at approximately 10h00 on 3 August 2016. It appears from the docket that the case against the plaintiff was withdrawn on 23 March 2017 due to the death of the arresting officer on 30 January 2017.
- [3] The defendant is thus, vicariously liable for the actions of his employees. The plaintiff claims an amount of R400 000. 00 against the defendant, for pain and suffering, discomfort and embarrassment, loss of amenities of life, contumelia, and deprivation of freedom.
- [4] The defendant has defended the action and contends that the plaintiff was arrested for aiding a suspect to escape from lawful custody.
- [5] At the commencement of the proceedings, the defendant made an application for the written statement made by Ramakatsa to be admitted into evidence in accordance with the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

ISSUE FOR DETERMINATION

- [6] What stands for determination by this Court, is whether the plaintiff's arrest and detention was lawful and therefore justified.

EVIDENCE

- [7] Having granted the application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, the matter proceeded on the merits.

- [8] The defendant closed its case without calling any witnesses. They instead placed reliance on the statement of Ramakatsa which was admitted into evidence as stated above.
- [9] The essence of Ramakatsa's statement is that the plaintiff opened the police vehicle and let his son out without the permission of the police officers. Ramakatsa admitted that he threw a stun grenade as he had no option as more community members were coming. He further admitted that he arrested the plaintiff without warning him
- as there was no time to do so, as more community members were approaching. He stated that he only warned the plaintiff and notified
- him of his rights once they got to the police station.
- [10] The plaintiff testified that on the day in question at approximately 10h00 he had gone to "town when he met Captain Melando (Melando). Melando informed him that he wanted to interview some children who were involved in protests and causing public disorder in the community. The plaintiff's 17 year old son was reported to be one of those children. He testified that Melando told him this, because the plaintiff was part of the Community Policing Forum in his area. He told Melando that he would group the children together as he knew they were afraid of the police. Melando could then interview them at the plaintiff's house.
- [11] Upon his arrival at home he asked his son to go and call the other children and told him what the reason was. A few minutes later, the children came into his house running and told him that the police were chasing other children. When he went outside to investigate, he saw another police vehicle emerging with Melando and Mahatle in it.
- [12] When he enquired what was happening, three police officers alighted from the vehicle. It was Ramakatsa, and two other police officers. Ramakatsa did not ask anything and simply pushed the gate open. Ramakatsa fired shots in the air and the children ran inside the house and closed the door. He assured the police officers that he would take the children out, but Ramakatsa kicked the door and entered the house. He fired teargas. The plaintiff and his wife ran into the house to rescue their five year old child, retrieved the two boys and handed them over to Melando as earlier agreed.
- [13] Melando placed the boys in the police vehicle and drove with them to the police station, and invited the plaintiff to come and watch a video footage of the boys dragging trees and causing chaos in the community.
- [14] As he was watching the footage at the police station, one police officer caused one of the boys to lie on the ground, and stepped on his head. It was at that stage that the plaintiff intervened and told the police office not to assault the child. This led to a confrontation and the said police officer manhandled and assaulted the plaintiff.

- [15] The plaintiff further testified that he could not see the child when he was manhandled, he only heard him scream from the nearby room while he was still watching the video footage. Ramakatsa arrested him but did not tell him why. He was released after 10 days.
- [16] During cross examination the plaintiff testified that he did not know Ramakatsa prior to the day of the arrest, but that he must have heard his name from someone else. He reiterated his evidence that he had an arrangement with Melando and what transpired thereafter.
- [17] The plaintiff was put to task about his evidence that he was arrested three times in the same incident. His explanation was that he was first arrested by the female police officer and thereafter by Ramakatsa, and lastly when he was in court at Ganyesa. He stated the time of arrest as 17h00, contrary to his particulars of claim and contrary to what was stated by Ramakatsa.
- [18] When questioned why he did not institute criminal proceedings for assault against the police officers, the plaintiff reiterated that the police did not give him a chance. He could not explain why he opted not to lay criminal charges thereafter.
- [19] In its plea, the defendant provides no further details, save to state that the plaintiff was arrested for aiding a suspect to escape from lawful custody. The plea makes no reference to section 40(1) of the Criminal Procedure Act 51 of 1977(CPA) or any of the subsections thereto, which stipulate the basis on which an arrest without a warrant may be carried out.
- [20] Mr Mothibi argued on behalf of the defendant that the plaintiff's evidence was contradictory, improbable and generally of poor quality. He pointed out the contradictions in the plaintiff's evidence. These relate to his version of events why the suspects ran into his house, which according to the defendant, he could not explain. This is not correct, as the plaintiff stated that the children told him that the police were chasing other children and that is why they ran into his house.
- [21] As to the plaintiff's inability to explain why Ramakatsa threw teargas upon entering the plaintiff's premises, this could best be explained by Ramakatsa. Having admitted his statement into evidence due to his death, he could not be cross- examined on the contents of his statement. The court could also not assess his demeanour or verify any of the allegations made by him, which are in any event, very sparse.
- [22] Mr Mothibi further argued that to the extent that the plaintiff's version does not accord with Ramakatsa's version, it should be rejected. He submitted that the court ought to exercise caution when considering the evidence of the plaintiff as he is a single witness. He relied on three decisions of the SCA, urging the court to consider the full conspectus of the evidence tendered.

LEGAL FRAMEWORK

[23] Apparent from the above factual basis is that the arresting officer was exercising his powers in arresting the plaintiff. According to him, the plaintiff committed an offence of “aiding an escape before incarceration”, in his presence. The issue then turns on whether at the time of the plaintiff’s arrest,

his son whom he is alleged to have assisted to escape, was under arrest.

[24] The manner in which the police must exercise their powers to arrest is set out in section 39 of the CPA, which provides:

(1) An arrest shall be effected with or without a warrant and, unless

the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

[25] The evidence before this Court is that the plaintiff’s son was in the police vehicle, and the plaintiff opened the door to let him out, asking why his son had been placed there. At no stage was any evidence led by the defendant that the plaintiff’s son had been arrested, at what stage, and the reason therefor. This is also at odds with the plaintiff’s evidence that he had an agreement with Melando that he would come and interview the plaintiff’s

son together with the other children.

[26] According to the plaintiff, Melando did in fact attend at his house but it was around the same time when Ramakatsa arrived and acted in the manner described. Further, according to the plaintiff, he was arrested while he was at the police station while according to the defendant he was arrested at his house.

[27] There are thus, two irreconcilable versions before this Court. This Court must weigh up the two conflicting versions, and on a preponderance of probabilities, determine which of the two versions should prevail.

[28] In *National Employers’ General Insurance Co Ltd v Jagers*[1] the court laid down the law as follows:

“...where there are two mutually destructive stories, (a party) can only succeed if he satisfies the Court on a preponderance of probabilities

that his version is true and accurate and therefore acceptable, and that the other version advanced by the (other party) is therefore

false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the

(defendant's) allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”[2]

- [29] Applying this test to the present case, the defendant, as the party who bears the onus to prove that the arrest was lawful, must satisfy the court on a balance of probabilities that he is telling the truth and that his version is therefore acceptable.[3] His statement is not corroborated by any evidence. The only statement discovered in terms of Rule 35 is that of Melando which in itself also does not shed any light on how the plaintiff's son ended up in the police vehicle. Melando was not called to testify.
- [30] If one considers the jurisdictional facts for a defence in terms of Section 40 (1)(a), the offence must have been committed in the presence of the peace officer. At a glance, the statement of Ramakatsa suggests this to be the case. The plaintiff denies committing any offence. His evidence suggests that Ramakatsa acted aggressively and without provocation fired shots in the plaintiff's yard. Ramakatsa in his statement confirmed this. He acted in the manner that he did as more community members were approaching. He says no more.
- [31] Section 40(1)(a) of the Act authorises a peace officer to arrest a person without warrant if that person commits or attempts to commit an offence in his presence. The authority of the police to arrest under section 40(1)(a) is limited to crimes which are already completed and attempts to commit crimes. The offence must be committed in their presence.
- [32] The prerequisite under this section is that “it must first be clear that the action precipitating the arrest is indeed an offence”. The determination whether the facts observed by the arresting officer *prima facie* establish the commission of an offence is a matter of law. “His honest and reasonable conclusion from the facts observed by him is not of any significance to the determination of the lawfulness of his conduct, but may be relevant for determination of the quantum of damages”.[4]
- [33] In this case, the plaintiff's son had not been incarcerated as is clear from the charge sheet and Ramakatsa's statement. This leads to the ineluctable conclusion that at the time the plaintiff was arrested, the plaintiff's son was not under arrest or could not be said to have been in the lawful custody of the police. On a balance of probabilities, the plaintiff's version is probably true.

[34] As to the time of the plaintiff's arrest, it is not relevant to the determination of whether or not his arrest was lawful. Neither is the issue of how many times he was arrested as according to him, he was arrested three times. This in my view, may only be relevant to the quantum of damages. Mr Mothibi argued that this speaks to the inaccuracies and contradictions in the plaintiff's testimony. In my view they are not material. Not every contradiction or inaccuracy in a witness's statement affects the credibility of a witness.

PLAINTIFF'S DETENTION

[35] It follows naturally that if the arrest is unlawful, the detention must also be. The defendant provided no explanation why the plaintiff was detained from 27 July 2016 to 03 August 2016.

CONCLUSION

[36] In the premises, I find that the defendant did not discharge the onus of proving on a balance of probabilities that the plaintiff's arrest and detention was justified. There are no facts present in this case justifying his arrest and detention. The plaintiff's arrest and detention was therefore unlawful.

[37] In the result, I make the following order:

- (1) The arrest and detention of the plaintiff on 27 July 2016 to 03 August 2016 was unlawful.
- (2) The defendant is liable for 100% of the plaintiff's agreed or proven damages.
- (3) The issue of quantum is postponed to a date to be arranged with the Registrar, in consultation with the office of the Judge President.
- (4) The defendant shall pay the costs, on a party and party basis, to be taxed.

S MFENYANA

JUDGE OF THE HIGH COURT

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Date Reserved

: 30 June 2023

Date of Judgment

: 05 March 2024

[1] 1984

(4) SA 437 (ECD).

[2] Paragraph 440 D.

[3] See also in this regard: *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid- Afrikaanse Spoorweë en Hawens (supra)* and *African Eagle Assurance Co Ltd v Cainer* 1980

(2) SA 234 (W).

[4] *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG).

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