



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

CASE NO: 682/2020

In the matter between:

ZIHLE MLENZANA

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] Mr Zihle Mlenzana (the plaintiff) issued a combined summons against the Minister of Police (the defendant), for damages arising from an unlawful arrest and detention by a member of the South African Police Service (SAPS), Sergeant Jerry Xolisile David (the arresting officer). It is undisputed that, throughout the relevant period, the members of the SAPS were acting within the course and scope of

employment of the defendant. The plaintiff alleges that the defendant was unlawfully arrested and detained for the period of 180 days and suffered general damages in respect of deprivation of liberty, discomfort, pain and suffering, and loss of enjoyment of the amenities of life and *contumelia*.

[2] As a result thereof, the plaintiff claims an amount of R7 200.000 for general damages.

The Pleadings

[3] The plaintiff avers that on the 23 of September 2018, at Lutateni Village, Mount Frere, he was unlawfully arrested without a warrant by the arresting officer.

[4] He was detained at Mount Frere police holding cells until his first appearance in court. The court postponed the case and ordered his further detention.

[5] The plaintiff claims that the arresting officer had no reasonable or probable cause to arrest and detain him because the offence for which he was arrested is not listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA) and that there was no infliction of a dangerous wound against the complainant.

[6] In addition, the plaintiff avers that the information that the arresting officer had, prior to arrest was obtained from the community members and thus disclosed no reasonable suspicion that a Schedule 1 offence was committed. The plaintiff suggests that the defendant ought to have obtained information from the complainant and that would have formed a basis for the arrest of the plaintiff.

[7] The defendant filed a plea and made a bold denial of events. Subsequently, the defendant amended his plea and averred that the plaintiff was arrested after having committed offences falling under section 40 (1) (b) of the CPA. The defendant further denied the liability for general damages arising out of arrest and detention.

[8] In terms of Rule 37(4) of the Uniform Rules of Court, a pre-trial conference was held on 11 October 2021. The parties agreed that the defendant bears the onus to prove that the arrest and detention were justified. It was further agreed that the defendant would begin to lead evidence.

[9] The trial proceeded on the basis that there would be no separation between liability and quantum.

The evidence

[10] Sergeant Jerry Xolisile David (the arresting officer) testified that at the time of the plaintiff's arrest, he held the rank of a Constable. He has been working for SAPS since 2010. On Sunday the 23rd of September 2018, he along with other members of the SAPS were on patrol duties around Mount Frere district.

[11] At around 16:30, they were alerted through a call from the charge office that the plaintiff had assaulted an elderly woman by the name of Noncinci Manqutywa, the plaintiff's guardian and that police intervention was sought. They attended to the complaint and on their arrival at Lutateni, they met a mob of the community members on one of the streets in the village.

[12] A certain group of angry community members approached the police car and confirmed if they were there to assist them in their complaint. They reported that the plaintiff had assaulted an elderly person and directed them to the plaintiff's home.

[13] The plaintiff's home would have been about 1 km from where the community members were. Some made certain threats that they were ready to take the law into their own hands and go to jail if the complainant was not attended to. They further threatened to burn the plaintiff's home.

[14] The arresting officer testified that life is a priority against all other issues and for this reason, amongst others, they decided to first approach the plaintiff and protect his life from the angry mob. On arrival at his home, they found the plaintiff inside the house where he had locked himself up. They asked for permission to get in, which permission was granted. They introduced themselves as police officers.

[15] They informed him that he was accused of having assaulted an elderly woman and advised that he should leave the house and go with them. According to the arresting officer, the purpose of leaving the house with the plaintiff was to protect him from the angry community. They all went to Ms Noncinci Manqutywa's home (the complainant).

[16] On arrival at the complainant's home, the arresting officer and his other colleague went inside the complainant's house leaving the plaintiff and one colleague in the police car. The complainant informed the officers that the incident began when she was at home with her grandchild. The plaintiff passed her house bleeding. He

asked him to explain what had gone wrong. Instead of responding, he assaulted her with a stick that was wrapped with tape. He continued to strike her with the stick until he decided to leave. The complainant informed the officer that she was saved by a neighbour whom she reported the matter to.

[17] The arresting officer saw a swollen lump between the complainant's shoulder and neck. The lump was the size of a fist of an adult person. The arresting officer asked what had caused the lump, to which the complainant informed him that the lump was a result of the assault by the plaintiff. The complainant informed the arresting officer that during the assault the plaintiff broke her cell phone. The arresting officer advised the complainant of her right to file a formal complaint. Subsequently, the complainant proceeded to lay charges against the plaintiff. The arresting officer obtained a sworn statement from the complainant.

[18] He then went to the plaintiff in the police van and advised him that he would be formally charged with the crime of assault with intent to do grievous bodily harm and malicious injury to property. He testified that when he preferred these charges, he considered that a dangerous weapon was used (the stick) and he took note of the serious injury that the complainant suffered. He further considered that the complainant's cell phone and a walking stick were broken.

[19] When questioned about the stick the plaintiff allegedly used to attack the complainant, the arresting officer testified that he had been presented with the stick the plaintiff allegedly abandoned at the scene. He subsequently seized the weapon and registered it as an exhibit in SAP 13. The arresting officer further testified that

upon informing the plaintiff about the broken cell phone, the plaintiff expressed the intent to repair it.

[20] After the plaintiff was notified of his impending arrest by the arresting officer, he chose to remain silent. When questioned by the court on whether the plaintiff was handcuffed, the arresting officer informed that this was not necessary since the plaintiff was already in the police van.

[21] On arrival at the police station, the plaintiff's particulars were registered in SAP 14 due to his status as an arrested individual. When questioned on the purpose of arrest, the arresting officer testified that his intention was firstly, to take him to court on an appropriate date. Secondly, he wanted to protect him from harm from the angry community members. Thirdly, the nature and seriousness of the offences warranted the arrest of the plaintiff.

[22] When the arresting officer was questioned on his choice not to use alternative methods to ensure the plaintiff's appearance in court, the arresting officer explained that close proximity of the plaintiff's residence to that of the complainant can be a risk for recurring assault, therefore the plaintiff had to be detained. Additionally, because he was staying alone, the arresting officer was uncertain whether there would be someone to assist in finding the plaintiff should he fail or refuse to attend court. He further held a view that the matter was a Schedule 6 warranting the court to make a determination with regard to the release of the plaintiff. Further and most importantly, the angry mob posed a risk to the life of the plaintiff.

[23] The arresting officer testified that he intended to ensure the complainant's safety had she refused to lay charges against the plaintiff. He testified that when the plaintiff appeared in court, it was within 48 hours from the date of arrest. According to his testimony, the plaintiff was arrested on Friday, 23 September 2023 and the 26 of September 2023 which was on a Monday was a public holiday. When the plaintiff appeared in court, the arresting officer was present in court and he did not oppose the release of the plaintiff on bail.

[24] When the conditions in the cell were brought into question, the arresting officer testified that the police cells were clean and there was running water for human consumption. He provided the plaintiff with a blanket and a mattress to sleep on. The arresting officer further informed the court that he provided the plaintiff with food before his detention.

[25] In cross-examination, the arresting officer was asked about the name of the neighbour to whom the assault was reported by the complainant. He testified that he did not enquire about his name at that moment. He confirmed to have seen the broken cell phone. When asked to describe the type of cell phone that was broken, he could not remember. He was adamant that a charge of malicious damage to property was opened because the screen of the complainant's cell phone was scratched and a walking stick was damaged after the assault.

[26] When he was challenged about the insufficient information he had for purposes of arrest, the arresting officer maintained that he obtained a sworn statement from the complainant and her injury was visible. The arresting officer was challenged on the statement he made where he narrated the events of what happened during the

plaintiff's arrest. In his arrest statement, he omitted to note that the purpose of the plaintiff's arrest was to protect him from the angry community. He failed to record that the injury that he observed on the complainant's body was a lump. In response to the challenge, the arresting officer testified that the statement was a summary of what had transpired.

[27] When questioned about the absence of a medical record, the arresting officer explained that despite the lack thereof, the injury on the complainant's body was visible. When confronted with the assertion that there was no angry community and the plaintiff never assaulted the complainant, the arresting officer maintained that an assault had occurred and there was the presence of an angry mob. He justified his decisions by stating that in response to the perceived threat, he decided to protect the plaintiff by removing him from his home. When challenged about not listening to the plaintiff's denial of allegations, the arresting officer testified that the plaintiff chose not to state his version of events.

[28] The fact that the conditions in the cells were also conducive to human habitation was also challenged. The arresting officer maintained that the police cells were not bad. With this evidence, the defendant closed his case.

[29] The plaintiff's version can be summarised as follows: The complainant is a frail elderly woman whose state of health has never been good since the plaintiff grew up. She is bedridden and relies on walking sticks for mobility. Despite enduring constant family feuds, particularly the mistreatment from his uncle, he has always maintained a good relationship with the complainant. This bond persists even to this day.

[30] On the day of the alleged incident, the plaintiff was socialising with friends and drinking liquor. They went to visit a next-door neighbour's home where he encountered his uncle Dalindyebo. His uncle referred to him as a "coloured" person causing the plaintiff to exhibit discomfort with the statement. In response, his uncle got up and assaulted him with a stick and he bled profusely.

[31] He left the neighbour's premises and proceeded home. On the way home, the complainant who observed that he was bleeding, called out to him. Concerned, the complainant enquired about his injuries. He reported that his uncle had assaulted him. At that stage, the blood was oozing profusely staining his T-shirt and trousers. He enquired from the complainant whether he was aware of his identity as a coloured person. The complainant responded that she bore no knowledge of that.

[32] The plaintiff then left the complainant's premises and went home. He cleaned his injury and was later joined by his friend Saziso. He informed Saziso of what had happened to him, took a bandage and bandaged his head.

[33] The police arrived and entered his house which was already open. They never greeted or introduced themselves. They asked who Makhehle was and handcuffed him. They confiscated all his sticks which were underneath the bed. They locked in the police van until they reached the complainant's place. He remained in the car while the arresting officer and his colleague entered the complainant's premises. He saw his uncle in the complainant's premises together with the village sub-headman. About 30 minutes later they came back and left with him. When the arresting officer informed him that he would be charged, he indicated that he never assaulted the complainant.

[34] They drove to the police station where he was asked to exit the police van. The plaintiff testified that the handcuffs were causing a discomfort and injuries from the time they were put on. When he asked the arresting officer to remove them, he refused. Before he was detained, he again informed the arresting officer that he committed no crimes and the officer disputed his assertions.

[35] In the prison cells there was no running water and the lavatories were not functional. They were dirty to the extent that one of them was covered with a blanket. The plaintiff endured challenging conditions, as he slept on an empty stomach due to the absence of food. When he requested medical attention to treat his wound and was informed that it was a public holiday and there were no facilities available for that purpose.

[36] On his first appearance in court, the proceedings were postponed and the court ordered continued detention. He transferred to Wellington Prison where he was faced with inadequate conditions such as the absence of a bed. He was discriminated against and ill-treated based on his home language which is IsiZulu. He was detained for a period of six months and would be taken to court when called by the magistrate. The plaintiff testified that his arrest and detention were unlawful because he never committed these offences.

[37] In cross-examination, the plaintiff averred that he never assaulted the complainant. The complainant must have been influenced by his uncle Dalindyebo and other people who were called into her homestead to lay false charges against him. He further conceded that there was a mob of community members in the village.

Issues

[38] The issue for determination is whether the plaintiff's arrest and his subsequent detention were lawful.

The Law and its application to the facts

[39] In an action for damages for unlawful arrest and detention, once the arrest and detention are admitted or proved, the onus to prove the existence of the grounds justifying arrest and detention rests with the defendant. In this regard, the following remarks of Hefer JA in *Minister of Law and Order and Another v Dempsey*¹ are relevant:

"I accept, of course, that the *onus* to justify an arrest is on the party who alleges that it was lawfully made and, since an arrest can only be justified on the basis of statutory authority, that the *onus* can only be discharged by showing that it was made within the ambit of the relevant statute. Any statutory function can, after all, only be validly performed within the limits prescribed by the statute itself and, where a fact or a state of affairs is prescribed as a precondition to the performance of the function (a so-called jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed."

[40] It is common cause that the arresting officer arrested the plaintiff without a warrant of arrest. Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 (CPA) reads,

¹ 1988 (3) SA 19 (A) at 38B-C.

“A peace officer may without a warrant, arrest any person-

(a).....

(b) whom he reasonably suspects of having committed an offence referred to in Schedule I, other than offence of escaping from custody”

[41] The jurisdictional facts for section 40(1)(b) defence were encapsulated in *Duncan v Minister of Law and Order*² as follows:

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

[42] The arrests in terms of section 40(1) (b) of the CPA are affected by the police mandate which is provided in the preamble to the South African Police Service Act 68 of 1995 (the SAPS Act). The preamble, as it is relevant in the present matter reads:

‘WHEREAS there is a need to provide a police service throughout the national territory to:

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;
- (c) ensure co-operation between the Services and the communities it serves in the combating of crime;
- (d) reflect respect for victims of crime and the understanding of their needs; and
- (e) ensure every civilian supervision over the Service.....’(my underlining)

² 1986 (2) SA 805 (A).

[43] Upon evaluation of the evidence tendered, it is common cause that Sergeant Jerry Xolisile David was a peace officer. He entertained a suspicion that the plaintiff committed the offences of assault with intent to do grievous bodily harm and malicious injury to property.

[44] On the first charge, Mr Vapi on behalf of the plaintiff correctly argued, that the offence of assault with intent to do grievous bodily harm does not fall under Schedule 1. In terms of the CPA, a crime of assault with intent to do grievous bodily harm falls under Schedule 7 and is therefore irrelevant for purposes of proving the second jurisdictional element as encapsulated in terms of section 40(1) (b) of the CPA. This proposition is supported by several authorities. In *Bobbert v Minister of Law and Order*³, Tring AJ stated,

“For an assault to fall under Schedule 1, a 'dangerous wound' must have been inflicted. Any attempt to commit any offence referred to in Schedule 1 also constitutes an offence under that Schedule. The concepts of 'grievous bodily harm' and 'dangerous wound' as formulated by the Courts in the context of assault are, however, not synonymous. Thus, where the sole basis for an arrest in terms of section 40(1)(b) is the arrestor's suspicion, based upon an entry seen in a police 'register of suspects', that the arrestee had allegedly committed an assault with intent to commit grievous bodily harm, there is no reasonable ground for the arrestor to suspect (1) that an assault in which a dangerous wound had been inflicted, had in fact been committed, nor (2) that such an assault had been attempted; a person who commits an assault with intent to do grievous bodily harm does not necessarily attempt to commit an assault in which a dangerous wound is inflicted, and such arrests are unlawful under s 40(1)(b).”(my underlining)

³ 1990 (1) SACR 404 (C).

[45] The recent pronouncement on this subject was made by the Supreme Court of Appeal in *De Klerk v Minister of Police*⁴, Shongwe ADP (with Majiedt JA and Hughes AJA concurring), held at paragraph 9,

'It is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of 'assault' when a dangerous wound is inflicted. Therefore, one of the jurisdictional facts is absent.'

[46] In his evidence, the arresting officer endeavoured to overcome this barrier by stating that the complainant had a lump between her neck and shoulder due to the assault. In *R v Jones*⁵ Gardner JP (as he then was) held, at 332 C:

"The expression 'dangerous wound' is not easy to define. One may well ask, 'Is a serious wound always a dangerous wound?' A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then, however it is not the wound which causes the danger but the sepsis. It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted." (my underlining)

[47] In the case under consideration, there is no evidence that the complainant was seen by the Doctor after the alleged assault. The defendant placed reliance on the evidence presented by the arresting officer. When the matter was brought before the Magistrate, the Public Prosecutor instructed the investigating officer to submit a medical report (the J88) which was never submitted until the matter was withdrawn. There were no cogent reasons advanced for the investigating officer's failure to submit a medical report. All we know, as the evidence illustrates, is that the complainant

⁴ (329/17) [2018] ZASCA 45(28 March 2018).

⁵ 1952 (1) SA 327 E; see also *Bobbert's* case at fn. 3 (*supra*).

appeared in court until the matter was finally withdrawn. Therefore, it cannot be inferred that she suffered a dangerous wound, under the circumstances. On probabilities, it may well be argued that she was injured but there is no evidence to validate that the injury was likely to endanger life or the use of a limb or organ.

[48] Gleaning from the defendant's plea, and the evidence presented, the plaintiff faced a second charge of malicious injury to property. When the docket was opened, the plaintiff was informed that he was facing charges of assault with intent to do grievous bodily harm and malicious injury to property. To substantiate that the plaintiff was aware of the charges against him, in his warning statement, he specifically denied having assaulted the complainant and damaged her property. In his written heads of arguments, Mr Vapi, on behalf of the plaintiff, appeared to have either overlooked this issue or failed to give it a thought. In this regard, he failed to file the supplementary heads of argument when called upon to do so by the court.

[49] Considering the fact that the defendant's case was based on two charges, which were properly canvassed in the pleadings and during the trial, it is imperative that I should pronounce on these aspects. The relevance of the crime of malicious injury to property lies with the fact that it falls under Schedule 1 of the CPA. Therefore, the arresting officer formulated a suspicion that the plaintiff broke the complainant's cell phone and a crutch. This brings me to the following questions:

Was the suspicion that the plaintiff committed an offence of malicious injury to property reasonable? If so, was it based on solid grounds?

[50] These questions can only be answered by making reference to the applicable case law. In *Mabona and Another v Minister of Law and Order and Others*⁶, Jones J remarked:

“.....It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear 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 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 on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

[51] The Supreme Court of appeal in *Biyela v Minister of Police*⁷ held,

‘[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.”

[52] The evidence leading to the plaintiff’s arrest is to a great extent common cause. The disparity lies in the fact that the plaintiff denies assaulting the complainant. He

⁶ 1988 (2) SA 654 (SE) 658 G-J.

⁷ (1017/2020)[2022](1 April 2022) ZASCA 36.

further denied that he broke the complainant's cell phone and a crutch. Where the parties' evidence differ, I will apply the technique that is generally employed by the courts in resolving factual disputes, as it was eloquently put in *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others*,⁸ On the probabilities, the fact that the police were called by the community members to the scene, clearly shows that the crime(s) were allegedly committed. Although the plaintiff initially denied that there was an angry mob in the village, he later conceded this fact.

[53] Upon verification of the facts, the arresting officer formulated a suspicion that the plaintiff assaulted the complainant. The relevance of the complainant's assault lies in the fact that the complainant's cell phone screen was allegedly damaged by the plaintiff. On the evaluation of facts before him, the arresting officer deemed it

⁸ *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5. the court held: "The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

necessary to charge the plaintiff with a separate count of malicious injury to property. In this regard, the arresting officer's approach was correct as it is supported by the law. It is common cause that the essentials of the crime of assault with intent to do grievous bodily harm, differ from the essential elements relevant in proving a crime of malicious injury to property. Not only did he rely on what he was told by the complainant, but the arresting officer also saw the complainant's cell phone screen and one of her crutches damaged.

[54] It is common cause that the plaintiff went to the complainant's house after he was assaulted by his uncle Mr Dalindyabo. Presumably fuelled by anger from the incident, the plaintiff may have chosen to violently express his emotion to the complainant. The plaintiff conceded that despite this, he and the complainant maintained a good relationship even at this stage. The complainant was described as an old and frail woman who held no grudges against the plaintiff. Therefore, the plaintiff's evidence that Mr Dalindyabo, his uncle might have influenced the complainant to lay false charges is highly speculative and improbable. Applying the principle that was intensified in *Biyela's* case (*supra*)⁹, I find that the reasonable suspicion which led to the plaintiff's arrest and detention was obtained from a credible and trustworthy source, the complainant. Therefore, upon holistic evaluation of the evidence presented, it is safe to conclude that the suspicion was based on solid grounds. Furthermore, considering the probabilities of this case, the defendant succeeded in proving the presence of the jurisdictional facts as encapsulated in *Duncan's* case above¹⁰.

⁹ *Biyela v Minister of Police* at fn 7.

¹⁰ *Duncan v Minister of Law and Order* fn 2.

[55] It is well settled that once the jurisdictional facts for an arrest are present, the question of discretion arises. The general requirement is that any discretion must be exercised in good faith, rationally and not arbitrarily.¹¹ A party that attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.¹²

[56] In *Sekhoto's*¹³ case, Harms DP set some limits of the reasonable suspicion discretion.

“At para 42-44:

1. Peace officers are entitled to exercise this discretion as they see fit, provided they stayed within the bounds of rationality.
2. This standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court.
3. The standard is not perfection, or even the optimum judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard is not breached.
4. It is clear that the power to arrest is to be exercised only for purpose of bringing the suspect to justice; however, arrest is but one step in that process.

¹¹ *Masethla v President of the RSA* 2008 (1) SA 566 (CC) At para 23; *The Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA)

¹² The Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto* held:

“Para [46]... once the jurisdictional facts have been established it is for the plaintiff to prove that the discretion was exercised in an improper manner. This approach was adopted in *Duncan* (at 819 B-D) as being applicable to attacks on the exercise of discretion under Section 40(1) (b). Para [47]; all this and more has already been stated by Hefer JA in *Dempsey*. I do recognise that the context was somewhat different and that he was dealing with motion proceedings and not trials. Para [48], As to the general principles, he said: Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegations to prove it.”

¹³ See fn. 11, *the Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

5. The arrestee is to be brought to court as soon as reasonably possible, and the authority to detain the suspect further is then within the discretion of the court.”
6. This discretion is subject to a wide-ranging statutory structure and, if a peace officer were to be permitted to arrest only when he or she is satisfied that the suspect might not otherwise attend the trial, then the statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
7. The arrestor is not called upon to determine whether a suspect ought to be detained pending trial; that is for the court to determine; and the purpose of an arrest is simply to bring the suspect before the court to enable it to make that determination.
8. The enquiry to be made by a peace officer is not how best to bring the suspect to trial, but only whether the case is one in which the decision ought properly to be made by a court. The rationality of the arrestor’s decision on that question is depended upon the facts of the particular case, but it is clear that in cases of serious crimes such as those listed in Schedule 1, an arrestor could seldom be criticised for arresting a suspect to bring him or her before the court.”

[57] In his particulars of claim, the plaintiff’s focus was on the charge of assault with intent to do grievous bodily harm. He contended that the arresting officer ought to have granted the plaintiff bail because he had the jurisdiction to do so. He failed to address the charge of malicious injury to property. Section 38 of the Criminal Procedure Act 51 of 1977, provides,

‘38 METHODS OF SECURING THE ATTENDANCE OF ACCUSED IN COURT

- (1) Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 OF 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.”

[58] In *casu*, the arresting officer presented valid reasons why he chose to arrest instead of warning the plaintiff to appear in court. It has already been established that a crime of assault with intent to do grievous bodily harm falls under Schedule 7 and has no bearing on the issues raised in this matter. The fact that the arresting officer mistakenly believed that a crime of assault with intent to do grievous bodily harm falls under Schedule 6 is irrelevant. Most importantly, he was aware that a crime of malicious injury to property does not fall under Schedule 6. Furthermore, the arresting officer was called by the members of the community who had converged near the scene before the plaintiff's arrest. The arresting officer acted reasonable in ensuring that the plaintiff's safety and security as envisaged in the SAPS Act is protected. In this regard, his decision was within the range of rationality and cannot be faulted. On the facts presented, the plaintiff failed to prove on a balance of probabilities that the arresting officer exercised his discretion to arrest improperly.

DETENTION

59] It is by now axiomatic that an arrest and detention are separate legal processes, so much so that while the arrest may be lawful; the detention may be unlawful; the fact that both result in someone being deprived of her or his liberty does not make them one legal process.¹⁴ During trial proceedings, it was strongly contended that the plaintiff was brought to court outside the 48 hours, as prescribed by the Constitution¹⁵ and the statute¹⁶.

¹⁴ M R v Minister of Safety and Security 2016 (2) SACR 540(CC) at para 39.

¹⁵ Section 35 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996 states that everyone who is arrested for allegedly committing an offence has the right- (d) to be brought before court as soon as reasonably possible, but not later than-(i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the hours expire outside ordinary court hours or on a day which is not an ordinary court day.

¹⁶ Section 50 (1) of the CPA states: (a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant. (b) A person who is in detention as contemplated in paragraph (d) shall, as soon as reasonably possible, be informed of his or her right to institute

[60] There is no dispute that the plaintiff was arrested on Sunday 23 September 2018 at 17:55. The 48-hour period ended on Tuesday 25, September 2018 at about 17:55. His first appearance in court was on 26 September 2018. The plaintiff's contention has no merit in my view. Further and more importantly, the decision for his further detention was within the discretion of the court. The defendant informed the Public Prosecutor that he was not opposed to the plaintiff's possible release either on bail or on warning. On the salient facts, there is no evidence to support that the plaintiff's detention post-first court appearance was out of the arresting officer's wrongful, malicious, unreasonable, unjustified, and unlawful conduct. As a result, the plaintiff's claim should fail.

Order

[61] I make the following order:

- 1. The plaintiff's claim is dismissed.**
- 2. The plaintiff is ordered to pay costs of this action.**

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bail proceedings. (c)Subject to paragraph (d), if such an arrested person is not released by reason that-(i)Bail is not granted to him or her in terms of Section 59A, he or she shall be brought before court as soon as reasonably possible, but not later than 48 hours after the arrest.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**APPEARANCES:**

Counsel for the Plaintiff : Mr S. Vapi
Instructed by : VAPI INC ATTORNEYS
No 8 Mirriam Raziya Street
MTHATHA

Counsel for the Defendants : Adv. L Mncotsho-Boya
Instructed by : State Attorney
No 94 Sisson Street,
MTHATHA

DATE HEARD : 03 November 2023

DATE DELIVERED : 12 December 2023