**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, MAKHANDA)**

**Case No: 3916/2011**

In the matter between:

**XOLANI THEO MFUKU** **Plaintiff**

And

**THE MINISTER OF POLICE** **Defendant**

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**JUDGMENT**

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**BESHE J:**

[1] Plaintiff is suing the defendant for damages he alleges he suffered as a result of having been unlawfully arrested and detained by employees of the defendant. He initially also alleged that he was unlawfully assaulted by the defendant's employees. He has since abandoned the claim for unlawful and wrongful assault.

[2] It is common cause that plaintiff was arrested by members of the South African Police Services (SAPS) on the 14 August 2009 without a warrant, in connection with a charge of robbery. The parties are not *ad idem* about the number of days plaintiff was detained. Plaintiff alleges that he was detained for eleven (11) days. Defendant pleaded that he was detained for ten (10) days.

[3] It is also common cause that the charge of robbery plaintiff was facing was withdrawn on 17 December 2012.

[4] Defendant denies that the plaintiff's arrest was unlawful and wrongful and pleads that it was justified in terms of *Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977*.

[5] Plaintiff testified that on the 14 August 2009 he was accosted by three police officials at his home situated at Hlalani, Makhanda. They told him they were looking for a firearm he allegedly had in his possession. He denied that he did. Even though they searched his room, no firearm was found. He was however bundled into a police motor vehicle and taken to the Makhanda police station where a statement was saught from him, after which he was locked up. He appeared in court on a Monday, having been arrested on a Friday. He was further detained until 24 August 2009 on which day he was released on bail. Plaintiff was arrested in connection with a charge of robbery it being alleged that he robbed one **Mr Dotyeni** of a firearm. He denied that **Mr Dotyeni** was in the company of the police when he was arrested or that he pointed him out to the police before the arrest. He confirmed that after his first appearance in court the trial matter was postponed for a formal bail application.

[6] **Captain Bovey** testified in support of defendant's case. His evidence revealed that the criminal case in respect of which the plaintiff was arrested was assigned to him on the 4 August 2009. He interviewed the complainant **Mr Dotyeni** who told him he knew the person who robbed him of his firearm and that he stayed at Hlalani Township, Makhanda. They proceeded to Hlalani Location where **Mr Dotyeni** pointed out the plaintiff as the person who robbed him. This was also based on the fact that plaintiff allegedly admitted in the presence of spaza shop owner that he had **Mr Dotyeni's** firearm. However, a search of plaintiff's house did not result in the recovery of the firearm. He had obtained statements from both **Mr Dotyeni** and the spaza shop owner **Ms Mayi**. He nonetheless took the plaintiff with him and detained him. He testified that when the plaintiff was arrested the complainant was there to point out plaintiff's place as well as the plaintiff as he (**Bovey**) did not know

him. It also transpired that **Mr Dotyeni** had previously fingered another suspect who it turned out was not linked to the robbery. Even though, as a result of the earlier incident he doubted the reliability of **Dotyeni's** identification skills, he took comfort in that his assertion was confirmed by independent witness in the form of **Ms Mayi**. It transpired that plaintiff is alleged to have admitted to having **Mr Dotyeni's** firearm, not to robbing him, in the presence of **Ms Mayi**. This was in response to being confronted by **Mr Dotyeni** after allegedly recognising him as the person who robbed him of his firearm on the 1 August 2009. Plaintiff allegedly said the firearm was at his house. Plaintiff is said to have confirmed to the shop owner that he will give **Mr Dotyeni** his firearm back.

[7] It is common cause that when plaintiff was questioned about the firearm prior to his arrest he denied knowledge thereof. He elected not to make a statement. It is further common cause that at the time of reporting the robbery (first information of crime), **Dotyeni** did not mention that he identified his assailant/s. In fact, when he implicated one **Qubuda** (the person he first implicated) he stated clearly that he did not recognise his assailants' faces but bases his identification of **Qubuda** on his body structure. By his own admission, **Bovey** gave **Dotyeni** a 50/50 trustworthy status but relied on the evidence of "an independent witness" to compensate for the other 50%.

[8] It was furthermore **Bovey's** evidence that he had to act with haste in view of the fact that a firearm was involved.

[9] It is trite that in order to justify an arrest without a warrant in terms of *Section 40(1)(b) of the Criminal Procedure Act*, the following jurisdictional facts must be present:

(i) The arresting officer must be peace officer;

(ii) who must entertain a suspicion that the arrestee committed a schedule 1 offence; and

(iii) such suspicion must rest on reasonable ground.[1] It is trite that the test as to whether there was a "reasonable suspicion" is determined by an objective standard, namely "that of the reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the peace officer".[2]

[10] As to how a reasonable suspicion is formed in ***Mabona and Another v Minister of Law and Order & Others***[3] the following was said:

"The test whether a suspicion is reasonably entertained within the meaning of s (40)(1)*(b)* is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient 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."

This approach has been followed in a long line of cases. See, for example ***M R v Minister of Safety and Security***[4] and the authorities discussed therein. It

[1] See Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 811 H – I.
[2] Duncan v Minister of Law and Order *supra* page 810 J – 811 A.
[3] 1988 (2) SA 654 (SE) at 658 E – H.

is clear that a police officer who seeks to rely on *Section (40) (1)* to justify an arrest is required to carefully analyse the facts before him before he comes to the conclusion that an arrest is necessary. The reason for this requirement is obvious: An arrest is a drastic invasion of person's right to liberty. Did **Captain Bovey** measure up to this required standard? Was his suspicion that plaintiff had committed a *Schedule1* offence in the circumstances one that was based on good and sufficient grounds? Was it reasonable in the circumstances or facts at his disposal? **Captain Bovey** had the following information at his disposal: (As succinctly pointed out in plaintiff's heads of argument).

In a statement obtained from **Mr Dotyeni** on the day after he was robbed, he made no indication that he was able to identify any of his three assailants. Later that same day a **Mr Qubuda** was arrested after being pointed out by **Mr Dotyeni**. After taking over the docket, **Captain Bovey** obtained a statement from **Mr Dotyeni** where he clearly stated that he did not recognise any of the suspects who robbed him. Further that he pointed out **Qubuda** because he robbed him two years ago and he suspected him in respect of the latter robbery because of his built. It is common cause that **Mr Qubuda** was released before **Captain Bovey** took over the case due to lack of evidence. In yet another statement to **Captain Bovey**, **Mr Dotyeni** asserted that on 9 August 2009 at 16H00 he recognised a black male person as the suspect who robbed him on the 1 August 2009 at 20H30. He recognised his face. When he confronted him asking him where his firearm was, he said it was at his house. But, once at his house, he did not produce same. At yet another spaza shop, plaintiff confirmed to the spaza shop owner that he will give **Mr Dotyeni** his firearm.

[11] It is noteworthy that alarm bells did ring with **Captain Bovey** regarding the reliability of **Mr Dotyeni's** evidence, especially when plaintiff denied knowledge of the firearm. He nonetheless acted on same, taking comfort on the fact that, according to him there was evidence from an independent witness – the spaza shop owner. All the spaza shop owner apparently confirmed was that plaintiff said he

[4] M R v Minister of Safety and Security 2016 (2) SACR 540 CC at 553 (42).

would give **Mr Dotyeni** his firearm. She did not witness the robbery. Can it be said that in these circumstances, **Captain Bovey's** suspicion was objectively sustainable and therefore reasonable? In my view, the facts at **Captain Bovey's** disposal pointed away from there being good and sufficient grounds for suspecting that plaintiff had committed robbery – had robbed **Mr Dotyeni**. A close objective scrutiny of the circumstances would have brought it home to **Captain Bovey** that **Mr Dotyeni's** evidence is not reliable. We know that the robbery took place at night. In his first statement, he did not indicate that he identified any of his assailants. In a subsequent statement he expressly stated that he did not recognise them. First, he points at a wrong person. When he points at the plaintiff, on the basis *inter alia* that he said his firearm was at his house, no such firearm is recovered by the police. Plaintiff denied knowledge of the firearm to **Captain Bovey**.

[12] Based on the above, it is my considered view that the suspicion that **Captain Bovey** had was not based on good and sufficient ground and was therefore unreasonable. Plaintiff's arrest was therefore unlawful, so was his detention. Based on the authority of ***Minister of Safety and Security v Never Ndlovu***,[5] the unlawfulness did not cease with the matter being postponed in the reception court without an enquiry whether it is in the interest of justice to detain him further. Which appears to have been the case in the matter under consideration.[6] I have no difficulty in finding that the defendant is liable for the initial detention as well as the further detention after the first appearance in court.

[13] Plaintiff was arrested and detained on the 14 August 2009 and released on the 24 August 2009, the date of which bail was fixed and after he paid bail, making that ten (10) days.

[14] Plaintiff's claim for damages is for a sum of R710 000.00. However, in argument it was submitted that a sum of R330 000.00 would constitute appropriate compensation for unlawful arrest, detention and *contumelia*.

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[5] 788/11 [2012] ZACSA 189 30 November 2021.
[6] See De Klerk v Minister of Police [2019] [ZACSA] 32 CC at [74].

[15] Regard being had to the facts of this case which are *inter alia* that the plaintiff now forty two (42) years old was detained for ten (10) days; initially detained in Makhanda police station and later transferred Grahamstown Prison where he shared a cell with 15 others. In circumstances where it was not possible to enjoy the measly meals served because cell mates would be using the toilet which was inside the cell. He slept on the cement floor on a thin matrass. I am of the view that a sum of R330 000.00 will constitute appropriate compensation for the damages suffered by the plaintiff.

**[16] In the result, the following order is issued:**

**1. Defendant is to pay plaintiff a sum of R330 000.00 for damages.**

**2. defendant is to pay interest on such damages at the prescribed rate of interest from date of judgment to date of payment.**

**3. Defendant is to pay costs of suit.**

**N G BESHE**
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

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Date Heard: 8 – 9 November 2021
Date Reserved: 9 November 2021
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