

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 49587/2009

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	<u>14/10/2016</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between:

SHADRACK TROT MASUKU

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY
POLICE OFFICIAL

FIRST DEFENDANT
SECOND DEFENDANT

JUDGMENT

COLLIS AJ:

INTRODUCTION

[1] The evening of the 13th April 2009, turned out to be no ordinary evening for the plaintiff, Mr. Shadrack Trot Masuku. On this evening he was shot in his right leg, arrested by members of the South African Police Service and thereafter ended up spending the next 16 days in hospital until his final release from police custody on the 2nd of May 2009.

DISPUTED ISSUES

[2] This court was called upon to decide the lawfulness of the arrest and the subsequent detention of the plaintiff. Furthermore, whether the use of force (*the shooting incident*) prior to his arrest, was justifiable in terms of section 49(2) (a) and (b) of the Criminal Procedure Act.¹ At the commencement of the proceedings, the parties applied to the Court to separate the *merits* from the *quantum*, and in terms of Rule 33(4), the Court granted such separation.

DEFENCES

[3] It is trite law that an arrest is *prima facie* wrongful and unlawful. The defendant thus carried the *onus* to prove the lawfulness of the arrest.² Reliance in this regard has been placed on the provisions of section 40(1) (b) of the Act. The relevant section is quoted hereunder for ease of reference.

'(1) A peace officer may without a warrant arrest any person-

(a)

¹ Act 51 of 1977

² Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A): dictum at 589E-F applied

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody;.....'

[4] In *Duncan v Minister of Law and Order*³ it was held that the jurisdictional factors for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (*the arrestee*) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

[5] In its amended plea the defendants in paragraph 6 thereof had formulated its defences as follows:

"6.1 Save for denying that a police officer negligently shot and arrested Plaintiff without a valid reason, the rest of the allegations herein are admitted.

6.2 First Defendant avers that Plaintiff's arrest is justifiable in terms of section 40(1) (b) of the Criminal Procedure Act 51 of 1977 in that:

6.2.1 he was arrested by a peace officer;

6.2.2 the arresting officer entertained a suspicion;

6.2.3 that the Plaintiff had committed or attempted to commit a crime of robbery and/or assault which fall under Schedule 1 of Act 51 of 1977;

6.2.4 that the suspicion rested on reasonable grounds;

6.2.5 and the arresting officer exercised a proper discretion on having the Plaintiff arrested and incarcerated.

³ 1986 (2) SA 805 (A): dictum at 818H-J applied

6.3 The First and Second Defendants avers that Plaintiff's shooting is justifiable in terms of section 49(2)(a) and (b) of the Criminal Procedure Act 51 of 1977 in that:

(i) the Plaintiff posed threat of serious violence to the Second Defendant:

(ii) the Plaintiff was suspected on reasonable grounds of having committed a crime involving the infliction of serious bodily harm and there was no other reasonable means of affecting the arrest at that time or later."

[6] Briefly the facts of this case can be summarised as follows: On the evening of 13 April 2009, the plaintiff travelling in a vehicle, had a mechanical breakdown around the Crystal Park area. As he was nearby a tavern he walked towards the tavern to ask some patrons to assist him to push his vehicle towards the tavern in order to secure it. After having been assisted he locked his vehicle and proceeded on foot to his friend's house that happens to stay in the Crystal Park area. At the time he only had in his possession his car keys and cellular phone. Whilst he was walking along he then heard a gunshot rang out and started to run. He fell to the ground and it was only then, that he had realised that he had been shot in the right leg. One of the police officer's then approached him and started to assault him. This officer called for assistance over his radio. A police van then arrived from which a second police officer alighted and this officer also assaulted him with booted feet. He was then dragged and pushed into this police van. Whilst they were driving away and at the back of the van, he tried to make a call from his cellular phone and the van then came to a standstill. Another police officer alighted from the van and took his cellular phone away from him. The van then proceeded to drive to a house from where a gentleman was called and asked to identify him. The person was unable to do so

and the plaintiff was then taken to the police station. Upon their arrival at the police station the police officers went inside the police station, but he was required to remain at the back of the van until he eventually fell asleep. Some 30 minutes or so had elapsed when an ambulance finally arrived and he was then taken to the Tembisa hospital where he was treated and hospitalised for approximately 3 weeks. Upon his discharge from hospital he was further detained at the Crystal Park police station and only released the following evening without ever appearing in court. Under cross-examination, he inter alia stated the following:

- that upon his arrest he failed to inform the police that he earlier had a breakdown and that his vehicle was left at the tavern.
- albeit the area was dark where he was walking prior to being shot, he was still able to see ahead of him. Moreover, that a vehicle approaching him at a distance of 40 metres from behind had illuminating bright lights which made it possible for him see.
- that he for the first time only observed the police van after he had been shot and at no stage prior thereto.
- he could proffer no reason as to why the police would have shot at him.
- he further denied that on the evening in question he was carrying a bag which contained housebreaking implements and that he was resisting arrest.
- furthermore, that on the evening in question he did not shout for help after having been shot and assaulted as it was late at night and that he was afraid.

[7] Nomsa Mkhathshwa was a witness for the plaintiff. In brief she testified that she was a relative of the plaintiff and on the evening of his arrest she had borrowed him, her vehicle to use. Upon learning of his arrest, she went to Tembisa hospital but was

unable to visit him as he was under police guard. Sometime thereafter she returned to the hospital where the plaintiff had given her, her car keys and she eventually found her car parked next to a tavern in Crystal Park. She was unable to testify as to the events leading up to the plaintiff's arrest.

[8] This then was the totality of the evidence presented by the plaintiff.

[9] Constable Azwinndini Mabuda testified that at the time of the incident he was employed by the South African Police Service, stationed at the Crystal Park police station. Whilst on duty at the police station, he was approached by a member of the public, who reported that an unknown gentleman was in his yard and he wanted some assistance from the police. He together with two other police members then proceeded to escort the complainant to his house driving behind him in their marked police vehicle. Upon arrival at the complainant's house he observed an unknown gentleman, crossing the street. He then first escorted the complainant into his house found everything to be in order and then returned to his vehicle where after they then proceeded to follow this unknown gentleman. As they proceeded along he then noticed this person walking next to a streetlight. He accelerated and switched on his bright lights and it was then that this person ran to the direction of the houses and jumped into one of the yards. He alighted from the vehicle and further pursued this person on foot. He waited for approximately 15 minutes and then noticed this person emerged from one of the yards. He then cried out to this person: "Who are you and where are you going?" This person immediately stopped and looked at him surprised. This person then started walking towards him and took out an okapi knife from his pockets whilst aggressively shouting: 'Shoot, shoot.' The witness then fired

a warning shot into the ground, shouting: "Stop, stop." This unknown person continued to aggressively approach him and he then fired a second warning shot into the ground. The next shot was then fired into the leg of this individual who eventually fell down to the ground and dropped the bag that he was carrying. He stood up, leaned against a wall and then proceeded to yet again jump this wall running into the yard whilst screaming and asking for help. The witness then pursued him and his colleague arrived, the person was then arrested. Contained inside the schoolbag they found a wheel spanner, jack and spoiled food, which the person refused to eat when asked by the police to do so as he claimed for it to have been poisoned. The witness further testified that the area where the incident occurred was known for housebreakings, theft and dog poisoning and the reason for shooting this individual was to stop him from approaching him with a knife. During cross-examination the witness *inter alia* stated the following:

- that the police was given a description by the complainant of the unknown gentlemen which he found inside his yard. The description being that this person was not very tall and wearing dark clothes.
- that the plaintiff on first being observed by the witness was going to be arrested if the plaintiff fitted the description as given by the complainant.
- That on first approaching the plaintiff he failed to inform the plaintiff that he wanted to arrest him and he could give no reason why he failed to do so. He also conceded that when the plaintiff had put his hands in his pockets he failed to ask him to take same out.

- He conceded that the incident was his first occurrence with a suspect and that during his training he was taught he could apply force when his life was in danger.
- He also conceded that on the evening in question the plaintiff was arrested for being in possession of car breaking instruments i.e. a screwdriver, spanner and jack and that the plaintiff when asked about it, had failed to give an explanation for being in possession of it.

[10] Ms. Legoana Granny Modiope was a further witness called by the defendant. In brief she testified that on the evening of the incident and whilst still at the police station, the complainant approached them seeking assistance to accompanying him to his house as there was an unknown person at his gate. This evening she was in the company of Constable Mabuda and Constable Modimula. Upon arrival at the complainant's house they all alighted from their marked patrol vehicle and first accompanied the complainant into his house. When they returned to their vehicle she was the driver, and it was then that they noticed an unknown black male walking in the street. They proceeded to follow this individual and her crew members alighted from the vehicle to pursue this person on foot. As she was patrolling she then heard three gunshots rang out and she returned to the street where her colleagues had alighted. She then found that the suspect had been shot and assisted her colleagues in handcuffing the suspect. On the scene she noticed a bag which contained a jack, wheel spanner, okapi knife and dog poisoning. She denied the claim that the suspect had car keys in his possession and testified that the suspect was resisting arrest.

[11] This then was the totality of the evidence presented before the court.

[12] For the purposes of this judgment it would be appropriate to mention that the first three jurisdictional factors were indeed common cause between the parties. The fourth jurisdictional factor is what the plaintiff has placed under attack.

[13] To decide what a *reasonable suspicion* is, there must be evidence that the arresting officer formed a suspicion, which is objectively sustainable.⁴

[14] In addition thereto, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a schedule 1 offence. In the decision of *Mabona and Another v Minister of Law and Order and Others*⁵ Jones J, said the following:

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good sufficient grounds for suspecting that 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 this information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only

⁴ *Mvu v Minister of Safety and Security & Another* 2009 (2) SACR (GSJ) at [9]

⁵ 1988 (2) SA 654 (SE): dictum at 658E-G applied

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.'

[15] The peculiar circumstances of a particular case that the arresting officer is presented with, will therefore determine whether such suspicion would be reasonable or not. The test as to whether the suspicion of the person effecting the arrest is reasonable must be approached objectively.⁶

[16] In general the object of an arrest must be to bring the arrested person before a court to be charged, tried and then either convicted or acquitted. See in this regard the decision *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) at [28]. But if the person effecting an arrest is a peace officer and he entertains a reasonable suspicion that a person has committed a First Schedule offence, it is not necessary that he intends to bring the arrested person before a court in order to charge him. It is sufficient in such circumstances to intend to detain the suspect in order to first investigate the case and then, depending on the result of the investigation, to either bring him before a court to be charged or release him. This qualification of the general rule on the one hand results from the element of uncertainty implicit in the concept of 'suspect' in section 40(1) (b).

⁶ See in this regard *R v Van Heerden* 1958 (3) SA 150 (T) at 152E

[17] The question to then be answered is; what was the reasonable suspicion entertained by Constable Mabuda on the evening in question? He at first responded to a report made by the complainant to accompanying him to his house as he had noticed an intruder inside his yard. Constable Mabuda testified that upon accompanying the complainant to his house no intruder was found inside his yard nor was there any indication that the complainant's house had been broken into. In fact when he left the complainant's house all was in order.

[18] The pleaded case of the defendants,⁷ was that the arresting officer arrested the plaintiff having formed a reasonable suspicion that the plaintiff had committed or attempted to commit the crime of robbery and/or assault which falls under Schedule 1 of Act 51 of 1977. The only remaining information that Constable Mabuda had at his disposal having left the house of the complainant, was a clothing description and height of the intruder which happened to describe the plaintiff. At that point he could not have formed a suspicion as per the defendants pleaded case that the person so described by the complainant had either committed the crime of robbery or attempted to commit the crime of robbery and or assault.

[19] The further question then remains, what subsequent facts were at his disposal upon which he could have formed the suspicion? The only other facts were the behaviour of the plaintiff in not having responded to questions posed by Constable Mabuda as to who he was and where he was going. Also, the behaviour of the plaintiff, namely, having jumped into the yard of one of the houses and of the plaintiff

⁷ See Amended Plea para 8.2.3 page 81

having carried a bag with him. Constable Mabuda testified that this heightened his suspicion that the plaintiff was somehow involved in breaking into houses or vehicles as these offences had been prevalent in the area.

[20] The actions as to the behaviour of the plaintiff and that on the night in question, he was carrying a bag and running from the police was denied by the plaintiff.

[21] Where a court is faced with two mutually destructive versions Nienaber JA in the decision Stellenbosch Farmers Winery Group Ltd & Another v Martell ET Cie 2003 (1) SA 11 (SCA) described the technique to be employed by the courts in resolving factual disputes and I am enjoined to employ this technique.

[22] The witnesses on either side made favourable impressions on the Court. Where necessary they could motivate answers given by them and were able to tender their evidence in a coherent and logic manner. In respect of all the witnesses before this court, I find that their evidence could be relied upon.

[23] When one however has regard to the probabilities, such tend to favour the plaintiff's case and this I say for the following reasons:

23.1 On Constable Mabuda's version, the plaintiff jumped into a yard to run from the police, yet the plaintiff elected to emerge from the very yard in order to face arrest. This I find to be improbable.

23.2 On Constable Mabuda's version, the plaintiff was carrying house breaking or car breaking implements contained inside the bag which he was carrying and even though the plaintiff had ample opportunity to discard the

bag, he continued to carry same and thereby placing himself at risk for it to be confiscated by the police.

23.3 On his further evidence, the plaintiff must have been very heroic in confronting a policeman with a knife this whilst the policeman was pointing a firearm at him.

23.4 On the defendant's version, the plaintiff was never taken to be identified by the complainant, yet it was as a result of the complainant that the police went to the area. The most probable thing to have been done, would be to allow the complainant an opportunity to identify the plaintiff.

23.5 Constable Mabuda also testified that the bag, together with its contents was booked into the SAP 69 register, yet no corroborating evidence in the form of the register was presented before this court, which would have given credence to not only his testimony but also that of Constable Modiope.

23.6 Another probability weighing heavily against the defendant is the failure to have charged the plaintiff after his prolonged stay in hospital under police guard. The uncontested evidence presented by the plaintiff was that upon his discharge from hospital he was taken back to the Crystal Park Police station and only released the following evening without ever being charged or appearing in court.

[24] Given the conspectus of the evidence and the probabilities listed above, I am of the opinion, that the probabilities tend to favour the version proffered by the plaintiff and as a consequence I conclude that the defendant failed to discharge its *onus*. It thus follows that the decision to arrest the plaintiff was made arbitrarily and premised on irrational grounds.

[25] Having found that the probabilities tend to favour the version as testified to by the plaintiff, I similarly conclude that the defence relied upon in terms of section 49(2) (a) and (b) of the Criminal Procedure Act, cannot be sustained.

ORDER

[26] In the result the following order is made:

26.1 On the *merits* judgment is granted in favour of the plaintiff against the defendants with costs.



COLLIS AJ

ACTING JUDGE GAUTENG LOCAL DIVISION JOHANNESBURG

Date of Hearing:	8 August 2016
Date of Judgment:	14 October 2016
Counsel for Plaintiff:	Adv. Z.R. Nxumalo
Instructing Attorney for Plaintiff:	Steve Nkosi Attorneys
Counsel for Defendant:	Adv. M.M. Zondi
Instructing Attorney for Defendant:	State Attorney Johannesburg