



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
 (3) REVISED No

DATE: 8 February 2019.....

SIGNATURE:

Case No. 51292/2013

In the matter between:

MASINDI ALPHEUS MUKWEVHO

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MILLAR, A J

1. The Plaintiff brought an action for damages against the defendant for damages arising out of what was alleged to be his unlawful arrest and detention.
2. The parties agreed that the action proceed at this stage for the determination of liability and in the circumstances sought an order in terms of Rule 33(4) of the Uniform Rules separating the issue of liability from that of the quantum of damages. I granted the order sought.
3. It was common cause that on 9 March 2012 and at Mabopane, the plaintiff was arrested. He was arrested, without a warrant having been first issued and thereafter detained at the Mabopane Police Station until his release on bail a few days later.
4. The defendant accepted that it bears the onus of proving that the arrest was lawful but only if it was established that the arrest was effected by its employees. It raised the point that it would establish that the arrest was not effected by its employees but by officers of the Tshwane Metropolitan Police.
5. The plaintiff was the only witness who testified at the trial. His evidence was that on the evening of 9 March 2012 he had gone to the Morula Sun Casino for the evening. When he had arrived at the gate he had been taken aside and detained. He was told that he was being detained because of an unpaid hotel bill – the allegation being that he had previously stayed overnight at the hotel and then absconded without payment.
6. He was taken to a satellite police station a short distance from the Morula Sun entrance. The officer he found behind the counter there spoke to him and advised him to sort the matter out and pay. The plaintiff did not know why he had been detained or brought to the satellite police station. His evidence was that he did not owe anything and so would not pay.

7. A while later he was taken to the Mabopane Police Station where he was taken into custody and locked in the cells. It was only during the early hours of the following morning that he was approached by a police officer who informed him that he was the investigating officer and told that he was under arrest.
8. The plaintiff was cross-examined primarily on the colours of the uniforms of the various persons with whom he had interacted. He was certain that he had been detained and arrested by the police as they wore blue uniforms – both at the satellite station and at the Mabopane station.
9. After the plaintiffs' case was closed, the defendant placed on record that it had no evidence available to establish the arrest of the plaintiff by the Tshwane Metropolitan Police and thereupon closed its case.
10. The plaintiff was arrested without a warrant. Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that, "a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1".
11. It was held by the Supreme Court of Appeal in *Duncan v Minister of Law and Order*¹ that *"The so-called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:*

(1) the arrestor must be a peace officer;

(2) the arrestor must entertain a suspicion;

(3) the suspicion must be that the suspect committed an offence referred to in schedule 1;

(4) the suspicion must rest on reasonable grounds."

¹ 1986 (2) SA 805 (A) at 818 G-H

12. The test to be applied is an objective one² and requires evidence.
13. The onus of proving the lawfulness of the arrest in a matter such as the present one lies with the defendant³. The defendant led no evidence to establish any of the jurisdictional facts necessary for the arrest to be rendered lawful.
14. In the circumstances, I find that the defendant has failed to discharge the onus upon it and the plaintiff's claim succeeds.
15. It is ordered:
 - 15.1 The defendant is liable for such damages as the plaintiffs may prove arising out of their arrest and detention on 9 March 2012;
 - 15.2 The defendant is to pay the plaintiff's costs of suit to date on the scale as between party and party.
 - 15.3 The determination of the quantum of damages is postponed *sine die*.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 7 FEBRUARY 2019

JUDGMENT DELIVERED ON: 7 FEBRUARY 2019

² Duncan supra at 814 D-E where it was stated "*it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach he in fact has reasonable grounds for his suspicion*"; see also Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ)

³ Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589 E-F; Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A).

REASONS: 8 FEBRUARY 2019

COUNSEL FOR THE PLAINTIFF: ADV PJ COETSEE

INSTRUCTED BY: MAKWARELA ATTORNEYS

REFERENCE: MR MAKWARELA

COUNSEL FOR THE DEFENDANT : ADV MD SEKWAKWENG

INSTRUCTED BY: THE STATE ATTORNEY - PRETORIA

REFERENCE: MR MATUBATUBA