




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 13065/17

(1)	REPORTABLE: NO / YES
(2)	OF INTEREST TO OTHER JUDGES: NO / YES
(3)	REVISED. NO / YES
<u>31</u> MARCH 2022	
DATE	 SIGNATURE

In the matter between:

TOCKNICE MPHAMBO

1st Plaintiff

SANDISILE MPHAMBO

2nd Plaintiff

WILLIAM MZUBANZI MPHAMBO

3rd Plaintiff

AND

MINISTER OF POLICE

Defendant

JUDGMENT

MAKHOB A J

1. The 3 (three) plaintiffs were arrested for murder and subsequently the charges were withdrawn against them. The plaintiffs are claiming damages against the minister of police for unlawful arrest and detention.
2. In the opening address and heads of argument counsel for the defendant informed this court that the defendant is only liable for the unlawful arrest and detention of the plaintiff's from 18th August 2016 to the 19th August 2016 which amounts to a duration of 1 (one) day only.
3. For the remainder of the 41 (forty-one) days the plaintiffs were detained counsel for the defendant impute the blame squarely to the prosecution who are not joined in the proceedings.

Common Cause

4. It is common cause between the parties that the plaintiffs were arrested and detained by the police officer Mulaudzi on the 18th August 2016 on a charge of murder and they were detained for 42(forty-two) days. The

officer Muluadzi was acting within the scope of his duties when he arrested the plaintiffs. Unfortunately, officer Mulaudzi has since passed on.

5. The parties agreed to hand in the docket as contained on caseline¹. It is further common cause that the plaintiffs handed themselves to the police and they were arrested and detained.

The issues

6. The issue between the parties is whether the national prosecuting authority in this case (the prosecutor) who asked the magistrate to remind the plaintiffs in custody for 41 (forty-one) days is responsible for the detention of the three appellants unlawfully and thus liable for damages.
7. All three plaintiffs testified that upon hearing from their neighbours that the police were looking for them they handed themselves to the police on the 18th August 2016 and were detained by officer Mulaudzi and were in custody for 42 (forty-two) days. They were all released when the prosecutor withdrew charges against them. The plaintiffs testified that they did inform the arresting officer that they were not involved in any assault or murder of the deceased.
8. The defendant did not call any witnesses and closed its case. Both counsels submitted their heads of argument.

¹ Vide- Caselines 077-1

9. Counsel for the defendant admitted liability on behalf of the defendant. However, the plea by the defendant on paragraph 4.2² reads as follows:

“4.2 The defendant specially denies that the plaintiffs were unlawfully arrested without a warrant by members of the South African Police Service on the 18th August 2016 or any date whatsoever and puts plaintiffs to proof thereof”

Paragraph 5.2 reads as follows:

“The defendant specifically denies liability to compensate the plaintiff for the amount claimed or any amount whatsoever and puts plaintiffs to proof thereof.”

Paragraph 13 reads as follows:

“The allegations herein contained and plaintiffs are put to proof thereof. Wherefore, defendant prays for plaintiff’s claim to be dismissed with costs.”

10. The above mentioned paragraphs in the defendant’s plea at no stage were they amended by the respondent up until the end of the trial.
11. It is trite law that the address by counsel or admission of liability must be in line with the pleadings.
12. The admission of liability without the amendment of the pleadings cannot supersede what is contained in the pleadings. Unless the plea is amended to be in line with the admission of liability the court is not bound by the admission of liability by counsel for the defendant.

² Vide- Caselines 002-1 at 002-17

13. Therefore, what is contained in paragraphs 4.2, 5.2 and 13 of the plea still binds the defendant because it was not amended.
14. To reiterate the admission of liability by counsel for the defendant has no merit as it was done without amending the plea and therefore does not bind the court.
15. The onus rests with the defendant to establish the lawfulness of the plaintiff's arrest on a balance of probabilities see *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 at 38B-C; *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA (CC) at paragraphs 24 and 25.
16. Section 40 (1) (a) and section 40 (1) (h) of the CPA are relevant to the arrest in this matter. Section 40 (1) (a) of the CPA reads as follows:
- "40 Arrest by peace officer without warrant*
(1) A peace officer may without warrant arrest any person-
(a) Who commits or attempts to commit any offence in his presence."
17. The burden of proof in civil case lies with the plaintiff to prove the case on balance of probabilities. See *Pillay v Krishna and another* 1946 AD 945
18. Of cardinal importance in this case is that the court must decide whether officer Mulaudzi acted lawfully in arresting the plaintiffs.

19. The statement of the deceased girlfriend namely Thozama Magwebu³ shows that the deceased whilst alive accused the plaintiffs of having assaulted him. When Thozama Magwebu visited the deceased, the deceased repeated to her that he was assaulted by the plaintiffs. She again states in her statement that she had a love affair with Sandile Mphambo the second plaintiff in this matter.
20. Moreover, Captain Issac Phokwane⁴ in his statement says when he went to the hospital he saw the deceased and from his observation the deceased had stabbed wounds on his head.
21. The statement of one Manana⁵ is very vague because he says that he was driving a motor vehicle and he collided with a person. It is not clear whether that person is the deceased in this case or not. Furthermore, this statement contradicts the statement of Captain Phokwane and Thozama Magwebu.
22. In *Jacobus J Van Wyk v The Minister of Police*⁶ A.C Basson J said the following in paragraph 18 page 6

“[18] The test is an objective one and the question to be answered is in our view whether arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the arrestee had prima facie committed an offence in his presence. Stated differently, did the arresting officer have knowledge at the time of arrest of the arrestee, of such facts which would, in the absence of any further facts or evidence, constitute

³ Vide- Caselines 077-53

⁴ Vide Caselines 077-58

⁵ Vide- Caselines 077-128

⁶ North Gauteng Division of the High Court no: A617/15 delivered on the 17/11/201. See also *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG)

proof of the commission of the offence in question. The aim is not to determine whether the arrested person is guilty of the offence on which he was arrested. It accordingly matters not that the arrestee was not prosecuted or was acquitted at a subsequent trial on the basis of evidence other than what the arresting officer had in his possession at the time when he executed the arrest. An acquittal simply means that the prosecution failed to prove the guilt of the arrested person beyond a reasonable doubt on the evidence available to it at that time and place before the trial court. As stated by Price J in R v Moloy 1953 (3) SA 659 (T) at 662E:

'It is not necessary, of course, that a person who is apparently committing one of the minor offences referred to in s 26(a) of Act 31 of 1917 must thereafter be convicted of that offence in order for the arrest to have been lawful. For instance, a constable may validly arrest a person whom he sees committing a common assault even if it should turn out later on that such person was acting in self-defence and is innocent of any offence. The constable in such a case would see before his eyes all the elements which go to constitute the crime of assault.'

23. In page 7 of the same decision Judge Basson says

"Of particular importance is the principle emphasised by the court in Scheepers that it is not required of the arresting officer to determine whether the arrestee is guilty or not. What is relevant is whether, objectively viewed, the arresting officer had knowledge at the time of the arrest of such facts which would, in the absence of any further facts or evidence, constitute proof of the commission of the offence in question. It is also not required that the arresting officer must form the view on the likelihood or otherwise of a conviction of the person that was arrested in terms of section 40(1) (a) of the CPA. It is likewise not required that the arrestee is later charged or convicted. See in this regard Minister of Safety and Security and Another v Mhlana where the court held that-

“...in order for a peace officer to be placed in a position to rely upon a 40(1) (a) it is not necessary that the crime in fact be committed or that the arrestee be later charged and convicted of the suspected offence.”

24. From the decisions I have referred to above it is clear that the arresting officer must exercise a discretion before effecting an arrest⁷.
25. In addition an arrest will not be unlawful if it was the intention of the arresting officer to arrest pending further investigations into the alleged offence prior to releasing the arrestee⁸.
26. Taking into account the statements of Thozama Magwebu and Captain Phokwane I am satisfied that sufficient facts were present upon which the arresting officer could properly have concluded that *prima facie* an offence had been committed in that the deceased had already told his girlfriend who assaulted him. In our law of evidence what the deceased said before he/she died is admissible in a court of law. Captain Phokwane's statement also corroborates the statement of the deceased and Thozama Magwebu that the deceased was assaulted and not that he was hit by a motor vehicle.
27. The remand of the plaintiffs in custody for more than one day is justified in the light of the nature of the criminal case against the appellants.

⁷ Raduvha v Minister of Safety and Security and Another [2016] ZACC 24

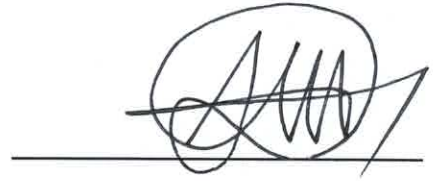
⁸ Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 812 H-813 B

28. It is not a requirement that the arresting officer must form the view on the likelihood or otherwise of a conviction of the person that was arrested in terms of section 40(1) (a) of the Criminal Procedure Act⁹. It is likewise not required that the arrestee is later charged or convicted¹⁰.
29. On the basis of the statement contained in the docket handed to court by both parties. In my view the prosecutor misdirected himself/ herself when she/he withdrew all the charged against all 3 (three) plaintiffs. In my view there is *prima facie* evidence against all 3 (three) plaintiffs. All 3 (three) plaintiffs on the basis on the statements contained in the docket can still and must be prosecuted for the murder of the deceased.
30. The submission by the counsel for the respondent are in direct conflict with the plea and have no merit since the plea|was not amended.
31. I am furthermore of the view that in the light of the facts and evidence before me that sufficient facts existed at the time on which officer Mulaudzi arrested the plaintiffs. I am satisfied that the arrest was lawful in the circumstances and that the discretion to arrest and detain the plaintiffs was properly exercised. I am further satisfied that in arresting the plaintiffs, the arresting officers acted within the ambit of section 40 (1) (a) and 40 (1) (h) of the Criminal Procedure Act.
32. I am satisfied that there are no merits in the claim by the plaintiffs.

⁹ Scheepers v Minister of Safety and Security *supra*

¹⁰ Jackobus Van Wyk v The Minister of Police *Supra*

33. Consequently all three plaintiffs claim is dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized 'M' with a horizontal line crossing through it, positioned above a solid horizontal line.

D MAKHOB

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the applicant: Advocate L Ledwaba

Instructed by: Tshabangu Attorneys

For the respondent: Advocate Malatji

Instructed by: The State Attorney

Date heard: 19 January 2022

Date of Judgment: 31 March 2022