

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 958/2017 &

959/2017

In the matter between:

MOJALEFA SHADRACK KHUMALO

1st Plaintiff

NOMBULELO CAMAKU

2nd Plaintiff

And

MINISTER OF POLICE

Defendant

DATE OF HEARING : 12 FEBRUARY 2019

DATE OF JUDGMENT : 21 FEBRUARY 2019

FOR THE APPLICANT : MR. GURA

FOR THE RESPONDENT : MR. NKONWANA

JUDGMENT

HENDRICKS J

Introduction

- [1] Mr. Mojalefa Shadrack Khumalo (1st plaintiff) and Ms. Nombulelo Camaku (2nd plaintiff) instituted separate actions for damages based on alleged unlawful arrest and detention against the Minister of Police (defendant). Respective case numbers were issued for the different actions namely case number 958/2017 in respect of Mr. Khumalo's case and 959/2017 in respect of Ms. Camaku's case. These two cases were consolidated and heard on the 12th day of February 2019. At the inception of the trial, the parties had agreed that the merits and quantum be separated and that the trial proceed on merits only. The issues to be determined are whether the arrest and detention of the 1st and 2nd plaintiffs, without a warrant for their arrest, were lawful and furthermore whether they were detained in excess of 48 hours as prescribed by the Criminal Procedure Act 51 of 1977, as amended.
- [2] The facts can be succinctly summarized as follows. On Wednesday, the 30th day of November 2016, Mr. Kgori the owner of Nthabisang Trading shop situated at Driefontein Village, Lehurutshe received a report about a burglary at the shop. He went to the shop to inspect what happened. The shop was burgled and goods to the value of approximately of R 13 000.00 were stolen. He and some companions then followed the footprints and tracks of a wheelbarrow that was apparently used. This led to a place where he found Ms. Nombulelo_Ms. Camaku and Mr. Shadrack Khumalo. He conducted his own investigations which led him to belief that they were involved in the commission of this offence. A complaint was laid with the South African Police Services (SAPS) on the 01st day of December 2016. The private investigations done by Mr. Kgori revealed that Mr. Motsamai, who is also referred to as a pastor and traditional healer, had knowledge about his goods. Mr. Motsamai was confronted about this. Ultimately the goods were retrieved from a shack which belong to the girlfriend of Mr. Motsamai.

- [3] Captain Mokgatle of the SAPS was the investigation officer in this case. He conducted investigations. Based on the information he received from Mr. Kgori, he caused Ms. Nombulelo Camaku and Mr. Shadrack Khumalo to be arrested by members of the SAPS in Mahikeng on Thursday, the 29th day of December 2016. On the very same day, he travelled to Mahikeng to collect them and transported them to Lehurutshe Police Station at about 17H00 hours. After questioning them, they were charged and detained at Groot Marico Police Station. They were taken to court on the 03rd day of January 2017. During cross-examination it became apparent that the investigations by this witness carried on for a month (30th November to 29th December). According to this witness the case was provisionally withdrawn against Ms. Camaku and Mr. Khumalo.
- [4] It emerged during the cross-examination of Captain Mokgatle that he formed a reasonable suspicion based on the information he received, that Ms Camaku and Mr. Khumalo were, together with Mr. Motsamai, involved in the commission of this offence. This informed his decision that they should be arrested. They were charged with (house) breaking and theft. It is common cause that they were arrested without a warrant.
- [5] The defence to the claim of unlawful arrest and detention is that in terms of section 40 (1) (b) of the Criminal Procedure Act, 51 of 1977 (the act) as amended, a Schedule 1 offence namely housebreaking and entering as well as theft were committed. Section 40 (1) (b) provides:

"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;

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

(c) ...”

(Emphasis added)

- [6] The onus to prove that the arrest was lawful is on the defendant. So too, was the duty to begin. In **Minister of Law and Order vs Hurley and another** 1986 (3) SA 568 (A) at 589 E-F the following is stated:

“In view of the foregoing I hold that the above-quoted passage in the judgment of OGILVIE THOMPSON JA in Brand's case supra contains a correct statement of the law as to the question of onus in the case of arrests without warrant and, furthermore, that the law as there stated also applies to arrests under s 29 (1) of Act 74 of 1982. I would add that I consider it to be good policy that the law should be as there stated. An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law. See generally Weeks and Another v Amalgamated Agencies Ltd 1920 AD 218 at 226; Cohen Lazar & Co v Gibbs 1922 TPD 142 at 144 - 145; May v Union Government 1954 (3) SA 120 (N) at 124H; Ingram v Minister of Justice 1962 (3) SA 225 (W) at 227D and Areff v Minister van Polisie 1977 (2) SA 900 (A) at 914G.”

- [7] It is trite that the arrestor must be a peace officer, who entertain a suspicion that the suspect committed an offence referred to in Schedule 1 of the act and that the suspicion must rest on reasonable grounds. In **Duncan v Minister of Law and Order** 1986 (2) SA 805 AD the following is stated:

“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) He must entertain a suspicion.*
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).*
- (4) That suspicion must rest on reasonable grounds.*

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislator.”

See also: **De Klerk v Minister of Police** 2018 (2) SACR 28 (SCA)

- [8] The question that arises is whether there was a reasonable suspicion that the plaintiff’s has committed the offence of (house) breaking and entering as well as theft. The question as to whether the suspicion of the person effecting the arrest

is reasonable, must be applied objectively. The circumstances giving rise to the suspicion must be as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence.

See: **De Beer and Another v Minister of Police and Another** (Case 3792 & 3793/2010) ZAGPPHC.

- [9] The question whether the arresting officer harbored a reasonable suspicion is relevant. In a leading case on the subject of unlawful arrest, namely: **Minister of Safety and Security v Sekhoto** 2011(1) SACR 315 (SCA) at 320h-321b, the following is said:

*"[27] As was held in **Duncan v Minister of Law and Order** (1986 2 SA 805 (A) at 818G H), the jurisdictional facts 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."

[28] In all the circumstances, and for the reasons mentioned, I am of the view that these jurisdictional facts were present when the appellants were arrested so that the section 40(1)(b) defence raised in the plea falls to be upheld. For the same reasons, I am of the view that the respondents discharged the onus resting upon them to prove that the

arrest and subsequent detention of the appellants was lawful – as to this onus, see Amler's Precedents of Pleadings by Harms, 7th ed p46 and the authorities there quoted.”

- [10] In some conclusionary remarks Prinsloo J. in the **De Beer** case, *supra*, addresses the question whether the police were obliged to consider whether there were no less invasive options to bring the suspects before the court than immediate detention. This aspect was comprehensively addressed in **Minister of Safety and Security v Sekhoto** 2011 (1) SACR 315 (SCA) as the fifth jurisdictional fact. The following is stated in paragraph [22].

“[22] *With all due respect to the different High Court judgments referred to, applying all the interpretational skills at my disposal and taking the words of Langa CJ in Hyundai seriously, I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.”*

No fifth jurisdictional fact exist for purposes of a section 40 (1) (b) defence. I echo the sentiments expressed by Prinsloo J. in that judgment.

- [11] It is quite apparent from the investigations done by Mr. Kgori, which information was conveyed to Captain Mokgatle, that Ms. Camaku and Mr. Khumalo were suspected to be involved in the commission of this offence. Mr. Kgori established that the shoeprints that they followed led to the place where Ms. Camaku and Mr. Khumalo were. It is common cause that Mr. Kgori did approach Ms. Camaku on the 01st December 2016. Ms. Camaku made some admissions to him and

volunteered certain information. Mr. Kgori confronted Mr. Motsamai who confessed and led Mr. Kgori to the shack where the goods were stored. The goods were retrieved and positively identified by Mr. Kgori as his. Statements in this regard were obtained and filed in the police docket before the arrest of Mr. Khumalo (1st plaintiff) and Ms. Camacu (2nd plaintiff). Armed with all this information, Captain Mokgatle formed the suspicion about the involvement of Ms. Camacu and Mr. Khumalo in the commission of this offence.

- [12] This is not a case where Captain Mogkatle arrested first and then investigated later. He first investigated and gathered information about the involvement of the 1st and 2nd plaintiffs and thereafter, based on the information at his disposal, formed a reasonable suspicion about their involvement in the commission of the offence, before he caused them to be arrested, detained and charged. It is quite surprising that the matter was withdrawn even against Mr. Motsamai in the face of such overwhelming evidence. However, that is not a matter for this Court to decide. In my view, the arrest of the 1st and 2nd plaintiffs were lawful.
- [13] In the pleadings it was contended that the detention of the 1st and 2nd plaintiffs were unlawful in that they were detained in excess of 48 hours. They were arrested on the 29th December 2016, which was a Thursday, and also charged. The time of their arrest according to the evidence of the 1st and 2nd plaintiffs were effected between 06H00 and 07H00, in Mahikeng. According to their warning statements they were charged at 14H31 at Motswedi Police Station in Lehurutshe. They were taken to Groot Marico and detained there.
- [14] The following day was Friday, 30th December 2016. The 48 hour period stopped running at midnight on that Friday and only continues to run after the weekend. The 31st December 2016 was on a Saturday and the 01st January 2017 (New Year's day) was on a Sunday. Because New Year's day (01st January 2017) was a public holiday and it fell on a Sunday, the following day, Monday, 02nd January 2017 was then also a public holiday. Courts were not open on the 02nd January

2017. The next court date was Tuesday, 03rd January 2017. It is common cause that the 1st and 2nd plaintiffs were taken to court on this day. All this happened within the prescribed 48 hour period. Mr. Gura who represented the 1st and 2nd plaintiffs conceded, quite correctly in my view, that the period of detention did not exceed the 48 hour period. Therefore, the detention of the plaintiffs were not unlawful.

[15] I am satisfied that all the jurisdictional facts for the arrest without a warrant is present in this matter. Captain Mokgatle did form a reasonable suspicion that the plaintiffs were involved in the commission of this offence together with Motsamai, based on the information at his disposal. The arrest and detention of the plaintiffs were lawful. Consequently, their claims should be dismissed. Costs should follow the result and be awarded in favour of the defendant.

Order:

[16] Resultantly, the following order is made:

- (i) The claims of the 1st plaintiff (Mr. Mojalela Shadrack Khumalo) and the 2nd plaintiff (Ms. Nombulelo Camacu) are dismissed.
- (ii) The 1st and 2nd plaintiffs are ordered to pay the costs of suit, jointly and severally, the one paying the other to be absolved.

R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG