

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/29650

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

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DATE

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SIGNATURE

In the matter between:

**MATHE: PATRICK JABULANE**

**Applicant/Plaintiff**

And

**THE MINISTER OF POLICE**

**First Respondent /Defendant**

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**J U D G M E N T**

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**HAWYES, AJ:**

**INTRODUCTION AND COMMON CAUSE FACTS**

**AD THE MERITS**

- [1] The Plaintiff instituted action in the High court against the Defendant following Plaintiff's arrest on the 29<sup>th</sup> January 2011 in Greenside, Johannesburg. Plaintiff alleges that his arrest and subsequent detention were unlawful.
- [2] The Plaintiff was arrested and charged with dealing in drugs by one Captain Mkhize.
- [3] The arrest was affected without a warrant.
- [4] Plaintiff was placed in custody at Parkview Police Station at about 2h10 On the 30<sup>th</sup> January 2011 where he was detained until Monday the 31<sup>st</sup> January 2011.
- [5] On 31 January 2011 the Plaintiff was taken to Hillbrow Magistrates Court where his matter was postponed to the 7 February 2011. On the 7 February 2011 bail in the amount of R4000.00 was set for him by the court. It is unclear when the Plaintiff paid his bail and Plaintiff could not assist the court in this regard.
- [6] The parties agree that the Defendant bears the onus to prove that the arrest itself was lawful (**Minister of Law and Order v Hurley 1986 (3) SA 568 (A)** at 589 E-F)

### **ISSUES TO BE DECIDED**

- [7.1] The Validity/lawfulness of the arrest;
- [7.2] The period of unlawful detention;
- [7.3] Quantum of damages

### **SURVEY OF PLAINTIFF'S EVIDENCE AND ARGUMENT**

- [8] Only the Plaintiff testified in support of his case.
- [9] Plaintiff testified under oath that on the 29 January 2011

he went to the "Gin Bar" situated at Gleneagles Street, Greenside in the company of a friend. They arrived at the bar at about 18h30 and proceeded to drink alcohol. Between them they drank 18 cans of Castle beer.

- [10] Before 23h00 Plaintiff's friend left the bar and Plaintiff proceeded down the road to a shop to buy cigarettes. He was then approached by two white males who offered him a beer. They were in civilian clothing. They were driving a BMW motor vehicle. Plaintiff consumed the one beer with his companions.
- [11] They then discussed the possibility of purchasing more beers and agreed to go by foot to a nearby Shell garage to draw money so they could purchase more alcohol.
- [12] When they arrived at the Shell garage Plaintiff noticed three or four police vans. The two white males took him to the toilet to search him. A lady remained outside. They found a small packet of white powder in Plaintiff's trouser pocket. It was wrapped in plastic. They said nothing. Plaintiff testified that he told them the powder was grandpa headache powder.
- [13] Plaintiff was nonetheless arrested and taken to the police station where he was later charged for dealing in drugs. He spent the night in the police cells.
- [14] Plaintiff testified further that there were bed bugs in the cells but no sponge mattresses to sleep on. He slept on the floor and was not provided with blankets. He also had to share the cell with ten to eleven other people. His whole body was badly bitten by bed bugs which affected him badly.
- [15] Plaintiff denied approaching a white lady and agreeing to sell her cocaine for R300.00.

**SURVEY OF RELEVANT DEFENDANTS EVIDENCE AND ARGUMENT.**

- [16] The defendant lead the evidence of five witnesses to wit, Mrs Rose Muger, the Prosecutor of Hillbrow Magistrate's Court, Reservist Constable Zelna Breytenbach nee' Van Der Merwe (In whose presence the offence was committed), Captain Mkhize (the arresting officer), Mrs Bridget Steer and Captain Ledwaba.
- [17] The gist of the Defendant's version given by Reservist Constable Van der Merwe is that she is employed as an administrative official at the Parkview Police Station and has been so employed since 2002. Between 2003 and 2013 she qualified as a constable police reservist and performed these additional duties from time to time.
- [18] Van der Merwe testified further that she performed crime prevention duties on the evening of the 29 January and morning of 30 January 2011 together with Captain Mkhize. She was dressed in civilian clothing and Captain Mkhize was garbed in uniform.
- [19] The community had lodged numerous complaints about drugs being sold in the area, prostitution and shebeens' operating without liquor licenses. It was hoped to effect arrests for these crimes.
- [20] Van der Merwe testified further that Captain Mkhize dropped her off at the corner of Glen Eagles and Barry Hertzog Ave. She spoke to the car guards and indicated that she wished to buy drugs, specifically cocaine. She then proceeded to walk up and down Glen Eagles Road.
- [21] After a while the Plaintiff approached her and offered her a packet of cocaine for R300.00. Van der Merwe testified that she spoke English and that the Plaintiff conversed with her in Afrikaans. Plaintiff produced a small folded see through packet containing a white powder. Van der Merwe indicated that they should meet at the Shell Garage at

Emmerentia because she needed to draw money. She walked off with the Plaintiff walking behind her. Van der Merwe sms'd Mkhize to advise that she was on the way with a suspect.

- [22] When they arrived at the Shell garage Mkhize approached and immediately searched the Plaintiff. He recovered the small packet containing the white powder in Plaintiff's trouser pocket. Plaintiff was arrested for dealing in drugs.
- [23] Van der Merwe deposed that she had been involved in three separate incidents of people selling drugs to her.
- [24] Plaintiff was taken to the Parkview police station. Van der Merwe made a written statement detailing the events and Plaintiff was placed in the cells. The parcel containing the white powder was placed in a forensic bag and sealed in Plaintiff's presence. It was later dispatched to the forensic laboratory in Pretoria for analysis. It is common cause that the white substance did not contain the active ingredients of cocaine but rather aspirin.
- [25] Plaintiff's version was put to Van der Merwe. Latter denied working with white police officers that evening.
- [26] Captain Sandile Mkhize deposed that he had 28 years' service with the SAPS, 8 of which were performed at the Parkview police station.
- [27] Mkhize gave details of just how bad the incidences of crime were in the area. He admitted to working with Van der Merwe on the night of the 29<sup>th</sup> and morning of the 30<sup>th</sup> January 2011. The Plaintiff was arrested during the early hours of Sunday morning (30 January 2011).
- [28] Mkhize testified that he specifically briefed Van der Merwe to find someone who would sell her drugs. Van der Merwe left him and proceeded to walk up Gleneagles Road. The two of them

communicated via sms. Van der Merwe advised him that she had found someone willing to sell her cocaine for R300.00 and she had advised him that she would draw the money at the Shell garage in the nearby vicinity. Mkhize met them there, introduced himself, searched the Plaintiff, discovered the white powder in Plaintiff's trouser pocket and placed him under arrest.

[29] Both witnesses were of the view that Plaintiff was not drunk.

[30] Both witnesses testified that Plaintiff gave no explanation for the substance in his possession.

**ANALYSIS OF WHICH VERSION SHOULD BE ACCEPTED:**

[31] Plaintiff was a single witness in respect of his version.

[32] Counsel for the Plaintiff referred to an alleged contradiction between Van Der Merwe and Mkhize concerning exactly when another suspect was arrested and taken to the police station. It is common cause that this other person was arrested for some alcohol related offence. Adv Snoyman relies upon the accuracy of the records at the Parkview police station and the testimony of the witnesses to found his argument that Plaintiff was actually arrested for an alcohol related offence and during the course of a search of the Plaintiff the white powder was discovered. This version postulated by Snoyman himself amounts to unwarranted speculation and is not part of the Plaintiff's own testimony.

[33] The testimony lead revealed that the records at the police station did not always strictly accord with the times that they were recorded and accordingly cannot be relied upon as proof of specific detail when certain individuals were arrested in relation to others. Besides Van der Merwe and Mkhize were focussed on the arrest of the Plaintiff and not the details of someone who was not before court.

- [34] With regard to the relevant testimony in this case I found Mkhize and Van der Merwe to be good, honest, reliable witnesses who corroborated each other in all material respects. Their testimony was detailed and informative.
- [35] I was not impressed with the testimony of the Plaintiff. I found it necessary to make numerous observations in my notes about inadequacies in the evidence of the Plaintiff. This includes comments that the version was improbable, a contradiction related to the length of time Plaintiff resided at his place of residence and numerous incidences of the Plaintiff demonstrating evasive conduct when answering questions.
- [36] Unlike the version of the Defendant witnesses Mkhize and Van der Merwe, Plaintiff's version is uncorroborated.
- [37] I will therefore, accept the Defendant's version of the events leading up to the arrest of the Plaintiff.

#### **THE LAWFULNESS OF THE ARREST:**

- [38] Whichever version is accepted it remains common cause that Plaintiff was arrested and spent a day and a half in police custody before appearing at the Hillbrow Magistrates Court on Monday 31<sup>st</sup> January 2011.
- [39] It is also common cause that the substance found in Plaintiff's possession was not an illegal substance (i.e. aspirin).
- [40] It is also common cause that the Defendant bears the onus of proving that Plaintiff's arrest was lawful, on a balance of probabilities.

[41] The Defendant pleaded that the arrest of the Plaintiff was lawful in that he was lawfully arrested in terms of section 40(1) (a) of the Criminal Procedure Act, 51 of 1977 (CPA).

[42] Section 40 (1) (a) of the CPA states that a peace officer may without warrant arrest any person (a) who commits or attempts to commit any offence in his presence.

[43] Adv Snoyman argued that the alleged offence did not fall within the statutory ambit of section 40 (1) (a) as no offence was committed in the presence of the arresting officer Captain Mkhize. The offence of dealing in drugs was committed in the presence of police reservist, Mrs van der Merwe and thus Mkhize had no right to arrest the Plaintiff thus rendering the arrest unlawful.

[44] It is clear that section 40(1) goes far wider than sub paragraph (a) and it is necessary to refer to sub paragraphs (b) and (c) for the sake of completeness.

[45] Sub paragraphs 40 (1) (b) and (c) read as follows:

A peace officer may without a warrant arrest any person:-

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

(c) who is found in possession of anything which the peace officer reasonably suspects to be stolen property dishonestly obtained, and who the peace officer reasonable suspects of having committed an offensive with respect to such thing.

[46] Mkhize (based upon the communications with his police reservist Van Der Merwe) had a reasonable suspicion that Plaintiff was dealing with



drugs (selling cocaine). Dealing in drugs is a schedule 1 crime and so is any attempt to do so.

- [47] It is common cause that Plaintiff was in the possession of the white powder at the time of his arrest. The sale had not been consummated in that Plaintiff still hoped to be paid his R300 after the money had drawn. Mkhize continued to harbour a reasonable suspicion at the time of the Plaintiff's arrest due to the information given to him by Mkhize earlier and the subsequent search of the Plaintiff's trouser pockets.
- [48] However, it is possible to carry this argument one step further.
- [49] I accept the Defendant's version that Plaintiff gave no explanation for his possession of the white powder at the time of his arrest. According to the Plaintiff he told Mkhize that the white powder was grandpa headache powder.
- [50] The probabilities suggest that when the Plaintiff met Van Der Merwe well knowing that he had grandpa powder in his possession he tried to sell it to her as cocaine. Plaintiff perceived Van Der Merwe as a gullible individual. It is also probable that he has been drinking and this may have fuelled a devious intent.
- [51] Plaintiff probably wasn't a drug dealer in the true sense of the word but more of a con-man whose actions were every bit as undesirable as those of drug dealers.
- [52] It is probable that Plaintiff made no mention of the fact that he only possessed aspirin for had he done so he probably would have faced an attempted fraud or theft charge which would have led to a different lawful arrest with regard to the provisions of section 40(1) of the CPA.
- [53] I agree with the principles set out by Innes ACJ in **Shidiack v Union Government 1912** AD 642 at 651 to 652 as follows:

“Now it is settled law that where a matter is left to the discretion or the determination of a public officer and where his discretion has been bona fide exercised or his judgement bona fide expressed the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would be; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fides or from ulterior and improper motive, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

[54] I find that Mkhize acted within the prescripts of the law by exercising his discretion to arrest the Plaintiff. Thus the day and a half spent by the Plaintiff in police custody before appearing in court does not constitute unlawful detention and it is not necessary for me to apply my mind to the aspects of Plaintiff further incarceration after appearing in court since further detention was requested by the State Prosecutor acting in her capacity as an official of the Director of Public Prosecutions (DPP). It is common cause that the DPP was not cited as a party to these proceedings. The Defendant has succeeded in proving that Plaintiff's arrest was lawful on a balance of probabilities.

[55] I hereby make the following order:

55.1 Plaintiffs arrest on the 30<sup>th</sup> January 2011 was lawful and Plaintiffs action is accordingly dismissed with costs.

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**MA HAWYES  
ACTING JUDGE OF THE HIGH COURT**

**ATTORNEYS FOR THE PLAINTIFF:** Maesela Incorporated

**COUNSEL FOR THE PLAINTIFF:** Adv. C. Snoyman

**ATTORNEYS FOR THE DEFENDANT:** The State Attorney

**COUNSEL FOR THE DEFENDANT:** Adv. DJ Joubert

**DATE OF HEARING:** 27 October 2015

**DATE OF JUDGMENT:** 29 January 2016