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REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: 41410/2012

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DATE

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SIGNATURE

In the matter between:

MHLANGA PHIKIZANI

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

MOOSA AJ:

INTRODUCTION

[1] The Plaintiff herein is Mhlanga Phikizani, an adult female businesswoman of [...] F. Park, Devland.

[2] In *casu*, she sues the Minister of Police as a result of an incident that occurred on 12 February 2012, when members of the South African Police Services arrested the Plaintiff without a warrant.

[3] She alleges that both her arrest and subsequent detention at the Eldorado Park Police station was unlawful and unreasonable, and that she suffered damages as a result thereof for injury to her privacy, dignity and bodily integrity until her release from custody by members of the SAPS on 13 February 2012.

[4] The plaintiff claims damages in the amount of R 150 000.00 (one hundred and fifty thousand rands), plus interest at the rate of 15.5% from date of summons and costs of the action.

[5] The defendant has defended the claim by Plaintiff and in his plea denies all the allegations and puts the Plaintiff to the proof thereof.

[6] At the commencement of the trial the parties agreed that the Defendant had the right to begin as the burden of proof rests on the arresting officer to prove that the arrest was lawful¹. It is well established that the onus rests on the arresting officer to prove the lawfulness of the arrest. This is so because as Rabie CJ stated in **Minister of Law & Order & others v Hurley & another 1986 (3) SA 568 (A) at 589 E – F**: ‘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’.

EVIDENCE

[7] The only witness called by the Defendant was the arresting officer, Constable Thembisile Wicliff Skotha (‘Skotha’) who was in the employ of the SAPS for a period of 8 (eight) years as at the time of the incident. He testified that he was on crime prevention duties together with other colleagues during

¹ See Minister of Safety and Security and Another v Swart 2012 (2) SCA at 191

the afternoon of 12 February 2012. He received information of a number of people who were unlawfully dealing in liquor whilst patrolling the Freedom Park area.

[8] Skotha testified further that he proceeded to the address where it was alleged that the unlawful sale of alcohol was taking place. Upon arrival at the premises, he observed a number of persons sitting in the premises whilst consuming alcohol. He further observed a number of liquor advertisements that were displayed on the premises. Upon further inspection, he asked one of the patrons as to the whereabouts of the owner. This patron pointed out the Plaintiff to him and he observed her selling alcohol to her patrons. He immediately approached her and requested her to produce a permit that entitled her to sell alcohol.

[9] The Plaintiff however failed to produce any permit that entitled her to lawfully sell liquor to members of the public from her premises. When taxed further about the permit, the Plaintiff stated that the patrons had purchased the liquor from a neighbour and that she was only selling traditional beer to them.

[10] Skotha then searched the premises in the presence of the Plaintiff and found several bottles of alcohol in the shack and her refrigerator, which he confiscated. The Plaintiff was then informed that she was being charged for dealing in liquor without a permit and placed under arrest, after her rights were properly read and explained to her. She was then placed in the police vehicle, and taken to the Eldorado Police Station. She was detained thereat and the exhibits entered in the SAP 13 register with serial number 189, which comprised of the following: 27 (twenty seven) bottles of 750 ml Hansa Pilsener; 7(seven) bottles of 750 ml Castle Lager; 3 (three) bottles of 750 ml Black Label and 3 (three) SAB crates.

[11] He was adamant that he did not confiscate any traditional (sorghum) beer, nor did he see anyone consuming traditional beer at the premises. He testified that he was entitled to arrest the Plaintiff during the crime prevention operation and especially when a crime was being committed in his presence.

Further, he did not issue a summons to the Plaintiff as it was a Sunday and secondly it would have defeated the purposes of the crime prevention exercise, by waiting for summons to be issued to the Plaintiff for the crime committed.

[12] The Plaintiff was duly processed at the charge office and placed in the holding cells. She was handed a notice of her constitutional rights under Notice Number Q2794638.

[13] The witness referred to the SAPS 10 wherein it is recorded that the Plaintiff was charged at 23h10 on 12 February 2012 and thereafter released. Skotha testified that the Plaintiff was released from custody a few hours after her arrest, having paid an admission of guilt. The Plaintiff subsequently paid an admission of guilt in the amount of R 100.00 (one hundred rand) under counterfoil number W7702495 at the Eldorado Police Station. Skotha testified that the only time an arrested person would pay an admission of guilt would be if they acknowledge that they have been guilty of the crime for which they have been charged. He referred to the relevant SAPS registers to corroborate his viva voce testimony.

[14] The Defendant, Mhlanga Permission Phikizani testified that on 12 February 2012 she was at her yard and seated with her customers who were consuming sorghum beer, when two members of the South African Police Services arrived thereat. They walked passed the group and entered her shack and opened the refrigerator where she kept her meat. They enquired as to who the owner of the premises was and she identified herself accordingly. They asked her if she was selling beers and she denied same, adding that the beers that were in her refrigerator belonged to her customers and that she was selling sorghum beer.

[15] They insisted that the beer belonged to her and that she was selling it to her customers and subsequently placed her under arrest. She denied selling any of the beer to her customers and further denied that the members of the SAPS had asked her for any documentation. She testified that the

liquor that was confiscated belonged to her customers who had requested her to keep them cold in her refrigerator. She denied ever been explained any of her constitutional rights.

[16] Her children of 12 (twelve) and 8 (eight) years old were extremely upset and crying whilst she was placed in the police vehicle, in full view of her customers and children. She denied having any liquor adverts displayed on her premises.

[17] Upon arrival at the Eldorado Police Station she was duly processed and placed in a cell, which was in a very bad state, inter alia, the toilet was not flushing; the cell smelt foul and she observed other inmates relieving themselves on the floor. She was not given anything to eat or drink and neither was there any drinking water available. She felt very humiliated and did not feel good about being arrested.

[18] She denied ever being explained any of her rights at the Police Station. She was only given a document containing her constitutional rights at a later stage, when she was asked as to whether she wanted to be released or not. She denied paying an admission of guilt in the amount of R 100.00 (one hundred rand) for her release from custody and denied ever admitting guilt that she was selling liquor illegally.

EVALUATION

[19] It is important to note that the particulars of claim state that the Plaintiff was unlawfully arrested on 12 February 2012 by unknown members of the South African Police Services without a warrant acting within the scope of their employment with the Defendant on a charge of 'Drinking in Public and dealing in Liquor'. Alleging further that the arrest of the Plaintiff was unlawful as she did not commit the offences for which she was arrested as she was only selling traditional beer, which does not require a licence and that such arrest was not justified under the provisions of Section 40 of the Criminal Procedure Act 51 of 1977.

[20] Central to the considerations of whether Plaintiff's arrest was unlawful or not, are Sections 39 and 40 (1) (a) and (h) of the Criminal Procedure Act² together with the evidence of the parties.

[21] In terms of Section 40 (1) (a) of the Criminal Procedure Act 51 of 1977, a peace officer may arrest a person without a warrant who commits or attempts to commit an offence in his/her presence. The requirements that must be met before the power conferred in terms of S 40(1) (a) may be exercised are as follows:

- (1) The arrestor must be a peace officer;
- (2) an offence must have been committed or there must have been an attempt to commit an offence; and
- (3) such commission or attempt must have been in his or her presence.

In terms of Section 40 (1) (h) a peace officer may arrest a person without a warrant who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition.

[22] Section 154 (1) (a) of the Liquor Act 27 of 1989 ('Liquor Act') provides as follows: *"Any person who sells any liquor otherwise than under a licence or an exemption, shall be guilty of an offence"*.

Section 163 (1) (a) of the Liquor Act reads as follows: *"Any person who is guilty of an offence in terms of this Act shall on conviction be liable – in case of an offence referred to in Section 154 (1) (a) to a fine or to imprisonment for a period of not more than five years"*

² 51 of 1977

[23] The question whether an officer was authorised to arrest a person is therefore a factual one, namely whether an offence was committed or attempted to be committed in the presence of a peace officer. This gives the officer a wide discretion, irrespective of the crime that was committed. In **Minister of Safety and Security v Kleinhans 2014 (1) SACR 613 (WCC)**, Le Grange J noted that the power to arrest comes into existence when the above noted factual situation exists, irrespective of the trivial nature of the crime.

[24] The precarious nature of the fact that the decision to arrest is left to the idiosyncratic nature of every officer of every officer of the law is summarised in the Supreme Court of Appeal decision in **Minister of Safety and Security v Sehoto & Another 2011 (1) SACR 315 (SCA)**: *“This would mean that peace officers are entitled to exercise their discretions as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed to be optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached”*.

The factors, in my view, that need to be present for an officer to affect an arrest without a warrant, or rather a rightful arrest, with reference to the aforementioned decision would be the following:

- (1) The jurisdictional prerequisites for S 40 (1) must be present;
- (2) the arrestor must be aware that he or she has a discretion to arrest;
- (3) the arrestor must exercise that discretion with reference to the facts;
- (4) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[25] Skotha testified that pursuant to information received he attended at the premises of the Plaintiff and, inter alia, observed her selling liquor without being in possession of a valid licence/permit. Accordingly, he was of the view that an offence in terms of the Liquor Act was being committed in his presence and he accordingly proceeded to arrest the Plaintiff, for such contravention.

[26] It is common cause between the parties that the confiscated items, as per the SAP 13 were taken from the premises of the Plaintiff. The crisp dispute is whether the Plaintiff was selling the liquor to her customers as per Skotha, or whether on her version she was merely storing the liquor in her refrigerator for her customers and selling traditional (sorghum) beer, at the time.

[27] The question simply to be answered is whether the Plaintiff had committed an offence in the presence of the member of the SAPS, and if this is the case then this court must find that the arresting officer was lawfully justified in terms of the Criminal Procedure Act and the relevant legislation in terms of the Liquor Act. This answer can only be obtained after a careful analysis and appraisal of the evidence of the two witnesses who appeared before this court.

[28] Skotha gave his evidence in a simple straight - forward manner without contradicting himself. His evidence simply is that during a crime prevention operation he received information of unlawful dealing in liquor taking place at the premises of the Plaintiff. He proceeded thereto and observed the Plaintiff selling liquor from her shack to her customers. He requested her to produce a permit that she was unable to. Hence, it was clear to him at the time that she had contravened Section 154 (1) (a) of the Liquor Act, in that she had committed such offence in his presence.

[29] On the other hand the Plaintiff wants this court to accept her version that she was merely selling traditional beer and that the liquor was kept in her refrigerator for safekeeping. Further, that she did not sell any liquor to her

customers at the time; and cannot furnish this court with any reason as to why the member of the SAPS would want to falsely implicate her in the commission of the offence. What I find strange is the fact that she denies being properly apprised of her rights at all material times, despite the documentary evidence that was presented during the trial. This in my view is clearly a ruse to bolster her allegations of an unlawful arrest on the part of the SAPS.

What is more telling and in my view the death knell of the Plaintiff's case is the fact that she paid an admission of guilt; which she vehemently denies. It begs the question as to who would be so magnanimous to pay an admission of guilt on behalf of the Plaintiff, in order to secure her release from custody on the night of 12 February 2012.

[30] It is clear from the documentary evidence presented before this court that the Plaintiff was arrested during a crime prevention operation, detained at the SAPS Eldorado Park in terms of the proper protocols and subsequently released from custody, after having paid an admission of guilt and before any appearance in court on 13 February 2012.

[31] After carefully considering the totality of the evidence before me, having due regard to the applicable law and the necessary caution to be applied regarding single witnesses, I am satisfied that the Defendant has established that the arrest upon the Plaintiff on 12 February 2012 was justified in the circumstances, and that such arrest was lawful in terms of Sections 39 and 40(1) (a) of the Criminal Procedure Act 51 of 1977.

I find that Skotha was a reliable and credible witness. He gave his evidence in a clear, concise and chronological manner and was not swayed by probing cross - examination. The Plaintiff on the other hand did not make a very good impression on this court and she fared fairly badly during her evidence before this court.

ORDER

[32] In the result, I make the following order:

The Plaintiff's claim is dismissed with costs including costs of counsel.

**C I MOOSA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Counsel for Plaintiff:	Mr T Ntunja
Instructed by:	Ettas Arthur Makamu Inc Johannesburg Tel: 0118321040 Ref: EAM/20/2012
Counsel for Defendant:	Ms M Kgariya
Instructed by:	Office of the State Attorney Johannesburg Tel: 0113307634 Ref: 6953/12/P62/fm
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