

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. 7205/2020

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED: YES/**NO**

DATE: 6 June 2023

SIGNATURE:

In the matter between:

SAMUEL GOSITSWANG MOALISI

Plaintiff

V

THE MINISTER OF POLICE

Defendant

Coram: Kooverjie J

Heard on: 26 April 2023

Delivered: 6 June 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 6 June 2023.

SUMMARY: In terms of Section 40(1)(a) of the Criminal Procedure Act (51 of 1977), if a peace officer, upon his observations, reasonably come to the conclusion that a crime is committed, he/she may act upon such opinion or belief, even though in subsequent court proceedings, it is not proved that a crime was in fact committed.

ORDER

It is ordered: -

1. the action proceedings are dismissed with costs.

JUDGMENT

KOOVERJIE J

- [1] This is a damages claim based on an unlawful arrest. The plaintiff instituted proceedings against the defendant, the Minister of Police, for damages which he alleged he suffered as a result of the arrest and detention by members of the South African Police Service. It is the plaintiff's case that such arrest and detention was unlawful.
- [2] This matter only concerns the merits and not the quantum. The parties have agreed that the quantum issue be dealt with at a later stage. The issue for determination is whether or not the arrest and detention of the plaintiff was lawful. This will be determined from the evidence before the court and by virtue of the pleadings together with the testimonies presented on behalf of both parties.
- [3] The onus is on the defendant to show, on a balance of probability, that the arrest of the plaintiff was lawful.

BACKGROUND

- [4] On 4 March 2018 Mr Moalisi, the plaintiff, was arrested by members of the South African Police Service ("the SAPS") who were acting in the course and scope of their employment with the defendant. The plaintiff was arrested on the charge of

driving a motor vehicle whilst under the influence of intoxicating liquor. He was taken to the Tembisa Hospital where he was tested for alcohol intake by Dr Ngobeni. He was thereafter detained at the Rabasotho Police Station in Tembisa. He was released on warning on 5 March 2018. The plaintiff was not prosecuted.

THE PLAINTIFF'S CASE

[5] The plaintiff's version is that his arrest on 4 March 2018 was unlawful. He was detained without being tested as to whether he was under the influence of alcohol. He specifically denied that he was intoxicated at the time.

[6] In the particulars of claim the plaintiff pleaded the following:

“6.2 The plaintiff was stopped by members of the South African Police Service, who accused him of driving under the influence of alcohol.

6.3 The plaintiff was not under the influence of alcohol.

6.4 The plaintiff was arrested around 21:00 hours, this was done without testing if indeed the plaintiff was under the influence of alcohol. He was kept in the police van until 10 pm, only then was he taken to the police station.

6.5 After being charged he was taken to the hospital for blood samples. The blood samples were taken to check his alcohol level in his blood (if any).

6.6 The plaintiff was then taken to Ivory Park cells, this is when he was informed that the cells were full. The plaintiff and the members of the SAPS then proceeded to Rabasotho cells in Tembisa.

6.7 The plaintiff had to stand the entire night as the cells were full. There were no beds or mattresses to sleep on or even a space on a bed for him to sleep on.

6.8 On the 5th of March 2018, at or around 2 pm, he was released on a warning. The plaintiff was then informed that he had to attend court on the 3rd of July 2018.

6.9 On the 3rd of July 2018 the plaintiff was informed by the prosecutor that the matter had not been enrolled. This was six hours after the plaintiff waited in court for his hearing.

6.10 The following day, on the 4th of July 2018 the plaintiff went back to the police station to get an update on this matter, he was informed that the blood test -results are still outstanding and that he should come back in January 2019.

6.11 When the plaintiff went back in January 2019 he was asked to come back in February 2019. In February 2019 he was told that the test results was back and that the case was closed.”

THE DEFENDANT’S CASE

[7] In the plea the defendant admits the plaintiff was indeed arrested but however maintained that the arrest was lawful. In response to paragraph 6.1 of the particulars of claim, the defendant, in the amended plea, pleaded at paragraph [14]:

“14.1 Save to deny that the arrest was unlawful and that the plaintiff was arrested at 21:00, the defendant admits the remaining allegations of the paragraph.

14.2 The defendant avers that the plaintiff was arrested because he committed an offence in the presence of the members of the South African Police Service (SAPS) who arrested him, in that he was driving a motor vehicle while he was under the influence of liquor.

14.3 The defendant further avers that the plaintiff was arrested at 23:30.”

[8] Further in response to paragraph 6.4 of the particulars of claim (which deals with the fact that he was arrested without being tested), the defendant, at paragraph [17], denied that the plaintiff was arrested at around 21h00 and that he was kept in the police van until 10 pm. The defendant avers that the plaintiff was arrested at 23:30.

8.1 At paragraph [17.3] the defendant went on to plead:

“The defendant further avers that the members of the SAPS, who arrested the plaintiff, did not test if the plaintiff was under the influence of liquor before arresting him because the SAPS members did not have the testing devices with them.”

8.2 Paragraph [17.4]:

“The defendant further avers that from the site of the arrest, the plaintiff was taken to the hospital for testing and later taken to the police station, arriving there at about 01:00.”

8.3 The defendant further pleaded at paragraph 18.2:

“The correct sequence is this- the plaintiff was arrested, taken to the hospital for blood tests, thereafter taken to the police station where he was handed over to the detective on standby who charged him.”

[9] The defendant does not dispute the fact that the plaintiff was released on warning on 5 March 2018 and that he was informed by the prosecutor that the matter has not been enrolled.

[10] In respect of the outcome of the matter, the defendant, at paragraph [23] pleaded that it had no knowledge of this fact. At paragraph [25] the defendant further pleaded that the arresting officer could see that the plaintiff was under the influence of liquor whilst driving a motor vehicle. Moreover the fact that the plaintiff was indeed driving under the influence of liquor was eventually confirmed by the blood test results. The defendant specifically denied that the plaintiff suffered in the hands of the law enforcers.

ANALYSIS OF THE EVIDENCE

[11] The plaintiff testified that when he was stopped by the police at the road block, the police officer accused him of being under the influence of alcohol and stated that his eyes were brown. He denied that he had consumed alcohol and informed the police that his eyes were always that colour. The police officer insisted that he was drunk and placed him in the police van. He was thereafter arrested. The plaintiff further pointed out that no test was carried out by the officer at that stage. His balance was also not tested in order to determine whether he was indeed under the influence of alcohol. He further denied that he was assisted by the police officer when he got out of the motor vehicle.

[12] He particularly disputed the veracity of the blood results. He testified that the police refused to furnish him with the results when he initially requested same. He was advised that the results would be furnished to his legal representatives. He was later informed at court that he would have been charged if he was under the influence of alcohol.

- [13] The witness who testified on behalf of the defence was Sergeant Ramohadi. It is common cause that he was the arresting officer on the night of 4 March 2018. He testified that he had noticed a black motor vehicle approaching the road block around 22h00. He testified that he flagged the vehicle to slow down and requested the plaintiff to pull up by the side of the road. He noticed that the plaintiff stopped and proceeded again as he was approaching the road block. It was then that he alerted the plaintiff to stop. When he ordered the plaintiff to get out of the vehicle, the plaintiff was unable to follow instructions. Instead he remained seated with his head bent down. It appeared that he was falling asleep.
- [14] Sergeant Ramohadi further testified that the plaintiff seemed to be oblivious of his surroundings. The plaintiff failed to respond and he was unable to stand or walk on his own when he got out of the car. He had to be assisted. He testified that when he asked the plaintiff for his name, he did not respond. He specifically observed that the plaintiff's eyes were bloodshot, he smelled of alcohol and his speech was slurred. It was at that point that the decision was made to arrest him. At this juncture, it should be pointed out that the said defendant's version aforesaid was not put to the plaintiff during cross-examination.
- [15] Under cross-examination Sergeant Ramohadi was primarily questioned on the contents of the arrest statement which was deposed to on the night of the arrest. He was particularly questioned as to why he failed to record all his observations, more particularly in respect of the plaintiff's speech and his balance. It was put to him that the contents thereof are therefore reliable.
- [16] It was also explained that those suspected being under the influence of alcohol were all put into the van. They were collectively taken to the hospital for the tests to be conducted. He further testified that the plaintiff was arrested at around 23h30.

[17] The legal point that has a bearing on this matter is premised on Section 40(1)(a) and Section 40(1)(b) of the Criminal Procedure Act (Act 51 of 1977) (“the Act”) which makes provision for a peace officer to, without a warrant, arrest any person who commits or attempts to commit any offence in his presence. In these circumstances the onus rests on the peace officer to prove that the crime was committed in his presence.

[18] It is accepted that all that is necessary for a successful reliance upon Section 40(1)(a) of the Act is the observance of behavior which is *prima facie* criminal. In the **Tsose** matter¹ the court stated:

“If a peace officer, as a result of observations, honestly and reasonably comes to the conclusion that a crime is being committed, he may act upon such opinion or belief, even though in subsequent proceedings, whether civil or criminal, it is not proved that crime was in fact committed. Moreover, in order to justify the apprehension and to determine whether or not a crime is being committed, the arrestor should not be confined to what he perceives at the time of arrest, but may import into his decision the antecedent conduct of the arrested person, as well as his knowledge of all the relevant surrounding circumstances and thus supplement what is perceived by him.”

[19] The defence argued that Sergeant Ramohadi testified that the manner in which the plaintiff behaved in his presence, he had reasonably come to the conclusion that a crime was in fact being perpetrated.

[20] In **Minister of Safety and Security and Another v Mhlana 2011 (1) SACR 63 (WCC) at paragraph 15** the court reiterated that in order for a peace officer to be placed in a position to rely on Section 40(1)(a), it is not necessary that a crime be in fact committed or that the arrestor be laid to charge and convicted of a suspected offence.

¹ Minister of Justice and Others v Tsose 1950 (3) SA 88T at 92H – 93A

[21] The defence submitted that the plaintiff's arrest was lawful in terms of Section 40(1)(a) of the Criminal Procedure Act in the following circumstances, namely:

21.1 when sergeant Ramohadi explained the circumstances that led him to form the opinion that the plaintiff did in fact commit an offence in question in his presence;

21.2 he conceded that he did not test if the plaintiff was under the influence of alcohol but he was certain from his observation that the plaintiff was under the influence of alcohol;

21.3 he had arrested the plaintiff at the time of the commission of the crime.

[22] As alluded to above, under cross-examination the emphasis centered on the reliability of the arrest statement. It was argued that the defendant's testimony was not aligned to the arrest recordal in the statement. The observations regarding the plaintiff's speech and balance were important observations that should have been recorded. Hence the only reasonable inference that could therefore be drawn is that the plaintiff was not under the influence of alcohol when he was arrested. The plaintiff's version is therefore more probable.

[23] I have noted that the arrest statement recorded the following namely that:

23.1 the plaintiff was arrested at 23h30 "for contravening of Section 65(1) of the National Road Traffic Act, Act 93 of 1996;

23.2 the plaintiff was taken to Tembisa Hospital where the arresting officer instructed Dr Ngobeneni to take a blood sample from the accused and perform the necessary test;

23.3 “A sealed container marked Seal number DD229747 was opened and an empty glass tube taken from it and handed to the registered doctor”;

23.4 At 23h10 a blood sample was taken by the doctor from the right body part of the accused. The blood sample was injected into a glass tube.

[24] The plaintiff further argued that no evidentiary weight could be placed on Dr Ngobeni’s report. Argument was proffered that although Dr Ngobeni indicated that a blood sample was taken from the suspect, he did not examine the plaintiff.

[25] It is not in dispute that what was recorded was that the arresting officer, upon his observations, had a reasonable suspicion that the driver was under the influence of alcohol, that he smelled of liquor and that his eyes were red.

[26] It is necessary to have regard to both statements in context. When the arrest statement is read with the affidavit of Dr Ngobeni, the following facts are common cause, namely that Dr Ngobeni was requested to draw blood for the plaintiff and he did so on 5 March 2018 at 01h00, that the plaintiff was arrested at 23h10 and that the seal number on the blood sample was recorded as DD229746.

[27] I have noted the discrepancies raised in respect of the testimony on the part of the defendant. For instance, it was also pointed out that the defendant’s version being that the plaintiff was unable to communicate with the police officer, is untenable as the plaintiff was able to identify himself to the peace officer. Such discrepancies illustrate that the defendant’s version was fabricated.

[28] I am mindful that the test of whether a suspicion is reasonably entertained within the meaning of Section 40(1)(b) is objective. The enquiry should be would a reasonable man in the defendant’s position and who is possessed with the same information have formulated the view that there were good and sufficient grounds

for suspecting that the plaintiff was guilty of the offence for which he sought to arrest the plaintiff.

[29] In considering the aforesaid; it is necessary to bear in mind that conducting his duties in terms of Section 40(1)(a) read with Section 40(1)(b) of the Act constitutes drastic police action. The reasonable man would therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly. It is only after an examination of this kind that he would allow himself to entertain a suspicion which will justify an arrest. That is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. This section requires suspicion and not certainty.²

[30] In my view, the fact that the arresting officer did not record the plaintiff's speech, his balance and other factors does not make the arrest statement or the plaintiff's testimony unreliable. The evidence of the defendant from the testimony read with the arrest statement is that the police officer had a reasonable suspicion that the plaintiff was under the influence of alcohol and noted that he smelled of liquor and his eyes were red.

[31] Our courts have been guided on the manner in which one should weigh two conflicting versions. In the ***Stellenbosch Farmers Winery*** matter³, the court

² Mabona and Another v Minister of Law and Order and Others 1988(2) SA 654 (SE)

³ **The Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at 14J - 15E, further set out on how to approach such a situation. It was stated:**

"To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall

aply set out the approach. In summary, this court would be required to make findings on the credibility of the witness, the reliability of the evidence, and the probabilities of such versions.

- [32] In the matter of **National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440E - 441A**. The court stated:

“... where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false.” (My emphasis)

- [33] In applying the aforesaid test, I find Sergeant Ramohodi's version is probably true. His evidence was not only in accordance to what had been pleaded on the defendant's behalf, but there were no contradictions in his evidence.

- [34] He further made concessions where it was warranted. He also did not deny that the plaintiff was arrested based on his suspicion and that the blood test was drawn thereafter. In particular, he conceded that he completed the arrest

thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it... But when all factors are equipoised probabilities prevail”. (My emphasis)

statement and that he had not recorded all his observations, that the plaintiff was not tested for alcohol intake at the scene and that the police did not have testing devices to execute the relevant tests at the scene.

[35] The jurisdictional factors in this instance were met for S 40(1)(a) of the Criminal Procedure Act, namely: Sergeant Ramahodi was a peace officer who arrested the plaintiff; he formed a suspicion that the plaintiff was under the influence of alcohol; it was a suspicion that the plaintiff committed an offence referred to in Schedule 1 of the Act; and such suspicion was arrived on reasonable grounds.

[36] I therefore find that the arrest was lawful. Consequently the plaintiff is not successful.

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the plaintiff:

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Instructed by:

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Counsel for the Defendant:

Adv Z Madlanga

Instructed by:

State Attorney Pretoria (Ms Constance Buso)

Date heard:

26 April 2023

Date of Judgment:

6 June 2023