

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 215/2017

In the matter between:

XOLISILE MLATSHA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

BESHE J:

[1] Plaintiff instituted action against the defendant claiming damages arising from what he alleges was wrongful arrest and detain by the employees of the defendant.

[2] Plaintiff pleaded that he was arrested at Grahamstown on the 12 May 2015 without a warrant. Thereafter detained at the police station from 12 May 2015 to 14 May 2015. He stood trial and was acquitted on 31 August 2015. The defendant, through his employees maliciously set the law into motion against him by laying a false charge of theft of a motor vehicle against him. He was arrested even though the police had a warrant of arrest issued in the

name of his brother **Siyamxolela Mlatsha**. Plaintiff's claim is for payment in the sum of R480 000.00 as and for damages.

[3] In his plea defendant denied that plaintiff's arrest and detention was unlawful. It was admitted that the arrest occurred on the date as alleged by the plaintiff. Further that it was without a warrant based on the ground of reasonable or probable cause that he had committed an offence to wit possession of dagga in the presence of a peace officer. This after having obtained a warrant to search the premises where plaintiff was arrested.

[4] Two witnesses **Sergeant Sauli** and **Constable Zana** were called in support of defendant's case. Plaintiff was the only witness to testify in support of his claim.

[5] **Sergeant Sauli's** evidence was that as he was patrolling in a police van with **Constable Zana** at extension 7 in Makhanda on the 12 May 2015 when they were stopped by a male person who pointed a house to them alleging that drugs were sold therefrom. Based on this information, they approached the local Magistrates Court where they obtained a warrant authorising them to search the said premises being number 4[...] Extension 7. It is common cause that the search warrant bore **Siyamxolela Mlatsha's** name. Armed with the search warrant, they proceeded to 4[...] Extension 7 where he observed there were two flats. They knocked on the door closest to the gate which door was open. Plaintiff who was known to him came out and identified himself as the owner of the flat. He was the only person inside the flat. Having introduced themselves, they showed him the search warrant and asked if he had any drugs inside the flat and whether they could search the place. Plaintiff responded that he did not have any drugs and that they could go ahead and search the flat. They found dagga underneath a chair not far from the door. His colleague **Constable Zana** found dagga in a plastic bag next to the

wardrobe. They also found dagga underneath the bed. Plaintiff was then placed under arrest for possession of dagga. After weighing the dagga in his presence at a Tip Top butchery he was taken to the police station where he was locked up on a charge of possession of dagga.

[6] During cross-examination, he confirmed that according to the information, the owner of the house whose name was given as **Siyamxolela** was the one selling drugs. He however insisted that the person they found in possession of dagga was the plaintiff. It also transpired that the flat where plaintiff was found is the only place that was searched. He also denied that there was a **Colonel Van Roos** in their company and that there was forceful entry into any structure in the premises. He could not explain why **Captain Van Roos** deposed to a statement to the effect that plaintiff was arrested in his presence. He testified that he is the one who arrested the plaintiff and there was no one else present in the premises besides the plaintiff. The latter did not tell him he was not **Siyamxolela**. He denied **Siyamxolela's** girlfriend was present in the room and that she confirmed the room / flat belongs to **Siyamxolela**. **Sergeant Sauli** asserted that he arrested the plaintiff because he was found in possession of dagga even though he is not the same person in respect of the search warrant was authorised and took the court through the wording of the search warrant. Namely, authorising the holder to search the identified premises and to search any person found on or at such premises and seize the drugs if found.

[7] **Constable Zana** by and large confirmed **Sauli's** evidence regarding how they ended up in 4[...] Extension 7 Joza. Adding that the informer had actually pointed out the flat they ended up searching after having obtained a search warrant. How plaintiff confirmed he was the owner of the flat from which he came out after they had knocked on the door. He denied possession of any dagga and gave them permission to search the flat. As well as how they proceeded to search the room and about what they found. He denied that

any force was used to gain entry into any structure in the premises when he was there. He denied that plaintiff was arrested on a false charge of theft of a motor vehicle. He also denied that plaintiff said the room belonged to his brother and that his brother's girlfriend also confirmed that or that plaintiff was not home when they arrived and only found them there when he returned from the shops. Or that they refused to let him go to his room to fetch his Identity Document.

Plaintiff's version

[8] On 12 May 2015 he returned home from a nearby shop to find people moving about inside the premises of his parental home, in particular in the area of his younger brother's room. He established that those were the police, and they were arguing with his father. It appears to be common cause this was at 4[...] Extension 7 in Joza. He enquired about what was happening. He told them who he was. The police told him they found dagga in his room and showed him a search warrant in his younger brother, **Siyamxolela's** name. the police refused to go to his room as he suggested so that he could get his Identity Document and show them who he was. They insisted they were arresting him. They did not show him what they allegedly found in his brother's room. He testified that there were eight policemen involved, amongst them was one **Van Roos**. After he was placed in a police van, the police continued searching other structures at his home. That the room in question was his brother's, was confirmed by his brother's girlfriend. Having been arrested on 12 May 2015, he was kept in police custody until the 14 May 2015 when he appeared in court. Plaintiff denied that he was told that he was being arrested in connection with a charge of theft of a motor vehicle as pleaded in his particulars of claim. He also denied as suggested in his particulars of claim that the police had a warrant of arrest for his younger brother, **Siyamxolela**. He testified that the police did not warn him about his constitutional rights.

Asked how the police could have mistaken him for his brother when his name clearly appeared, is reflected in the notice of rights form as well as his statement, he responded that he was surprised that he was arrested yet the document police bore his brother's name. He could not explain why if his brother's girlfriend was inside the room where dagga was allegedly found she was not arrested.

[9] The basis upon which it is contended on behalf of the plaintiff that, the police had no justification to arrest him is as it would appear from his testimony:

The drugs, if found, were found inside his brother's room. He cannot be expected to know what is kept therein. He could not have had the necessary intention to possess the drugs. Hence according to the police, he said he did not have any drugs in his possession when he was asked.

[10] Arguing for the absolution of the defendant, *Mr Mpahlwa* submitted that it matters not that the search warrant bore plaintiff's brother's name because the search warrant provided for the search of the premises and persons therein. Which the police did. Further that, had the dagga been found in the room in which plaintiff's brother's girlfriend was, she would have been arrested. Further that does not make sense that the police would let go of her and arrest plaintiff who was not in the room where dagga as found. It was submitted that the police were justified in arresting the plaintiff for committing the offence of possession of dagga in their presence. (*Section 40 (1) (a)* of the *Criminal Procedure Act 51 of 1977*) This section provides for an arrest without a warrant of any person who commits or attempts to commit any offence in the presence of a peace officer.

[11] It seems to me that to decide the matter one way or the other I must determine whether there is evidence on a balance of probabilities that the place where the dagga was found belongs to the plaintiff or not. This is the room in which dagga weighing 11.800kg was found in three different places as aforementioned.

[12] Plaintiff denies he was found or emerged from his flat when the police knocked on its door that was open. I do not understand his version to be that he was inside the said room but had only visited same as it belongs to his brother not him. Hence, I do not think that decision in the matter of **S v Gentle**¹, to which I was referred by *Mr Basson*, his legal representative is of much assistance to him. But I take note of the dictum therein that where it was held that there was a reasonable possibility that the appellant in that matter had no knowledge of the negligible amount of dagga found in his presence and therefore lacked the required intention to possess the dagga. Had the plaintiff admitted that he was inside the said room which belonged to his brother but was not aware there was dagga it would have been different. The **Gentle** matter is also distinguishable from the case under consideration because we are not talking about a negligible amount of dagga but 11.800kg. Some of which was under a chair not far from the door and apparently not concealed. It is not common cause that the room in question belongs to plaintiff's brother. According to defendant's witnesses, plaintiff told them it was his room after he emerged from inside the room.

[13] It will be recalled that plaintiff pleaded that he was arrested on false charge of theft of a motor vehicle. That the police had a warrant of arrest that was issued against his brother. That the police arrested him even though he told them **Siyamxolela** whose name appeared in the arrest warrant has his brother. It is common cause that the search warrant (not arrest warrant) the

¹ 1983 (3) SA 45 NPD.

police had plaintiff's brother's name. Granted he may have been mistaken to say it was a warrant of arrest, probably being a layperson. So, the description of the warrant police had is of no moment since there is a logical explanation for it. But it transpired during his testimony that he was not arrested on a charge of motor vehicle theft as pleaded.

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[14] In addressing the issue of the divergence between plaintiff's plea and evidence in this regard, it was submitted that the court is not bound by the pleadings if a particular issue was fully ventilated during the trial. It is trite that the purpose of pleadings is to define the issues between the parties and the court. that it is impermissible for the party in particular plaintiff to plead one case and then seek to establish a different case during the trial.² It is also trite that pleadings are made for the court and not the court for pleadings and therefore where a party has placed all the facts before the court and same have been fully ventilated there will be no justification not to have regards thereto. Be that as it may, it is noteworthy that even though the claim was instituted after the plaintiff was acquitted in respect of a criminal case, in his pleadings he steered clear of the real reason given for his arrest. Namely, the allegation that drugs were found in his room. In my view, this cannot be ignored when assessing plaintiff's version.

[15] It was also argued against the run of plaintiff's evidence that there may have been confusion if he said the room in question was his because that was his parental home. But he denies that he was inside the room that was searched by the police. Same as the argument that he would not have known that there were drugs in that room because he was merely a visitor. That was not his evidence. But that was not his version, he denied he said that was his room.

² See *Kaliv Incorporated v General Insurance Ltd* 1976 (2) SA 179 D at 182A.

[16] From what has been said so far, it is clear that the versions presented by the plaintiff and the defendant are irreconcilable and mutually destructive. Even though plaintiff's version is not that clear cut. The approach to be adopted in such circumstances has been suggested in a number of cases which include:

National Employers' General Insurance v Jagers³ where it was said:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and 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."

SFW Group Ltd & Another v Martell Et Cie & Others⁴ where it was stated:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a 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 about 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

³ 1984 (4) SA 437 ECD at 440 D-E.

⁴ 2003 (1) SA II SCA at 14-15 paragraph 5.

extracurial 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 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[17] It is trite that the *onus* rests on the defendant to justify an arrest.⁵ Has the defendant succeeded in discharging the *onus* resting on him to show that the arrest of the plaintiff was justified? The *onus* rests on the defendant to allege and prove the legal justification of the arrest. Defendant contends that the reason for plaintiff's arrest was that he had committed an offence in the presence of the arresting officer. The offence being possession of dagga. Evidence was adduced in this regard. I do not understand plaintiff's evidence to dispute that the police found dagga in one of the structures in the premises. I could not find any fault with the evidence of defendant's witnesses. During cross-examination a statement that was deposed to by a **Captain Van Roos** was drawn to their attention. The statement seemed to confirm plaintiff's evidence that he observed the two witnesses who testified on behalf of the defendant **Sauli** and **Zana** together with other officers who included **Captain Van Roos** inside his premises. **Van Roos** in his statement states that on the same date as alleged by the defendant's witnesses the 12 May 2015 together with his colleagues from the Crime Prevention Unit visited plaintiff's home armed with a search warrant, having received information that dagga was sold

⁵ Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA at 322.

in the premises. As a result of the search dagga was found in the premises. The problem however is that **Sauli** and **Zana** deny that they were attached to the same unit with **Van Roos** or that he was part of the crew that found drugs at plaintiff's house as a result of which he was arrested by **Sauli**. **Van Roos** was not called as a witness by any of the parties. Even though the search was, according to **Van Roos**, conducted on the 12 May 2015 his statement was commissioned on the 27 May 2015. According to **Zana** and **Sauli**, **Van Roos** was no longer with the South African Police Service. The suggestion was therefore that the defendant's witnesses were not speaking the truth. For what is it worth, **Van Roos's** statement seems to confirm defendant's evidence about dagga having been found in the premises. That the person in whose house dagga was found was arrested. It is common cause that plaintiff is the person who was arrested on that day in the premises. I am not persuaded that **Van Roos's** statement affects the reliability or veracity of defendant's evidence. The evidence of the two witnesses was consistent and coherent. They did not contradict each other in any material respect. The dagga the allegedly found in plaintiff's room was handed in by **Constable Sauli** and entered in the exhibits register. The arrest statement is deposed to by **Sauli**.

[18] On the other end of the spectrum, plaintiff's evidence cannot be said to have the same characteristics. His case is far from being consistent.

[19] The case that the defendant came to answer was that the plaintiff was wrongfully and unlawfully arrested on false charge of theft of a motor vehicle, even though the police had a warrant of arrest issued in his brother's name.

[20] It was only in his evidence that he testified that dagga was found albeit in his absence. He was told by the police that they found dagga and shown a warrant in his brother's name. Presumably in a bid to prove to them that he

was not the person with the name in the warrant, he asked the police to take him to his room so that he can show then his identity document, but they refused. He also suggested that the room in which dagga was found belonged to his brother and the latter's girlfriend was inside the room. In argument it was submitted that he was merely a visitor and could not have known that there was dagga inside that room because it was concealed. But it was never his evidence that he was inside the room and the room belonged to his brother. It is also not clear why if his brother's girlfriend was inside the said room where 11.800kg of dagga was found she was not arrested. Nor was the owner of the house, plaintiff's father arrested.

[21] In all the circumstances, I am satisfied that on a preponderance of probabilities defendant's version is true and accurate and therefore acceptable and that plaintiff's version is false and falls to be rejected.

[22] I am satisfied that defendant's evidence proves that the plaintiff committed the offence of being in possession of dagga in the presence of peace officers **Zana** and **Sauli**. That therefore plaintiff's arrest was justified on the basis of *Section 40 (1) (a) of the Criminal Procedure Act*.

[23] Accordingly, plaintiff's claim is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 30 January 2023, 31 January 2023, 1 February 20203

Date Reserved : 1 February 2023

Date Delivered : 13 June 2023