



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 204/2020

In the matter between: -

TIEHO ALFRED NHLAPO

Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

CORAM: N. M. MBHELE, DJP

HEARD ON: 26, 27 OCTOBER 2021 and 26 JANUARY 2022

DELIVERED ON: 11 MAY 2022

- [1] On 22 November 2018 the plaintiff (Nhlapo) was arrested by Sergeant Ramaele Abram Mokanyane (Mokanyane) acting within the course and scope of his employment of the South African Police Service stationed at crime intelligence. Nhlapo was taken into detention at Bethlehem Police Station. He appeared in court on 26 November 2018 and on 3 December 2018 when he was released on bail. On 3 December 2018 the matter was postponed to 13 December 2018, on 13 December it was postponed to 21 January 2019 for DNA results, on 21 January 2019 it was postponed further to 14 February 2019 when it was

removed from the roll in terms of section 342(A) of the Criminal Procedure Act (CPA).

- [2] Arising from this, Nhlapo instituted an action for damages against the 1st and 2nd defendant (The Minister of Police and the National Director of Public Prosecution) for unlawful arrest and malicious proceedings. The arrest, duration of the detention and the facts that Nhlapo was arrested without a warrant on a charge of stock theft are common cause.

- [3] Nhlapo's evidence is, *inter alia*, to the following effect: He worked as a caterer before his arrest. On the date of his arrest, he was at Oxford street in Bethlehem to buy stock feed. He was arrested by Mokanyane from Intelligence who informed him that he was following instructions from Inspector Vermeulen (Vermeulen). By that time the police had already arrested the person he had sent to the auction to collect his cheques for the 2 cattle that he sold at the auction around 11 November 2018. Mokanyane only informed him that he was arrested for stock theft when he arrived at the police station.

- [4] He was informed that a third party showed up at the auction and claimed that the cattle that Nhlapo sold to Vleissentraal auctioneers belong to him. His version is that he purchased these cattle at the Vleissentraal auctioneers in October 2017. He did not disclose this to Mokanyane as well as Vermeulen on the date of his arrest and the following day when Vermeulen came to charge him. He confirmed that he exercised his right to remain silent as reflected in his warning statement. He only branded the cattle a year later, on the day he took them to the auction for sale, at the advice of an employee of Vleissentraal, whose truck he used to transport the cattle to the auction. The receipt from Vleissentraal dated was never presented to the police, it only emerged late in these proceedings as part of Nhlapo's supplementary discovery affidavit.

- [5] He was kept at the holding cells at Bethlehem Police station from the time of his arrest until 26 November 2018 when he was transferred to Bethlehem Correctional Centre. He was represented by Mr. Harrington from the date of his first appearance until 14 February 2019 when the matter was struck off the roll.

- [6] The first defendant called Inspector Vermeulen and Sergeant Mokanyane and 2 witnesses in support of its case, their testimony was as follows: Johannes Jacob Vermeulen is an Investigating Officer at the Stock Theft Unit at Ladybrand. On 13 November 2018 he received a call from Mr. Scheepers from Tuinplaas in Bethlehem who laid a complaint of theft of his 8 Angus cattle. He met with Mr. Scheepers who identified 2 cows and 1 calf at the auction kraals as his own property. Upon enquiry he was informed that the cattle were sold to the auctioneers by T Alfred Nhlapo who had completed the Section 6 document as proof of sale. Vermeulen interviewed the truck driver who brought the cattle to the auction kraal. This interview led to the arrest of an individual called Jacob (the man who was tasked by T Alfred Nhlapo to remain at the auction and receive his cheque).
- [7] He asked Mokanyane who was at the auction kraal to help him trace the second suspect involved, who was known as Mbutane. On 22 November 2018 Mokanyane called him and told him that he succeeded in tracing Mbutane, who happened to be Tieho Alfred Nhlapo. He interviewed Nhlapo at the police station and he at first indicated that the cattle belonged to him and when he was asked about the proof of purchase he said he did not have and disowned the cattle. DNA samples were taken from the cattle and he received information that the results show that one of the calves was sired by one of the complainant's bulls. He testified that in terms of the Animal Identification Act, a new owner of cattle must brand them within 14 days from the date of acquisition. He observed that the brand marks on the cattle were fresh and not older than a day.
- [8] Mokanyane works as Information Manager at Bethlehem Public Order Policing. At the time of the arrest of Nhlapo he was stationed at Crime Intelligence as an information gatherer. On 13 November 2018 he was at the auction kraals when Vermeulen, who was in company of some white male (Scheepers), informed him that Scheepers identified 3 of his cattle at the auction bearing the brandmark of Tieho Alfred Nhlapo also known as Mbutana. Scheepers said that he was the only farmer in the whole district farming with the specific breed. He

went to trace Mbutana at an address in Vuka and the lady he found at the address said she does not know his whereabouts as he had a tendency of disappearing without notifying anyone. He went back to the auction where the auctioneer called Mbutana in his presence who said he would come collect his cheque. On 22 November 2018 he received information from one of his sources that Mbutana was near the golf estate. He followed the information and introduced himself to him. He informed him that he was assisting Vermeulen with investigations in CAS 248/11/2018 wherein the 3 cattle he sold were identified by the complainant as his property. He responded that he never took cattle to the auction, he then arrested him and informed him that he would give his further explanation to Vermeulen. He denied that he did not explain Nhlapo's rights upon his arrest.

[9] Section 40(1) of The Criminal Procedure Act¹ provides as follows:

"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;
 - (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
 - (g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;"

[10] In **Duncan v Minister of Law and Order**² the court sets out 4 jurisdictional factors to be complied with for the arrest to be lawful. Where these factors have been satisfied, the arrest is deemed lawful regardless of its reasonableness. These factors are:

- "(a) the arrestor must be a peace officer;

¹ Criminal Procedure Act 51 of 1977.

² 1986 2 SA 805 (A) 818G-H.

- (b) he must entertain a suspicion;
- (c) the suspicion must be that the suspect has committed an offence listed in schedule 1 of the CPA;
- (d) such suspicion must be based on reasonable grounds.”

[11] In **Duncan** the court further remarked as follows:

“The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt.”

[12] In **Biyela v Minister of Police**³ Musi AJA remarked as follows:

“[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.”

[12] Mr. Zietsman, on behalf of the Plaintiff, submitted that the requirements set out in Section 40(1)(b) of the Act had not been met by the defendant when the

³ *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36 (01 April 2022)

Plaintiff was arrested. He avers that Mokanyane did not harbour a reasonable suspicion because he had no knowledge of the investigation and reasons for arresting the plaintiff. He, further, took issue with the defence counsel's failure to put the defendant's version to Nhlapo during cross examination.

- [13] Ms. Nhlapo, on behalf of the defendants, did not challenge parts of plaintiff's evidence which are in dispute. In the **President of the Republic of South Africa and others v South African Rugby Football Union and Others**⁴ it was held as follows:

"....If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."

It is clear from the above that a party is obliged to put any matters concerning his or her own case that are inconsistent with a witness' evidence to that witness. It is a rule of fairness that obliges counsel to afford the witnesses an opportunity to respond to evidence that forms part of the other party's case. The rule does not require counsel to smooth out all inconsistencies in the witness' testimony but it is to afford the witness a chance to respond and the court an opportunity to see the witness' reaction to the other party's version.

I have to look at the part of Nhlapo's disputed testimony that is said to have been unchallenged. The main dispute is whether Mokanyane explained the reasons for his arrest. Although this was not put to Nhlapo in explicit terms it was put to him that he failed to give an explanation for his possession of the cattle at the time of his arrest. Mr. Zietsman cross examined Mokanyane extensively on the statement that he gave to the police after the arrest. In that statement, Mokanyane stated that he informed Nhlapo of the reasons for his arrest and that he explained his constitutional rights to him. When viewing the evidence in its totality, the disputed facts wane when placed in front of the undisputed evidence brought by the defendant's witnesses.

⁴ 2000 (1) SA (CC)

- [14] It is common cause that Scheepers had laid a complaint of stock theft and that he visited the auction kraals where he laid claim on the cattle sold by the Plaintiff. The cattle were only branded on the day of sale. The undisputed evidence of the defendant is that Mokanyane is a peace officer, he was at the auction on 13 November 2018 when Scheepers identified 3 cattle sold by the plaintiff as his. He was present when the auctioneer called the person in whose name the cheque was written (Nhlapo) to collect the cheque. He witnessed the arrest of Jacob. The plaintiff admitted that he was called and informed that there was someone who claimed ownership of the cattle he sold at the auction and that he informed the caller to contact his Attorney, Mr. Harrington. He was aware that Jacob got arrested on 13 November 2018 when he went to collect his cheque and that the police were looking for him. He did not inform Mokanyane nor Vermeulen of the origin of the cattle.
- [15] As set out in **Biyela**, the reasonableness of the suspicion held by the arresting officer is assessed objectively. Reasonable suspicion requires facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. In the circumstances of this case reasonable suspicion means that any reasonable person in the position of Mokanyane, would have suspected that Nhlapo had committed the crime that he was arrested for. On the basis of the totality of the information that Mokanyane had before him, I am satisfied that his suspicion that Nhlapo had committed the crime of stock theft was reasonable. The jurisdictional facts for him to arrest Nhlapo were therefore present. The arrest would have been reasonable owing to the seriousness of the offence and the fact that according to the police information Nhlapo's whereabouts were not known by the people he was staying with.
- [16] Having found that the arrest of Nhlapo was not unlawful and that the jurisdictional requirements of an arrest without warrant in terms of section 40(1)(b) of the CPA have been established by the defendant, particularly that Mokanyane formed a reasonable suspicion that Nhlapo was guilty of Stock theft, Nhlapo's claim cannot succeed.

[17] I make the following order:

1. The plaintiff's action is dismissed with costs.



N.M. MBHELE, AJP

Appearances:

For the Applicant/3rd Plaintiff: Adv. C. Zietsman
Instructed by Jacobs Fourie Inc.
Bloemfontein

For the Respondent/Applicant: Adv. K. Nhlapo
Instructed by State Attorney
Bloemfontein