



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No:	1416/2020
Heard:	16 – 17/08/2022
Argued:	18/08/2022
Delivered:	14/12/2022

In the matter between:

GAOIKWATLHAE BETHUEL RALEHIKE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Mamosebo J

- [1] In this action the plaintiff, Mr Gaoikwatlhae Bethuel Ralehike, claims an amount of R2 million in damages against the Minister of Police for his alleged unlawful arrest on 21 November 2019 and detention from that date to 02 December 2019. The breakdown is as follows: R1,000,000.00 for the unlawful arrest and deprivation of freedom and R1,000,000.00 for *contumelia*, inhuman treatment and emotional shock. The parties have agreed to separate merits and quantum and only sought determination of the merits at this stage. Adv. T Tyuthuza represented the plaintiff while Mr. P Visagie represented the defendant.

- [2] The issue that stands for determination is crisp, that is, whether the plaintiff's arrest and detention was lawful as contemplated in s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). Couched differently, whether there was information available to cause the members of the South African Police Service (SAPS) to reasonably suspect the plaintiff and the two other men, Mr Simon Sipho Ravuza and Mr Mike Langa, of having committed the offences of fraud and extortion with which they were accused of.
- [3] The following are common cause facts:
- 3.1 The citation of the parties is confirmed;
 - 3.2 The *locus standi* of the plaintiffs is acknowledged;
 - 3.3 The jurisdiction of the court to adjudicate the case;
 - 3.4 That the members of the SAPS arrested plaintiff without a warrant; and
 - 3.5 The *onus* of proof and duty to begin rested upon the defendant, the SAPS Minister.
- [4] The defendant called three witnesses who testified on his behalf: D/Sgt Tebogo Samuel Markus (Markus) and D/Sgt Moshopa Macdonald Mojaki (Mojaki), who are members of the SAPS attached to the Hartswater detective branch, and Sgt Godwin Phushudi (Phushudi), a member of the Crime Intelligence Unit (CIU) of the police service. They are all experienced police officers who have been with the police service for 16, 17 and 18 years, respectively. The sum total of the defendant's case is summed up hereunder.
- [5] On 21 November 2019 D/Sgt Markus received a telephone call around 08:00 in the morning from a gentleman by the name of "Zenzile" (whose full details were unknown to him), but is known to Markus as one of the elders in the community he grew up in, with information that he will be meeting with the investigating officer

(I/O) to give him money in order for the I/O to have his son, who was arrested and charged with rape, released from prison. "Zenzile" was later identified as "Zenzile Nyane". The transaction was to take place in the vicinity of the post office.

- [6] Markus used an unmarked SAPS vehicle which he parked facing the direction of the post office so that he could observe the transaction as it unfolds. He noticed Zenzile handing over something to Mike Langa. The recipient then walked towards a silver-grey Nissan Almera sedan vehicle parked behind Markus' vehicle. Markus saw the recipient using the rear and side mirrors of his vehicle. He recorded the registration numbers of the Almera and noticed that there were two other occupants in the Almera. Markus then made a U-Turn with his vehicle to establish whether the occupants, one of whom turned out to be the plaintiff, were members of the SAPS. He was content that the occupants were not SAPS members.
- [7] Markus drove to Standard bank to meet with Zenzile. Zenzile reported that he gave Mike Langa R100.00 (One Hundred Rand) in cash and the balance of R2,000.00 (Two Thousand Rand) was to be exchanged around 12:00 midday that same day. Markus assured Zenzile that the men were not police officers and arranged with Zenzile for the next transaction. Zenzile delivered R2,000.00 in notes to the police station. The police made copies of the notes. An entrapment was set. They handed Zenzile the entrapment money to give to Mike Langa who solicited the bribe.
- [8] There was back-up from additional SAPS members who were strategically positioned around the post office area to monitor and conduct surveillance of this transaction. Markus parked his unmarked vehicle at the prearranged spot. He saw the same three men in the Almera that he had identified earlier. Markus saw Mike

Langa counting the money before he left. Plaintiff and Sipho Ravuza remained in the Almera when the transaction took place. After the transaction Mike walked to the Almera. Markus and a colleague followed him while others approached from the opposite direction. Just as he was about to board the vehicle the recipient of the money, Mike Langa, noticed the police presence and screamed "police" as he attempted to flee and was arrested.

- [9] D/Sgt Moshopa Macdonald Mojaki arrested the plaintiff as he was about to occupy the driver's seat. The police searched the briber, Mike Langa, and recovered the marked money. Markus testified that all three men acted in concert. It was put to Markus in cross-examination that the plaintiff makes an income by transporting commuters with his private vehicle and that on that specific day he transported the two men as part of his business. No certificate or licence for lawfully doing so was produced.
- [10] D/Sgt Mojaki was on duty on 21 November 2019 when Markus arrived with Zenzile. Markus recounted the stated call he received from Zenzile and left. Around 14:00 Markus returned with Zenzile who informed them that a certain man by the name of "Mike", who identifies himself as a police officer, assists people with the release of their children who are arrested and detained by the police, for a fee. At the time when the information was related, the detectives were in the company of the members of the Crime Intelligence Unit within the SAPS. Zenzile carried cash in notes which he gave to the police to be photocopied. Thereafter, they proceeded to the post office where they positioned themselves strategically and waited for the transaction to occur. Mojaki stood watch outside Standard Bank which was across the road from the post office.

- [11] Mojaki testified that he saw Zenzile arriving with his wife and stopped at the post office within sight. Mike arrived wearing a pair of light blue pants, a checkered shirt and red shoes. Zenzile and Mike stood around talking. Zenzile put his hand in the right pocket of his pants and took out the money and handed it over to Mike. Mike then turned around and took the direction from which he came. Mojaki and Markus followed him.
- [12] The plaintiff was seated in the vehicle. Mike spotted Sgt Phushudi approaching from behind the plaintiff's vehicle and shouted to the plaintiff "we are caught out", and tried to flee. Detectives Mojaki and Markus apprehended him. The plaintiff quarrelled with Sgt Phushudi. They furnished their full names and were all informed of the reason for their arrest, being fraud and extortion. They were taken to the police station where Zenzile positively identified them as the same persons who had impersonated police officers. He also identified their vehicle. The cash was registered in the SAP 13 exhibit register.
- [13] SAP 14A is a Notice of Rights in terms of the Constitution attached to the papers of the Minister of Police evidencing the rights explained to the plaintiff by the arresting officer. The plaintiff signed the document at 14:30 on 21 November 2019. Below his details appears those of the arresting officer, D/Sgt Mojaki. Mojaki explained that at the time of arrest he suspected that the two gentlemen and plaintiff had committed crimes of fraud and extortion.
- [14] It became clearer during cross-examination of Mr Mojaki by Ms Tyuthuza that Nyane and Zenzile was a reference to the same person:

"Ms Tyuthuza: So did Mr Zenzile Nyane on 21 November 2019 at 13:40 approach you with the information?"

D/Sgt Mojaki: Yes, we were together in the office, all members were present in the same office. We then called other members of the Crime Intelligence Service, Sgt Pitso or Commander."

Mojaki explained that at the scene was Mike Langa, who went to collect the cash from Mr Zenzile Nyane, inside the vehicle was Bethuel Ralehike, the plaintiff, behind the steering wheel and Simon Sipho Ravuza occupied the seat behind the driver. The front passenger seat was unoccupied. The window was rolled down.

- [15] Sgt Godwin Phushudi is attached to the Crime Intelligence Unit of the police service. He responded to the invitation of the detectives on 21 November 2019 to aid with the entrapment process as contemplated in s 252A of the CPA. He knows the plaintiff as a person of interest. Phushudi wore his civilian clothes. He did not effect the arrest of the plaintiff but Mojaki did. He denied any knowledge that the plaintiff renders public transport services from Hartswater to Pampierstad. He witnessed the arrest as he was part of the surveillance team. When one of the suspects noticed him he shouted "we are busted". There was no altercation as alleged by the plaintiff but he advised the plaintiff to cooperate with the police on the incident at hand as it was unrelated to their previous encounters. It was put to Phushudi in cross-examination that one of the persons of interest had informed Phushudi that the plaintiff was not involved in the commission of the offences. Phushudi refuted the statement and stated that that same person, Mike, chose to engage the services of an attorney and will only speak through his attorney. Phushudu further clarified that the plaintiff was hostile towards him when he followed up with an interview after their arrest.

- [16] Mr Visagie, for the Minister, did not call any further witness and closed the case for the defendant.

The plaintiff's evidence

- [17] The plaintiff, Mr Gaoikwatlhae Bethuel Ralehike, was the only witness to testify for his case. He resides in Pampierstad and has, for the past six years, used his private sedan vehicle, a Nissan Almera, as public transport, to convey people from Pampierstad to Hartswater. On 21 November 2019 he left Pampierstad at 08:30 in the morning transporting two young men who were known to him to Hartswater. They are Simon Siphso Ravuza and Mike Langa. They informed him that they were meeting people in town next to Standard Bank. He charged them each R50.00. On the way he also picked up a female passenger who was to alight at the taxi rank. When they reached Standard Bank he parked the vehicle. Mike alighted from the vehicle and told him he was collecting something from a gentleman. Mike was away for about 20 minutes while the plaintiff, Siphso and that lady waited with him in the car.
- [18] After Mike returned he asked the plaintiff to take them to the Spar store to buy food. They and the female passenger alighted at the Spar. The plaintiff waited for them in the car. On their return, they drove and stopped in the shade next to a dentist's practice. They spent about 45 minutes there and ate together. He told Siphso and Mike that he needed to return to Pampierstad. They released him on condition that he will fetch them when they called him. They called him when he was already back in Pampierstad. He told them to wait for him at the same spot near OK/Midas and arrived there at 14:00. He alerted them that he has more commuters around 14:00. They insisted that he should wait. He remained in the vehicle. They were both sitting on a bench but Siphso later sat on the back seat of his vehicle.

- [19] The plaintiff realised that Mike had left. As he was about to drive off he noticed Sgt Phushudu approaching and signalled for him to stop and he did. Sgt Phushudu confiscated his vehicle keys and informed him that he was under arrest. There were several police officers. Sipho attempted to flee but the police apprehended him. Sgt Phushudu locked both him and Sipho in the police van. The plaintiff maintains that he was arrested by Sgt Phushudu. Mike was conveyed in another police vehicle. Mike and Sipho explained to Sgt Phushudu that he (plaintiff) was not involved in the transaction but Phushudu became angry and ordered the detainees to remove their belts and they were searched. He was taken by D/Sgt Mojaki to the cells.

In my view it is immaterial who amongst the entrapment team arrested who as nothing untoward revolves around that. I pointed out in para 3.4 (above) that it is common cause that the plaintiff was arrested by members of the police.

- [20] In cross-examination the plaintiff was referred to the bundle under the head "plaintiff's discovered documents" where he deposed to an affidavit in support of a formal Schedule 5 bail application, signed on 02 November 2019 in which he informed the bail court at para 1.4 that he is unemployed with no income. The plaintiff confirmed that the statement is correct. In this action he is informing this court that he is operating a transport business for reward. His response was that he is "pirating", which means operating without authority. He derived a meagre income from the venture. He was asked whether he instructed his legal team about the presence of a lady in the vehicle. He responded in the negative. He did not notice that Sipho had alighted from the vehicle and only realised that he had when he was brought back to the car by the police. He did not

tell his legal team that when they returned to the spot at Standard Bank he sat in the car while the two men sat outside.

[21] At paras 4.2 and 4.3 of the Particulars of Claim plaintiff pleaded as follows:

"4.2 At the time when the plaintiff was arrested he told the police that he was not involved in the commission of the alleged offence. Also, the other two persons [Mike and Sipho] who were arrested with the plaintiff confirmed the same. Nevertheless, the police proceeded to arrest the plaintiff.

4.3 Even during the first appearance of the plaintiff [in court] it was said, by accused one (1), [Madoda David "Mike" Langa] in court and to the police that the plaintiff was not involved in alleged commission of the said crime but the police insisted on his further detention."

Against the backdrop of the aforementioned plea Mr Visagie put it to the plaintiff that these pleaded particulars are not borne out by what was stated by the plaintiff in the statement regarding an interview with the suspect [the plaintiff] at page 23 of the defendant's index bundle volume 1. Counsel submitted that it cannot be correct because when the plaintiff was asked whether he wished to make a statement he said he will make a statement at court.

[22] The plaintiff was further asked in cross-examination whether he had told his legal team that he was arrested by Sgt Phushudi. He answered in the affirmative. He was however, referred to para 4 in the Index Pleadings at page 5 where he pleaded the following:

"4.1 On 22 November 2019 the plaintiff was unlawfully and wrongfully arrested and detained without a warrant of arrest by a certain Warrant Officer and other unknown members of the South African Police Service (SAPS), stationed at Hartswater Police Station"

The plaintiff was persistent that he told his legal team that he was arrested by Sgt Phushudi. He must be given the benefit of the doubt because the manner in which the particulars of claim were couched was within the remit of his legal advisers. As stated before, this is really of no consequence.

- [23] It was put to the plaintiff that Mojaki testified that he suspected him of being involved in the illegal transaction that had unfolded in his presence. The plaintiff's response was that he cannot dispute that Mojaki was suspicious but that he was not aware that a crime was being committed. The Court has to look at the facts and decide whether the arresting officers were justified in effecting the plaintiff's arrest.

The plaintiff closed his case without calling any witnesses.

The law

- [24] The remarks by Langa CJ in *Zealand v Minister of Justice and Constitutional Development and Another*¹ are apposite:

"[24] ...*The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. **The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.***"

In this instance, the Minister of Police, who is in charge of the members of the SAPS who arrested the plaintiff, bore the onus of proving that their action was justified in law. See *Minister of Law and Order and Others v Hurley and Another*²

¹ 2008 (4) SA 458 (CC) at 468 para 24

² 1986 (3) SA 568 (A) at 589E

[25] In *Minister of Safety and Security v Slabbert*³ the Court held:

"[11] The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial."

[26] Section 40(1)(b) of the CPA provides:

"A peace officer may without warrant arrest any person –

- (a) Who commits or attempt to commit any offence in his presence;*
- (b) Whom he reasonably suspects of having committed any offence referred to in Schedule 1, other than the offence of escaping from lawful custody;..."*

[27] The Court in *Duncan v Minister of Law and Order*⁴ enunciated the following requirements for the defendant to succeed in proving that the arrest was lawful:

- (i) The arresting officer was a peace officer;
- (ii) The arresting officer entertained a suspicion;
- (iii) The suspect to be arrested committed a Schedule 1 offence;
and
- (iv) The suspicion rested on reasonable grounds.

Analysis of the defendant's evidence

[28] It is common cause that Markus, Mojaki and Phushudi are members of the SAPS. They were experienced, gave credible evidence and were reliable witnesses. Their evidence was consistent and probable. Mr Zenzile Nyane was not called to give evidence. No reason for this default was proffered. It would have been prudent for Zenzile to have testified. Notwithstanding this lacuna the

³ [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) at para 11

⁴ 1986 (2) SA 805 (A) at 818G-H

testimony presented covered his version in all respects. Zenzile notified the police about the offence that was being concocted by the plaintiff, Sipho and Mike who, acting in concert, impersonated police officers. He furnished the police with the exact times, morning and afternoon, exact location, and gave the amounts of the transaction demanded. He even went as far as cooperating with the police to uncover the truth by setting up a trap.

[29] The police, through entrapment, were able to recover the money that Zenzile had paid to Mike which matched the money they had photographed earlier. It cannot be a coincidence that Zenzile said three men visited him at his home and offered to assist him with the release of his child from police custody and three men were indeed at the scene and arrested in relation to the same transaction. It is common cause that the plaintiff, together with his co-perpetrators were caught red-handed in the commission of a Schedule 1 offence.

[30] Musi AJA, writing for a unanimous court, in *Biyela v Minister of Police* said⁵:

"[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 of 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 the arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence."*

⁵ [2022] JOL 52757 (SCA) at paras [34] and [35]

Analysis of plaintiff's evidence

[31] Before it can be determined whether the defendant (the Minister) discharged the *onus* reposed upon him it must be examined whether plaintiff's countervailing evidence displaced that onus. As alluded to earlier, the plaintiff was a single witness. He could have called Messrs Mike Langa and Sipho Ravuza and the unnamed lady who was in the vehicle with them when they waited for "Mike" to return, to corroborate his evidence, but failed to do so. The only reasonable inference that the Court can draw under the circumstances is as enunciated in *Elgin Fineways Ltd v Webb*⁶ :

"... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...".

[32] The plaintiff took issue with who his arresting officer was and was adamant that he was arrested by Sgt Phushudu. However, in his Particulars of Claim, which are his pleadings on which his case rests, he pleaded that he was arrested by an unknown warrant officer. It is apparent that he either is not telling the truth about being arrested by Phushudi or is trying to cast doubt that the arresting officer was not a peace officer. The fact of the matter is that Mojaki arrested him lawfully in the presence of his colleagues.

[33] The plaintiff claimed to be earning an income from "pirating", that is, operating a public transport service without a permit or a license to do so. The conflicting versions he presented under oath in the bail court hearing is that he was unemployed with no income and the trial court version during which he maintained that he was operating this public transport to earn an income. This carries with

⁶ 1947 AD 744 at 745

it an element of dishonesty. Whatever version is preferred, if any, does not detract from what he did on the scene of crime.

[34] After waiting, according to the plaintiff, for about twenty minutes, Mike returned to the vehicle in which they were waiting and asked the plaintiff to take them to the Spar store. The plaintiff obliged without charging additional fare. This is perplexing because for a mere R100.00 he forfeited earning an income. The nameless lady is strangely no longer taken to her destination, the taxi rank.

[35] Eksteen AJP, then, pointedly remarked in *National Employers General Insurance Co. Ltd v Jagers*⁷:

"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, 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."

[36] In summary. The plaintiff, acting in concert with Sipho Ravuza and Mike Langa, held themselves out to be police officers. They conspired to illicit a bribe from Mr Zenzile Nyane whose son had

⁷ 1984 (4) SA 437 (ECD) at 440E - G

been arrested for an offence. The context of the conspiracy was that for a fee of R2,000.00 plus R100.00 they would have the charges quashed. The police set a successful trap and the bribers were lawfully arrested. Plaintiff was present when both the R100.00 was paid in the morning and when the R2,000.00 was paid in the afternoon. Mike Langa also screamed at him that they were "busted". He tried to drive away but was stopped. This was an overt and active participation.

- [37] On a conspectus of the evidence before me, there is no doubt in my mind that a reasonable suspicion existed, premised on reasonable grounds, that when the plaintiff and his associates were arrested, they had committed fraud or extortion or a related offence. The SAPS members took precautionary measures by not only increasing back-up in the form of mobilising the Crime Intelligence Unit but also ensuring that the implicated offenders were brought to book.
- [38] I therefore find that the evidence of the plaintiff is fabricated and false and reject it in its totality. I did not discern in the papers or from the oral evidence that D/Sgt Mojaki and his colleagues acted arbitrarily or irrationally in the exercise of such discretion. Essentially, all the four jurisdictional factors alluded to in *Duncan v Minister of Law and Order* referred to in para 26 of this judgment (above) were established by the Minister. As already alluded to, I accept the version of the defendant as probable and credible. I am satisfied that the plaintiff's arrest was justified and therefore lawful as contemplated in s 40(1)(b) of the Criminal Procedure Act, 51 of 1977.
- [39] It is trite that costs are within the discretion of the Court and must be exercised judiciously. The accepted principle is also that costs

normally follow the result. There is no reason for me to deviate from the general principle.

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

The plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'M.C. Mamosebo', is written over a horizontal line.

M.C. MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

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