



IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

REPORTABLE / NOT REPORTABLE

Case No: 642/2021

In the matter between:

YANDISA POSWA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

DA SILVA AJ:

- [1] On the unfortunate evening of 24 September 2020, after 22:00, the plaintiff was a paid-up passenger in a motor vehicle which was stopped by members of the South African Police Service (*“the Service”*). The driver of the said motor vehicle was allegedly driving without a license.

For this, the motor vehicle was taken to the Police Station in Elliotdale where the driver was issued with a ticket. Nothing much turns on the issuance of the ticket.

[2] It is common cause that the plaintiff was arrested without a warrant on the fateful night at the Police Station on a charge of obstructing the ends of justice. The circumstances leading to the arrest are however in dispute.

[3] According to the arresting officer, Lungisa Mlingo, (Mlingo) the plaintiff is alleged to have been making a noise at the charge office of the Elliotdale Police Station in that he, the plaintiff, was shouting at the members of the Service, saying that the members were taking chances by arresting the driver and that they, the members, wanted money. This happened whilst Mlingo was filling out the ticket against the driver. The plaintiff is said to have uttered the aforementioned words 3 – 4 times for about a period of 3 minutes. During this period, Mlingo was unable to complete the ticket as he could not hear the driver's responses to the questions posed. According to Mlingo the arrest was in terms of section 40(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (*“the CPA”*).

[4] It was Mlingo's evidence that he arrested the plaintiff for the purpose of ensuring his attendance in court. He, Mlingo, did not consider other

methods of securing the plaintiff's attendance in court as he was of the view that because of the way the plaintiff was behaving (shouting), the plaintiff would not attend court if warned to do so.

[5] Of course, the plaintiff denies that he was shouting or making any noise. Instead, the plaintiff testified that on the fateful night, after the police had driven the motor vehicle with its passengers (which included the plaintiff) to the Police Station, the plaintiff panicked when he saw that it was getting late, and he just wanted to go home.

[6] According to the plaintiff, the panic started when he saw that the police were man-handling the driver who was apologizing for driving without a license. When the plaintiff saw this and that time was passing, he said to the police that the driver was not opposing the police, that the police should either arrest the driver (in which event the driver must refund him his money) or release him. For saying these words, the plaintiff was arrested.

[7] It is common cause that after the arrest, the plaintiff was taken to Coffee Bay Police Station where he was detained until Monday, 28 September 2020. The plaintiff was charged on the evening of Friday, 25 September 2020.

- [8] On 28 September 2020, the plaintiff was driven to the cells of Mqanduli Magistrates' Court from where he was picked up by the members of the Service and taken to Elliotdale Magistrates' Court. At Elliotdale Magistrates' Court, the plaintiff was placed in the holding cells until such time when he was informed that the prosecutor had issued a *nolla prosecui*. This was around lunch time.
- [9] Thereafter the plaintiff was taken to the Police Station in Elliotdale where he was detained for a short while whilst he was being processed out of the system.
- [10] In challenging the arrest and detention, the plaintiff not only averred that they were unlawful but that they were without reasonable and justifiable cause and maliciously carried out. During the trial, the Court asked the plaintiff's counsel, Mr. Mbiko, whether he was challenging the discretion to arrest and detain, as well. The answer was a resounding yes.
- [11] Having set out the pleaded case and the evidence, it is apposite for me to deal with the issue of the plea. The plea was only signed by an attorney in his capacity as attorney for the defendant. It was not signed by counsel and an attorney or in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has

the right of appearance in the High Court. This issue was remedied with the defendant amending his plea with no objection from the plaintiff.

[12] Having stated above, I now turn to deal with the first issue: was the arrest lawful?

[13] It is trite law that the police, having admitted the arrest and detention, bear the onus of justifying same.¹

[14] Section 40(1)(a) empowers a peace officer to arrest without a warrant any person who commits an offence in their presence. The jurisdictional facts necessary for an arrest under section 40(1)(a) are the following: (i) the arrestor must be a peace officer; (ii) an offence must have been committed or there must have been an attempt to commit an offence²; and (iii) the offence or attempted offence must be committed in his or her presence³.

¹ **Minister of Law and Order v Hurley** 1986 (3) SA 568 (A) pp. 587–589 and **Lombo v African National Congress** 2002 (5) SA 668 (SCA) para. 32.

² **Madyibi v Minister of Police** 2020 (2) SACR 243 (ECM).

³ **Van Wyk & another v Minister of Police & another** (unreported, GP case no A617/15, 17 November 2016) at [16] and **Mtshemla & another v Minister of Police & others** 2020 (2) SACR 254 (ECM).

- [15] It is commendable that an arrest in terms of section 40(1)(a) should be confined to serious cases but where a peace officer does effect a lawful arrest in terms of section 40(1)(a) for what may be considered to be a less serious offence, the arrest or subsequent detention does not become unlawful merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her presence at court.
- [16] However, in *Mpale NO v Minister of Police*⁴, the trial court took into account the fact that the offence was not of a serious nature in deciding that there was no need to arrest and detain, and that less stringent and less invasive procedures were available to secure the suspects' attendance at court.
- [17] The elements of the offence of defeating or obstructing the course of justice are: '(a) conduct (b) which amounts to defeating or obstructing (c) the course or administration of justice and which takes place (d) unlawfully and (e) intentionally'.⁵
- [18] Regard being had to paragraphs 3 and 7 above, it is evident that there are mutually destructive versions with regards to the issue of what was

⁴ Unreported, GJ appeal case no A3133/2017, 26 April 2019 at [16].

⁵ R Snyman *Criminal Law* 6 ed (2014) at 237. There is now a newer edition, but the definition remains the same – see CR Snyman *Criminal Law* 7ed (2021) at 292.

uttered by the plaintiff. However, regard being had to the approach that I take in this matter, I need not deal with which version is more probable.

[19] For the purposes of this judgement and without making any finding on credibility, I shall accept Mlingo's version in respect of what was uttered by the plaintiff and his conduct to determine whether such conduct constituted an obstruction of justice. In so accepting this version, I repeat, I make no credibility findings.

[20] Mlingo said that justice was obstructed because he could not hear what the driver was saying when the ticket book was being completed. However, he also says that the plaintiff uttered the above-mentioned words 3 – 4 times over a period of about 3 minutes. That would mean that the plaintiff would have said the afore-mentioned words about once per minute, at best for the defendant. Clearly this shows that the conduct of the plaintiff, in the circumstances of this case, was not obstructive and that Mlingo could have carried on with his duties.

[21] Further, the Constitution guarantees the right to freedom of expression. It is my view that if the plaintiff had uttered the words that he said to have uttered, he was free to do so. It may very well be that Mlingo was offended by these words, and he used the letter of the law to arrest the plaintiff as

a form of punishment. Thus, I hold the view that no offence was committed in the presence of the peace officer.

[22] In light of the above, the arrest was unlawful. It follows that the detention was also unlawful⁶.

[23] I now turn to deal with the issue of quantum. The plaintiff did not give any evidence in aggravation of quantum other than to state the circumstances of his arrest and the period of his detention. These facts are adumbrated above and need not be repeated.

[24] It is trite that in cases involving deprivation of liberty, the quantum to be awarded is in the discretion of the trial court and such discretion is to be exercised fairly and generally calculated according to what is good on the merits of the case. Various factors play a role in determining an appropriate amount. It is therefore useful to consider the assessment of awards for damages in previous cases.

[25] In ***Nel v Minister of Police***⁷ the court determined that R35 000 would be appropriate for 20 hours detention in a dirty, stinking cell. In ***Madyibi v***

⁶ ***Isaacs v Minister van Wet en Orde*** 1996 (1) SACR 314 (SCA).

⁷ ***Nel v Minister of Police*** (CA62/2017) [2018] ZAECHGHC 1.

Minister of Police⁸ the court awarded R40 000 for an unlawful arrest and detention of a 24-hour period.

[26] In **Domingo v Minister of Safety and Security**,⁹ the court awarded R40 000 in respect of unlawful arrest and detention for the plaintiff who was arrested and released the following day.

[27] The plaintiff was arrested in the night of 24 September 2020 and released in the afternoon of 28 September 2020. The plaintiff was thus detained for about 3 ½ days.

[28] Regard being had to circumstances of the arrest and the period of detention, it would be appropriate for the defendant to pay the sum of R95 000.00 for the unlawful arrest and detention.

[29] I accordingly make the following order:

(a) The defendant is held liable for the unlawful arrest and detention from 24 – 28 September 2020.

⁸ 2020 (2) SACR 243 (ECM).

⁹ (CA429/2012) [2013] ZAECGHC 54(5 July 2013).

- (b) The defendant is directed to pay the plaintiff the sum of R95 000.00 for the unlawful arrest and detention from 24 – 28 September 2020.
- (c) The defendant is directed to pay interest on the afore-said amount from the fourteenth day of judgment to date of payment.
- (d) The defendant is directed to pay the costs of suit.

AM DA SILVA
Acting Judge of the High Court

Appearances:

<i>Counsel for Plaintiff:</i>	<i>Adv Mbiko</i>
<i>Instructed by:</i>	<i>MK Majavu & Associates</i>
	<i>Mthatha</i>
<i>For Defendant:</i>	<i>Mr Mkhongozeli</i>
<i>Instructed by:</i>	<i>HN Mkhongozeli Attorneys</i>
	<i>Mthatha</i>
<i>Dates heard:</i>	<i>2 & 3 August 2022</i>
<i>Date judgment reserved:</i>	<i>3 August 2022</i>
<i>Date judgment delivered:</i>	<i>18 August 2022</i>