

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO.: 1322/2016

In the matter between:

JUSTICE GININDA

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

JOLWANA J

Introduction

[1] Plaintiff instituted an action for damages for unlawful arrest and detention as well as assault. However, counsel for the plaintiff indicated at the commencement of the proceedings that the claim in respect of assault was being abandoned, and that only the claim for unlawful arrest and detention would proceed.

[2] Plaintiff was arrested by the police without a warrant on 13 October 2015 for possession of suspected stolen property. He was detained at Cofimvaba Police Station

until he appeared at Cofimvaba Magistrates' Court on 15 October 2015 where he was released on bail.

[3] The defendant admitted the arrest and detention but the unlawfulness thereof was denied. Defendant pleaded that plaintiff was arrested together with other people as they were suspected of having participated in the theft of various items of clothing and foodstuff from various shops in Cofimvaba. Furthermore plaintiff was allegedly found in possession of suspected stolen goods and therefore his arrest was justified in terms of section 40 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). The pleaded basis in justification of the detention was that the state needed to do the necessary investigations for purposes of bail.

The facts

[4] The defendant called sergeant Walter Mandla Tyalimpi who testified that on 13 October 2015 he was doing patrol duties in town in Tsomo with sergeant Jojwana and his other colleagues who were in another vehicle also doing patrols. He received a call from his commander instructing him to mount a mini road block at 40 Junction in Tsomo. He was told that there were three cars that were coming from Cofimvaba which were suspected to have stolen goods.

[5] He then phoned his colleague sergeant Zonwabele Ntombini who was also doing patrols in Tsomo in another car asking him to assist in the road block that he was going to conduct. The two vehicles proceeded to 40 Junction which is between Tsomo and Cofimvaba. They mounted the roadblock and the first car that appeared was an unmarked police vehicle from Cofimvaba Police Station which they knew.

[6] Warrant officer Maninzi alighted from that vehicle and informed them that the vehicles which were suspected to have stolen goods were on the way behind him. He described the first vehicle that was coming as a silver grey honda ballade whose registration number he now no longer recalls but was given to him by warrant officer Maninzi. Indeed the vehicle as described to them by warrant officer Manzini appeared and they stopped it. It had five occupants including the driver being two males and three females. Sergeant Ntombini ordered the occupants to alight and lie down and they obliged.

[7] Thereafter two other vehicles appeared being a red polo and a black getz which were also stopped and their occupants were also ordered to alight and lie down. The occupants of all the vehicles were searched and nothing was found on them. The vehicles were also searched and all of them were found to have goods which they suspected to have been stolen.

[8] The plaintiff was in the first car, the silver grey honda ballade. In the plaintiff's vehicle they found a lot of goods like body lotions, toughies shoes and clothing like school trousers which were new and in bulks and some still had price tags on them. The body lotions were still in their original packaging and wrapping. They were asked to explain the possession of the goods and they said the goods belonged to all of them. In other vehicles baby formula and other goods were found some of which were also still in their original packaging. When plaintiff and his passengers could not give a satisfactory explanation for the goods and could not produce proof of purchase they were all arrested for being in possession of suspected stolen property.

[9] After arresting the plaintiff and his passengers as well as the people in the red polo and black getz vehicles they proceeded from 40 Junction to Cofimvaba Police Station. The registration of the goods and the opening of the cases took sometime as there were fifteen suspects being five from each vehicle and all three vehicles had different types of goods. It was after 17:00 when the arrest took place and they were taken to Cofimvaba Police Station where the goods were entered into the SAP13 exhibit book.

[10] He testified that as a police officer he was entitled and authorized in terms of section 40 of the Criminal Procedure Act to effect an arrest without a warrant where evidence could be lost if he applied for a warrant. The suspected stolen goods were there and the plaintiff and his passengers failed to give an explanation or to produce proof of purchase. While they were at Cofimvaba Police Station but before they were detained he also asked them to explain where they got the goods from as some of the items still had their tags from Pep Stores. This was after the manager of Pep Stores at Cofimvaba had arrived at the Police Station and confirmed that the goods belonged to Pep Stores. On this basis he denied that the arrest and detention were unlawful.

[11] The detention was not unlawful because the plaintiff and his co arrestees were made to appear in court on 15 October 2015 which was within 48 hours of their arrest. He also testified that he did not know why they did not appear in court the following day after they were arrested.

[12] Under cross examination he testified that his commander did not tell him how the theft of the said goods was committed, he just asked him to assist in conducting a road block for vehicles that were suspected to have stolen goods. He did not personally

search the plaintiff nor did he personally question him. He saw the goods that were found in plaintiff's vehicle. He arrested the plaintiff and the other people that were arrested for being found in possession of suspected stolen goods.

[13] It was put to him that plaintiff would say that he was not arrested by him and that he had given an explanation to the person who arrested him. He testified that he personally arrested plaintiff and all of the other suspects as they did not give an explanation for the goods that were found in their vehicles. He denied that plaintiff had explained that he had given a lift to passengers and said such an explanation was not given to him. At Cofimvaba Police Station they were asked to stand next to the car that each person travelled in. He was satisfied that they were involved in the commission of the offence as they all failed to give him an explanation for the possession of the goods.

[14] He denied that he arrested the plaintiff and his passengers and other people in the other cars on instructions from his superiors and said that he had sufficient evidence being the goods that were found which led to the arrest. He testified that warning them to appear in court was not an option as at that stage the police did not know where they stayed and the address that plaintiff gave still needed to be verified.

[15] The second witness for the defendant was Zonwabele Ntombini, a police officer from Tsomo Police Station. He testified that on 13 October 2015 he was on duty doing patrols in Tsomo. He received a call from sergeant Tyalimpi saying that their commander, warrant officer Mnqojana was asking them to assist Cofimvaba police at 40 Junction. There were vehicles from town in Cofimvaba which were carrying suspected stolen goods.

[16] He and sergeant Tyalimpi proceeded to 40 Junction in two different cars. They stopped at 40 Junction and waited for the cars that had been described to them. A police vehicle arrived first. Later a silver grey honda ballade which was one of the suspected vehicles appeared. They stopped it. Thereafter a red polo vehicle followed by a black getz vehicle also appeared which had also been described to them. Those vehicles were followed by a police vehicle. The vehicles were stopped and each had three females and two males. In the boot of the silver grey honda ballade they found a lot of goods which appeared to be from shops.

[17] The goods were still new and in their packaging. It was clothing, body lotion, baby formula, soap, shoes and slippers. They asked for proofs of purchase which were not produced and no explanation for the possession of the goods was given. They informed the occupants that they had information that those goods had been stolen from Cofimvaba shops. Sergeant Tyalimpi told all of them that they were being arrested for possession of suspected stolen goods as they failed to produce proof of purchase or explain how they came to be in possession of those goods.

[18] The goods were recorded in the SAP13 register as exhibits. He testified that the reason for the plaintiff's arrest was that they had received information that there were three cars from Cofimvaba which had suspected stolen goods. When they stopped the said vehicles indeed goods were found and they were not given an explanation as to where the goods came from. They did not produce proof of purchase and the goods were found in the vehicles that had been described to them. The arrest was based on the fact that they suspected the goods to have been stolen.

[19] They told the plaintiff and the other suspects that their information was that the goods were suspected to be stolen. He denied that the arrest of the plaintiff was unlawful in the circumstances. Under cross examination he testified that the female passengers in the silver grey honda ballade owned up to the goods but the plaintiff did not distance himself from the goods. The plaintiff who was the driver never said anything. He testified that if plaintiff had given an explanation to his colleagues that he had merely given a lift to the other passengers, his colleagues would have told him about his explanation. The defence closed its case after this witness.

[20] The plaintiff testified that he normally picked up hitchhikers to raise money for fuel, sometimes at or near PRD building in Mthatha when he drove to Cofimvaba or Queenstown. On 13 October 2015 he drove from Mthatha to Cofimvaba looking for business opportunities. As he was leaving Mthatha he picked up four people who were going to Engcobo and their fare helped him to put petrol in his car. He went to a block of flats behind Boxer Super Stores in Engcobo looking for office space. The owner of the flats was not there. He proceeded to Cofimvaba also looking for office space and drove around town. He thereafter drove to Capitec Bank to deposit some money as he had debit orders that deducted on 15th. This is when he received a call from his neighbour Zanele enquiring about his whereabouts because she knew that he normally offered lifts on the Engcobo, Cofimvaba, Queenstown route. He told Zanele that he was at Capitec Bank and would be going to Mthatha.

[21] Zanele asked him to pick her up next to Boxer Super Sores and would get other passengers for him. After doing his banking he drove to Boxer Super Stores where he found Zanele with two ladies and a gentleman. He gave them a lift and they left for

Mthatha. At 40 Junction on the way to Mthatha there was a police road block and police stopped him and pointed firearms at him. He was dragged out of his vehicle, assaulted and told to lie down on his stomach. He was handcuffed and told to keep quite. The vehicle was searched and he asked the police what was happening. Police asked who the owners of the goods were. He asked them where were the goods and he was told that the goods were found on the back passenger seat of his car.

[22] He testified that sergeant Tyalimpi was lying to say that the goods were found in the boot of his car. Everybody except for himself was told to stand next to their belongings. The man who had been sitting behind him took his backpack and the ladies took their “no problem” bags. Two of the ladies had been sitting at the back with the gentleman. He was placed next to the car and handcuffed. He was asked where he was coming from and he said he was coming from Cofimvaba. Sergeant Tyalimpi was not the one who asked him questions. He said he only knew Zanele who had phoned him and had given a lift to Zanele and the other passengers. The police officer who questioned him said he was arresting them for possession of suspected stolen goods. He told that policeman that he only gave a lift to his passengers. On the way to the police station when it was only the two of them in the vehicle, the police officer asked him again and he gave him the same explanation. The name of that officer was Lonwabo and he is the one who arrested him.

[23] That officer asked him what he did for a living. He told him that he owned a security company. He installed car alarms, motorized gates and electric fences. At Cofimvaba Police Station they were humiliated in front of the members of the public and members of the public were allowed to take their photographs using their cellphones.

They waited at the parking space at the police station standing there for three hours. When they asked what they were waiting for, police said they were waiting for a manager from Pep Stores. The manager from Pep Stores eventually arrived.

[24] Police registered all the items after which the goods were handed back to their owners and they were told that they were being arrested. He asked why he was being arrested and the police said he would be exonerated by the ladies in court because if he was released the ladies could later say the goods belonged to him. He never saw sergeant Tyalimpi. They were told that the police would get stationery from Tsomo Police Station and the ink for finger prints. He was not allowed to call his lawyer. After 21:00 they were told that they would be detained without being charged because there was no stationery.

[25] The cell in which he was detained was over crowded, smelly and had no beds or blankets. At that time he was on medication which was in his vehicle. In the middle of the night he asked the police officers who had come to count them to fetch his medication from his vehicle and they refused. On the 14 October 2015 they were detained the whole day. Police again came at midnight and again he asked for his medication and again they refused to fetch it from his vehicle. On the 15 October 2015 they were loaded in a big truck and taken to a court cell where they were separated and paperwork for their arrest was done. In court he was granted bail of R250.00. On each court appearance their numbers dwindled until only three of them were left. On 11 April 2016 only he and Zanele were left and charges against them were withdrawn.

[26] Under cross examination he testified that even in 2015 at the time of his arrest they were neighbours with Zanele in Mayden Farm in Mthatha. When he was arrested he was clapped with an open hand and was kicked on his face and sustained a minor injury in the form of a bruise. He did not know the people in the red polo and black getz vehicles and was surprised when he saw the other items that were taken out of those cars. He was surprised that those vehicles and his vehicle all had suspected stolen goods. He never asked Zanele who had brought those people to his vehicle who they were because she knew Zanele very well.

[27] In Cofimvaba he drove around for less than 30 minutes looking at the set-up of the town. He never saw the polo and the getz vehicles when he was driving around. In his security company business he has four consultants, two telemarketers, one receptionist and he is the CEO of the company. In relation to his personal information that was recorded by the police, he testified that police did not ask him about some of the information that they recorded. For instance his marital status being reflected as unmarried and his business address as being not applicable and him being reflected as unemployed.

[28] His explanation that he had given a lift to those people and that what was found in his car was not his property was not written anywhere. He told the police that he would make his statement to his lawyers. He testified that the signature purportedly appended by him on SAPS 14A Notice of Rights in Terms of the Constitution form was not his signature.

[29] He testified that the reason he was claiming R400 000.00 in respect of his arrest and another R400 000.00 for his detention is that when he was arrested he was on a mission to make business. He lost business because his clients could not get hold of him for three days. He was on medication and when he came out of detention he had to see doctors several times. He had several visits to the doctor but could not remember how much it cost him as he was in and out of the doctor's surgery.

[30] The second witness for the plaintiff was his neighbour Zanele Sotshongaye. She testified that on the 13 October 2015 she was in Cofimvaba and needed a lift to Mthatha. She went to the taxi rank and the taxi had one passenger. She decided to go to the hiking spot in front of Pep Stores opposite Boxer Stores. While waiting for a hike she thought of a car that normally gave her a lift when she needed a hike to Cofimvaba. She phoned the plaintiff who told her that he was at Capitec Bank in Cofimvaba. They discussed the lift and the plaintiff told her to wait for him at the hiking spot.

[31] She saw a male person who was also hitch hiking to Mthatha as well as two females who also said they were going to Mthatha. They all waited there and plaintiff arrived after about 15 minutes. They all got a lift from the plaintiff and drove to Mthatha. They left Cofimvaba at about 15:15. On the way to Mthatha they saw a man standing on the white line on the road pointing a firearm at them ordering them to get off the road.

[32] Plaintiff was dragged out of the car and the police told all of them to get out of the car and lie down. They remained there on the ground for about 30 minutes and she could hear the police talking about other cars that were still coming. When those other

cars arrived their occupants were also taken out of their vehicles. They did not know what was going on. They were all loaded into a police vehicle and taken to Cofimvaba Police Station.

[33] In Cofimvaba Police Station they were made to stand in a line in a big open space in front of the police station. Each person was ordered to take their items. She took her purse, the male passenger took his backpack and each lady took her “no problem” bag. The bags were emptied on the ground. A policeman came and asked who the owner of those items was and one lady claimed ownership of the goods. They were taken into a small office in the police station where they stayed not knowing what was happening.

[34] They were together with the plaintiff in that room. They were told that they were being arrested but were not told the reason for their arrest. Police would not allow them to make calls. At some stage they were loaded into a police vehicle and taken to Tsomo Police Station. Tsomo police said they did not want them and were returned to Cofimvaba Police Station where they were detained.

[35] Under cross examination she testified that it was after 21:00 when they were taken to Tsomo Police Station. She did not see the plaintiff being assaulted to 40 Junction because she was far away from him. She did not see the red polo and black getz vehicles when they arrived as she had been made to lie down next to the wheel. She did not see the police when they searched the honda ballade, the polo and the getz vehicles.

[36] They were never told why they were being arrested, the police only told them that they were being arrested. When she asked why was she being arrested she was told

that she would argue the reason for the arrest in court. When it was pointed out to her that her warning statement which she signed shows that they were informed that the police were investigating theft, she said they were only informed at night. After Ms Sotshongaye's evidence the plaintiff's case was closed.

The issues

[37] In respect of unlawful arrest the plaintiff's claim is pleaded as follows in his particulars of claim:

"On or about the 13th day of October 2015 at Tsomo junction, Tsomo, within the area of jurisdiction of the Honourable Court, the plaintiff was arrested without a warrant of arrest by the other members of Cofimvaba Police Station the South African Police Services whose names and ranks are unknown to him. During the arrest the plaintiff was fastened with police handcuffs at Tsomo junction, Tsomo and was taken to Cofimvaba Police Station."

[38] In respect of unlawful detention, plaintiff's claim is pleaded as follows:

"On or about the 13th day of October 2015 and at Cofimvaba Police Station, Cofimvaba, in the Eastern Cape Province, the members of the Cofimvaba Police Station who was and are employed by the defendant wrongfully and unlawfully detained the plaintiff without any just cause and without being in possession of warrant of detention. The plaintiff was detained as from 13th October 2015 until 15th October 2015. However, he first appeared on the 15th October 2015 facing a charge of possession of suspected stolen property, and was released on bail of R250.00"

[39] The defendant denied that the arrest and detention were unlawful and pleaded its defence as follows:

"

The plaintiff together with other people with whom he was arrested participated in the theft of various clothing and food item from various shops at Cofimvaba in the presence of a member of the South African Police Service.

10.3

When the plaintiff was arrested he was found in possession of various clothing and food items which members of the South African Police Services reasonably suspected that he had stolen or had dishonestly obtained.

10.4

The arrest of the plaintiff without a warrant of arrest was therefore lawful in terms of section 40 of the Criminal Procedure Act no. 51 of 1977.”

[40] The defence in respect of unlawful detention is pleaded in part as follows in the defendant's plea:

“

11.1

....The defendant avers that the plaintiff was arrested and detained upon evidence that he had committed the offences for which he was charged and for the state to do the necessary investigations for purposes of bail.

11.2

In further amplification the defendant avers that the period of detention of the plaintiff was permissible in law.

11.3

The plaintiff was detained from 18h50 on the 13 October 2015 and appeared in court on the 15 October 2015 where bail was granted.

11.4

The defendant denies that the plaintiff was wrongfully and unlawfully detained without just cause. The contentions made in paragraphs 10.2 to 10.4 above are repeated herein.”

[41] If regard is had to the particulars of claim it would seem that the claim in respect of unlawful arrest is based on plaintiff having been arrested without a warrant. In other words plaintiff's basis for the alleged unlawfulness of his arrest is the fact that it was effected without a warrant authorizing the same. There is no other basis pleaded for this claim. I will in any event also deal with whether, even if the arrest was without a warrant, it was in any event justified or not. The issue for determination in this matter is whether or not, the arrest and detention having been admitted, were effected in a lawful manner. The onus to justify the arrest and detention rests upon the defendant.

[42] In *Minister of Police and Another v Du Plessis*¹ the legal position in this regard was stated as follows:

"[14] Police bear the onus to justify an arrest and detention. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) 589 E-F the following is stated:

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justice in law.'

[15] Our new constitutional order, conscious of our oppressive past, was designed to curb intrusious upon personal liberty which has always, even during the dark days of apartheid, been judicially valued and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[16] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008(2) SACR 1 (CC) (2008(4) SA 458; 2008(6) BCLR 601) para 24 the following is said:

'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.'

¹ 2014(1) SACR 217 (SCA)

[17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.”

[43] Section 40 of the Criminal Procedure Act on which the pleaded justification for the plaintiff’s arrest is founded provides that:

“40. 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;”

[44] It is not in dispute that plaintiff was arrest on suspicion of having committed theft. This appears both in the defendant’s plea as well as the relevant docket which had been discovered and furnished to the plaintiff. Theft for which plaintiff was arrested is an offence referred to in Schedule 1 of the Criminal Procedure Act.

[45] The evidence of sergeant Tyalimpi is that the three vehicles that were stopped in that road block at 40 Junction including plaintiff’s vehicle had 15 occupants including drivers. In all three vehicles suspected stolen goods were found and he arrested all of them. The plaintiff’s version is that he was arrested by sergeant Lonwabo Sisusa. That both Sergeants Tyalimpi and Sisusa are police officers is common cause. It is also common cause that the arrest was effected without a warrant. The only issue is whether in the circumstances the arresting officer could have entertained a reasonable suspicion that plaintiff had committed theft.

[46] In *Mabona v Minister of Law and Order and Others*² Jones J explained a reasonable suspicion envisaged in section 40(1)(b) of the Criminal Procedure Act in the following terms:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This 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. The section requires suspicion but not certainty. However, a suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

The analysis of the evidence

[47] The evidence of sergeant Tyalimpi was that at 40 Junction he and his colleagues mounted a roadblock. The first car to appear was an unmarked police vehicle which was known to them. Warrant officer Maninzi alighted from that vehicle and told them that vehicles that were suspected to have stolen goods were coming behind him. The first vehicle was a silver grey honda ballade. Indeed the said vehicle as described appeared. They stopped that vehicle and ordered its occupants to get out and lie down. There were two male and three female occupants in the vehicle. Thereafter a red polo

² 1988(2) SA 654 (SE) at 658 E-H

and a black getz vehicles also appeared which had also been described. Those two vehicles were also stopped and all the occupants were ordered to get out and lie down.

[48] They searched the occupants of those vehicles and found nothing on them. The vehicles were thereafter searched and a large quantity of goods were found in the vehicles. They suspected that the goods had been stolen. The plaintiff was in the first car, the silver grey honda ballade. In the plaintiff's vehicle they found a large quantity of body lotions, toughies shoes, school trousers and other items. Some of those items were still wrapped in their original packaging and some of them still had price tags. The plaintiff and his passengers did not produce proof of purchase nor did they explain the possession of the goods.

[49] In the other two vehicles similar goods were also found in large quantities as well and no proof of purchase was produced. No explanation was given about the possession of those goods. On the basis of the goods found in plaintiff's vehicle and the other vehicles with no proof of purchase or explanation, all occupants of all three vehicles were arrested for possession of suspected stolen property. They were all taken to Cofimvaba Police Station where they were charged with theft and detained. It was at about 17:00 when the arrests were effected.

[50] In his evidence the plaintiff testified that he should not have been arrested because at 40 Junction where he was arrested he told the police that he had only given a lift to his passengers, he had nothing to do with the goods that were found in his vehicle. There are a number of problems with the plaintiff's evidence. For instance he testified that his boot was empty and the police told him that the goods were found in the rear

passenger seats of his car. This makes no sense because the amount of goods that were found in his car suggests that he would have known that his passengers had a lot of goods. The full details of the goods are clearly stated at page 153 of the police docket that was discovered in these proceedings. Some of those goods were identified by a manager from Pep Stores as belonging to Pep Stores. Some other items were not identified.

[51] On his own version plaintiff had four passengers, one passenger in front and three passengers at the back. It is difficult to imagine how that amount of goods could still be in the passenger seats at the back while the boot was empty. It is more likely to be true that the goods were found in the boot of his car as defence witnesses testified. Plaintiff's evidence in many ways was beyond just contradictions and was simply unbelievable and improbable.

[52] He maintained that already at 40 Junction he told the police that he had given a hike to his passengers and had nothing to do with the goods. Very strangely, in his warning statement he elected to exercise his right to remain silent. In his warning statement it is reflected that he elected to make a statement to his lawyer. There is nothing wrong with this election and indeed it was his right to do so. However, it is contrary to his version that from the very beginning before the arrest he told the police that he just gave a lift to his passengers. Again the version of the police that he did not give the explanation to them which in his evidence he said he gave is more likely to be true. His evidence about giving any explanation to the police does not sit well with him exercising his right to remain silent. It is more likely that he exercised his right to remain silent all the way.

[53] His evidence was not only self-contradictory and senseless, it also contradicted that of his witness Zanele Sotshongaye. Her evidence was also in many ways self-contradictory and similarly full of not only inconsistencies but was also incredible. It is clear that the goods that were found in plaintiff's vehicle were such that a reasonable police officer would suspect them to have been stolen unless an explanation was given which was not or proof of purchase produced which was also not produced.

[54] If plaintiff's inconsistent and often contradictory versions about the same incident needed any confirmation, it can also be found in the obligatory letter of demand³ addressed to the defendant right at the early stages of these proceedings. The letter is dated 8 March 2016 and this is what the letter reads in regard to the abandoned claim for unlawful assault:

"On or about the 13th day of October 2015 and at the place of arrest the members of the Cofimvaba Police Station are (sic) assaulted our client using the sjambok, donkey peer and other dangerous instruments saying that he is going to tell them the truth in so far as the theft is concerned. They further put on him the black plastic denying him an oxygen which affected our client very much because he was unable to breath, (sic) in any way they were trying to kill him because immediately one denies the other an oxygen she/he is killing the person. And as a result of the assault he sustained severe injuries including

³ Section 3 of the Institution of Legal Proceedings Against Certain of State Act 40 of 2002 provides:

"(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
- (b) The organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
- (b) briefly set out-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor."

head injury which affects him not to concentrate to anything, trauma and emotional shock were included."

[55] In his evidence the plaintiff testified that he suffered a minor injury which was a bruise and had already healed when he was released from detention on 15 October 2015. For that reason he never told his lawyers about the assault. If he never told his lawyers about the assault where they got the details of how he was assaulted becomes mysterious. This is incredulity and disingenuousness beyond description.

[56] This matter calls for something to be said about the explanation that a person may give to police officers. I do not believe that if plaintiff had given the explanation that he said he gave, police were then obliged not to arrest him. The issue is whether, despite his explanation when the police were confronted with the three cars all of which contained suspected stolen goods, the explanation itself did not need to be evaluated. It must be remembered that the evidence of the defendant is that in front of the plaintiff's vehicle was a police vehicle unbeknown to the plaintiff and his friends. Behind the last vehicle, the black getz was another police vehicle also unbeknown to the plaintiff or the other cars.

[57] I do not understand the legal position to be that all that is required is an explanation and if it is given police must just accept it. That is clearly not so and it must necessarily depend on the facts of each case. The police are entitled to evaluate the explanation and may still arrest a suspect if the explanation proffered still leaves them with a reasonable suspicion which is all that is required. I am fortified in this view by the

sentiments expressed by the Constitutional Court in *Minister of Safety and Security v Van Niekerk*⁴ in which Sachs J said:

“17. To my mind the present matter is far from constituting a viable test case as claimed. On the contrary, it demonstrates that the constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances⁵. Nothing in the judgment of the trial Court supports the proposition that that Court purported to establish a general rule concerning the issuing of a warning instead of an arrest. The judgment itself is based on the notion that the lawfulness of an arrest is highly fact-specific. Such conflict as may exist between Louw and Charles is simply not raised by the facts of this case.”

[58] This brings me to the issue of whether having arrested the plaintiff police were justified in detaining him. The Criminal Procedure Act provides as follows regarding procedure after arrest:

“50. Procedure after arrest

- (1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.
- (b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed by his or her right to institute bail proceedings.
- (c) Subject to paragraph (d) if such arrested person is not released by reason that –
 - (i) no charge is to be brought against him or her, or
 - (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after his arrest.”

[59] It is clear that this section envisages a court appearance as soon as possible after arrest, which means even on the day of the arrest. Therefore, it follows that detaining a suspect and waiting until just before 48 hours expire before bringing him to court is on

⁴ 2008(1) SACR 56 (CC)

⁵ My emphasis

its own unlawful unless justified. In this case it was already after 17:00 when the arrest took place. There was no evidence that it was possible to bring plaintiff before a lower court on the 13 October 2015, the day of his arrest.

[60] About the 14 October 2015, the following day after the plaintiff was arrested, under cross examination, sergeant Tyalimpi testified that warning the plaintiff to appear instead of detaining him was not an option because he did not know where plaintiff came from. He further said that he was not sure about plaintiff's place of residence, however, he, himself did not really know why plaintiff could not appear in court the following day. For some strange reason the defendant did not call the investigating officer to explain the further detention on the 14 October 2015. This seems to have been based on the misconstruction of the provision of section 50(1) regarding the appearance of an arrested person within 48 hours. The defendant must realize that section 50(1) of the Criminal Procedure Act and section 35 of the Constitution⁶ provide that the arrested person must appear before a lower court as soon as possible after arrest. This means that even either on the day of arrest or the following day if it is not a public holiday or a weekend.

[61] Section 35(1)(d) of the Constitution provides as follows:

“Everyone who is arrested for allegedly committing an offence has the right –

(d) to be brought before a court as soon as reasonably possible, but not later than -

(i) 48 hours after the arrest; or

⁶ Constitution of the Republic of South Africa, 1996

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.”

[62] This means that the defendant bore the onus to explain the detention from the moment of detention until the first court appearance. The appearance within 48 hours is no justification, without the non-appearance in court on the 14 October 2015, which was a normal court day being explained. Having said that, in this case the evidence placed before court is that there were 15 arrestees who were all arrested at the same time after 17h00 all of whom were detained. On the evidence of sergeant Tyalimpi he could not warn the plaintiff to appear in court on a specific date instead of detaining him because plaintiff’s details needed to be verified. Clearly he would have needed to verify all of the other people’s details. It seems unlikely that it could have been possible to do so on the 14 October 2015 for all of them. In fact even the warning statement of the plaintiff appears to have been taken at 20:33 on 14 October 2015. I simply cannot see how the plaintiff and the other arrested persons could have been made to appear in court earlier than the 15 October 2015 in the circumstances.

Conclusion

[63] Therefore, both the arrest and detention of the plaintiff until he appeared in court on the 15 October 2015 when he was granted bail were justified.

[64] Accordingly the following order shall issue:

1. The plaintiff’s claim for unlawful arrest is dismissed.
2. Plaintiff’s claim for unlawful detention is dismissed.

3. Plaintiff is ordered to pay costs of suit.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

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MTHATHA

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Instructed by: STATE ATTORNEY

MTHATHA

HEARD ON: 18 JUNE 2019

DELIVERED ON: 25 JUNE 2019