

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

CASE NO 3166/2017

Reportable	Yes /No
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In the matter between:

IVIWE MATHAMBO

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NQUMSE AJ:

[1] The plaintiff sued the defendant for damages in the amount of R1 000 000,00, arising from an allegedly unlawful arrest and detention without a warrant.

FACTS

[2] The plaintiff and his friend Ricardo Gumede (Gumede) were arrested and detained on two separate incidents, namely on 25 December 2015 and on 28

December 2015. However, the defendant relies on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act) and contends that the arrest and detention of 25 December 2015 was lawful.

[3] In support of its defence the defendant led evidence of Dumisa Ngongo a sergeant in the police service attached to the Crime Prevention Unit. He testified that on 25/12/2015 he was on duty together with Constable Mbewu who has since died. Whilst on duty, they received information that there were three young men at a corner house at Ndudula Street in Mthatha who were in possession of an unlicensed firearm and were pointing the said firearm to people who were passing by.

[4] They hurriedly went to the place they were informed about and found the plaintiff and Gumede, both seated inside a white Toyota Tazz. They introduced themselves as police and sought permission to search them as well as their car. Upon permission being granted, they searched them and found an unlicensed firearm underneath the driver's seat of the car with a magazine that was loaded with 2 rounds of ammunition. The plaintiff, whom he asked about the firearm, said he had seen Anorld Solani (who is also referred to as Moerane) pointing the firearm at passers-by. This response was also echoed to by Gumede.

[5] Whilst he was still talking to the pair, Arnold appeared apparently coming from the toilet. He also questioned him about the firearm, and Arnold said he saw the firearm

underneath the car seat. He took it and went to point at his friend in a playful manner. Arnorld further told him that he thereafter returned the firearm underneath the seat where he had found it. After Anorld told them that the car belonged to a certain Mr Teddy, they went to question him and he also denied any knowledge of the firearm.

[6] They thereafter arrested all three namely, the plaintiff, Gumede and Arnold for possession of an unlicensed firearm and took them to the police station at Ngangelizwe. At the police station they were charged and their warning statements were obtained. As a result of obtaining further information regarding the employment and residential addresses of the plaintiff and Gumede, he released them after they had been issued with J127 forms (notice to appear) and warned them to appear in court on Monday, 28 December 2015. As part of confirming their addresses, he transported them back to their homes.

[7] In cross examination Sgt Ngongo was asked why he had arrested both the plaintiff and Gumede when Arnold had admitted that he had earlier possessed the firearm and later placed it under the car seat. His response was that upon their arrival at the scene, they found the firearm in the vehicle in which the plaintiff and Gumede were occupants. He denied that he ordered the plaintiff and Gumede to return to the police station on Monday, in order to have them re-incarcerated. According to him, he only advised them to appear in court on Monday and if they needed transport they are free to go to the police station where they will receive assistance with transport. He also stated that he does not know how it came about for the plaintiff and his companion to be

re-incarcerated on Monday and why they had to be released on condition they paid bail when they appeared in court.

[8] He also stated that he was informed that the charges against the plaintiff and Gumede were withdrawn owing to an admission made by Arnold that he is the one who owned the firearm and who had placed it underneath the car seat. He further stated that the plaintiff and his companion except Arnold were never detained in the cells on 25 December 2015. This is notwithstanding their names appearing on the cell register commonly known as the SAP 14.

[9] The court asked how was it possible for the plaintiff and Gumede who after they had been issued with J127 forms to appear in court on Monday ended up in police custody. His response was that he assumes that when they presented themselves at the police station on Monday, they were not carrying their J127 forms. As a result they were included in the SAP 216, (Body Receipt Register) in order to be accounted for in the trip to the court. To a question, for how long were the plaintiff and his companion in their custody on 25 December 2015. he said they were in their custody for about 2 hours.

[10] The plaintiff testified briefly that on 25 December 2015 he was at his place at Ngangelizwe when he was asked by Gumede to fetch him from town and they thereafter went to plaintiff's place and consumed alcohol. Arnold, who stays in the

same yard approached them and requested that they should listen to music in a Toyota Tazz vehicle that was parked in that yard.

[11] At the time Arnold was carrying a firearm with which he pointed at a certain man who came to buy from a spaza shop that was also in the same yard. He further testified that when they got to the said vehicle, Arnold sat in the front seat whilst he and Gumede out of fear occupied the back seat. After a while Arnold alighted and went to the toilet. It is at that stage when the police arrived in three police vehicles. They ordered them to alight from the vehicle and to lie down on the ground. They were searched and when nothing was found in them, a lady police officer searched their car and discovered a firearm underneath the driver's seat.

[12] He further testified that when the police intimated that he knows something about the firearm, he told them that the person who was seated in the front seat was Arnold. At that moment Arnold appeared from the toilet. He was also searched and questioned about the firearm and his response was that he bears no knowledge of the firearm. Arnold suggested that the firearm may belong to Teddy the owner of the vehicle. He further testified that around 17:00 they were taken to the police station where they were caused to make statements in one of the rooms. They were subsequently taken to a cell for a short-while whilst Arnold was taken to a different cell. Shortly after they were put in a cell they were released by police officers who informed them to collect their cellphones from Sgt Ngongo. Sgt Ngongo informed them that he releasing them as a

favour. He further told them not to disclose to anyone of their release as this would cause him problems.

[13] According to plaintiff, Sgt Ngongo further informed them that he will collect them on Monday morning to take them back to the police station so that it should not be noticed that they were released from custody. He further testified that on Monday morning when he was fetched by Sgt Ngongo he found Gumede already in the police vehicle. They were taken to the police station where they were locked up in the cells to join other awaiting trial inmates who were going to be transported to court.

[14] He further testified that at court, they were together with the other inmates put into the court cells and later appeared in court and were granted bail of R500,00 each. He was released from the court cells around 11:00 and 12:00 after his bail had been paid.

[15] He further testified that as a result of this incident his mother who was responsible for his school fees disowned him. This resulted in him going to stay with his aunt who also undertook to take over the responsibility of paying his school fees.

[16] In cross-examination he said that he did not inform the police on Monday, that they had been released previously because Sgt Ngongo had informed them that their release on 25 December 2015 was a favour. He further denied that he went to the

police station on his own volition and neither was he given a notice to appear in court on 28 December 2015, although he was made aware that they will be appearing in court on the said Monday.

[17] Gumede testified briefly that on 25 December 2015 he paid the plaintiff a visit. Whilst he was at the plaintiff's residence a, certain Arnold Moerane arrived in possession of a knife and a firearm. Arnold went to the street and pointed the firearm at people who were passing by. He later came back and asked them to go with him to listen to music in a Toyota Tazz that was parked outside. Since they were scared of Arnold he and the plaintiff occupied the back seat whilst Arnold sat in the driver's seat. After a while Arnold went to relieve himself in the toilet.

[18] He further testified that whilst they were in the car with the plaintiff three police vehicles arrived. The police ordered them to lie on the ground in order for them to be searched. At the same time another police officer searched the vehicle and discovered a firearm. When they were asked to whom it belonged, he said it belonged to Arnold. When Arnold came back, he was also questioned as to whom the firearm belonged and he said it belonged to Teddy. They were subsequently arrested and taken to the police station.

[19] He further testified that whilst being questioned at the police station he overheard Arnold saying he and the plaintiff had no knowledge about the firearm and that he,

Arnold, was the one who knew about it. This caused Sgt Ngongo to release both himself and the plaintiff and gave them a lift back to their residences to enable him to confirm their residential addresses. Sgt Ngongo also informed them that he will fetch them on Monday morning.

[20] Sgt Ngongo came to fetch him on Monday morning. When he got to police station the plaintiff was already at the police station. They were both detained in a cell and later transported to court. They were kept in the court cells until their appearance in court and released on condition they each paid bail of R500,00.

[21] In cross examination Gumede distanced himself from what appears in his warning statement which is to the effect that the police had searched the vehicle after they had asked for permission to do so. He also denied that they were given documents to appear in court by Sgt Ngongo.

ISSUES

[22] The issues to be determined are crisp and they are –

- 22.1 whether a reasonable police officer in the position of the arresting officer would have believed that the plaintiff had committed a Schedule 1 offence read with the provisions of section 3 of the Firearms Control Act 60 of 2000.

22.2 whether the arrest and detention of plaintiff more specifically on 25 December 2015 was unlawful as well as his detention on 28 December 2015; and

22.3 the issue of quantum.

THE LAW

[23] In terms of section 40(1)(b) of the Act:

“A peace officer may without a warrant arrest any person –

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

[24] In *Duncan v Minister of Safety Law Order*¹ it was stated that the arrestor must prove the existence of four jurisdictional factors as the following:

1. the arrestor must be a peace officer;
2. he / she must entertain a suspicion;
3. it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act, and
4. the suspicion must rest on reasonable grounds.

¹ 1985 (2) SA 805 (A) at 818G – H.

[25] The plaintiff submitted in the heads of argument that when the arresting officer went to the scene of crime he had already made up his mind to arrest and therefore did exercise his discretion properly. He failed to take into account Arnold's explanation that he did not possess the firearm on behalf of the plaintiff and Gumede. The officer further failed to appreciate that joint possession of a firearm cannot be easily inferred.

[26] In argument before court, Mr Matanda for the plaintiff argued that the police officer should have established that the legal requirements for possession of a firearm were in existence before effecting the arrest. In support of his argument he relied on the Constitutional Court judgment of *Makhubela v The State; Matjeka v The State* [2017] ZACC 36. He also argued that the detention of the plaintiff on 25 December 2015 for about three (3) hours was not justified in light of the firearm having been found at the scene and there was no need therefore for further investigations.

[27] On the contrary, in the heads of argument the defendant submitted that the jurisdictional factors had been satisfied as required by section 40(1)(b) of the Act. Ms Boya for the defendant further argued that Sgt Ngongo who effected the arrest conducted the necessary investigations, assessed the quality of the information at his disposal and verified it before he entertained the suspicion. He did so by confronting Arnold and Teddy if they knew about the firearm. Under those circumstances, so the argument went, Sgt Ngongo acted reasonably.

[28] Ms Boya further argued that whilst the arrest on 25 December 2015 is admitted, both plaintiff and Gumede were never detained in police cells. This argument is advanced at the backdrop that the defendant does not deny that at the scene of crime the plaintiff and Gumede were put in the back of a van and transported to the police station. Neither does the defendant disputes that the plaintiff spent 2 hours in the custody of police before his release.

[29] Ms Boya further argued that, whilst the defendant admits the detention of plaintiff on 28 December 2015, *albeit* unlawful it had not been pleaded. However, the alternative submission was that of the court were to found in favour of the plaintiff the court should consider awarding costs on the magistrate's court scale.

[30] The law is trite that a police officer who purports to act in terms of section 40(1)(b) should investigate exculpatory explanations offered by a suspect before he can form a reasonable suspicion (See *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T); See also *Siqubashe v Minister of Police and Another* (527/2011 [2015] ZAECHBHC 32 (22 September 2015)).

[31] When Sgt Ngongo arrived at the scene he met with the plaintiff and Gumede from whom he enquired about the firearm that was discovered under the driver's seat of the car in which they were the occupants. I find it necessary to revisit the answers proffered to Sgt Ngongo, including the response of Arnold when he was confronted

about the firearm. Plaintiff said he told the police that he knew nothing about the firearm and he further told them about the person who had been seated on the driver's seat. Gumede on the other hand told the police that the firearm belonged to Moerane (referring to Arnold) who had gone to the toilet.

[32] However, it is worth noting that both plaintiff and Gumede corroborate each other that when Arnold was confronted by the police about the firearm, he distanced himself from it. According to both of them they said Arnold told the police that he knew nothing about the firearm and that it belonged to Teddy.

[33] It is apparent that at this stage the arresting officer was faced with three suspects who neither of them claimed ownership of the firearm. It is only when they were at the police station that Arnold is alleged to have admitted that he at some point had used the firearm to point at his friend. It must be borne in mind that the alleged admission by Arnold comes after the arrest. Even then, Arnold did not claim ownership of the firearm, he only admitted using the firearm at some stage but placed it back under the car seat.

[34] The stark question that still remained unanswered was to whom the firearm belonged. Undoubtedly, this question in my view, could only have been answered decisively through the conducting of further investigations by the police officer.

[35] In *Mhlongo v Minister of Safety and Security*² it was held that the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee had committed a first Schedule offence.

[36] The law is trite that the belief or suspicion on which the peace officer acts must be reasonable and the test for such reasonableness is an objective one (See *S v Nel and Another* 1980 (4) SA 28 (E) at 33H). The question is would a reasonable man in the position of Sgt Ngongo and possessed of the same information at his disposal have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of possession of a firearm. In *Woji v The Minister of Police*³ it was said “suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. Suspicion arises at the commencement of an investigation of which the obtaining of *prima facie* proof is the conclusion.”

[37] In *casu* I find that the arresting officer had objectively assessed the information he was faced with at the time. He therefore had a reason to suspect that a crime had been committed by either one of them or jointly. Accordingly, I find the arrest of plaintiff on 25 December 2015 and until his release from detention lawful. However, this is not the end of the matter. On 28 December 2015 the plaintiff mysteriously ends up in police custody and transported to court with a police van. When he appeared in court he was

² [2001] 2 ALL SA 534 (Tk).

³ *Woji v The Minister of Police* (92/2012) [2014] ZASCA 108 paras 17 and 18.

granted bail as if he was at all times pursuant his arrest on 25 December 2015 in custody.

[38] There is a dispute as to whether the plaintiff and Gumede were fetched from their homes by Sgt Ngongo on 28 December 2015 in order for them to be re-incarcerated. Sgt Ngongo denies the allegation by the plaintiff and Gumede. He further stated that he bears no knowledge of why the plaintiff was re-incarcerated and granted bail in court. The plaintiff and Gumede gave conflicting versions on this aspect. It is the plaintiff's evidence that when he was fetched by Sgt Ngongo he found Gumede in the police van which took them to the police station. Whereas Gumede said when he was fetched from his home, he found the plaintiff at the police station. This contradiction in the evidence of the plaintiff's case received no plausible explanation. Mr Matanda for the plaintiff sought to explain this contradiction by suggesting that the time lapse between the incident and trial of the matter may be the cause and further argued that the contradiction was not material. I find no merit in this suggestion and it ought to be jettisoned as it is not supported by any shred of evidence that Gumede had forgotten the events of the morning in question. Instead Gumede was confident and resolute on what had happened on the morning of 28 December 2015.

[39] I find the allegation of the plaintiff and Gumede that their release on 25 December 2015 was a secrete and that they were fetched by Sgt Ngongo on 28 December 2015 improbable for the following reason. According to the plaintiff when they were incarcerated on 25 December 2015, two police officers took them out of the

cell and advised them to collect their belongings from Sgt Ngongo. It is quite clear that there were at least two other police who knew of their release. It is also common knowledge that inmates in police custody are visited periodically during their incarceration and such visitation is recorded in the applicable register. It is obvious that in their case such register would not indicate that they were in custody and / or paid any visitation for their entire duration of 25 to 28 December 2015. Something I find very improbable.

[40] Further, on 28 December 2015, there is no suggestion that Sgt Ngongo played any role in their re-incarceration, as it would have been expected of him, seeing that they must appear as having been in custody for the entire duration of their arrest. I cannot agree with the submissions of the defendant that the probabilities favour the plaintiff on this aspect. The probabilities in my view, are consistent with the version of Sgt Ngongo that upon release of the plaintiff and Gumede, he advised them to attend court on 28 December 2015. That he further advised them should they be in need of transport they should attend to the police station where they will get assistance. I further find his explanation that the plaintiff and Gumede were recorded in the Body Receipt Register for purposes of transporting them to court, as more probable.

[41] Having regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martel ET CIE and Others*⁴ and *National Employers' General Insurance v Jagens* I am of the view that the probabilities favour the version of

⁴ 2003 (1) SA 11 (SCA) at para [5].

Sgt Ngongo as being more plausible than it favours the plaintiff's version. Consequently, the plaintiff's version that Sgt Ngongo ordered them to return to the cells on Monday under secrecy has to be rejected as false.

[42] I deem it necessary to deal with the aspect that was raised, that the detention of plaintiff on 28 December 2015 is not covered or alleged in the particulars of claim. I must regrettably state that the plaintiff's Particulars of Claim are not a model of clarity. I shall therefore reproduce the relevant paragraphs as follows:

43.1 Paragraph 4 the Particulars of Claim reads:

"On the 25 December 2015 and at Ngangelizwe, Ndudula Street Mthatha, the plaintiff was wrongfully and unlawfully arrested without a warrant by an unknown members of the South African Police Services."

43.2 Para 5 reads:

"Thereafter, the plaintiff was detained at Ngangelizwe Police Station from 25 December 2015 until 28 December 2015 at the instance of the aforesaid policemen and various other policemen whose names and ranks are to the plaintiff unknown."

[43] When it became apparent that the allegations in paragraph 5 were not supported by the plaintiff's evidence since he was never detained for the entire duration from 25 to 28 December 2015 as alleged, Mr Matanda attributed this defect to a misunderstanding that has since been cured by evidence. It shall be noted that not only are the

Particulars of Claim misleading on the duration of incarceration of the plaintiff, neither do they allege the events leading to the detention of 28 December 2015 which is a separate and distinct incident which required to have been specifically pleaded as such.

[44] It is trite that 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 (See *Moaki v Reckitt and Colman v Africa Ltd and Another* 1968 (3) SA 98 (A) at 122 A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107).

[45] Notwithstanding the principle of law alluded to in the preceding paragraph 1, in *Minister of Safety and Security v Slabbert*⁵ the court stated that there are however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue or question has been canvassed fully by both sides at the trial.

[46] In this matter the incarceration of plaintiff on 28 December 2015 was fully canvassed and ventilated by both sides. Consequently, the absence of the averment in the Particulars of Claim in the manner the detention of 28 December 2015 occurred is in my view not fatal to the plaintiff's case. I therefore find that the court was fully entitled to pronounce on the issue of the detention of plaintiff on the 28 December 2015.

⁵ *Minister of Safety and Security v Slabbert* [2010] 2 ALL SA 474 para 12.

Accordingly the court finds that there was no justification to have the plaintiff incarcerated on the said date and as a result his detention was unlawful.

[47] I now turn to deal with the question of quantum. Section 12(1)(a) of the Constitution⁶ guarantees everyone the right to freedom and security of his or her person, including the right not to be deprived of his or her freedom without just cause. Counsel for both parties were *ad item* that the detention of plaintiff on 28 December 2015 was not justified and was therefore unlawful. For this, the plaintiff is entitled to damages. Mr Matanda invited the court to take into account that the arrest on the plaintiff had led to the souring of relations between himself and his mother. Ms Boya submitted that costs should be awarded on the magistrates' court scale. Mr Matanda further argued that at the time of the drafting of the particulars of claim they anticipated the quantum to be within the jurisdiction of this court and therefore it will be unfair to the plaintiff if costs were awarded on the magistrates' court scale.

[48] According to the objective evidence it can be reasonably accepted as was contended by the defendant that the plaintiff was detained on 28 December 2015 for approximately six (6) hours until his release from court pursuant the payment of bail.

⁶ Constitution of the Republic of South Africa, Act 108 of 1996.

[49] The approach of a court in the assessment of general damages is summarised aptly by Nugent JA in *Minister of Safety and Security v Seymour*⁷ where the learned Judge stated:

“The assessment of awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no high value than that.”

[50] Having regard to the circumstances under which the plaintiff was detained as well as the period he spent in custody, it is my view that an appropriate award of damages would be one of R20 000,00.

[52] In the result the following order will issue.

1. The defendant is ordered to pay the plaintiff the amount of R20 000,00 for damages.
2. Interest on the said amount at the legal rate from date of judgment to date of payment.
3. costs of suit.

⁷ 2006 (6) SA 320 (SCA) at 325B.

V NQUMSE

ACTING JUDGE OF THE HIGH COURT

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Dates Heard:

22, 23, 24 May 2019; 21 June 2019 and

03 July 2019

Judgment Delivered:

25 September 2019