

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

Case NO's: 2375/2013; 2623/2013 & 2624/2013

NOKWANDA STUURMAN

1st PLAINTIFF

MNCEDISI DAMBA

2ND PLAINTIFF

NOMAKHAYA HOHO

3RD PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Neutral citation:

Coram: Dawood J

Heard: 31 JULY 2019

Delivered: 23 OCTOBER 2019

JUDGMENT

DAWOOD J:

1. This is a consolidated action in respect of three plaintiffs.

2. The plaintiffs were arrested and detained at the Idutywa Police Station for a period of 2 days.
3. The plaintiffs alleged that the arrest and detention were unlawful, not sanctioned by law and the officers did not have a warrant of arrest authorising the same.
4. The plaintiffs further alleged that they were subjected to humiliation and their dignity was impaired to a large extent for being called a thief in the presence of the public.
5. The plaintiffs each claimed the sum of R450 000-00 in respect of various heads of damages.
6. The defendant's plea in the Stuurman case was a bare denial however in the other matters the defendant relied upon the provisions of section 40 (1) (e) of the Criminal Procedure Act 51 of 1977 to justify the arrest and detention.
7. The defendant further avers that the plaintiffs were interviewed inside their vehicle.
8. It was also pleaded that they were caught shoplifting at Jet Stores by a security guard.
9. In this matter reliance was placed on section 40 (1) (e) of the Criminal Procedure Act which reads as follows:

“(1) A peace officer may without warrant arrest any person-

...

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

...”

10. It is trite that the *onus* to justify an arrest without a warrant is on the defendant, which means that the defendant must convince the court on a balance of probabilities that all the jurisdictional facts existed for a lawful arrest.
11. The jurisdictional facts for an arrest in terms of section 40 (1) (e) are the following:
 - a) The arrestor must be a peace officer;

- b) The suspect must be found in possession of the property;
 - c) The arrestor must entertain a suspicion that the property has been stolen or illegally obtained; and
 - d) That the person in possession of the property has committed an offence in respect of the property and the arrestor's suspicion must rest on reasonable grounds.¹
12. The conduct of the arresting officer accordingly has to be viewed in relation to these factors to determine whether or not it meets the jurisdictional requirements and is lawful and justified.
13. Very briefly with regard to the present plaintiffs before court the arresting officer states that he had just arrested an occupant from that vehicle, in Jet Stores, who was together with the driver, and had gone to the vehicle initially to ensure that it was not left unattended, not that he entertained any suspicion at that stage.
14. He was surprised to see that there were other occupants in the vehicle and upon his arrival there he noticed a number of items lying on the floor of the back seat of the vehicle and this caused him to become suspicious.
15. When he questioned the occupants regarding the items he was told that it was purchased from Spar but none of the occupants produced any receipts, as proof thereof.
16. He then caused the driver of that vehicle to drive the vehicle to the police station and requested each of the occupants to stand next to their items and he again asked for the receipts and none were produced and in fact according to him they all admitted stealing the goods.
17. He clearly gave contradictory evidence regarding whether or not he had arrested the driver of the vehicle initially emphatically denying the same stating that he had insufficient evidence to justify arresting him and only when he was shown documentation did he concede that he had forgotten due to the lapse of time whereas initially he even went so far as to say that the investigating officer may have arrested the driver and not him as he had formed the opinion that there was insufficient evidence to detain the driver.

¹ See *Setlhapela v Minister of Police and Another* (GP) unreported case no: 45031/2012 of 20 May 2015 at para 21; *Swalivha v Minister of Safety and Security* [2016] JOL 35056 (GNP) at para 111 and *Mdlalose and Another v Minister of Police and Another* [2016] 4 All SA (WCC) at para 72.

18. There admittedly was a lapse of 6 years since the event but that does not explain why he would be so emphatic about his recollection initially and even give an explanation regarding why he had not arrested the driver and only when he was confronted with documentary evidence proving that he was reflected as the arresting officer did he suddenly rely on lapse of time and memory resulting in an error. If he had initially said that he could not recall but believed that he had not arrested the driver that would have been understandable.
19. The question however is whether this contradiction means that his evidence pertaining to his recollection regarding the arrest and detention of the plaintiffs also falls under a cloud of doubt and ought to be rejected because of the established misinformation demonstrated regarding the driver. He appeared to genuinely believe that he had not arrested the driver and did not appear to be attempting to mislead the court in this regard.
20. In considering this aspect regard was had to the concession by the plaintiff who testified, who stated that she did not provide a receipt in respect of the goods but merely stated that she bought it.
21. This accordingly supported his version that no receipt was produced, irrespective of whether one accepts her version that none was asked for or his that they failed to produce it when asked.
22. She however stated that she was not asked about the receipt and that the goods were in the boot of the car not the backseat and further that the goods were not lying loose but were in a bag which was not put to him when he was questioned.
23. She has had previous brushes with the law on charges of theft and even if one were to accept her version that she was not asked, she would know that producing a receipt for the goods would make it clear that she had not stolen the goods. Even when making her warning statement she failed to produce the receipt that she alleged she had in her possession nor did she give it to her attorney when she consulted with him shortly after her release.
24. The arresting officer may not have been the best of witnesses but he did not appear to be lying to the court. His version is far more probable with regard to questioning the plaintiffs about the goods and asking for the production of the

receipts, which on the testimony of the plaintiff that testified, she failed to produce.

25. The arresting officer:

- a) Was a peace officer;
- b) The plaintiffs were found in possession of the property;
- c) He did entertain a suspicion that the property was stolen when he saw the quantity of the individual items;
- d) The occupants failed to produce receipts for the items causing him to entertain a suspicion that they had each committed an offence in respect of the property;
- e) The fact that they said they had purchased the goods from Spar but failed to produce receipts for the same nor were any of the items in a Spar packet, objectively viewed justified his suspicion that the property had been stolen and that the plaintiffs had committed an offence with regard thereto and in this case further according to him they in fact admitted stealing the items when he questioned them; and
- f) A reasonable officer acting in the arresting officer's position would accordingly have been satisfied that an offence had been committed that warranted the arrest of the plaintiffs.

26. The defendant has accordingly established all the jurisdictional facts for a lawful arrest.

27. The plaintiff argued further:

- a) that the arrester's discretion to arrest was improperly exercised;
- b) that the plaintiffs should not have been detained;
- c) further that they ought to have been released prior to the expiration of the 48 hours;
- d) accordingly their detention even if initially lawful was subsequently unlawful because they were not released as soon as reasonably practicable;
- e) that the plaintiffs did not appear in court so a purpose of arrest was not fulfilled and accordingly their arrest was not for the purposes of appearing in court.

28. None of this was specifically pleaded in the plaintiffs' particulars of claim.

29. It is evident that the prosecutor did not enrol the matter because he wanted further information. The arresting officer's intention however is what is in issue and he clearly intended having the plaintiffs brought to court and that was why he had arrested and detained them. The investigating officer also intended to have them brought before court.
30. They were in fact taken to court but were not caused to appear before a magistrate in light of the prosecutor's views and they were accordingly released from custody at that stage.
31. The fact that the prosecutor did not cause them to appear because he was not satisfied does not detract from the fact that the police fulfilled the purpose of arresting the plaintiffs to bring them to court.
32. Their appearance there was to be at the instance of another role player exercising his discretion as to whether or not there was at that stage sufficient evidence available to prosecute.
33. This did not detract from whether or not the jurisdictional facts were present warranting an arrest for the purposes of bringing the accused/plaintiffs before court.
34. It was not disputed that they were conveyed to the court from the police station. They were accordingly taken to court.
35. The officers were further not questioned regarding what the procedure was for an investigator to be appointed and why that could not be done immediately upon the arrest of the plaintiffs to ensure that their warning statements were taken on that evening to enable them to be taken to court the following morning as opposed to having to wait for the expiration of the 48 hours.
36. The response of the investigating officer that he had other matters to attend to and had 48 hours and did not consider this matter as urgent is somewhat disconcerting since the right to liberty is paramount and every detainee's matters should be dealt with as expeditiously as possible and regarded as urgent. His further explanation however was that it was already too late on that day for him to take the plaintiffs to court for a first appearance due to the practice of the court regarding the time such first appearances were dealt with is a legitimate explanation for not taking them to court later on the day that he

was appointed as the investigating officer because it was already late in the day and first appearances were not dealt with at that hour.

37. Accordingly the plaintiffs' argument unfortunately is without merit.
38. Additionally that contention ought to have been pleaded specifically where all the jurisdictional facts are present.
39. The party who attacks the reasonableness of the exercise of discretion bears the *onus* of proof and has to specifically raise it in the particulars of claim.
40. In *Minister of Safety and Security v Sekhoto and Another*² it was *inter alia* held that:

“ ...

A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether or not the right to freedom is compromised.

... ”

The case can be disposed of on a simple basis, namely, that the proper exercise of Van der Watt's discretion was never an issue between the parties. The plaintiffs, who had to raise it either in their summons or in a replication, failed to do so. The issue was also not ventilated during the hearing. This means that, since the magistrate had found that the four jurisdictional facts required for a defence under s 40(1)(b) were established by the appellant — a finding upheld by the court below — their claims had to be dismissed”.

41. As already indicated the plaintiffs failed to plead that even if the court found that the jurisdictional facts justifying arrest were present, that the arresting officer exercised his discretion to arrest in an improper or unlawful manner or for an improper purpose and accordingly this is not an issue that can be adjudicated upon.
42. The defendant has discharged the *onus* resting upon it to justify the arrest and detention of the plaintiffs in terms of section 40 (1) (e) and accordingly the arrest and detention is found to be lawful and justified.
43. The plaintiffs were pursuing a constitutional right to liberty and did not appear to be doing so maliciously.
44. There will accordingly be no cost order made against the plaintiffs despite my dismissing their claims.

² 2011 (5) SA 367 (SCA) at paras 49 and 57.

45. In the result I make the following order:

1. The plaintiffs' claims are dismissed.
2. Each party to pay their own costs.

DAWOOD J
JUDGE OF THE HIGH COURT

DATE HEARD: 31 JULY 2019

DATE JUDGMENT DELIVERED: 23 OCTOBER 2019

Appearances

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