

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

CASE NO.: 2859/2015

In the matter between:

GOODMAN GOLIDE MBODLA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NTSEPE AJ:

[1] This is an action wherein the plaintiff sues for damages arising out of an alleged wrongful and unlawful arrest and detention.

[2] In his particulars of claim, the plaintiff has alleged that the arrest was “*wrongful and unlawful in that the police members did not have any reasonable suspicion and legal justification*”.

[3] The plaintiff has further alleged that the arrest and detention were unlawful as the initial detention exceeded the statutory period of 48 hours which further rendered the detention “*unjustified*”.

[4] These allegations have been denied by the defendant who has pleaded as follows:

- “3.2 *The defendant denied that the arrest was wrongful or unlawful;*
- 3.3 *In amplification of such denial the defendant avers that:-*
- 3.4 *The plaintiff was arrested on reasonable suspicion that he had driving a motor vehicle which caused an accident at or near Madwaleni while under the influence of intoxicating liquor.*
- 3.5 *The suspicion the members of the defendant had was also confirmed by the plaintiff when he admitted having driven a motor vehicle while under the influence of intoxicating liquor.*
- 3.6 *The suspicion that the members of the defendant had when arresting the plaintiff has also confirmed by the laboratory blood results which indicated that the alcohol content in the plaintiff's blood exceeded the minimum limit ; and*
- 3.7 *Subsequent to the arrest, the plaintiff was lawfully detained in terms of Section 50 of the Criminal Procedure Act, 51 of 1977 as amended and was cause to appear within the prescribed period.*
- 3.8 *For the above reasons, the allegations of the unlawfulness of the arrest and the unlawfulness of the detention are denied by the defendant. ”*

[5] It is common cause, as it is trite law that the defendant bears the duty to adduce evidence first and the onus to prove, on a balance of probabilities, that the arrest and detention were lawful.

[6] In an attempt to discharge the onus resting upon him, the defendant called one witness; one Constable Ziyanda Yabo Sogiba (Cst Sogiba/Sogiba) who is the arresting officer. She testified that she has been a member of the South African Police Service (SAPS) since 22 March 2010. She was on duty on 15 May 2015 at Mqanduli Community Service Centre/Police Station when the plaintiff arrived at the police station.

[7] According to Cst Sogiba the plaintiff had initially given a different reason for his visit to the station, but later, when an unidentified male delivered the plaintiff's driver's licence to him, the plaintiff then requested to report an accident that, according to the plaintiff, had occurred at or near Madwaleni Location.

[8] The relevant and material portions of Cst Sogiba's evidence can be summarised as follows:

- 8.1 The plaintiff informed her that the truck he was driving had overturned at or near Madwaleni.
- 8.2 She then noticed that the plaintiff "*could not stand still*" and she initially suspected that the plaintiff might have sustained some injury in the accident.
- 8.3 At the time that she was interviewing the plaintiff they were at the reception area of the police station and members of the public began mocking the plaintiff saying the plaintiff had essentially come to request to be arrested.
- 8.4 In an attempt to save the plaintiff from the comments from the members of the public Cst Sogiba moved with the plaintiff into another "*private*" office.
- 8.5 It was in the private office that Cst Sogiba smelt alcohol on the plaintiff

8.6 Sogiba noticed that the plaintiff's eyes were blood shot, his speech was slurred and he could not explain how it came about that the truck he had been driving overturned and gave different versions of how the accident had occurred.

8.7 She obtained the details of the vehicle that had overturned from the plaintiff and had requested a member of the SAPS crime prevention unit to verify whether there was indeed an overturned truck at or near Madwaleni. The requested member confirmed that there was an overturned truck and also confirmed the full description and registration number of the truck.

[9] Cst Sogiba further testified that based on the above mentioned she suspected that the plaintiff had driven a vehicle whilst he was under the influence of liquor. In line with that suspicion the plaintiff was taken to Mthatha hospital for a blood sample to be drawn. Furthermore-

9.1 The blood sample was drawn and Sogiba and the plaintiff returned from Mthatha hospital to the police station after 16:30 pm the same day.

9.2 The plaintiff was interviewed by Cst Sogiba and a warning statement was taken from the plaintiff. According to the warning statement, the plaintiff stated "*Yes I admit the allegations stated against me I was drunk but I drank liquor on the previous day.*"(sic)

9.3 The plaintiff remained in custody until 18 April 2018 when he was released in Court at approximately 13:00 pm.

[10] Under cross examination Mr Mdodana, who appeared for the plaintiff, challenged the manner in which Cst Sogiba executed her duties on the day. The first criticism on Cst Sogiba by Mr Mdodana was that the second page of the warning statement provides for three options listed as paragraphs 1-3, inter alias:

- “1. *Remain silent*
2. *Remain silent now and consult with a legal practitioners*
3. *Make a statement which will be taken down.”*

[11] Mr Mdodana highlighted that according to the selection made on the warning statement, the plaintiff had opted to remain silent. This conclusion, so Mr Mdodana contended, was arrived at because there is a tick next to the option “*remain silent*”. Cst Sogiba denied that the tick meant that the plaintiff had opted to remain silent and testified that the tick could have been on the *pro forma* warning statement before the warning statement was completed.

[12] A further criticism of Cst Sogiba by Mr Mdodana was that the warning statement does not indicate that the interview between Sogiba and the plaintiff had been conducted in Isixhosa. Sogiba’s response was that she had laboured under the belief that because no interpreter was used, she did not have to complete any further details relating to which language was used.

[13] Mr Mdodana also contended that Cst Sogiba’s A1 statement detailing the arrest was not deposed to under oath. Sogiba’s response was that she understood the oath to be an oath that a deponent makes to him or herself and that she did not know that it had to be taken before a commissioner of oaths.

[14] After Cst Sogiba's cross examination the defendant closed his case. The plaintiff also closed his case without calling witnesses or leading any evidence.

[15] On the pleadings and the evidence before Court, the following facts were common cause between the parties:

- 15.1 that on or about 15 May 2015, the plaintiff had driven a vehicle which overturned at or near Madwaleni;
- 15.2 that the plaintiff attended Mqanduli police station to report the accident;
- 15.3 that whilst at Mqanduli police station, the plaintiff was arrested without a warrant for driving a vehicle under the influence of liquor at approximately 13:00 pm and was detained until he was released at approximately 13:00 pm on 18 May 2018;
- 15.4 that the arrest was affected by Cst Sogiba who is a peace officer;
- 15.5 that the offence that the plaintiff was arrested for is an offence that is listed in Schedule 1; and
- 15.6 that Cst Sogiba entertained a suspicion that the plaintiff had committed an offence listed in the said Schedule 1.

[16] Both Mr Luzipho, who appeared for the defendant, and Mr Mdodana agreed that the crisp issue before the Court was whether Cst Sogiba's suspicion

that the plaintiff had committed an offence listed in Schedule 1 rested on reasonable grounds.

[17] The pleadings are the point of departure in considering the issues for determination and having considered same coupled with the evidence before Court I am in agreement with both Counsel that the only question for the Court's consideration is whether Cst Sogiba's suspicion rested on reasonable grounds.

[18] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 is the relevant section that has been raised as a justification for the plaintiff's arrest. section 40(1)(b) reads as follows :

“40. Arrest by peace officer without warrant

1. A peace officer may without warrant arrest any person –

(a)

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

[19] The defence of section 40(1)(b) as well as the jurisdictional facts contained therein have been considered extensively in a long line of decided cases, one of which is *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) wherein it was held that jurisdictional facts for the defence of section 40(1)(b) of are:

- (i) the arrestor must be a peace officer;

- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- (iv) the suspicion must rest on reasonable grounds.

[20] The *Duncan* decision was cited with approval by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto and another* 2011 (1) SACR 315 (SCA).

[21] Furthermore, the Court in *Sekhoto* found that once the jurisdictional facts for arrest whether in terms of Section 40(1) or in terms of Section 40(3) are present then the discretion arises. The Court went on to say “*once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer it should be emphasized is not obliged to affect the arrest.*”

[22] I must pause to emphasize that the exercise of the discretion and/or the review thereof is not an issue before this Court. The Court is solely requested to consider the jurisdictional facts set out in section 40(1)(b) and determine whether those jurisdictional facts existed in order for the police have to affect the arrest in terms of section 40(1)(b).

[23] It is trite law that the question as to whether the suspicion of the person affecting the arrest is reasonable must be approached objectively (*Minister of Safety and Security and Another v Swart* (2012) (2) SACR 226 (SCA) at [20]).

[24] As stated in the matter of *Duncan*, the question of the reasonableness of a suspicion cannot be determined without first determining the meaning of

suspicion. The Court in *Duncan* went on and found that the word “*suspicion*” implies an absence of certainty or adequate proof.

[25] Therefore, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee (*Minister of Safety and Security v Jaftha* unreported, ECG CA310/2014, 1 March 2016 at [21]).

[26] In *Minister of Safety and Security v Bothma and Another* 2016 (1) SACR 632 (ECG) at [13] the court held that all that is required is that the police officer must “*show that he was in possession of information which, objectively viewed, would lead a reasonable person in his position to form the suspicion that the arrestee had committed the relevant offence*”.

[27] As stated above it was common cause that the arresting officer entertained a suspicion, however, the challenge is whether or not such suspicion rested on reasonable grounds.

[28] According to the evidence of Cst Sogiba the following facts led to her formulating the suspicion that the plaintiff had committed the offence of driving a motor while under the influence of liquor, *inter alias* :

28.1 he was unsteady on his feet;

28.2 his eyes were bloodshot and he smelled of alcohol;

28.3 his speech was slurred and he struggled to give a concise version of how the collision had occurred; and

28.4 he admitted to having been under the influence of liquor although he had stated that he had consumed the said liquor the day before.

[29] Armed with that information the police officer had obtained the details of the collision as well as the details of the vehicle that the plaintiff had allegedly been driving and she caused for members of SAPS to verify that in fact there had been an accident and those facts were confirmed.

[30] It was at that stage, so Cst Sogiba testified, that she suspected that the said offence had been committed and thereafter took the plaintiff to the hospital to have a blood sample taken.

[31] It must be noted that it is in any event not in issue between the parties that the plaintiff had been driving on the day in question. It is further not in issue between the parties that whilst the plaintiff was driving the vehicle was involved in an accident. It is further not in dispute between the parties that the plaintiff had in fact admitted to having been drunk and his defence seemingly was solely that he had consumed alcohol the day before.

[32] The only challenges that the plaintiff presents are technical in nature. He seeks to suggest that the Court ought to not accept the warning statement based on the '*discrepancies*' which have been dealt with hereinabove, inter alias; that there was a selection by the plaintiff to remain silent, that the warning statement does not record that the interview was conducted in IsiXhosa and that the arresting officer's A1 statement was not commissioned..

[33] These issues, however, do not take the matter any further. At no stage did counsel for the plaintiff deny that the plaintiff had said what was contained in the warning statement.

[34] In fact, for the entirety of the cross-examination the plaintiff's version was never put to Cst Sigoba. The only issues that Mr Mgodana had persisted with are stated above.

[35] I must repeat what is stated above. These amount to nothing but technicalities that are not substantiated and/or upon which nothing turns, particularly in light of the fact that the plaintiff failed to testify and/or to lead evidence to rebut what was testified to by Cst Sigoba.

[36] The effect of a litigant's failure to cross examine was considered by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA (CC).

[37] In light of the pronouncement in *SA Rugby Union*, Mr Mgodana's belated argument in closing, that Sigoba's evidence ought to be rejected on the basis that the warning statement in itself as well as Sigoba's evidence are contradictory in as far as the warning statement records that the plaintiff was drunk whereas the same statement records that the plaintiff was "*in his sound and sober senses*" cannot be accepted.

[38] The difficulty with this argument is that these issues were not raised in cross examination and this is further aggravated by the fact that the plaintiff did not give or lead evidence. In any event, a close examination of the challenge raised by Mr Mgodana reveals that whilst there appears to be a contradiction *ex facie* the warning statement, the contradiction in all the circumstances is not material for the following reasons:

38.1 at no stage did the plaintiff challenge the allegation/s in the warning statement that he was drunk; it would have been expected of a party to deal specifically with the allegation that he or she had admitted to certain conduct. That was not done by the plaintiff, infact there was no challenge what so ever on the extent and content of Sogiba's conversation with the plaintiff ; and

38.2 importantly, there is no challenge on behalf of the plaintiff that the information at Sogiba's disposal could and/or would not have been reasonable grounds for suspecting that the plaintiff had committed the offence of driving under the influence of liquor.

[39] The quality of Cst Sogiba's evidence cannot be faulted by the Court. She was consistent when she testified about her interview with the plaintiff; she was clear about the content of her interview with the plaintiff. She particularly made a favourable impression on the court with her temperament and her overall demeanour. Under cross examination, counsel for the plaintiff, challenged her competency and stated that she had not done her job properly. Sogiba's response remained objective, consistent and clear.

[40] In the absence of evidence or even a challenge under cross examination on Sogiba's evidence, the Court accepts that the facts that Cst Sigoba possessed at the time of the arrest, objectively viewed, amounted to reasonable grounds for Sogiba to suspect that the plaintiff had committed the offence of driving under the influence of liquor.

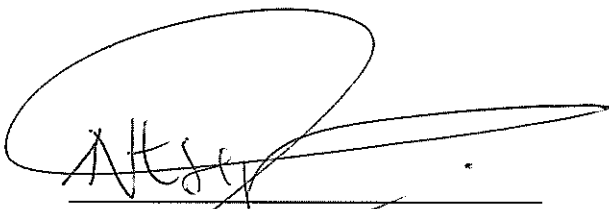
[41] Put differently, I accept that any reasonable person who was in the same position that Sigoba was in, armed with the same facts, would have arrived at

the suspicion that the plaintiff had driven the vehicle under the influence of liquor.

[42] Furthermore, on the uncontested version of Sogiba that the process of drawing the plaintiff's blood finalised after the expiry of Court hours on 15 May 2015 (which fell on a Friday), that she only returned to the police station with the plaintiff at 16:30 pm on the said date and that the plaintiff was taken to Court on Monday 18 April 2015 being the first court day after the arrest. I therefore find that the failure to bring the plaintiff before a lower court within 48 hours was in terms of section 50 (1) (d) of the Criminal Procedure Act and thus lawful.

[43] In my view, the arrest and resulting detention of the plaintiff was justified.

[44] In the result, the plaintiff's claim is dismissed with costs.



N Ntsepe

Acting Judge of the High Court

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Date Heard: 18-19 April 2018

Delivered on: 08 May 2018