

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

CASE NO: 2786/2013

In the matter between:

SIBONGILE MPANGE

PLAINTIFFF

And

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

HINANA AJ:-

[1] It is common cause that :

- (i) on 23 September 2013, the plaintiff was arrested without a warrant at Maqwathini location, Mthatha by members of the National Intervention Unit (NIU) (a unit within the SAPS;
- (ii) he was released on bail on 25 September 2013;
- (iii) he was charged for possession of unlicensed firearm and two rounds of ammunition;

(iv) he appeared in court and was granted bail;

(v) charges against him were withdrawn on 31 January 2014

[2] This court was called upon to determine whether;

(i) the arrest and detention of the plaintiff, Mr Sibongile Mpange was lawful or not; and

(ii) if unlawful, what amount of money should be awarded to the plaintiff.

[3] Mr Mdeyide appeared for the plaintiff and Mr Ntayiya appeared for the defendant.

[4] In justifying the arrest and the subsequent detention of the plaintiff, the defendant led the evidence of three police officers namely:-

(i) Constable Bongile Earnest Ngcele;

(ii) Constable Pumzana Patrick Gobidolo;and

(iii) Warrant Officer Lungisa Ntonga.

[5.1] Constable Bongile Earnest Ngcele (Ngcele) testified that he is a policeman attached to the National Intervention Unit, Mthatha (NIU). He received information from a member of the Crime Intelligence Gathering Unit, Mthatha to the effect that the plaintiff was in possession of an unlicensed

firearm which was used in a commission of an offence and would be also be used in the commission of an offence.

[5.2] He testified that the member from the Crime Intelligence Gathering Unit (CIG Unit) received this information from his informer. The CIG Unit member was later identified as Warrant Officer Lungisa Ntonga (Ntonga).

[5.3] Ntonga briefed the members of the NIU including Ngcele and Gobidolo and other members.

[5.4] Armed with the information which Ntonga was informed by his informer, members of the NIU, Ntonga and the unidentified informer went to Maqwathini during the night on 23 September 2013.

[5.5] As they proceeded to Maqwathini, Ntonga was in company of his informer (who gave Ntonga the information about the firearm).

[5.6] At Maqwathini, Ntonga only showed Ngcele the house where plaintiff was and he (Ntonga) did not attend to plaintiff's premises. Ngcele and Gobidolo proceeded to the room where plaintiff was, whilst other members were attending other houses within the plaintiff's homestead.

[5.7] Ngcele knocked at the door and plaintiff opened. On entering, Ngcele identified themselves as police officers and informed the plaintiff the reason

why they (police) visited his homestead, specifically the house where plaintiff was. He testified that he told plaintiff that they were looking for an unlicensed firearm of which the plaintiff was in possession of. Plaintiff replied by saying it was underneath a pillowcase and Ngcele lifted the pillowcase and asked the plaintiff to pick the firearm and hand it to him. The plaintiff did that. Ngcele then asked the plaintiff to produce a licence and he could not. The firearm was a Norinco NZ 75 with its serial numbers filled off. The plaintiff was informed of his arrest and the reasons thereof.

[5.8] He testified that he was not in possession of a search warrant and neither did he seek a consent from the plaintiff to search the premises. According to him, he never searched the plaintiff's premises and there was no reason to ask for consent from the plaintiff to search the premises. He further testified that he was sure that the firearm would be found because the information was that it was used in the commission of an offence and would soon be used.

[5.9] Ngcele further testified that he was justified in arresting the plaintiff.

[6.1] Under cross examination, he testified that he warned the plaintiff of the following constitutional rights after the seizure of the firearm and two rounds of ammunition:

- (i) Right to remain silent;
- (ii) Right not to incriminate himself as such incrimination may be used as evidence against him;
- (iii) Right to be visited by a family member and/ or a priest; and

(iv) The right to access to telephone, and plaintiff understood those rights.

[6.2] He denied that the plaintiff was assaulted by any police officer. He testified that he gave the plaintiff the rights referred to above verbally and did not cause him to sign his pocket book as required by clause 8(1) (b) of the standing order¹.

[6.3] He warned the plaintiff of his constitutional rights after the plaintiff had picked the firearm underneath the pillowcase.

[7] Phumzana Gobidolo testified and corroborated Ngcele to the effect that:

- (i) a firearm was recovered in a room where the plaintiff was,
- (ii) he was in company of the Ngcele when the firearm and ammunition were recovered.
- (iii) that Ngcele lifted the pillow case after having asked the plaintiff where was the fire arm;
- (iv) Ngcele asked plaintiff to take the firearm and hand over to him (Ngcele)
- (v) plaintiff indeed took the fire arm and handed it to Ngcele.
- (vi) they (police) were not armed with a search warrant, and
- (vii) they did not ask for the plaintiff's consent to search,

¹ Standing Order (G) 341 which provides; the member must request the arrested person to acknowledge that he/she has been informed of his/her rights and she/he understands the contents thereof in his/her pocket book the fact that the information was so furnished.

(viii) neither did plaintiff consented to the search ,

(ix) that the fire arm was said to be used in the commission of an offence, and would be used in a commission of an offence,

[8.1] However, Gobidolo testified that Ngcele warned the plaintiff of his constitutional rights, being that;

(i) Ngcele was a police officer;

(ii) He was arresting plaintiff for being in possession of an unlicensed firearm and (2) two rounds of ammunition;

(iii) A right to legal representation and or apply for Legal Aid when he appears in court

(iv) Right to remain silent and anything he (plaintiff) says may be used as evidence against him, and plaintiff understood those rights.

[9.1] Gobidolo further testified that they (as police officers) had not gone to conduct a search of a firearm and ammunition at plaintiff's homestead, but had gone there to take a firearm that they knew they will find.

[9.2] Plaintiff was then arrested and detained at Central Police Station by Ngcele.

[10.1] Lungisa Nelson Ntonga (Ntonga) testified that he is a member of the South African Police Services attached to CIG Unit Mthatha. On 23 September

2013 after 16h30 he received information from his reliable source to the effect that the plaintiff was in possession of an unlicensed firearm and ammunition, and that the firearm was used in the commission of an offence and would be used again (in a commission of an offence).

[10.2] Upon receipt of this information, he contacted the NIU members and met Ngcele and Gobidolo outside their NIU offices, Mthatha. He briefed them about the information and the two police officers later briefed their members.

[10.3] It was agreed that the information must be followed and indeed the NIU members (Ngcele and Gobidolo included), his informer and other members went to Maqwathini. He pointed the house where the plaintiff was and Gobidolo and Ngcele together with other members went to the plaintiff's room. He remained behind with his informer because they did not want to be seen or identified.

[11] The plaintiff testified and denied that the firearm was found in his possession. He stated that it was found in another room where his mother and father were sleeping. His evidence was corroborated by his mother who testified on his behalf.

[12.1] Mr Ntayiya, attorney for the defendant argued that section 20 of the Criminal Procedure Act does not apply in this case. The section provides,

“The state may, in accordance with the provisions of this chapter, seize anything (in this chapter referred to as an article)-

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;*
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or*
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence*

[12.2] He further submitted that the police did not go to the plaintiff's premises to search but to arrest.

[13] I, from the outset, did not understand Mr Ntayiya's submission at all. In my view, he could not assist the court in anyway whatsoever (more of this will be dealt with below).

[14] He relied on the information which was supplied to Ntonga by an unknown and faceless informer. However, he conceded that Ntonga was not the source of information and even Ntonga, relied on information from his unidentified informer.

[15] Further, Mr Ntayiya conceded and correctly so in my view that:

- (i) there is no evidence that the informer was reliable²;
- (ii) there is no evidence to the fact that why the informer could not be identified, could not testify and why the police believed the informer.
- (iii) Ngcele and Gobidolo acted on information supplied to them by Ntonga;
- (iv) that the police were not armed with a search warrant;
- (v) and that Ngcele and Gobidolo did not ask for permission to search the plaintiff premises and;

[16] To my utter amazement, Mr Ntayiya argued that the both Ngcele and Gobidolo had not gone to the plaintiff's premises to search but to arrest the plaintiff. It remained puzzling to me as to what would have been the reason for the arrest of the plaintiff as at the time the members of the NIU left their offices to Maqwathini. In my view, the police had formed their intention to arrest even before leaving their offices for Maqwathini. This is surprising indeed. They had not gone there to investigate the correctness of the information but to arrest.

[17] Further, both Ngcele and Gobidolo testified that the firearm was used in a commissssion of an offence and would be used in a commission of an offence. However, they failed dismally (and even Mr Ntayiya could not argue against his own case) to inform this court or to answer the following pertinent questions: -
i.e

- (a) when and where was the firearm used in a commission of an offence

² Hiya v The Minister of Safety & Security & another (Full Bench decision) case no 506/99 delivered on 19 November 1999 by Zilwa AJ (as he then was) with Madlanga AJP (as he then was) and Van Zyl J (as he then was) concurring

(b) what type of an offence was committed, and ;

(c) by whom

[18] Also, the police officers (including Mr Ntayiya) could not answer the following questions:

(i) when and where was the firearm going to be used;

(ii) by whom;

(iii) in committing which offence.

[19] The police and Mr Ntayiya were only constrained to make a blanket statement to the effect that in that area (Maqwathini) stock theft was the order of the day. Such a statement did not prove that the firearm was used by the plaintiff in a commission of an offence and was intended to be used in a commission of an offence.

[20] With regard to the arrest of the plaintiff Mr Ntayiya sought to rely on the provisions of section 40(1)(h) of the Criminal Procedure Act 51 of 1977. In my view, reliance on this section was an after thought which was not even pleaded. At the beginning of the trial, Mr Ntayiya sought to amend the defendant's plea, which amendment was not opposed. As such the court granted the amendment sought by Mr Ntayiya. The plea, as further amended reads as follows:-

“It is correct that the plaintiff had not committed any offence in terms of schedule 1 but was arrested because he committed an offence in terms of

section 3 of the Fire Arms Control Act, 60 of 2000, possession of unlicensed fire arm with (2) two rounds of ammunition”

[21] The arrest and the subsequent detention of the plaintiff was preceded by

- (i) the visit to his homestead at night on 23 September 2013;
- (ii) the demand by Ngcele that the plaintiff was having a fire arm and ammunition;
- (iii) the failure by both Ngcele and Gobidolo to inform the plaintiff that they were about to conduct a search of a fire arm and ammunition;
- (iv) Both Ngcele and Gobidolo did not ask for the plaintiff’s permission to search the house;
- (v) According to Ngcele and Gobidolo, the plaintiff agreed that he had a firearm which was below the pillowcase and Ngcele lifted the pillowcase and asked the plaintiff to pick the firearm and hand over to him (Ngcele) which plaintiff did. This evidence is disputed by the plaintiff and his mother, who both testified that the fire arm belonged to the plaintiff’s father and was found in a room where the plaintiff’s parents were, not where the plaintiff was found by Ngcele and Gobidolo.

[22] In my view, section 20³ describes an article to be seized by the police. Accordingly, the defendant’s submissions are that the unlicensed fire arm allegedly found to be in possession of the plaintiff was not an item liable to be seized. Indeed, this was a startling submission. Such a submission goes against

³ See paragraph 12.1 above

the provisions of the Criminal Procedure Act dealing with articles liable to be seized.

[23] If the fire arm was not an item liable to be seized and as argued by Mr Ntayiya, the only conclusion that one can arrive at is that the police had no reasonable grounds to believe that the firearm was involved in a commission of an offence and neither were they entitled to believe that the fire arm would be used in a commission of an offence. Further, with the positive answers to paragraph 17 and 18 above, it cannot be said that the firearm was used in the commission of an offence and/or was intended to be used in the commission of an offence.

[24] A policeman's belief is objectively viewed. Where, on the facts as in this case, the policeman's belief, objectively view, would not lead to a reasonable belief, the search and seizure would be declared unlawful⁴.

[25] I was also amazed to hear both Ngcele and Gobidolo testifying that they did not even ask for plaintiff's consent. At least they were honest in their testimony in this regard. Once again section 22 of the Criminal Procedure Act was not relied upon by neither Ngcele, Gobidolo nor Mr Ntayiya, save to say that all three of them stated that if the plaintiff had refused them permission to search, they would have left the premises and come back on the following day. It is worth mentioning that when the police arrived at the plaintiff's premises, it was after 22h00 on 23 September 2011. I wonder whether had they left the

⁴ S v Mayekiso en Andere 1996 (2) SACR 298 (C), Mnyungula v Minister of Safety and Security and others 2004 (1) SACR 219 (Tkei)

premises and came back later or on the following day, the purpose of their visit would have been successful.

[26] It seems to me that the police did not know what they were supposed to have done under circumstances. I find that the purpose of their visit was to search and seize the firearm. This is clearly demonstrated by both Ngcele and Gobidolo who asked where was the firearm and it was found underneath a pillowcase. It was not within their view at the moment they entered the plaintiff's room, hence they asked for it.

[27] I also find that the defendant failed to justify the arrest and detention of the plaintiff and should be held liable.

[28] Even though the plaintiff also claimed for an assault, both Mr Mdeyide, Counsel for the plaintiff and Mr Ntayiya agreed that the plaintiff failed to discharge the onus on him regarding the assaults. As such this claim must fail.

[29] With regard to *quantum*, the plaintiff was arrested on 23 September 2013 at Maqwathini Location, Mthatha at about 22h00.

[30] He was handcuffed and taken to Central Police Station where he was locked in a cell.

[31] His undisputed evidence about the condition of the cells is as follows:-

- (i) the toilet was not a closed toilet and one inmate could see the other when attending to a call of nature;
- (ii) food was pathetic;
- (iii) sleeping blankets were dirty and;
- (iv) there were no beds

[32] Nugent JA in **Minister of Safety & Security and another v Seymour**⁵ held that in assessing damages the primary purpose is not to enrich the aggrieved party but to offer a *solitium* for his or her injured dignity and loss of liberty. The award for damages in respect of plaintiff *injuria* cannot be calculated with mathematical precision, recourse must be had to guidance in previous similar facts decisions.

[33] The plaintiff was arrested during the night on 23 September 2013 and was detained at Central Police Station where cell conditions were not good for human occupation. There was no privacy when one inmate was attending to call of nature.

[34] The plaintiff further testified that the food was not palatable. In my view, such conditions are unbearable and a clear violation of one's constitutional rights.

[35] In my view, the following order is made.

⁵ 2006(6) SA 320 (SCA)

1. The arrest and detention of the plaintiff on 23 September 2013 to 25 September 2013 is declared wrongful and unlawful.
2. The plaintiff's claim for assault by members of the National Intervention Unit on 23 September 2013 is dismissed.
3. The defendant is directed to pay the plaintiff an amount of R70 000.00 as a result of the plaintiff's arrest and detention.
4. The defendant is directed to pay costs of suit on the High Court scale.

M.N. HINANA

ACTING JUDGE OF THE HIGH COURT

For the Plaintiff : Mr Mdeyide

Instructed by : Mjulelwa Inc
Mthatha

For the defendant : Mr Ntayiya

Instructed by : State Attorney
Mthatha

Dates heard : **16-18 March 2015**
23-24 March 2015

Date delivered : **09 April 2015**