

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3002/2013

In the matter between:-

N L MOKOENA

Plaintiff

and

THE MEC: POLICE, ROADS AND TRANSPORT,
FREE STATE
M P PHANDLIWE

1st Defendant
2nd Defendant

CORAM: MOENG, AJ

JUDGMENT BY: MOENG, AJ

HEARD ON: 28 OCTOBER 2014

DELIVERED ON: 10 NOVEMBER 2014

INTRODUCTION

[1] The plaintiff is an adult male and a taxi owner residing in Fichardtpark Bloemfontein. The first defendant is the member of the executive council, responsible for police, roads and transport in the Free State province whereas the second defendant is an adult male employed as a provincial traffic officer by the first defendant.

- [2] Plaintiff instituted an action against the defendants for loss of income in the amount of R 124 200.00. He alleges in his particulars of claim, that on 15 March 2013, second defendant, acting within the course and scope of his employment, issued a notice in terms of section 44(1) of the National Road Traffic Act 93 of 1996 ("section 44(1) notice") to his driver Mr. Pholoana ("the driver"). The notice directed him to discontinue operating the said taxi because it was not roadworthy. He further alleges that the second defendant unlawfully seized the said vehicle, and it was only released on 22 May 2013 after an urgent application to this court.
- [3] The defendants, in their plea, in turn admitted that a notice in terms of section 44(1) was issued to the plaintiff's driver but disputed that the car had been impounded. They allege that the plaintiff's vehicle was taken to the Lengau Testing Station ("Lengau") because the driver was a Lesotho citizen with no work permit. They advised the plaintiff to collect his car from Lengau but he elected to bring an urgent application.
- [4] The parties were *ad idem* that the central issue that needed determination was whether the vehicle was impounded and whether it was kept from the plaintiff so that he could not generate an income.

- [5] An application was made at the commencement of the trial by agreement for the quantum and merits to be tried separately and I granted the order. The trial then proceeded on the basis that only the issue of liability of the defendants had to be decided. This judgment therefore concerns the issue of merits only.

THE FACTS

- [6] Plaintiff and Mr. Ntsalla ("Ntsalla") testified in support his case whereas the second defendant narrated the defendants' version. The facts of the matter can briefly be summarised as follows:
- [7] On 13 March 2013 at around 07:05, plaintiff received a phone call from his driver that he was stopped by a traffic officer next to the Bains Game Lodge and that he intended to seize the minibus. Plaintiff, together with Ntsalla whose minibus was also stopped, hurried to the scene.
- [8] Second defendant confirmed this, but alleged that this particular incident took place on the 12th and not the 13th of March. He decided to take the vehicle to Lengau for further tests as it was not roadworthy. The driver could in addition thereto not produce the

taxi's operating license and he was working in the republic without a work permit.

- [9] Plaintiff, dissatisfied by the imminent seizure of his vehicle, demanded that he be issued with a notice of impoundment. The officer failed to issue the notice and he instructed his driver to drive back to his base and not accompany the officer. The vehicle was taken to Denkins testing station ("Denkins") on the same day for a roadworthiness test and all the defects that were pointed out by Denkins were repaired.
- [10] Second defendant in turn stated that the plaintiff was arrogant and that he had already issued a section 44(1) notice, but could not hand it to the driver since he absconded. This notice was only given to the driver three days later, as it will appear hereunder.
- [11] On 15 March 2013, the plaintiff received yet another phone call from his driver informing him that the same officer had stopped him next to the Bram Fischer building and that he seized the vehicle. This was confirmed by the second defendant who indicated that the driver was operating on an unauthorised route and the driver had no work permit.

- [12] He proceeded to Lengau accompanied by Ntsalla. He saw his vehicle amongst other impounded vehicles. He made enquiries and the second defendant was summoned by his colleague, Mr. Mokgobo to assist with the release of the vehicle. He informed them that he issued the driver with a section 44(1) notice and had taken him to the offices of the Department of Home Affairs as he had no work permit.
- [13] He further alleged that the minibus had no operating permit. The permit was however presented to the satisfaction of both officers. Mr. Mokgobo thereupon requested him (the second defendant) to get a copy of the section 44(1) notice to facilitate the release of the vehicle and he promised to collect it from his official vehicle, but never returned.
- [14] Plaintiff was then referred to his supervisor, Mr. Nkhi. He was again summoned, but refused to give any explanation on the matter and instead referred them to Mr. Mdhuli, who was in charge of taxi operations. Plaintiff was however forced to leave without any assistance since Mr. Mdhuli could not be reached on his phone.
- [15] Second defendant however disputed having been summoned by his colleagues. His version is that he informed the plaintiff to produce the section 44(1) notice issued to the driver to facilitate the release of his

vehicle. The plaintiff refused to do so and threatened him with legal action should his vehicle not be released.

- [16] Plaintiff returned to Lengau on Monday, 18 March, but could again not get assistance. He consequently consulted an attorney. Various letters were exchanged between his attorney and the first respondent, but he could still not recover his vehicle. He accordingly instructed his attorney to file an urgent application for the release thereof and it is only then that it was released.

THE ISSUES

- [17] That the plaintiff's vehicle was stopped by the second respondent on two different occasions and that it was taken to Lengau, and kept there from 15 March until 22 May 2013 is not in dispute. The critical issue is whether its removal and continuous storage by defendants' was lawful.

THE LEGAL POSITION

- [18] Section 44(1) of the National Road Traffic Act provides that if a motor vehicle is not roadworthy a traffic officer or an examiner of vehicles may, by notice in the prescribed form served on the driver, owner or

operator of such vehicle, direct that such vehicle shall not be operated on a public road or that such vehicle shall only be operated on the prescribed conditions.

[19] The said notice also directed the owner or operator to remove the vehicle to the nearest garage or to the owner or operator's address. The defects as pointed out and other defects not mentioned had to be repaired and the vehicle had to be presented on a specified date, time and place for testing and examination.

[20] Section 87 of the National Land Transport Act in turn provides as follows:

'Impoundment of vehicles.—(1) An authorised officer who is satisfied on reasonable grounds that a motor vehicle is being used by any person for the operation of public transport without the necessary operating license or permit or contrary to the conditions thereof, may impound the vehicle pending the investigation and prosecution of that person for an offence mentioned in section 90 (1) (a) or (b).

(2) A vehicle impounded under subsection (1) must be delivered to the head of the depot contemplated in subsection (4), who must retain the vehicle in the depot and release it to the person concerned only—

- (a) when the criminal charges against the person have been withdrawn or the person has been acquitted of the offence charged; or*
- (b) in the case where the person is convicted of the offence charged, and unless the court has ordered otherwise, on payment to the*

head of the depot of the amount determined by the MEC, which is an impoundment fee.'

EVALUATION OF THE DISPUTES

- [21] The reason advanced by second defendant for having removed the vehicle to Lengau was because it was driven by a Lesotho citizen who did not have a work permit. The defendants' thereby denied that the vehicle was impounded.
- [22] Both plaintiff and Ntsalla made a good impression. They corroborated each other materially about the initial incident on the Bainsvlei road. They both maintained that upon their arrival, the second defendant had already instructed the driver to follow him to Lengau and that he refused to give them any notice of impoundment.
- [23] Second defendant's reaction to this version is that the driver failed to produce an operating permit for the taxi, that he had no work permit and that the vehicle was not roadworthy. He further confirmed that operating a taxi without an operating license is regarded as very serious, sanctioned with a heavy fine and impoundment of the vehicle.

- [24] It is strange that in spite of the seriousness of this contravention, he decided not to issue a fine and a notice of impoundment. His explanation that he felt sorry for the plaintiff is less than frank and can safely be rejected based on the arrogant attitude that he said plaintiff portrayed.
- [25] It is also peculiar that second defendant had already issued the section 44(1) notice upon plaintiff's arrival, but he still wanted to conduct further tests. This was contrary to the provisions of the notice that directed the owner to remove the vehicle to the nearest garage or his home for repairs and that the vehicle be returned on a specific date to the testing station for inspection. The notice also provided that any other defects not mentioned had to be repaired.
- [26] It is inexplicable that he did not hand the notice over to the plaintiff so as to afford him the opportunity to act in accordance with the provisions thereof. The reason for not doing so remains a mystery. The most logical and plausible course that he should have followed was to have impounded the vehicle if the driver failed to produce the operating permit, and issued the section 44(1) notice.
- [27] His reaction when the driver 'absconded' was also noticeably unusual. He was at that stage aware that the vehicle was not roadworthy and the driver could not produce the operating permit. He

strangely did not pursue him for illegally working in the republic nor did he impound the vehicle in terms of section 87 of the National Land Transport Act.

- [28] Plaintiff's response in instructing his driver not to heed to the second defendant's instruction to follow him was in my view consistent with probabilities. He was satisfied that there was no legal ground upon which the vehicle could be seized in the absence of a notice and was well within his rights to refuse to obey an illegal order.
- [29] His version that the vehicle was not impounded but merely taken to Lengau because the driver had no work permit is flawed. He contended that the driver could not produce an operating permit and that he was not driving on his allocated route when he stopped the vehicle next to the Bram Fischer building. He however again failed to impound the vehicle despite these serious contraventions.
- [30] The allegation that the vehicle was not impounded is also in direct contradiction with what second defendant conveyed to Adv. Molotsi from the first respondent's office. In an email dated 25 April 2013, Adv. Molotsi confirmed that according to the second defendant, the vehicle had been impounded because it had no operating license and because the driver had no work permit. This vehicle admittedly had an operating license.

- [31] I can find no justification why the second defendant decided to take the vehicle to Lengau on the ground that the driver had no work permit. The section 44(1) notice directed that the vehicle be removed to the nearest garage or to the owner's address. A simple instruction to the driver to phone the plaintiff to remove his vehicle in accordance with the notice would have solved the problem, and he could have dealt with the driver in terms of the immigration laws.
- [32] There was purely no justifiable reason for the removal of the vehicle. I am satisfied that the second defendant's conduct in removing the vehicle amounted to an unlawful impoundment. This vehicle was admittedly already repaired on the 15th of March, and all that was required was for the owner to produce the vehicle to the testing station on the date as provided for in the notice. The defendants' could not provide any legal ground upon which this vehicle was removed.
- [33] Plaintiff's response at Lengau was likewise consistent with probabilities. He gave a detailed version of what transpired in his endeavor to recover his vehicle. He also explained what the second respondent's reaction was when he was requested to get a copy of the section 44(1) notice and when he was confronted by his immediate supervisor Mr. Nkhi. It is noteworthy that this aspect was

also not disputed under cross-examination but only when second defendant testified.

[34] In response to this, second defendant's version is that he requested plaintiff to present the section 44(1) notice that was issued to the driver and once produced, the vehicle could be released. I find this version absurd as the plaintiff would not have opted to institute legal action if a simple document was required. This version is also not supported by the email from the first respondent's office.

[35] The defendants further contended that the plaintiff was advised to take possession of his vehicle at Lengau but he in turn elected to lodge an urgent application. This version is likewise untenable and does not accord with probabilities. It is also contrary to the email from Adv. Molotsi which notified the plaintiff to approach the Department of Home Affairs to obtain a JS3t form for the release of the vehicle.

[36] Plaintiff's evidence about the steps he took to recover his vehicle on the 15th and later on Monday the 18th was not challenged in cross-examination. This issue was in my view crucial since it related to a material aspect upon which the case was based.

[37] As a general rule, though not absolute and inflexible, a party who calls a witness is entitled to assume that if a witness's testimony has not been duly challenged, it has been accepted as correct. In **Small v Smith** 1954 (3) SA 434 (SWA) Claasen J held as follows:

"it is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".

[38] This view was further confirmed in **President of the Republic of South Africa and others v South African Rugby Football Union and others** 2000 (1) SA 1 (CC) where it was held that it is essential, when a party intends to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to that fact by questions put in cross-examination showing that an imputation is intended to be made and to afford the witness an opportunity of giving any explanation and defending his or her character.

[39] It was further held that if the point in dispute is left unchallenged, a party calling the witness is entitled to assume that the uncontested

testimony is accepted as correct. The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences drawn from other evidence in the proceedings.

[40] The Court however warned that these rules relating to the duty to cross-examine must not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case, but their object must not be lost sight of.

[41] The inescapable conclusion is that the second defendant, as opposed to plaintiff and Ntsalla, was not a credible and a reliable witness. I am satisfied that his evidence, in so far as it contradicts that of the plaintiff, can be safely rejected. The impoundment of plaintiff's vehicle was not sanctioned by either section 44 of the National Road Traffic Act or section 87 of the National Land Transport Act.

[42] This vehicle was kept from the plaintiff without any justification and this prevented him from generating an income for this period. This case is a classic example of the abuse of power by law enforcement officials. Second defendant's insolence when he was requested by his colleague to fetch a copy of the notice from his car and his attitude when he was summoned to the office of his supervisor to

assist the plaintiff directly led to the loss in income that plaintiff suffered.

[43] The problem was aggravated by the laxity of first defendant to release the vehicle despite the number of letters addressed to them. These letters paint a sad picture of the steps plaintiff had to take to recover his vehicle.

ORDER

[44] I am under these circumstances satisfied that the following order should be made:

1. Judgment is granted in favour of plaintiff on the merits;
2. The adjudication of quantum is postponed *sine die*;
3. Costs to stand over for later adjudication.

L.B.J. MOENG, AJ

On behalf of the plaintiff: Adv. JL Olivier
Instructed by: Hugget Hendriks Inc.

BLOEMFONTEIN

On behalf of the defendants: Adv. NR Rathidile
Instructed by: State Attorney

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