

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

21/4/2013
CASE No: 52960/09

In the matter between:

MUTANDWA RUSIKE

And

MINISTER OF POLICE

Defendant

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
27 March 2013	<i>[Signature]</i>
DATE	SIGNATURE

JUDGEMENT

MOLOPA-SETHOSA J

The Plaintiff in this matter, Mutandwa Rusike ("Plaintiff") has instituted an action against the Minister of Police ("Defendant") for damages for alleged unlawful arrest and detention on 30th August 2008 at Middelburg by members of the South African Police Service ("SAPS").

At the commencement of trial, by agreement between the parties, the court was informed that the Plaintiff was no longer persisting with his claim for loss of earnings, and that if the court were to find in favour of the Plaintiff that the arrest was unlawful, the Plaintiff's award of damages

should only be for two days of detention for the unlawfulness of the arrest and detention.

The Defendant led the evidence of Megiel Jacobus Ehrens Botha ("Botha"). He testified that at the time of arresting the Plaintiff he was in the employ of the South African Police Services ("SAPS"). That he was in service of SAPS for 23 years and that at the time he arrested Plaintiff, he held the rank of Inspector and was stationed at the Middleburg Detective Branch. At the time he gave evidence herein he was no longer in the employ SAPS.

He testified that on Saturday 30 August 2008, he received a docket on theft of a truck and fraud of a diesel; that he read the complainant's statement and also interviewed the complainant one Naidoo ("Naidoo"); and that the complainant informed him that he could not reach the Plaintiff on his/Plaintiff's cellular phone. He then went with the complainant Naidoo to where the truck was. That the Naidoo identified the truck to him and pointed out the Plaintiff to him as the person/suspect who had stolen his truck/had unlawful possession of his truck for some days; that he/Botha then arrested the Plaintiff as the suspect. That for the reasons set out herein he exercised his discretion in terms of section 40(1)(b) and arrested the Plaintiff without a warrant.

He testified that from information by Naidoo, the truck in question was with the Plaintiff for a few days; that he exercised his discretion to arrest the Plaintiff because the Plaintiff was found in possession of the

truck in question [after Naidoo had laid a charge of theft against him], and the Plaintiff also handed him/Botha the keys to the said truck.

He further testified that he arrested the Plaintiff according to section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended ("the Act"), which gave him, as a peace officer, the right to arrest a suspect without a warrant if there was a prima facie case against the suspect. That theft is a serious offence, and he arrested the Plaintiff at the time in terms of section 40 (1) (b) of the Act based on a reasonable suspicion that the Plaintiff has committed a schedule 1 offence, based on the complainant Naidoo's allegation, and that since he found the Plaintiff in possession of the said truck and the Plaintiff gave him the keys to the said truck, he arrested him without a warrant.

He testified that when he arrested the Plaintiff he warned him of his constitutional rights according to section 35 of the Constitution Act 108 of 1996. Further that he warned the Plaintiff in English because he/Plaintiff said that he understood English, and that the Plaintiff spoke English well.

Asked why did he not just take the Plaintiff's statement and release him on warning to appear in court the next court day, he testified that he did not do that because the Plaintiff was not a South African Citizen, and that at that stage he had no fixed address, i.e. the Plaintiff could not give him a fixed address.

He further testified that on Monday 1 September 2008 the Plaintiff was taken to court so that his address could be investigated, and for bail application. That the Plaintiff's bail was refused and he was detained further because the Prosecutor was convinced that he should not be released.

He testified that at the time of arresting the Plaintiff there was no other way that he could have secured the Plaintiff's presence at court under the circumstances; further that he contends that he acted correctly and lawfully under the circumstances.

Under cross examination he stated that as far as he knows, when the Plaintiff appeared in court on 1 September 2008, he was not granted bail; that the matter was remanded to another date.

He further stated that he was not present in court when the Plaintiff appeared in court in December 2008; further that he is not aware that charges were withdrawn on 29 May 2009 and that he was not in court on the said day.

Asked if he was handling the case at the particular time when the Plaintiff appeared in court on 1 September 2008, December 2008 and May 2009, he stated that he was not handling the case; further that he/Botha did not appear in court on 1 September 2008, that he was not present. That subsequent to the Plaintiff's arrest he/Botha did not appear in court on the dates on which the matter was remanded.

He reiterated that he interviewed the complainant, Naidoo; that the said Naidoo informed him that he stays somewhere in Durban; further that though he/Botha did not know and/or was not sure of what type of business Naidoo does, he learnt that the business of Naidoo/complainant has got something to do with transport because Naidoo owns trucks. That he established from Naidoo that he/Naidoo was in Middelburg looking for his truck.

He stated that he does not know that Naidoo does some business and/or mining business in Middleburg, which he stated he cannot dispute, but that all he knows is that Naidoo was a complainant in his case and that he was just investigating the case.

He further stated that he did not know that Naidoo transports coal to Eskom power stations in Middleburg and Witbank. That he knows that Naidoo owns trucks, but that he did not know what Naidoo was transporting with the said trucks; further that he would not dispute that Naidoo transports coal with the said trucks.

Asked if Naidoo told him that he/Naidoo and the Plaintiff had a relationship, he stated that when he interviewed Naidoo, Naidoo told him that the Plaintiff worked for him and that Plaintiff was a driver of one of his trucks; that Naidoo did not tell him that the Plaintiff kept one of the trucks with him because he/Naidoo came and opened a case of theft of the truck against the Plaintiff.

Put to him that the Plaintiff was employed by Naidoo as a driver of the truck and that he/Plaintiff kept the truck with him, he stated that he cannot dispute that the Plaintiff worked for Naidoo and that they had a relationship, but that the complainant/Naidoo came and opened a case of theft, which meant that the Plaintiff had no right to keep the truck in question with him.

He stated that he can't remember that the complainant/Naidoo told him where the Plaintiff lived.

Asked if he could dispute that the Plaintiff stayed in Middelburg at the mine inside the truck, he stated that when he/Botha asked the Plaintiff where he stayed the Plaintiff told him that he was a Zimbabwean and that he did not have a fixed address.

He stated that he arrested the Plaintiff outside the Middleburg police station in front of the police station at around 13H55; that the Plaintiff came to the police station with the said truck and he does not know how the Plaintiff came there. That when he arrested the Plaintiff the complainant/Naidoo was also at the police station and that Naidoo pointed the Plaintiff/suspect out to him.

Asked if he could dispute that the Plaintiff and the complainant Naidoo had agreed to meet at the police station on 30 August 2008 because they had a dispute regarding Plaintiff's wages which had not

been paid by Naidoo for four (4) months, he stated that he cannot say as he was not present [when they allegedly agreed]. That he did not know what dispute they had; but that a criminal case was opened by the complainant Naidoo and he had to investigate the case.

He stated that the complainant never mentioned to him that on the day in question they [Naidoo and the Plaintiff] had agreed to meet at the police station, where the complainant would pay Plaintiff his wages and take his truck.

Put to him that the Plaintiff did not steal the truck as he/Plaintiff was living in the truck where the complainant was operating business, he stated that he disputes that because the complainant opened a case of theft of that truck against the Plaintiff in the morning on the same day [30 August 2008]. He reiterated that he interviewed the complainant/Naidoo who pointed out the suspect/Plaintiff to him. That when he interviewed the complainant Naidoo, he did not disclose to him that he and the Plaintiff had a dispute alleged by the Plaintiff's counsel.

Put to him that the Plaintiff's version is that the complainant was avoiding him, not taking his calls and went to open a case of theft fully knowing that the truck was with the Plaintiff and that he/Naidoo knew exactly where the Plaintiff was, he stated that is not what Naidoo told him; that Naidoo told him that the Plaintiff had disappeared with his truck. That he cannot testify to the reason why the complainant failed to appear in court on all the occasions as a result of which the case was withdrawn and that it is only the complainant who can testify to why he did not attend to court.

That concluded the case for the Defendant.

For the Plaintiff, Mutandwa Rusike, the Plaintiff himself testified.

He testified that he is a Zimbabwean national living in Zimbabwe; that he came to South Africa [on the day of the trial] specifically for this case and that for that purpose he was staying in Tembisa.

He testified that when he was arrested on 30 August 2008 he was staying at Vostalian mine in Middleburg. That at the time he was employed by Mr. Naidoo and was working at the mine; that they were contracted to the mine.

He testified that he was a driver, driving the truck that carried coal from the mine to Majuba power station, and that his salary was R10 000.00 per month; further that he started working for Naidoo in May 2008.

He testified that he was staying at the mine, that he kept the truck at the mine and that he slept in the said truck, that the truck was his home.

He testified that they were working 24 hrs a day, they were two drivers and they stayed in that truck. That the truck was staying at the mines and if it did not have a job to do it was parked in Middleburg.

He testified that he and Naidoo had a good relationship but that Naidoo did not pay them their salaries. That he worked for Naidoo for almost three (3) months and he never paid him in any single month.

He further testified that he tried to engage Naidoo as to why he did not pay him and Naidoo, in the first month when he asked for his salary said that the mine did not pay him; the second month again he said that they did not pay him, and on the third month his [Plaintiff's] supervisor told him that he was paid and that the mine had paid Naidoo.

He testified that he then asked Naidoo for his salary and Naidoo said that he was coming to the mine, but he did not come. That it was on a Friday [when he asked about his salary], and they did not have job to do at the mines that day so they went to park the truck in Middleburg.

He testified that on the Saturday morning [30 August 2008] he went back to the mines to see if there were jobs to do, and when he arrived there, the mine security officers informed him that Naidoo had phoned and had said that he/Plaintiff must hand over the truck keys to the mine security.

He testified that he then told the security officers that he was not going to give them the keys (i.e. he refused to give them the keys to the truck), stating to them that Naidoo himself must come and fetch the truck keys from him and pay him his salary because he/Naidoo was the one who employed him and gave him the said keys. Further that the security

officers then informed him that it was an instruction from their boss, but that he refused to give them the keys; that they/security officers then wanted to take the keys from him by force, and seeing this he then drove off to Hendrina police station [on the other side of Middleburg]; that the mine where they operated was between Hendrina and Middleburg.

He testified that at the Hendrina police station, he told them the story [pertaining to the salary dispute between him and Naidoo] and that they told him that it was a labour issue; that he must go and report it at the Middleburg Labour offices.

He further testified that when he left Hendrina police station he got into the truck and he was phoned by the people from tracker asking him where he was taking the truck to; he told them that he was at the Hendrina police station. They said that his boss/Naidoo reported to them that he was running away with the truck, that he told them that he was not running away with the truck but that he was at Hendrina police station to report that Naidoo had instructed the mine security officers to take the truck away from him while he/Naidoo did not pay him his salary.

He further testified that the tracker personnel then put the phone on conference mode where all three (3) could speak, i.e. himself, Naidoo and the tracker personnel, and they told Naidoo that he/Plaintiff says that he/Naidoo did not pay him for three (3) months; that Naidoo said that he did not have a problem to pay him, that he/Plaintiff must go to the mine and he will pay him there and take the truck.

He testified further that he drove back to the mine and waited for Naidoo for four (4) hours, but that he/Naidoo did not come, that instead he/Naidoo sent one Paul who was servicing the truck to come and take the truck. That he/Plaintiff then phoned the tracker people, as they had agreed with the tracker people that if Naidoo did not come he must phone and tell them. That the tracker people again called Naidoo and they talked to him and he said that he/Plaintiff must go to the workshop with Paul, that he was coming there. They went to the workshop and waited there for him for over an hour. Paul called him and he/Naidoo said that the Plaintiff must go to the Middelburg police station to meet him there so that he would pay him his salary, and the police would see that he has paid him.

He further testified that since Middelburg is in town they could not go there with the truck; they thus parked the truck at Paul's yard and drove with Paul's van to the police station.

He testified that when they got to the reception at the Middelburg police station on the Saturday, 30 August 2008, they saw Naidoo; that Naidoo then called a police officer and pointed to him/Plaintiff and said this is the 'guy', i.e. the suspect; that the police officer then arrested him.

He testified that he stayed in custody until December 2008; that he first appeared in court on Monday 01 September 2008 when the matter was postponed for further investigation and for bail application.

He further testified that he appeared in court approximately 10 to 11 times before the charges were withdrawn. That every time he appeared in court the case was remanded for further investigation; and that the complainant/Naidoo never came to court on all the days that he/Plaintiff appeared in court.

He testified that on the last day of his appearance, in May 2009 he was called in and the prosecutor informed him that the case was withdrawn and that he must go collect his passport. Further that the complainant Naidoo was not present in court on the day the matter was withdrawn.

He reiterated that when he arrived at the police station at Middleburg, Naidoo was there, and that he was pointed out to the police by Naidoo.

He testified that he did not explain his side of the story to the arresting police officer nor to any police officer; further that he did not make any statement because the police officers just said to him that he was arrested for fraud, theft and driving a vehicle without the owner's consent and that they then gave him a sheet with charges and told him to sign the said sheet. That he then signed the sheet in question.

He testified that he did not steal Naidoo's truck, that Naidoo gave him the truck; he was the one in charge of the truck because he was the

driver thereof. That Naidoo had given him permission to drive the truck when he employed him to drive the said truck; he was thus surprised when Naidoo said that he had stolen it.

He testified that the arrest pained him a lot because he worked for three months and Naidoo did not pay him his salary; that when he went to him to claim his money, he/Naidoo made the police arrest him and the police did not ask him to tell his side of the story to verify if he had a case to answer or not; they just arrested him and he stayed in prison for three (3) months; that when he went to Middleburg police station he thought that the police were going to him help, instead they arrested him.

He testified that he was called to the police station by Mr. Naidoo who said that he must come and meet him there.

Under cross examination he stated that he thought that the police were going to help him to get his money/salary from Naidoo because he had a problem with Naidoo.

He stated that he did not want to give keys to the mine security because he was not employed by the mine but by Naidoo, and that they were dealing directly with their boss/Naidoo not with the mine. That therefore when the mine security came to him to take the truck he would not give them the keys as no one was supposed to take the truck from him except Naidoo, the person who had employed him.

He disputed that his plan was to keep the truck until after Naidoo had paid him his salary, stating that Naidoo never came to him to fetch the truck keys, but that he sent people to come and fetch the said keys.

He stated that Naidoo went to all the trouble of calling Tracker stating that he had stolen the truck because he/Naidoo did not want to pay him his salary. That Naidoo reported to tracker that he had stolen the truck because he wanted to avoid paying him his salary; and that up until the day of the trial Naidoo had not paid him a cent.

He reiterated that it was not his plan to keep the truck until Naidoo had paid him his salary; that he just could not hand over the truck keys to the mine security and/or anyone if not told by Naidoo himself. That it is not true what Naidoo reported to the Tracker people that he had stolen the truck. That when the tracker people spoke to him and Naidoo, they all agreed that they were going to meet at Hendrina and he would give/hand over the truck to Naidoo and not to anyone else.

He disputed that Naidoo could not get hold of him and/or that he attempted to get hold of him because he had disappeared with the truck, stating that the tracker people had managed to find him because it was Naidoo who had given them his/Plaintiff's number. That Naidoo went to all the trouble of reporting him to tracker and to the police because he did not want or was avoiding paying him his salary.

He stated that after the Hendrina police station told him to go to the Labour Court as this was labour issue, he did not go to the CCMA because when the tracker people called him they, with Naidoo, had agreed that they would meet at the mine where Naidoo would come and pay him, but that Naidoo never showed up.

He reiterated that Naidoo pointed him to the police and said this is 'the guy'. He disputed that Botha arrested him on information from Naidoo and that therefore he acted lawfully, stating that Botha never listened to his side of the story. That he was never even asked or given a chance to give an explanation.

He disputed that he ever mentioned to the police officer/Botha that he would talk in court; stating that he was merely given documents written in Afrikaans to sign and they were not explained to him. That he would not have said that he will talk in court because he did not even have a lawyer, or money to pay a lawyer.

He stated that the truck was his home; that he stayed in it while at his work place. He used it as his house because he did not get housing.

Put to him that Botha's arrest was lawful, and based on reasonable suspicion/ grounds that he/Plaintiff had committed a crime; he stated that he does not think that the arrest was lawful because if Botha had asked him to explain why he was taking the truck he/Botha would have seen what the reason was. That he was working for Naidoo who had never

fired him and that the truck was his responsibility; further that Naidoo did not look for him otherwise he would have found him at the mine, where he was.

He stated that he agreed that the complainant/Naidoo misled the police; stating however that Botha was wrong [in arresting him] because he used misleading facts without even asking facts from him to see if the facts he was given [by Naidoo] were true/correct or not; that that meant that automatically there was negligence from the police.

That concluded the evidence of the Plaintiff, and the evidence pertaining to the whole matter.

It is common cause that the only issue to be decided by the court is the wrongfulness of the arrest; and to this extent the Defendant bears the onus to prove the lawfulness of the arrest.

From the evidence and submissions by Defendant' counsel it is clear that the Defendant contends that the Plaintiff was arrested on the complainant/Naidoo's allegation that there was a theft of his truck; that the complainant/Naidoo had laid a charge of theft of the said truck against the Plaintiff, which formed the basis of Plaintiff's arrest by Botha; and that the arrest was reasonable in terms of section 40 (1) (b) of Criminal Procedure Act 51 of 1977, as amended ("The Act"), which authorises a police officer to arrest without a warrant on reasonable

suspicion that a person has committed a schedule 1 offence. It is common cause that theft is a schedule 1 offence.

The onus is thus on the Defendant to prove on a balance of probabilities that Botha's arrest of the Plaintiff on 30 August 2008 was reasonable and lawful.

From the facts and evidence before court it appears that the only role played by Botha was in arresting the Plaintiff on 30 August 2008, and this after Naidoo, the complainant had laid a charge of theft of his truck and fraud of diesel against the Plaintiff; and according to Botha the truck in question was found in the possession of the Plaintiff, the Plaintiff even gave Botha the keys to said truck.

Looking at the entire evidence of the Plaintiff it is mainly based on the salary dispute between the Plaintiff and the complainant Naidoo. It was never disputed that basis upon Botha arrested the Plaintiff emanated from criminal charges laid by the complainant Naidoo against the Plaintiff, and that in fact the Plaintiff was pointed out to Botha by Naidoo as the suspect.

The Plaintiff corroborates Botha's evidence that when he/Plaintiff arrived at the police station at Middleburg, Naidoo, the complainant was there, that Naidoo then called a police officer and pointed to him/Plaintiff and said this is the guy, i.e. he/Plaintiff was pointed out to Botha as the suspect by Naidoo, as a result of which Botha arrested the Plaintiff.

He/Plaintiff testified that when they got to the reception at the Middelburg police station on the Saturday, 30 August 2008, they saw Naidoo; that when he went to him to claim his money he/Naidoo made the police to arrest him. Clearly the Plaintiff himself recognises it is actually Naidoo who instituted criminal proceedings against him and that the police officer, Botha, acted at the instance of the complainant.

Botha testified in his evidence that on the day in question he was given a docket to investigate; that there was a complainant's statement and that he further interviewed the complainant Naidoo who informed him amongst others that the Plaintiff had stolen his truck. Naidoo pointed the Plaintiff to him as the suspect in question, he found the Plaintiff, who gave him keys to the truck in question, in possession of the said truck.

The Plaintiff, in his evidence in chief testified that since Middelburg is in town they could not go to Middelburg with the truck and that they thus parked the truck at Paul's yard and drove with Paul's van to the police station. Something strange about this evidence is that it was never disputed in cross examination of Botha that the Plaintiff never brought the truck to the police station! Earlier in his evidence the Plaintiff testified that when the truck in question herein was not operating at the mines they would park it in Middelburg, which is contrary to his evidence that since Middelburg is in town they could not go to Middelburg with the truck. From the contradictions in his evidence herein, the Plaintiff seems not to be entirely truthful in this regard. It was never disputed in cross examination the Plaintiff was in possession of the

truck in issue herein when Botha arrested him after Naidoo had laid a charge of theft against him.

Botha testified that based on the facts before him he arrested the Plaintiff after explaining his section 35 constitutional rights to him. That he spoke in English with the Plaintiff and that the Plaintiff spoke English well, [which I may confirm from his evidence in court].

This was never disputed in cross examination, nor was it ever put to Botha that his arrest of the Plaintiff was unlawful. It was also never put to Botha in cross examination that Plaintiff never stated on the warning statement, page 63 of the bundle, that he would make his statement in court. Only during his cross examination did the Plaintiff state that the police officers spoke to him in Afrikaans and he did not understand, that he was merely given documents to sign not knowing what was in those documents. This was never put to Botha.

Surely Plaintiff's counsel had all the documents before trial and he clearly consulted with the Plaintiff prior to trial, as he put Plaintiff's version to Botha during cross examination. If indeed the police officers and/or Botha spoke to the Plaintiff in Afrikaans as alleged by the Plaintiff, Botha would surely have been confronted with this crucial aspect by Plaintiff's counsel.

Botha testified that the Plaintiff did not have a fixed address, thus he could not just release him on warning. The Plaintiff himself testified that he stayed in the truck and that the truck in question was his home. Actually it was also never disputed during cross examination that when Botha asked the Plaintiff during the arrest where he stayed the Plaintiff told him/Botha that he did not have a fixed address. It was actually put to Botha that the Plaintiff stayed in a truck at the mines. That cannot be termed a fixed address for purposes of bail or warning. It could thus not be a question of Botha merely taking a warning statement from the Plaintiff and releasing him to appear in court on a specified date.

From all the evidence before court it does seem, however, that there were labour issues between Naidoo, the employer and the Plaintiff, the employee, pertaining to the payment of Plaintiff's salary and retention of the truck by Plaintiff in lieu of payment of his salary by Naidoo. This labour issue is between Naidoo and the Plaintiff. Botha testified that Naidoo never disclosed to him that he and the Plaintiff had some labour issues/disputes.

If there is a person who may have laid false charges against the Plaintiff knowing very well that there were issues to be resolved between him and the Plaintiff, it is Naidoo. The Plaintiff himself stated in his evidence that, Naidoo is the one that misled the police officers and/or Botha. From the evidence it has not been shown that Botha was privy to such information and/or party to Naidoo's conduct.

As far as Botha is concerned a genuine charge of, amongst others, theft of a truck was laid against the Plaintiff and the said truck was indeed found in the possession of the Plaintiff who gave Botha the keys to the truck in contention herein after Naidoo had pointed the Plaintiff to Botha as the suspect in question.

Botha testified that as theft is a schedule 1 offence, he exercised his discretion in terms of section 40(1)(b) of the Act, which provides that 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...;

It has been held in **Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H** that the jurisdictional facts for a section 40(1)(b) defence are that:-

- i. the arrestor must be a peace officer;
- ii. the arrestor must entertain a suspicion
- iii. the suspicion must be that the suspect (arrestee) [the Plaintiff in this case] committed an offence referred to;

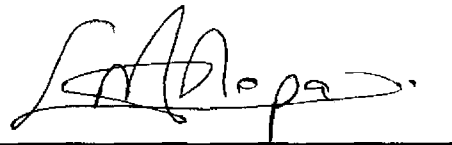
From all the facts set out herein it is clear that the Botha satisfies the jurisdictional facts aforesaid. He/Botha is a police officer; he

entertained a suspicion; Naidoo had laid a charge against the Plaintiff and had even made a statement pertaining thereto; The Plaintiff was found in possession of the truck Naidoo alleged him to have stolen, after Naidoo had laid the charge, and he/Plaintiff even gave Botha the keys to the truck in question.

There is no shred of evidence by the Plaintiff which indicates in anyway that in arresting him Botha acted unreasonably and unlawfully arrested him. In fact it is clear that Naidoo, the complainant may have maliciously laid false charges against the Plaintiff because of the labour issues they had, but Botha and/or the police officers cannot be said, on the facts before court, to have been in cahoots with Naidoo. Further the Defendant cannot be held responsible for Naidoo, a private person's conduct, malicious or otherwise.

Objectively, looking at all the facts and on the totality of the evidence before this court I am satisfied that the Defendant has proved, on a balance of probabilities that the arrest of Plaintiff was lawful and reasonable under the circumstances.

In the result the Plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'L M MoLOPA', written over a horizontal line.

L M MOLOPA – SETHOSA J
JUDGE OF THE HIGH COURT