Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **80/2021**
Heard on: **15 – 17/04/2024 & 22/05/2024**
Delivered on: **26/07/2024**

In the matter between:

SHARIF SALIM SIMBA Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

MAMOSEBO J

[1] The vexed question to be answered in this action is whether the plaintiff, Mr S Simba, a Tanzanian national, was unlawfully arrested and detained by members of the South African Police Service (SAPS) on 20 March 2020 as alleged or whether the arrest was within the purview of s 40(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA). The parties had agreed at the outset of the trial that the merits and quantum be separately adjudicated in terms of Rule 33(4) of the Uniform Rules of Court. On 09 May 2023 an order separating merits and quantum was granted. I shall thus deal with the question of liability.

[2] On 19 January 2021 the plaintiff instituted an action out of this Court against the defendant, Minister of Police, for damages flowing from his arrest and detention by the South African Police Service on 20 March 2020. He was apprehended and detained for a period of approximately two (2) months and six (6) days before the public prosecutor withdrew the charges against him.

[3] The parties had agreed to submit a special case for adjudication by the court in terms of Rule 33(1) of the Uniform Rules of Court. Having read the papers I issued a directive for the matter to proceed to trial which took place on 15 to 19 April 2024.

[4] It is trite that in an action for wrongful arrest and detention a plaintiff only bears the *onus* of proving the arrest and detention. In *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) Malan AJA summed it up as follows:

> *"To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty."*

The arrest and detention are not disputed. Therefore, the defendant bore the *onus* to prove the lawfulness of the arrest and detention.

[5] This is the case for the defendant. On 20 March 2020 the plaintiff was in the company of one Mr Mahomed when he was accosted by the SAPS members, Sgt Jacob Lele Madoda, the driver of a police vehicle and his commander, Capt. George Brooks. The two officers had been patrolling within the 10km radius from the South Africa/Namibia border known as the Nakop border when they spotted two unknown men trying to hide in the bushes near the bridge. Upon confrontation, Mahomed responded to

their communication while the plaintiff claimed not to be conversant in the English language. Mahomed translated the questions posed by Madoda and Brooks to the plaintiff.

[6] The said SAPS members demanded proof of passports and permits from the two men who were already within the borders of South Africa. According to Madoda, the two men said they were not in possession of valid travel documents. The police took them to Mr Bennie, the immigration officer at the border, who followed up with the immigration office in Upington. Thereafter, Mr Nicol Andreas, of the Department of Home Affairs in Upington, some 130km's from the border, invited them to bring the two suspects to Upington for a preliminary enquiry to determine whether or not they had the required documents.

[7] Sgt Madoda was accompanied by Sgt Letebele to Upington where the two suspects were arrested after confirmation by Andreas that they were illegally in the country. They were booked in police custody pending further investigations. Madoda denied that the plaintiff produced asylum documents and a passport on demand. He was elaborately cross-examined on the entry in the investigation diary dated 20 March 2020 where it is recorded: *"documents filed travel documents as per A2"*. Sgt Madoda explained that no emergency travel documents were presented to him and the passport he saw had expired in 2016. Sgt Madoda maintained that he arrested the plaintiff for failing to produce the valid travel documents.

[8] Capt George Brooks has been stationed at the Nakop Border for almost 12 years. He has held the rank of Captain for 20 years and has been a SAPS member for the past 31 years. He not only confirmed what was testified to by Sgt Madoda, but also stated that their search or patrol of the

surroundings at the border also includes the storm water drains to check for illegal movement of people. He added that since the only document produced, when they encountered the plaintiff and his companion, was a passport, they returned with the duo to the immigration office at the border. Brooks left immediately after handing the two men over to the immigration officer.

[9] Mr Nico Steven Andreas is employed by the Department of Home Affairs as a Control Immigration Officer in Upington. He conducted the verification of the plaintiff on the Movement Control System. This revealed that the plaintiff entered the border through Oshoek port of entry in Swaziland. His travel document, which had an endorsement for 90 days, had already recorded his movement on 21 August 2016. The plaintiff's Temporary Residence Permit (TRP) expired on 08 October 2016. This, notwithstanding, the passport was valid but the Temporary Residence Visa had expired. It followed that the plaintiff was an illegal immigrant. Andreas explained that the plaintiff's most recent passport was last updated on 25 August 2016. Having completed the verification process he then issued a warrant of detention which he handed over to the SAPS members. The plaintiff and his companion were arrested by Sgt Madoda and taken to Upington Police Station where their constitutional rights as per SAP 14A were explained before they were detained. The plaintiff was charged with a contravention of s 49(1)(a) read with s 1(1) of the Immigration Act 13 of 2002 in that he had remained in the Republic without any permit or documentation.

[10] Andreas, like Madoda and Brooks, denied being presented with the plaintiff's Emergency Travel Document issued by the United Republic of Tanzania. He maintained that had the plaintiff entered the border using the said Emergency Travel Document, the immigration officer,

processing his entry, would have put the official stamp on the document. Andreas further pointed out that the Emergency Travel Document permits the holder to a single trip. Pertaining to the fact that the State Prosecutor, Mr W Ntshekang, withdrew the charges against the plaintiff on the basis that the officials did not check the correct information, Andreas dismissed that remark as vague because it does not state which information was unchecked.

[11] Ms Melicia Julies, a former SAPS detective who had held the rank of Warrant Officer for 16 years, was the investigating officer in the plaintiff's criminal trial. The case docket was allocated to her on 23 March 2020. She ensured that the docket was taken to court at all the plaintiff's appearances. There had been no single instance where the prosecutor gave instructions in the investigation diary for her to obtain evidence that was not contained in the docket. Julies indicated the dates on which the case was before the Magistrate and reasons for postponements. On 23 March 2020 the matter was postponed to 24 March 2020 for a Swahili interpreter. On 24 March 2020 the accused who were in custody were not brought to court due to the Covid 19 pandemic and the case was postponed to 16 April 2020 for a trial date. On 16 April 2020 the case could not proceed because of the national lockdown. The case was postponed to 05 May 2020 to arrange a trial date. On 05 May 2020 the case was postponed to 15 May 2020 for a plea of guilty. On 15 May 2020 the case was again postponed to 22 May 2020 for a guilty plea. The record does not show what happened on 22 May 2020 but on 26 May 2020 the following entry was made by the Magistrate:

"The State request the charge be withdrawn due to [the fact that the] officials did not check the correct information. The charge is therefore withdrawn."

[12] Following the withdrawal of the case by the State Prosecutor, Ms Julies only received the docket back in June 2020 which she closed. According to Julies, the prosecutors did not give them any instructions for purposes of immigration investigations and that the National Prosecuting Authority (NPA) would either liaise with the Senior Public Prosecutor or directly with the Immigration Office. Counsel for the plaintiff, Mr Du Plessis, did not cross-examine Ms Juries and her evidence remains uncontroverted.

[13] The plaintiff testified in his case. He came to South Africa in the year 2000 and remained until 2020. However, he occasionally visited Tanzania. He had a fixed address in the Republic. He volunteered his services as an electrician and was employed as a driver by Gift of the Givers, a humanitarian organisation.

[14] At the beginning of March 2020, when he wanted to leave Tanzania to travel to South Africa, he was informed at the border that his passport was no longer accepted by the East African countries and he had to apply for a new passport. He made an application and was issued an Emergency Travel Document CA 02/552/02F06 dated 02 March 2020 valid for a single trip until 30 May 2020. He carried the Emergency Travel Document and the impugned passport whilst travelling to South Africa. He left Tanzania on 10 March 2020 by bus to Zambia and took another bus from Zambia to Namibia. After crossing the Namibian border into South Africa, he waited under a bridge next to the road for "a truck". Whilst waiting, he and his companion felt a call of nature and went into the bushes. It was then that the police apprehended them.

[15] A body search was conducted on him and his companion. He does not have a command of the English language and therefore relied on his companion to relate to him what the police were saying to them. He

produced the documents in his possession, namely his passport which was issued on 14 September 2012 and would only expire on 13 September 2022 and the Emergency Travel Document. He still does not understand why the police arrested him because he was not only carrying a valid passport but also a valid Emergency Travel Document. Only a copy of the Emergency Travel Document was discovered and formed part of the docket contents.

Discussion

[16] It is common cause that the plaintiff was not a holder of a permanent residence permit. He explained that he was not in possession of any permit as he had applied for one but it was not issued yet. Sec 9(4) of the Immigration Act stipulates:

> *"(4) A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if-*
>
> *(a) his or her passport is valid for a prescribed period;* ***and***
>
> *(b) issued with a valid visa, as set out in this Act."*

[17] Although the plaintiff's passport was still valid until 2022 it is significant to note that the endorsement contained in the visa was only valid until 2016 for the visitor's entry of 90 days per year, which the plaintiff did not dispute. This essentially means that without a valid visa the passport is rendered useless for entry into the Republic. Mr Andreas explained the plaintiff's travelling details as appearing in the Movement Control Report extracted from the system of the Department of Home Affairs which he gained access to by inserting the plaintiff's passport number to the system. He had the option of using either the plaintiff's date of birth or his full names or his passport number, but maintained that irrespective of the

option used, the system would still give the same results. Evidently, the Movement Control Report without an explanation by an immigration officer, would not have been straightforward and easy to interpret. However, with the explanation furnished by Andreas in his testimony, it became clearer and comprehensible. It is noteworthy that the report shows the plaintiff's last port of entry was in Oshoek, Swaziland, on 21 August 2016.

[18] More importantly is that the plaintiff's temporary residence permit or visa expired on 08 October 2016. This supports the contention by the defendant that he was illegally in the country despite his passport still being valid. The probabilities are that the plaintiff was alerted by his immigration office in Tanzania that the Temporary Residence Permit had expired but he chose to ignore the warning and rather allegedly applied for an Emergency Travel Permit which is valid for a single trip. Whatever the explanation that the plaintiff gave to the authorities that resulted in him being issued with the Emergency Travel Permit, it does not detract from the fact that he was not permitted to be a temporary resident in South Africa since the expiry of his temporary permit. More significantly is that the defendant's witnesses, Madoda, Brooks and Andreas deny having had sight of the Emergency Travel Document on the day of his arrest and only saw this during trial.

[19] Andreas issued a warrant for the detention of the plaintiff, on reasonable grounds after conducting the verification process and handed the warrant of detention to the SAPS member as contemplated in s 41(1) of the Immigration Act, which stipulates:

"(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent

> *resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34."*

Clearly, the plaintiff could not rebut the verification report that Andreas produced which confirmed that his Temporary Residence Permit had expired, and therefore justifying his decision to issue a warrant for his detention. Section 34 deals with the deportation and detention of illegal foreigners. According to Andreas, the next step following court proceedings that the immigration office was awaiting was the deportation of the plaintiff who was handed over to the SAPS to appear in court.

[20] The question to be answered is whether the s 40(1)(b) requirements were met when Madoda effected the arrest. The section provides:

> *"40 Arrest by peace officer without warrant*
>
> *(1) A peace officer may without warrant arrest any person-*
>
> ...
>
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;..."*

[21] The jurisdictional requirements are trite: (i) The arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds. Van Heerden JA enunciated the principle in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H that once the jurisdictional requirements in

s 40(1)(b) of the CPA are satisfied, the peace officer may, in the exercise of his discretion, arrest the suspect. Of importance is that the discretion so conferred must be properly exercised. At 819 A, Van Heerden JA explains the general rule that where the exercise of a discretion is questioned, the *onus* to establish the improper object of the arrestor will rest on the arrestee.

[22] Mr Du Plessis, counsel for the plaintiff, argued that the arresting officer was Sgt Letebele and not Sgt Madoda and that the defendant must stand and fall by his pleadings. However, as testified to by Sgt Madoda and corroborated by Capt Brooks, Sgt Madoda was the arresting officer. Sgt Letebele was the driver who accompanied Sgt Madoda to the immigration office in Upington for the verification process. Sgt Madoda and Capt Brooks were both credible witnesses and gave me no reason to doubt their testimony. The issue of the arrestor being a peace officer was not challenged by the plaintiff. In his written heads and in argument, Mr du Plessis contended that Captain Brooks deposed to an affidavit stating that he was the one who effected the plaintiff's arrest. But this contention is incorrect. Sgt Madoda testified and was corroborated by Capt Brooks that he effected the arrest. Captain Brooks' affidavit reads:

"The illegal foreigners could not satisfy me as a police official and they were arrested for a contravention of the Immigration Act." He does not say *"I arrested them."*

[23] Counsel further submitted that the charge appearing on the SAPS form SAPD 3M(L) under the head *"Verklaring Rakende Onderhoud Met Verdagte"* shows the offence as *"suspected illegal immigrant"* which does not exist. In the SAPS 503 form completed by Capt Brooks under crime committed is the following: *Contravention of Immigration Act 13 of 2002 (49).* In my view, the argument is technical and unnecessary

because the police do not craft the final charges to be levelled against the perpetrators. That responsibility resides with the National Prosecuting Authority. The plaintiff was, in my view, adequately aware of his transgressions and the reason for his apprehension and it cannot be gainsaid that he understood the police and immigration officer.

[24] It was further contended for the plaintiff that the offence which he was suspected of having been committed did not resort under schedule 1. However, it would appear that schedule 1 includes, apart from those specifically mentioned, offences for which a sentence imposed may be imprisonment exceeding six months without an option of a fine. Section 49(1)(a) of the Immigration Act sets the penalty to not exceed two years.

[25] What may have sent the public prosecutor on a tangent to have the criminal charges against the plaintiff withdrawn is his unexplained failure to subpoena the immigration officer to court to explain the contents of the Movement Control Report and the effect of an expired visa. The plaintiff was in the country illegally. It is common cause that the presiding Magistrate recorded on at least two instances in the discovered court record that the plaintiff intended to plead guilty to the charge. A person does not plead guilty to an offence he did not commit. When cross-examined in this regard his response was that he was unsure how long he was going to remain in detention and wanted the case to be over and done with. This explanation is feeble because the outcome of the case was not known to him. It cannot, in my view, be persuasively argued that the further detention of the plaintiff was unlawful.

[26] The plaintiff was not a credible and truthful witness and I observed him as a person who was adapting his version to suit his circumstances. For a person who has been in South Africa since at least the year 2000 and who

has worked or volunteered to work for the Gift of the Givers, it is improbable that he was not conversant with the basic English language. When the defendant's witnesses testified I seemed to gain the impression that the plaintiff did not understand a single word of English and was wholly dependent on his companion's translation when they were accosted at the bridge. He and his counsel even capitalised on the fact that upon his arrest the SAPS members, who completed the statement regarding interview with suspect (SAP 3M(L) form, did not utilise the services of an interpreter which they contend was unfair to the plaintiff as his constitutional rights may have been compromised due to the language barrier.

[27] Quite pertinently on that form (SAP 3M(L) compiled by Cst TA Basson, when the plaintiff was asked whether he wished to speak on his own or engage the services of a legal representative, the handwritten response is that the suspect will apply for legal aid. The plaintiff further said that he would furnish a statement in court. This, to me, does not substantiate any compromise on the rights of the plaintiff nor a breakdown in communication. Be that as it may, as his counsel was granted the indulgence during the trial to turn his back on the Court and approach the plaintiff in order to obtain further instructions, if any, I observed that his counsel spoke directly to him in English. Upon his return I asked counsel if my observation was correct and he confirmed it.

[28] Mr du Plessis further attacked the SAPS members' conduct in failing to explain the provisions of s 50 of the CPA to the plaintiff upon his arrest. Section 50 (1) of the CPA provides that:

"(a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as

soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.

(b) *A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.*

(c) *Subject to paragraph (d), if such an arrested person is not released by reason that —*

(i) *no charge is to be brought against him or her; or*

(ii) *bail is not granted to him or her in terms of section 59 [by a police official of above the rank of non-commissioned officer] or 59A [by a Director of Public Prosecutions or a prosecutor],*

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest."

[29] Failure to observe the provisions of section 50 is not contained in the plaintiff's pleadings and was argued as a new matter before me. Notwithstanding, the section makes provision for the procedure to be followed where bail has not been granted. It is unclear on the facts before me, whether or not bail was applied for and refused. However, sight should not be lost of the fact that when the police arrested the plaintiff on that day he was without the required documentation and therefore illegally in the country and that should be the end of the enquiry insofar as the police liability is concerned. For the police to release him without established facts would have defeated the purpose. EM Grosskopf JA in *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 51A – C held:

".....I consider, that when s 50(1) speaks of further detention for the purposes of trial being ordered by the court 'upon a charge of any offence', this does not contemplate that the matter would be ready for trial at the first appearance of the arrested person, or that a properly formulated charge must then be preferred against him. In this regard I agree with the conclusion reached in Ex parte Prokureur-generaal, Transvaal (supra). All that the section contemplates is that the purpose

of the detention throughout must be to secure the attendance of the accused at his trial upon the charge, which, it is expected, will be preferred against him. It goes without saying that it is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended."

[30] It is salutary to remind ourselves that the Preamble to Immigration Act provides that the Act aims at setting in place a new system of immigration control which ensures that-

> "*(b)* *security considerations are fully satisfied and the State retains control over the immigration of foreigners to the Republic; and*
>
> *(f)* *the entry and departure of all persons at ports of entry are efficiently facilitated, administered and managed..."*

[31] Counsel for the plaintiff urged this Court to draw a negative inference on the failure by the defendant to either call Cst Basson or to make him available to the plaintiff. Counsel for the defendant, Ms Panduva's, explanation regarding this submission was that there was prior communication between the erstwhile defendant's attorney and the plaintiff's attorney of record regarding the non-availability of Cst Basson as he had passed on. Therefore, there was no point entertaining the plaintiff's request in this regard.

[32] I have no difficulty in rejecting the version of the plaintiff for the following reasons.

32.1 He was aware that his temporary residence permit had expired in 2016 when he returned to the country in March 2020 and it would be unlawful for him to enter South Africa without the new permit.

32.2 South Africa does not fall under the East African countries where he was allegedly told his passport would not be accepted.

32.3 His ultimate destination was South Africa but he boarded buses from Tanzania to Zambia and Zambia to Namibia and surreptitiously decided to wait for "a truck" to pick him up. On cross-examination he changed and said he was intending to hitchhike a lift from any vehicle. He did not explain why he did not arrange for his transportation to reach South Africa since that was his final destination.

32.4 Moreover, if the plaintiff had produced both the passport and the Emergency Travel document at the border as he alleges, entering the Namibian/South African border legally, certainly, the immigration officer would have stamped the passport.

32.5 The version that some male immigration officer at the border just looked at the Temporary Residence Permit and allowed the plaintiff to pass is palpably implausible, farfetched, and clearly untenable.

[33] On the aforegoing analysis, I am satisfied that reasonable grounds existed for the arrest of the plaintiff. Undeniably, both the SAPS members as well as the immigration officer were not satisfied that the plaintiff was entitled to be in the country and the Immigration Act empowered them to keep him in custody. The plaintiff failed to counter the verification done on his status as testified to by Andreas. That, in my view, persuades me that Sgt Madoda exercised his discretion properly when arresting the plaintiff. The arrest of the plaintiff was for the purpose of bringing him before court.

[34] Mpati P in *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA) held:

> *"[14] ...The arresting officer is not required to conduct a hearing before effecting an arrest. Whether an arrested person should be released and, if so, subject to what conditions, arises for later decision by another person and that is the safeguard to the arrestee's constitutional rights. Once the jurisdictional requirements are satisfied the peace officer has a discretion as to whether or not to exercise his or her powers of arrest. Obviously, the discretion must be exercised properly."*

[35] The further detention in court was explained by the Magistrate in the record of proceedings. On the evidence presented, nothing suggests that the plaintiff's further detention was unlawful. For all the above reasons I conclude that Sgt Madoda exercised his discretion to arrest the plaintiff properly and not arbitrarily or without lawful cause. It follows that the defendant has made out a case for the plaintiff's case to be dismissed with costs.

[36] On the question of costs there is no reason why costs should not follow the result.

[37] In the result, the following order is made:

The claim against the defendant is dismissed with costs.

[redacted]

MAMOSEBO J
NORTHERN CAPE DIVISION

For the plaintiff:	Adv H Du Plessis
Instructed by:	Brandt & Lambrechts Attorneys c/o PGMO Attorneys Inc
For the defendant:	Ms N Panduva
Instructed by:	Office of the State Attorney, Kimberley