IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 1112/08

Delivered on: 18/07/13

NOT REPORTABLE

In the matter between:

SOLOMZI QAKU Plaintiff

and

MINISTER OF SAFETY & SECURITY Defendant

JUDGMENT

NHLANGULELA J:

[1] The plaintiff claims compensation for damages arising from an alleged unlawful search of his two residential properties and a motor vehicle, and his unlawful arrest and detention.

[2] At the outset of the trial proceedings both parties moved a joint application for the separation of the merits of the action and *quantum.* I duly granted the application, ordering that the trial proceeds for the determination of the merits only. I also made as an order of the Court the agreement of the parties that the defendant leads evidence first; it having been my understanding of the *dicta* that the defendant bears the onus of proving that (1) a warrantless search of the houses and search and seizure of a motor vehicle suspected to be stolen – *Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D and C.L.D.) at 571 D-E; and (2) a warrantless arrest and detention of a person suspected of committing a crime listed in Schedule 1 to the Criminal Procedure Act 51 of 1977 - *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H) were lawful.

[3] Two witnesses testified on behalf of the defendant, namely: Mr Sabelo Pika (the Warrant Officer) and Mr Zwelonakele Alfred Ngwenze (the Sergeant). They testified that during the night of 22 February 2008 a combined unit comprising members of public order policing from Mthatha, Port Elizabeth, East London and Queenstown had converged at Qumbu when their seniors advised them, together with ten other policemen, to go to house No. 563 Thabo Mbeki Township, Libode and search the premises of

the plaintiff, seize from them motor vehicles believed to have been stolen and firearms believed to have been possessed by the plaintiff without a licence and arrest him to answer to charges thereannent in due course. The two members aforementioned believed the information to be correct, *albeit* without any verification thereof, and duly repaired to Libode Police Station with a view of first obtaining a warrant as envisaged in ss 20, 21 and 22 of the Criminal Procedure Act 51 of 1977 (the Act.). Efforts to get a warrant were frustrated by the absence of the Station Commissioner and the magistrate. They told the Court that information at hand was that the exhibits might be moved to an unknown destination had the search, seizure and arrest been delayed by reason of absence of a warrant and the plaintiff receiving information that the police are on the way to his place of residence.

[4] Upon reaching the house of the plaintiff at midnight of 22 February 2008 the members of the defendant, including the witnesses as aforementioned entered the premises and the witnesses proceeded to the door and knocked. After having been let in by the plaintiff they introduced themselves and informed him about the purpose of their visit. Thereafter they searched the bedroom of the plaintiff in his presence, with permission

to do so having been obtained from him, but they could find neither stolen vehicles nor unlicensed firearms. Having been told by the plaintiff that he has another house nearby, house No. 556, Thabo Mbeki Township, Libode (the second house) they proceeded there and found a motor vehicle that had been reported stolen in Tsineng, Northern-Cape Province and reported under Ref. No. Tsineng 5/5/2007. The plaintiff was confronted about the vehicle and his response was that the vehicle belonged to him. However, proof of ownership was not shown to the witnesses. The witnesses decided to arrest and detain the plaintiff because they were satisfied that he could account for possessing such a vehicle.

[5] A search into the second house of the plaintiff led to a discovery of 8 rounds of ammunition for a firearm that was not present in the house. However, the witnesses decided not to charge the plaintiff for that ammunition. One Mr Mankahla, who was found sleeping in the house was charged together with Wandile Qaku, the brother of the plaintiff, and one Lubabalo Finiza.

[6] The version discernable from the evidence of the plaintiff, his wife and Lubabalo Finiza is that the searches in the two houses were unlawful to

the extent that they were not authorized by a warrant, the consent of the owner of the houses was not obtained and the search was characterized by violent intrusion upon the personal rights of the plaintiff who was pointed with firearms by the defendant's witnesses and many other policemen who could not be identified.

[7] The testimony of the plaintiff as given during the trial is briefly that the police broke the gate to gain access into the premises of the first house, they broke the doors of both houses to gain entry into the houses, the police pointed at his two children and helper with firearms, the police took him to the second house by means of conveyance in a police vehicle, the police tortured three men found sleeping in the second house, the only reason given for the search was that the vehicle seized had been stolen and later on recovered by the police before the search was conducted on 22 February 2008, the clothes in the wardrobes searched were left upside down, the mattress was separated from its base, the police refused to give plaintiff an opportunity of fetching from the first house documentary proof of ownership of the vehicle suspected to be stolen and that no explanation was given to the police that the 8 rounds of ammunition belonged to plaintiff's licensed

firearm, and that the keys to the vehicle seized were supplied by Wandile Qaku.

[8] Much of the details of evidence adduced by the plaintiff and his witnesses with regard to the manner in which the houses and the vehicles were searched, and put to the defendant's witnesses, were denied. The plaintiff's witnesses could also not confirm some of the details of the events relating to the manner in which the search was conducted. For an example there is no confirmation that the gate locks and doors of the houses were broken, the three men were suffocated with plastic bags placed over their heads and that there were documents/files of the plaintiff that were searched in the bedroom of the first house. What must have added to the difficulties in narrating the details of the searches is a long period of time lapse between the date of occurrence of the searches on 22 February 2008 and the date of trial in June 2013. Be that as it may, the following material facts seem to me to be common cause, namely that:

(a) there was information that the plaintiff was in unlawful possession of a vehicle(s) suspected to be stolen and unlicensed firearms.

(b) the search in the first and second houses were conducted without a warrant.

(c) the plaintiff's houses were searched and a vehicle suspected to be stolen and 8 rounds of ammunition were found in the second house.

(d) as a result, the plaintiff was arrested and detained.

[9] The singular question to be answered is whether the searches and the arrest and detention as aforementioned were lawful.

[10] Applying the test in resolving disputed facts as stated in the case of *Stellenbosch Farmers' Winery Group and Another v Martell et Cite and Others* 2003 (1) SA 11 (SCA) at para. [5] the contention advanced on behalf of the plaintiff that consent to conduct the search was not obtained from the plaintiff is correct. In the case of *Magobodi v Minister of Safety and Security And Another* 2009 (1) SACR 355 (Tk) at 360g it was held by Miller J that proper consent in terms of s 22(a) of the Act must be voluntary. It was not so in this case because the plaintiff would not be able to give informed consent where he is suddenly confronted by the police at midnight asking him where the firearms and stolen vehicles were kept. However, consent is not the only jurisdictional factor for consideration in determining lawfulness or otherwise of a warrantless search. Section 22(b) of the Act provides that a warrantless search is lawful if the searcher believed on reasonable grounds

that a warrant would be issued to him and that the delay in obtaining such a warrant would defeat the object of the search. The evidence of the defendant's witnesses that it was their intention to first obtain a warrant from the Station Commissioner or the magistrate but on failing to find them and fearing that the articles they were looking for would be removed unless they acted swiftly they had to proceed to the houses of the plaintiff. In the absence of gainsaying evidence to contradict such evidence, I am unable to find that the decision taken and the actions performed by the police were unreasonable. Further, it has not been contended on behalf of the plaintiff that the vehicle found in his possession was not an article liable to be searched and seized in terms of ss 20 and 22 of the Act. The vehicle would serve as an exhibit in a matter under investigation in Tsineng. In light of the telephonic and, later, documentary confirmation that the vehicle was suspected to have been stolen in Tsineng it would be improper for the police not to conduct the search simply because they did not have a warrant.

[11] I now turn to deal with the claim based on unlawful arrest and detention of the plaintiff for having been found in possession of a vehicle suspected to be stolen. The defendant's defence is that the police were entitled to arrest the plaintiff in terms of s 40(1)(b) of the Act, in terms of

which they had to prove that: (i) the arrestor is a peace officer; (ii) the arrestor entertained a suspicion; (iii) the suspicion was that the suspect (the arrestee) committed an offence referred to in Schedule 1 to the Act; and (iv) the suspicion must rest on reasonable grounds. See: *Duncan, supra,* at 818G-H; and *Minister of Safety And Security v Sekhoto* 2011 (1) SACR 315 (SCA) at 320, para. [6].

[12] It was submitted by *Mr Zono*, counsel for the plaintiff, that an offence of unlawful possession of a stolen motor vehicle is not listed in Schedule 1 to the Act as being one of those that the arrestee must be suspected to have committed; the police ought to have applied less invasive means of securing the attendance of the plaintiff in court to answer to a charge of unlawful possession of a vehicle than to keep him in prison; that the vehicle was proved by the plaintiff to have been owned by him legitimately; and that in so far as the police cordoned-off the areas in which the houses being searched were situated the police did not have a written authority of the Provincial Commissioner to do so as envisaged in s 13(8)(a) of the South African Police Service Act 68 of 1995. I will deal with each of these submissions in turn.

[13] Schedule 1 to the Act contains a list of a number of offences of which the offence of theft, whether under common law or statute law, is one. As I understand the facts of this case the vehicle for which the plaintiff was arrested and detained had been suspected to be a stolen vehicle under Ref No. 05/05/2007; Tsineng, Northern Cape. As a person found in possession of it he would be compelled to answer to a charge of theft, including the statutory crime of unlawful possession of goods suspected to be stolen, as envisaged in terms of s 36 of the General Law Amendment Act 62 of 1955. The fact that the plaintiff was charged with the offence of theft or unlawful possession of which he was ultimately not convicted is irrelevant. See: *R v Moloy* 1953 (3) SA 659 (T) at 662E. In any event, Schedule 1 provides that any offence the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine may be included in the list of offences the arrestee may have committed. The first submission must, therefore, be rejected.

[14] The second submission may be disposed of by referring to the *dictum* of Harms JA in the case of *Sekhoto, supra,* where he said at paragraph [22]:

> "I am unable to find anything in the provision [s 46(1)(b) of the Act] which leads to the conclusion that there is,

> somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides common law, one cannot change the meaning of the statute by developing the common law." (The underlining is mine for emphasis).

[15] Consequently, I find that the steps taken by the police upon discovering a suspected stolen vehicle in the possession of the plaintiff were adequate and, therefore, lawful. The defendant has no duty to show that other means of securing the attendance of the plaintiff in court than confining him in the custody of the police were appropriate.

[16] There is no evidence before the Court that the plaintiff submitted documentary proof of ownership to the police either at the time of arrest or later on. I did not see such proof in the bundle of documents discovered for the purposes of the trial. The submission with regard to the cordoning-off of plaintiff's two houses for the purposes of search does not, in my view, advance the case of the plaintiff beyond the concession made by the police witnesses that they had no written authority to cordon-off the houses. The defendant had no duty to prove that the cordoning-off of the houses was valid. These submissions fall to be rejected as well.

[16] In all the circumstances of the case I find that the defendant succeeded in justifying the searching of plaintiff's two houses without a warrant. I make a similar finding with regard to the arrest and detention of the plaintiff. The costs of suit must follow these findings.

[17] The following order is therefore made:

> **The plaintiff's actions based on unlawful search and unlawful arrest and detention are dismissed with costs.**

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Attorney for the plaintiff	:	Mr A.S. Zono c/o A.S. Zono & Associates MTHATHA
Counsel for the defendant	:	Adv K.D. Qitsi
Instructed by	:	The State Attorney c/o D N Nolangeni & Associates MTHATHA