



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

Case No: SS 24398/2013

Date: 23/11/2015

In the matter between

LOUIS NGWENYA

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT DELIVERED ON 23 NOVEMBER 2015

MAHALELO AJ:

1. The plaintiff instituted an action for damages against the defendant for unlawful arrest, unlawful detention and malicious prosecution after he was arrested without a warrant and detained by members of the South African Police Services (SAPS) on a charge of possession of illicit cigarettes.

2. It is alleged by the plaintiff that members of the SAPS were acting within the cause and scope of their employment as servants of the defendant in arresting and detaining him and as a consequence setting in motion his malicious prosecution.
3. The defendant denies that the arrest and detention were unlawful and states that the plaintiff was lawfully arrested and charged, that the charge was withdrawn by the state prosecutor on a technicality.
4. It is trite that the onus rests on the defendant to justify an arrest. As Rabie CJ explained in ***Minister of Law and order v Hurley 1986(3) SA 568 (A) at 589 E-F*** “*An arrest constitutes an interference with the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest to another person should bear the onus of proving that his action was justified in law,*” The plaintiff bears the onus in respect of the claim for malicious prosecution, by agreement they testified first.
5. The following facts are common cause between the parties:
 - 5.1. the plaintiff was arrested on 5 May 2012 after a room in which he was found was searched by the police and 31 cartons or more of illicit cigarettes were found.
 - 5.2. the packets of illicit cigarettes were found on a bed covered with a blanket , others were found hidden behind the couch on which the plaintiff was found seated.

5.3 . the plaintiff was detained at Honeydew Police Station under CAS number 242/05/2012 and was later transferred to Randburg Police station where he was charged with possession of illicit cigarettes, and

5.4 . He appeared in the Magistrate's court Randburg on 7 May 2012. The case was postponed several times , subsequently the State Prosecutor withdrew the charge on 26 May 2012.

6. Two witnesses testified in support of the plaintiff's case while the defendant led the evidence of the arresting officer. The evidence in this matter can be summarised as follows:

The plaintiff testified that he resides at [...] G. S., Extension [...] Diepsloot. The circumstances leading to his arrest at [...] S. L. S., Cosmo City on 5 May 2012 are the following: he had visited an acquaintance Ollie Ncube (Ncube). Ncube had briefly gone out of his residence just before the police arrived. While alone in Ncube's room a police officer entered, he asked him to stand up. The police officer searched the room and found packets of alleged illicit cigarettes on the bed covered with a blanket. Other packets were found behind the couch he previously sat on. The police officer informed him that he was under arrest for possession of alleged illicit cigarettes. He informed the police officer that he was not the owner of the room and that he had visited Ncube. The police made him to carry the alleged illicit cigarettes contained in two plastic bags out of the room. He was taken to the police car.

7. While in the police car Ncube arrived. He pointed him out and informed the police that he was the owner of the room. The police apprehended Ncube and

placed him in a different police car. The plaintiff was taken to Honeydew police station where he enquired about Ncube. He was informed that Ncube alleged that the illicit cigarettes belonged to him (plaintiff). He was transferred to Randburg police station. He was charged with the possession of illicit cigarettes and he appeared in the Randburg Magistrate's court on Monday the 7th May 2012. He was detained in the cells and given blankets of a poor quality, the toilet in the cell was not in a good working condition. He was also detained at Johannesburg prison where there were not enough beds to sleep on. The case was postponed several times until the charge was withdrawn against him by the state prosecutor on 26th June 2012.

8. Under cross examination he testified that he is a Zimbabwean citizen, that at the time of his arrest he did not possess a valid passport. He applied for asylum seekers permit in 2010 and was waiting to be issued with same. When he was arrested he was in possession of a receipt which showed that he had applied for a permit. He disputed that he was arrested at his residence at [...] G. S. Diepsloot . He testified that he furnished the address to the police officer who arrested him.

9. Nokonzima Mbusha testified that she is the owner of house number [...] S. L. S. Cosmo City at which Ncube rented a room. On the 5th May 2012 three police officers arrived at her house at approximately 19H00. A white police officer entered the room and came out with the plaintiff. The police officers she remained with in the kitchen informed her that the plaintiff had been arrested. She then called Ncube to come and solve the problem. When he arrived the police apprehended him as well and left with him. Ncube returned to the house

at around 22H00. When she questioned him about the whereabouts of the plaintiff, he responded that he did not see him. She disputed that the plaintiff was arrested at his residence at [...] G. S. Diepsloot.

10. Cornellius Christopher Kuilder, the arresting officer testified that, he is a Sergeant in the SAPS under the Vaal Rand Flying Squad Unit. On the 5th May 2012 they were busy with cluster operations gathering information relating to crimes committed and the tracing of and arresting of suspects. He was following up on information he had received regarding the sale and distribution of illicit cigarettes at number [...] G. S.. He was in the company of one crew member constable Ntsoe. The address [...] G. S. was pointed out to them by an informer.

11. Upon arrival at [...] G. S. they knocked and someone responded. The property is a two roomed RDP house. In the first room there was a TV and the second room was a bedroom. He entered the bedroom and found the plaintiff. He explained the purpose of him being there and asked permission to search the room. In the presence of the plaintiff he found cartons of cigarettes on the bed covered with a blanket. Others were found behind the couch. Upon inspecting them he discovered that they did not bear the SABS and RIP marks. He informed the plaintiff that the cigarettes were illegal and therefore he was placing him under arrest. He requested his ID document. The plaintiff did not have one. The plaintiff offered an explanation regarding same and the presence of illicit cigarettes. He found the explanation unreasonable. He explained to the plaintiff his Constitutional rights and thereafter arrested him and took him to Honeydew police station where he opened the case against him. He booked the illicit cigarettes in the SAP 13 Register. He made a statement and thereafter detained him.

12. Sergeant Kuilder testified further that the plaintiff was found and arrested at [...] G. S.. The plaintiff indicated to him that that was his place of residence. He found no one else at that address except the plaintiff. He never spoke to anyone else except the plaintiff. No person identified herself to him as the owner of the house.

13. During cross examination he conceded that he made a mistake in his statement that the plaintiff was arrested in Cosmo City instead of Diepsloot. He testified that there is no address known as [...] G. S. in Cosmo City. He explained that he is not quiet conversant with the area as his unit is based in the Vaal Rand and as a result he might have mistakenly written Cosmo City instead of Diepsloot in his statement. He was adamant that he arrested the plaintiff at [...] G. S.. He disputed that the plaintiff was arrested at [...] S. L. S. in Cosmo City.

14. The issues for determination are whether the arrest and detention of the plaintiff was unlawful, and whether he was maliciously prosecuted. Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act) provides:

“1. A peace officer may without a warrant arrest any person-

(a).....

(b) *Who he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.*

(e) *Who is found in possession of anything which the peace officer reasonably suspects to be stolen property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing.”*

15. In ***Duncan v Minister of Law and order***[1986] 2 ALL SA 241 (A) the jurisdictional facts for a section 40(1)(b) defence are the following:

15.1. The arrestor must be a peace officer,

15.2. The arrestor must entertain a suspicion,

15.3 The suspicion must be that the arrestee committed an offence referred to schedule 1 and

15.4. The suspicion must rest on reasonable ground.

16. In order to prove the fourth requirement, the test is not whether the peace officer believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion. Once the jurisdictional facts are present, the discretion whether or not to arrest arises. The officer is not obliged to arrest. See ***Minister of Safety and Security v Sekhoto and Another*** 2011 (1) SACR 315 (SCA)

17. ***Van Heerden JA in Duncan v Minister of Law and Order*** at 818 H to J ***supra*** said the following:

“If the jurisdictional requirements are satisfied, the peace officer may involve the power conferred by the section, i.e., he may arrest the suspect. In other words, he then has the discretion as to whether or not to exercise that power. No doubt the discretion must be properly exercised.”

18. In ***R v Van Heerden*** 1958 (3) SA 150 (T) the court held that the suspicion must be reasonable and the test for such reasonableness is objective. The approach to be adopted in considering whether the suspicion was reasonable is the one followed by Jones J In ***Mabona and Another v Minister of Law and Order and others*** 1988 (2) SA (SE) at 658 F-H

“It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant; i.e something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest: This is not to say that the information at his disposal must be of sufficient high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion.”

19. In the Sekhoto matter referred to supra, the court held that:

“Peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court. A number of choices may be open for him, all which may fall within the range of rationality. The standard is not perfect or even the optimum, judged from the vantage hindsight and so long as the discretion is exercised within this range the standard is not breached.”

20. Innes ACJ articulated the following principle in **Shadiack v Union Government (Minister of interior) 1912 AD 642 at 651-652**: *“Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgement bona fide expressed, the court will not interfere with the result. Not being a*

judicial functionary no appeal or review in the ordinary sense would he, and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law to make him change his mind or to substitute its conclusion for its own. There are circumstances in which inference would be possible and right. If for instance such an officer has acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provision of a statute, in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

21. Malicious prosecution consist in the wrongful and intentional assault on the dignity of a person, his or her good name and privacy. The elements required to show malicious prosecution are that the arrest or prosecution was instigated without a reasonable or probable cause and with malice or *animo injuriandi*. See **Heynes v Venter 2004(3) SA 200 (T) at 280 B.**

22. In **Thomson and Another v Minister of Police and Another 1971 (1) SA 371 (E)**, it was held that an arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. In **Minister of Justice and Constitutional Development v Moleko 2008(3) ALL SA 47(SCA)**, it was held that in order to succeed with a claim for malicious prosecution a claimant must allege and prove:

22.1 that the defendant set the law in motion (instigated or instituted the proceedings);

22.2 that the defendant acted without reasonable and probable cause;

22.3 that the defendant acted with “malice” (or amino injuriandi)

and

22.4 that the prosecution has failed.

It was further held that “*The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless have continued to act reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant or I would say, even gross negligence will not suffice.*”

23. The crux of the defendant’s case is that the arresting officer received information together with an address which was pointed out to him by an informer where it was alleged that someone was in possession of or distributing illicit cigarettes. The information was followed at the given address and illicit cigarettes were found. The plaintiff was the occupant of the room where such cigarettes were found. When he was asked about possession of the illicit cigarettes, according to Sergeant Kuilder, he offered an explanation which could not correct the wrong (referring to possession of illicit cigarettes). Sergeant Kuilder considered the explanation not to be reasonable and he arrested him.

24. On the other hand the plaintiff alleges that the cigarettes in question were not found at his residential address but in Ncube’s room. It is improbable that Sergeant Kuilder wrote the address [...] G. S. in his statement merely because it is the address where the plaintiff resided. Sergeant Kuilder testified that the address where the plaintiff was arrested is a two roomed house, that there was no other occupant except the plaintiff and no one else but the plaintiff was

arrested at the said address. The case docket and all other documents he completed at the police station (Honeydew) indicates the address where the plaintiff was arrested and illicit cigarettes found as [...] G. S..

25. It is worth mentioning that nowhere in the case docket or in the arrest statement is the address [...] S. L. Cosmo City mentioned. Sergeant Kuilder disputed that the plaintiff was arrested at [...] S. L. Cosmo City. It is common cause that there is no address known as [...] G. S. in Cosmo City. There is also nowhere where he stated that after arresting the plaintiff, Ncube arrived and was also arrested. There is no reason for Sergeant Kuilder to hide the fact that Ncube was also arrested on that day. There cannot be any reason that if Ncube was arrested he could just be released without being charged. Further to this there is no reason why the plaintiff who alleges to have been just a visitor, should be arrested, charged and be detained for what he did not have knowledge of.

26. It is not probable that if the events unfolded as the plaintiff and his witness wants the court to accept, that Sergeant Kuilder could dispute their version. He has nothing to gain. The plaintiff testified that there were many police cars and police officers at the time of his arrest. In contradiction to this version, his witness Nokonzima Mbusha testified that only three police officers entered the house. She did not mention that they came driving in many police cars to her house. On this aspect Sergeant Kuilder testified that they were using only one police vehicle and he was the driver thereof. It is improbable that if Ncube was arrested at the same time with the plaintiff, Sergeant Kuilder could not have been aware of such arrest. It is also strange that Ncube's name does not appear anywhere in the police docket.

27. It is clear from the evidence and the pleadings that the arrest and detention of the plaintiff is not in dispute. What is in dispute is the lawfulness or otherwise thereof. Counsel for the plaintiff submitted that the reasonableness of a suspicion that a suspect has committed an offence with regard to an article which is suspected of having been either stolen or dishonestly acquired depends on the acceptability of the explanation given by the suspect for his possession of such article. He further submitted that the explanation given by the plaintiff is the test used to determine whether there was a reasonable suspicion for purposes of justifying an arrest in terms of section 40(1)(e) of the Act.
28. Counsel for the plaintiff further more submitted that the fact that Sergeant Kuilder elected to exclude the explanation given to him by the plaintiff in his arrest statement leaves the court with no option but to accept the explanation given by the plaintiff, which explanation according to the plaintiff is reasonable.
29. Counsel's submission does not have merit. According to the evidence of Sergeant Kuilder he received information, went to the address pointed out by the informer, found the plaintiff in the bedroom, searched and found illicit cigarettes. He never came across the owner of the premises other than the plaintiff at that house. He does not know anything about the person by the name of Ncube. There was no other person except the plaintiff who was arrested in connection with the illicit cigarettes found at the said address.
30. Sergeant Kuilder testified further that he could not remember the content of the explanation given to him by the plaintiff but that the plaintiff could not reasonably explain the unlawful and wrongful possession of the illicit cigarettes.

The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of section 40(1)(e) is objectively justifiable. It is clear that the test is not whether a police officer believes that he or she has a reason to suspect, but whether on an objective approach, he or she in fact has reasonable grounds for his suspicion. See ***Duncan v Minister of law and Order supra.***

31. Taking into account the fact that the plaintiff was found alone in the bedroom in which the illicit cigarettes were found and was not able to explain the presence thereof, it is reasonable that the arresting officer entertained the suspicion that a crime was committed in his presence, consequently it was not necessary for him to obtain a warrant.
32. It is common cause that the plaintiff is a Zimbabwean citizen , at the time of his arrest he did not possess a valid passport. Sergeant Kuilder testified that he took into account the fact that the plaintiff was an illegal immigrant for purposes of considering bail. He concluded that the detention of the applicant was an appropriate way of ensuring his attendance in court on the 7th May 2012. A warning of the plaintiff or his release on bail at the police station under these circumstances would not serve the interest of justice.
33. The fact that the plaintiff was found in possession of illicit cigarettes and failed to explain his possession thereof can reasonably be regarded and interpreted by an objective reasonable police officer as committing a crime in his presence. There is no evidence that Sergeant Kuilder in effecting the arrest was mala fide or was motivated by ulterior motives or that he abused his powers. On the circumstances prevailing in this matter the arrest and detention of the plaintiff was justifiable and was effected on reasonable grounds in light of the reasonable suspicion formed by the arresting officer in terms of section 40(1)(e)

of the Act.

34. Against the backdrop of events and the factors that were common cause at the time of the plaintiff's arrest, detention and the subsequent withdrawal of the charge against him by the state prosecutor it cannot be cogently contended by the plaintiff that the charge instituted by the Sergeant Kuilder against him was unjustified, unlawful or predicated on malice. The plaintiff has not successfully argued that the prosecution instigated against him was without a reasonable and probable cause or with malice or amino inuriarum.

35. In the premises I make the following order:

35.1. The plaintiff's claim is dismissed with costs.

MAHALELO AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR PLAINTIFF: ADV T MUDENDA

COUNSEL FOR DEFENDANT: ADV P MARKS

DATE OF HEARING: 7 September 2015.

DATE JUDGMENT: 23 November 2015