


OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

23/2/2016

CASE NO: A603/2015

<u>DELETE WHICH IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
23/2/2016	
Date	Signature

In the matter between:

BRANDAN BEZUIDENHOUT

APPELLANT

And

MINISTER OF POLICE

RESPONDENT

JUDGMENT

VUKEYA AJ

- [1] The appellant sued the respondent for unlawful arrest and detention in an action arising from an incident which occurred on 25 August 2013. He alleges that he and his two friends were arrested without a warrant of arrest and at the insistence of members of the South African Police Services, he, together with the others, were detained at Boksburg North Police Station from 02h00 a.m. until 17h00.

- [2] The appellant was released on warning on the 25th August 2013 so that he could appear in Boksburg Magistrate's Court on the 26th of August 2013.
- [3] The Public Prosecutor did not enroll the matter and due to lack of evidence, he withdrew the charges against the appellant.
- [4] The appellant alleged that he suffered damages as a result of the unlawful arrest and detention and prayed for judgment against the respondent in the amount of R54 000, 00 with interests and costs.
- [5] The arrest and detention of the appellant was not denied by the respondent and therefore it was common cause. It was also common cause that the appellant was arrested for a suspicion that he and the other occupants in the vehicle he was travelling in were in possession of drugs.
- [6] The respondent denied that he was liable to pay the damages and stated that his actions were lawful as there was a reasonable suspicion, when the appellant was arrested, that he had committed an offence.
- [7] The respondent relied on section 40 (1) (a) and (h) of the Criminal Procedure Act 51 of 1977 to show that the arrest was lawful.
- [8] On the 5th of May 2015 and 01 June 2015 respectively, judgment was handed down in the matter at Boksburg Magistrate's court wherein the plaintiff's claim was dismissed, with costs.

- [9] The appeal is against the learned Magistrate's decision to dismiss the action.
- [10] The appellant contends that the Learned Magistrate misdirected herself when she found that the arrest and detention of the appellant was lawful and/or by dismissing the action.
- [11] The appellant further contends that the Learned Magistrate misdirected herself when she found that the respondent relied on the provisions of section 40 (1) (b) of Act 51 of 1977 and thereby finding that a reasonable suspicion existed that a Schedule 1 offence had been committed.
- [12] The appellant contends further that the respondent cannot rely on the provisions of section 40 (1) (a) and (h) when looking at the evidence before court.
- [13] Due to the fact that the arrest had been effected without a warrant, and the arrest and detention were not denied by the respondent, the burden of proof was on the respondent to show that the arrest and detention of the applicant was lawful.
- [14] The state relied on the evidence of two witnesses, Mashilo Rodney Makoetja and David Makhung to discharge the onus.

[15] In a nutshell, the evidence tendered is as follows:

The first witness noticed a white Golf vehicle while he was patrolling in the early hours of the morning on 25 August 2013. The motor vehicle in question drove through a red robot at a very high speed and he followed it in order to investigate the problem. He tried to stop it and it stopped but when he stopped his motor vehicle and alighted to speak to the driver, it drove off. He continued following it until he eventually lost it.

[16] He called for back-up and the motor vehicle was ultimately found having hit the pavement. Three people were inside the motor vehicle and the plaintiff was one of them.

[17] He ordered the occupants to alight from the vehicle and asked to search them and they agreed. He started searching them and then Constable Makhung arrived as back-up.

[18] Constable Makhung also assisted with the search and discovered three small plastic bags containing a white powder. The occupants of the car were asked about the white powder and they did not respond. Though they later said that they did not know anything about the powder, they were arrested and detained because the police suspected that the substance found in the plastic bag could be a drug.

[19] Const Makhung also confirmed having attended the scene and having found the three people in the company of Detective Constable Makoetja. He assisted the first witness when he was searching the car and saw a plastic containing a white powder which he also suspected to be a drug. He also stated that the

three people were arrested for being in possession of a substance which was suspected to be a drug and they were detained.

[20] The plaintiff alleged that when asked about the substance, he denied any knowledge of it and demanded that he be tested but the police refused.

[21] The plaintiff said that after watching a game of rugby, he and Shaun Holder decided to go out for drinks and ended up in Boksburg. They used Mr Holder's motor vehicle and went back home in the early hours of the morning and at that time they were with another person who was Shaun's friend.

[22] The Plaintiff was in the front seat Shaun was driving and the other person was in the back seat behind the driver's seat. While driving back home they passed a blue car which he thought was a police vehicle and drove downhill to a T-junction. An ambulance came there and disturbed the driver causing him to hit the pavement and the car came to a standstill.

[23] The police arrived and found him standing on the left hand side of the car and a lady who was with the police came to him and said he was under arrest for being drunk.

[24] Constable Makoetja did not search him then until Const Makhung arrived at the scene. When Makhung arrived, they were put at the back of the police van and Makhung later came and showed them a plastic bag with white powder in it asking "whose drugs is this?" to which they answered that they did not know. The plaintiff said he told them he does not even use drugs. He was not there

when the vehicle was searched and knew nothing about the drugs. They were then taken to the police station and detained. They were not told why they were arrested. They were detained in a cell with 20 others and at approximately 17h00 after instructing an attorney and paying him R4000. 00, he was released from police custody. On the 26th of August when he attended court, the prosecutor refused to prosecute.

[25] The appeal is against the fact that the Learned Magistrate found that the arrest was lawful. She based her decision on the fact that there was a reasonable suspicion that an offence was committed.

[26] An arrest or detention is *prima facie* unlawful and the onus is on the defendant to prove the lawfulness thereof.

[27] It is therefore important to look at the relevant provisions of the Criminal Procedure Act the defendant has relied on in their defence and the one the Learned Magistrate referred to in her judgment.

[28] Section 40 (1) (a), (b) and (h) provide as follows:

40. Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person -

(a) who commits or attempts to commit any offence in his presence;

(b) *whom he reasonably suspects of having committed an*

offence referred to in Schedule 1, other than the offence of escaping from lawful custody

(h) *who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;*

[29] The difference between the two sub-sections; (1) (b) and 1(h) is of importance to note for purposes of this judgment and in the context of the judgment handed down by the Learned Magistrate.

[30] Sub-section (1) (b) refers to a peace officer who reasonably suspects a person of having committed a Schedule 1 offence;
and Schedule 1 offences include, amongst others,

'Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine. (my emphasis)'

[31] The jurisdictional prerequisites of a section 40 (1) (b) defence are:

1. that the arrestor must be a peace officer;
2. the arrestor must entertain a suspicion;

3. the suspicion must be that the suspect committed an offence referred to in schedule 1;

4. and the suspicion must rest on reasonable grounds.

The test to be applied is an objective one.

See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A)

[32] Sub-section (1) (h) refers to a person who he (the peace officer) or a person who is suspected by another person to have committed a statutory offence, involving the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

[33] Even if the above provision in terms of schedule 1 were to be applied, it would be wrong, because the offence of possession of drugs has a sentence with an option of a fine. It does not therefore follow that the offence forms part of schedule 1, but it clearly falls under section 40 (1) (h) which deals specifically with certain statutory contraventions.

[34] It seems that the Learned Magistrate erred from the beginning of her judgment by stating that the defendant's defence was based on the provisions of section 40(1) (b) whereas the defendant had based their defence on section 40(1) (h), according to the pleadings.

[35] The jurisdictional prerequisites of a section 40 (1) (b) defence have been mentioned above but one that stands out for purposes of this judgment is that:

“the suspicion must be that the suspect committed an offence referred to in schedule 1”

[36] The offence that the plaintiff was arrested for does not fall under schedule 1 but it forms part of Schedule 2 Part 1 and the general right to arrest without a warrant under paragraph (b) is limited to offences in Schedule 1, it goes without saying therefore that the prerequisites as required for the defence were not met. And the Magistrate could not have found that a Schedule 1 offence had been committed when the evidence before her did not prove such.

[37] In the pleadings, during the course of the trial and at the appeal hearing, it was clear that the defendant relied on the provisions of section 40(1) (h) and it seems that after the parties were asked to prepare and submit further heads of argument the defendant changed their tone and argued that evidence was tendered on behalf of the defendant during the trial based on the defence in terms of section 40 (1) (b) and further that it would be prejudicial to the defendant if an amendment is not permitted as the defendant's main defence is in terms of subsection (1) (b).

[38] This move is indicative of the fact that the defendant is clutching straws, accepting such an amendment would frustrate the proceedings and expose the plaintiff to an unfair trial.

[39] The defendant's attempt to amend at this stage actually confirms that the he does not have a proper defence as they do not know exactly where they stand.

[40] The other concerning issue is that the Learned Magistrate found in her judgment that the defendant's witnesses contradicted themselves in material respects but still found that the evidence favoured the defendant.

[41] This is what the Learned Magistrate stated in her judgment:

“at this stage the court is not clear who found the white substance since the versions of both Constable Makoetja and Constable Makung are different and contradicted each other on material aspects as it would appear that the issue in contention is the commission of a schedule 1 offence which was allegedly committed by the Plaintiff” (my emphasis).

[42] She states that the material contradictions are in respect of the issue in contention which issue is whether any white powder was found in the appellant's possession and whether the police's action of arresting the appellant was justified.

[43] Discrepancies that are due to normal errors of perception or observation which do not shake the basic version of a party may be discarded, but not those upon which the whole case relies.

[44] In the instant case the Learned Magistrate's findings were that the contradictions were material, I am in agreement with this finding but I cannot find how such a finding justifies the judgment which was ultimately handed down herein. The major contradictions in this case cannot be ignored when examined in the correct perspective.

[45] On the evaluation of evidence and on making findings on proven facts this is what Nugent J (as he then was) said in the case of *S v Van der Meyden* 1999 (1) SACR 447 (W) and his view finds application in the instant case:

“what must be borne in mind , however, is that the conclusion which is reached must account for evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored”.

[46] I therefore find that the Magistrate misdirected herself by basing her judgment on the evidence of the two witnesses who were found to have contradicted each other in material respects.

[47] If the findings were that the contradictions are material, it means a serious doubt regarding the truth of such evidence and such evidence cannot therefore be relied on.

[48] In my opinion, after finding that the two witnesses of the defendant contradicted each other on material aspects, the Learned Magistrate should have rejected their evidence. There was no credible evidence upon which she would have found that a plastic bag or small plastic bags containing a white powder were found in the car, because the evidence of their discovery could not be relied upon.

[49] Section 40 (1) gives the arresting officer a discretion to arrest and the determining factors of the legality of the arrest are (a) did the arresting officer suspect that the person arrested was guilty of an offence; (b) were there

reasonable grounds for that suspicion; (c) did the officer exercise his discretion to make the arrest properly? See *Minister of Safety and Security v Sekoto and Another* 2011 (1) SACR 315 SCA (2011 (5) SA 367).

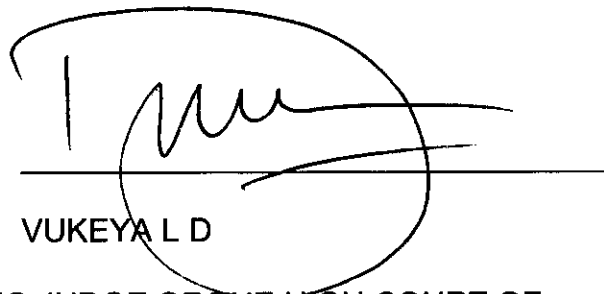
[50] When looking at the evidence as a whole, taking into consideration the evidence of the defendant and that of the plaintiff, what can be said is that the contradictions in the defendant's case to a certain extent confirm the version of the plaintiff that he did not know where the drugs came from. The determining factors of the legality of the arrest as stated in *Sekoto (supra)* have not been met.

[51] The onus rested on the defendant to show that the arrest was lawful, and the defendant had to show that all the jurisdictional prerequisites were fulfilled and failure to prove this would mean that the arrest was unlawful.

[52] I find that the suspected offending conduct of the appellant when he was arrested by members of the respondent was not covered by sub-section 1 (b) and I am of the view that the Learned Magistrate indeed erred by applying the provisions of Sub-section 1 (b) instead of sub-section 1(h) as the case may be, as this is detrimental to the appellant's case.

[53] **In the premises I propose that the following order is made:**

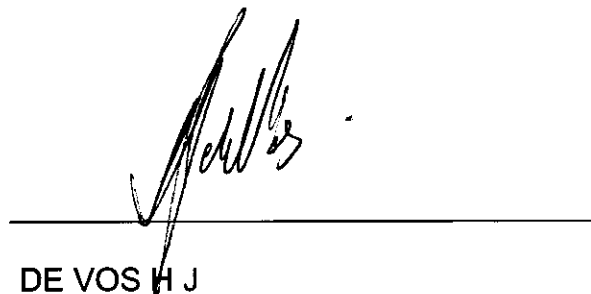
1. The appeal is upheld, with costs.



VUKEYA L D

ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

I agree and it is so ordered.



DE VOS H J

JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

HEARD ON:

DELIVERED ON:

COUNSEL FOR PLAINTIFF: ADV

ATTORNEYS FOR PLAINTIFF:

COUNSEL FOR DEFENDANT: ADV

ATTORNEYS FOR DEFENDANT: