

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 9778/13

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

25/04/2018  
DATE

.....  
SIGNATURE

25/4/18

In the matter between:

RIAN BOTES

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS

Second Defendant

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J U D G M E N T

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**SELLO, AJ:**

- [1] The plaintiff instituted action against the defendants for unlawful arrest and prosecution for which the plaintiff claims damages of R465 000.00. The plaintiff was incarcerated from 21 April 2012 and released on 23 April 2012. The matter proceeds on merits only.
- [2] The defendant had taken a special plea of non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State, 40 of 2002. The plaintiff had applied for condonation for the non-compliance. At trial this special plea was abandoned.
- [3] A brief chronology of events is as follows.
- [4] During or about 20 November 2008, the plaintiff was involved in a vehicle accident in the area of Mbazwana in the Mpumalanga Province. Passengers who were travelling with the plaintiff at the time sustained injuries as a result of the accident and one subsequently died.
- [5] A charge of culpable homicide was subsequently preferred against the plaintiff and an inquest into the death of the deceased was conducted. At the conclusion of the inquest during 2009, the prosecutor took the decision not to proceed with the prosecution of the plaintiff for culpable homicide. Following the inquest, the charge was withdrawn against the plaintiff.
- [6] It is common cause that at this juncture no other charges had been preferred against the plaintiff.

- [7] The plaintiff testified that on the day on question, he was driving a truck on a rainy day with passengers, some of whom rode in the back of the truck. These were his employees. When he tried to avoid another car he lost control and the truck veered off the road and some of the passengers at the back of the truck were thrown out of the vehicle. The other car that had caused the accident did not stop to assist. The plaintiff was not able to notice the registration number of the vehicle.
- [8] After the accident he alighted from the vehicle and proceeded to assist his passengers. He instructed one of the other passengers, a Mr De Bruyn, to flag down passing vehicle and ask for a ride to the hospital, which he did. After about 20 minutes an ambulance arrived and the some passengers were taken to Mjimi hospital. The plaintiff remained at the scene attempting to free the truck. As soon as he was successful he proceeded to the hospital where he learnt that one of the passengers had died and another had been admitted for a leg injury and had at that time been taken to theatre to be operated upon.
- [9] The plaintiff then left the hospital for Mbazwane police station to report the accident. It was close to midnight when he arrived at the police station. An officer took his statement and completed an accident report. The plaintiff thereafter left the police station.
- [10] His next communication with the police was when he enquired about the case number which was required by the funeral parlour in Kwanganashe, at which the deceased had been kept, which required the case number to issue a certificate for the release and transportation of the deceased.

[11] At this time the plaintiff was based predominantly in Mozambique where he was undertaking construction work.

[12] That was the last the plaintiff heard of the matter until it resurfaced in April 2012. The circumstances of the resurrection were as follows. On the morning of 21 April 2012 when he attempted to cross the border from South Africa into Mozambique he was confronted by one Inspector Zulu who informed him that he was in possession of a warrant for the arrest of the plaintiff for failure to report the accident. Inspector Zulu rejected the plaintiff's offer to furnish him with the case number issued when he reported the accident, which he kept with him at all times. Inspector Zulu advised him that his job was to arrest him and proceeded to do so.

[13] Inspector Zulu then detained the plaintiff and took him to the police station in Kosibay. In the afternoon of the same day, he was transferred to Mbazwane police station. The police officer to whom he was handed over at the police station expressed surprise that the plaintiff had been arrested on the basis that he failed to report the matter as the police officer was in possession of the file which he retrieved, which file contained the plaintiff's affidavit and his lawyer's statement. The plaintiff was nonetheless incarcerated and his clothes and shoes stripped off him.

[14] On 23 April 2012 the plaintiff was brought to court. His attorney presented to the court various documents indicating that the plaintiff had indeed reported the accident. The Magistrate enquired from the prosecutor the basis for the warrant of arrest. The prosecutor



stated that she issued the warrant on the basis of oral information provided to her by the Inspecting Officer. She admitted she was not provided with any documents.

[15] The charge against the plaintiff was immediately withdrawn and the plaintiff was released.

[16] No further witnesses were called by the plaintiff.

[17] The defence called three witnesses – Mrs Nozipho Khuzwayo, warrant Officer Mzikayini Mbuyazi and Lieutenant Colonel Derrick Zungu.

[18] Mrs Nozipho Khuzwayo, who is currently a magistrate at the Matateni magistrates court, was at the relevant time, a prosecutor at the Mbombo magistrates court. She had at the time 9-years experience as a prosecutor.

[19] Mrs Khuzwayo testified that during 2008/2009, whilst a prosecutor, she received a docket for decision relating to the accident in question. She considered the docket, and based on information provided, she decided to refer the matter to an inquest. She confirmed under cross-examination that at this juncture a charge of failure to report did not form part of the docket.

[20] She had no further involvement in the matter. She subsequently learnt that a decision had been taken not to proceed with the culpable homicide charge.

[21] Four years later, Lt. Col Zungu attended at her office with a copy of the same docket and a J50 statement he had completed. Lt. Col Zungu informed her that he had preferred another charge against the plaintiff for failure to report the accident and to render assistance and

was applying for the J50 to be authorised so the arrest of the plaintiff could be effected. On enquiry from Lt. Col Zungu as to why she was presented with copies of the docket and not originals, he informed her that he was still trying to obtain the original documents and would avail them as soon as they came to hand.

[22] She was satisfied with this explanation and was happy to endorse the copies, and she did so. The J50 submitted by Lt. Col Zungu was in respect of the failure to report the accident and failure to render assistance.

[23] When the plaintiff subsequently appeared in court she was the prosecutor in the matter. She considered the docket and realised that contrary to Lt. Col. Zungu's undertaking to provide original documents, the docket consisted only of copies. At this point she became concerned and took the decision to withdraw the charges of failure to report preferred against the applicant.

[24] Under cross-examination Mrs Khuzwayo confirmed that Lt. Col Zungu did not provide any reasons for the belated charge of failure to report. All she understood was what was set out in his statement which was that a family member had laid a complaint. She further confirmed that she did not discuss with Lt. Col Zungu the possibility of issuing a subpoena rather than a warrant of arrest. She justified this failure on the basis that it was claimed at the time that the plaintiff's address was unknown and in those circumstances the issue of a summons would not have been possible. She however did not require proof of this claim from Lt. Col Zungu.

[25] The annexure to the charge sheet lists the offence committed by the plaintiff as a failure to render assistance. The purpose of this document, as explained by the witness, is to inform the accused of charges that have been preferred against him. The charge however for which the plaintiff was arrested was failure to report the accident. When her attention was drawn to this discrepancy, Mrs Khuzwayo's explanation was that she did not complete the document but was assisted by another official in her office. Furthermore, she, as a prosecutor, is not bound by what the police inform her, she is at liberty to prefer any charge she deems fit. Having considered the docket and the statement of Lt. Col Zungu, she concluded that a charge of failure to render assistance was more sustainable than a charge of failure to report the accident.

[26] The defence next called Warrant Officer Mbuyazi. W/O Mbuyazi was the investigating officer in 2008 in respect of the culpable homicide charge. When he was allocated the matter the docket contained the statement by Constable Xulu and a witness who had been with the deceased, whose name he could not recall. Constable Xulu is the officer who interviewed the witness and opened the case. There was no statement by the driver in the docket. Neither were his address details available from the docket.

[27] The witness was adamant that the plaintiff had not reported the accident. He contended that had he done so, an accident report would have been in the docket. He was equally adamant that there can never be more than one dockets relating to the same accident.

[28] The case docket on record indicates two offences – one for culpable homicide and another for failure to report the accident. It is common cause that the second charge was later

added. The witness confirmed that the additional charge was recorded after the culpable homicide charge had been withdrawn. The defence submitted a copy of a second docket, bearing the same case number, into evidence. This copy did not reflect the charge of failure to report the accident. These facts were put to the witness, but he was not in a position to explain this anomaly.

[29] The witness stated that he had no means of tracing the driver, including a telephone number. This, according to the witness, is the reason the charge of failure to report the accident was not preferred against the plaintiff at the time and the charge of culpable homicide was subsequently withdrawn.

[30] At the time the charges were withdrawn he, as the investigating officer, did not have the plaintiff's identity number.

[31] W/O Mbuyazi stated under cross-examination that he had not received any request to trace an accident report number. He stated though that if such a number was provided could be cross-checked against police records, in particular a register where all accidents are recorded.

[32] Lt Col. Zungu testified next. He joined the police force in 1994 and in March 2009 became a lieutenant colonel.

[33] He testified that he first came to know of the plaintiff during March 2012 when three people arrived at the police station to complain about the death of a family member. At the time he was the station commander of the Mbazwana Police Station. According to the



lieutenant colonel these three people explained that the family was unable to process a claim against the Road Accident Fund for the death of the family member, and the court was unable to make a decision, due to the fact that the driver of the vehicle had neither given a written statement nor reported the accident to the police.

[34] As a station commander he obtained the docket which contained all statements save for the driver's. The SAP 5 indicated no evidence that the investigating officer had interviewed the driver. Based on his experience he immediately concluded that a crime had been committed because the driver was under duty in law to report the accident, which he did not do. He then added the charge of failure to report to the docket and wrote out his statement.

[35] Armed with the docket, as amended, and his statement he approached the prosecutor and informed her of what he had found in the docket and established in the accident register. Both of them were in agreement that the plaintiff had to be located and required to explain. He then applied for a warrant of arrest.

[36] Upon issue of the warrant arrest, he forwarded same to the Kosibay border post, as the plaintiff was travelling between Empangeni and Mozambique. Lt. Col Zungu maintained that following the plaintiff's arrest, the latter never claimed that he had in fact reported the accident and that neither did his records reflect such a report having been made.

[37] The warrant of arrest issued at the instance of Lt. Col Zungu bears the plaintiff's ID number. As to how Lt. Col Zungu obtained this number, which was not available to the investigating officer in 2009, he stated he must have received it from the family members

of the deceased and he thereafter wrote it down in the docket. As to why he did not utilise the same ID number to trace the plaintiff's whereabouts, Lt. Col Zungu testified that police officers have neither the power nor skill to trace someone. The only option they have is to forward the identity number to their head office, and even then the head office can only establish where the identity document was applied for.

[38] On the question of the number of dockets available in regard to the accident, Lt. Col Zungu testified that since the mother docket was closed, there was a small docket with the same case number and both were forwarded to the prosecutor. The small docket only dealt with the failure to report the accident.

[39] As regards the plaintiff's claim that he had reported the accident, Lt. Col Zungu was adamant that this did not happen. He based his conviction on the fact that such a report was not reflected in the docket nor the investigation diary. Whilst accepting that it was possible that the actual statement could be lost or mislaid, the fact that one was obtained would be reflected in the SAP 5, and this was not the case.

[40] During examination in chief he stated that all the family members of the deceased provided him with was the plaintiff's identity number. Under cross-examination however he stated that they also provided him with the original case number and that was how he was able to trace the closed file. These The family wanted him to open a case of murder because their family member had lost his life. He made an undertaking to pursue the matter and concluded to open a charge of failure to report.

[41] He recorded the information he obtained from the family members in his official diary and not in the investigation diary. His explanation for why this information is recorded in his personal official diary and not in the investigation diary was simply impossible to understand. As to how he verified that the identity number provided related to the plaintiff, the witness testified that he gleaned this from a computer in the station's filing room.

[42] He further explained that he verified the plaintiff's address through the Global Access System, which provides details of a person once their identity number is inputted into the system. These particulars include the address of such person if he normally comes to the police station, the CAS details which are obtained when one lodges a complaint or is charged as an accused. When it was pointed out to him that the documents do reflect the plaintiff's address and asked why he did not issue a subpoena and serve on such address, his explanation was that the system at the time did not contain this specific address. The address he obtained from the system was an address furnished when the plaintiff applied for a licence for a motor vehicle. He could not use this address for purposes of a subpoena because it was incomplete at the time, although he cannot recall in what respect it was incomplete.

[43] There were no statements or affidavits obtained from the family members who came to lodge the complaint. The reason for this, according to Lt Col Zungu, was that these were not necessary as the failure to report an accident is a police matter.

[44] The witness contended that there were two dockets – the original, which he referred to as the mother docket, and a sub-docket which he opened and that both were presented to the



prosecutor. When it was put to him that the prosecutor maintained that she was provided with only one docket, he explained that because they bore the same case number, she considered them as one docket.

[45] Lt Col Zungu testified that the information in his application for the issue of a warrant of arrest that the plaintiff travelled often between Empangeni and Mozambique was obtained from the docket. When he was invited to indicate where in the docket this information is reflected he could not.

[46] Lt Col Zungu explained the difference between an accident report number and an accident report form and stated that the number which is reflected on the form is obtained from the register. He confirmed that he was in a position to verify if a specific accident report number had ever been issued with reference to the register. He did not recall whether he had received a query from the office of the State Attorney to verify any accident report number pertaining to this case.

[47] Section 61(1)(a) of the National Road Traffic Act 93 of 1996 compels a driver of a vehicle, at the time when such vehicle is involved in or contributes to an accident in which any person is killed or injured, to immediately report the accident to the police. Lt Col Zungu contends that the plaintiff contravened the provisions of s61(1)(a). The plaintiff was adamant that he reported the accident as he is enjoined to.

[48] Section 61(1)(a) provides as follows:



*“(1) The driver of a vehicle at the time when such vehicle is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle, or animal shall-*

*(a) immediately stop the vehicle and report the accident on the prescribed form and in the prescribed manner, the officer concerned shall deal with the report in the prescribed manner and the chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner and within the prescribed period;”*

[49] It is apparent that the section imposes certain obligations on the driver, the police officer recording the incident and the chief executive officer of the Road Traffic Management Corporation established in terms of the Act:

49.1. The driver is enjoined to report the accident;

49.2. The officer concerned must deal with the report in the prescribed manner; and

49.3. The chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner and within the prescribed period.

[50] Both Lt Col Zungu and W/O Mbuyazi confirmed that the police station maintained a register of accidents as contemplated in s61(1)(a).

[51] Lt Col Zungu's reliance solely on the absence from the docket of an accident report form and a statement from the plaintiff is therefore difficult to fathom. His duty as station commander extends to ensuring compliance by all with the provisions of s61(1). Having

established that the docket did not contain the requisite accident form and the plaintiff's statement he ought to have consulted the register of accidents for reports relating to the 20 November 2008 and soon thereafter to verify and satisfy himself that the accident had indeed not been reported. It is curious why Lt Col Zungu instead relied solely on the absence of an accident report to conclude that there had, as a matter of fact, been a contravention of s61(1)(a).

[52] Whilst Lt Col Zungu was adamant that he had consulted the register before charging the plaintiff with contravention of s61(1)(a), he elected not to produce the register or excerpts therefrom before this court. His claim is thus bald and made in circumstances where he, as the custodian of all the necessary records, had access to objective and verifiable evidence to substantiate his claim and knew that such a claim would have to be supported by objective evidence to carry the day. His claim thus falls to be rejected.

[53] Furthermore, prior to the trial the plaintiff had issued a notice in terms of rule 35(3) for the production of, *inter alia*, the SAPS docket, the investigation diaries of the officials who worked on the matter as well as the accident report with an AR number 1604/20/11/2008.

[54] In response thereto, the first defendant did not address itself to the third request relating to the accident report bearing the specific accident report number provided by the plaintiff. Neither did it deny that such an accident report number exists in its records. Both Lt Col Zungu and W/O Mbuyazi confirmed that no requests were made to them by the first defendant's attorneys to produce documentation relating to an accident report bearing AR number 1604/20/11/2008.

[55] The first defendant had ample opportunity and means to negate the plaintiff's version but it elected not to. In fact it appears to have made no attempt to investigate the correctness of the plaintiff's claim that he had reported the accident. In the circumstances, the defendant has not established, as matter of verifiable fact, that an accident report as described by the plaintiff does not exist in its records.

[56] The version of Lt Col Zungu of how he came to seek the warrant of arrest is perplexing. According to him, certain family members of the deceased presented themselves to the police station to lodge a complaint that the plaintiff had not been prosecuted for the death of this family member. He recorded this complaint in the investigation diary. The identities of the family members are however not recorded, and not surprisingly Lt. Col ZUngu could not recal them. He explained that he recorded these details in his official diary, which diary, needless to say, was not made available to the plaintiff. The witness could not provide a coherent explanation of why he recorded some details of this interview in the investigation diary and others in his personal diary. He claims that copies of this diary were included in the second docket (which he refers to as the subdocket) which together with the main docket he submitted to the prosecutor.

[57] In evidence Mrs Khuzwayo stated that she issued a warrant of arrest for failure to render assistance. Section 61(1)(c) of the National Road Traffic Act renders such conduct an offence. Section 61 (a)(c) provides that -

*"The driver of a vehicle at the time when such vehicle is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle, or animal shall-*

*(c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering".*

[58] The J50 relied upon by Lt. Col Zungu to obtain the warrant of arrest sets out no facts to support a conclusion that an offence as contemplated by s. 61(1)(c) had been committed. The J50 attests to failure to report the accident which is an offence in terms of s.61.1(c). It is completely perplexing that Mrs Khuzwayo could be persuaded that such an offence had been committed in the absence of a factual matrix on which to found such a conclusion. Nothing in the J50 points to a commission of an offence in terms of s.61(1)(c).

[59] It was not open to Mrs Khuzwayo to issue a warrant where no facts were adduced to support a conclusion that an offence had been committed. The inescapable conclusion is that Mrs Khuzwayo was well aware that whether or the plaintiff had committed an offence is determinable with reference to the accident register and in the absence of such she could not conclude that an offence had been committed. It is only when she has satisfied herself that the register does not record the report of the accident that she would have a basis in law to issue the warrant.

[60] In a bid to overcome this difficulty she opted to prefer a charge in terms of s.61(1)(c), notwithstanding the fact that there were no objective facts to support this charge.



[61] Lt. Col Zulu, who received the warrant and served it at the border post, would have been aware of the charge preferred. He knew that there were not facts to support such a charge but caused for its service nonetheless. In the circumstances I have formed a view that the warrant was contrived, issued at the instigation of Lt. Col Zungu, and devoid of any validity. This conduct constitutes the most egregious form of abuse of power by a police officer.

[62] If Lt. Col Zungu had been acting in a bona fide manner he would have sought guidance from the Police Standing Order (G) 341. The Order recognizes that arrest constitutes one of the most drastic infringements of the rights of an individual and argues for restraint where feasible. To this end, members of the police are required to exercise their discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for s. 54 of the CPA.

[63] Lt Col Zungu contended that a summons would not have been appropriate in the circumstances because he did not have the plaintiff's physical address. This contention falls to be rejected. Section 54(1) contemplates the valid issue of a summons even in circumstance where the residential address is not known. The summons could have been served in the same manner by the commander of the very border post he directed the warrant of arrest to, duly authorized to serve the summons in terms of s. 329 of the CPA.

[64] In *Tsose V Minister Of Justice And Others* 1951(3) SA 10 (A) Schreiner JA said the following, at 17F-H "*an arrest, is of course, in general a harsher method of initiating prosecution than citation by way of summons but if the circumstances exist which make it*

*lawful under a statutory provision to arrest a person as a means of bringing him to court, such arrest is not unlawful even if it is made because the arrest will be more harassing than a summons”.*

[65] In *casu* Lt. Col Zungu did not have an objective and legitimate basis to cause for the plaintiff's arrest. On his own version, he sought a warrant for one offence and was content to receive one for another offence which he had neither investigated nor had the facts to support. It is thus not a question of which method of initiating prosecution was most appropriate in the circumstances. It is a question whether Lt. Col Zulu had the right to exercise his powers of arrest at all.

[66] In the circumstances, I find that the arrest, and subsequent detention, were unlawful and the first defendant is liable to pay the plaintiff such damages as may be proven.

[67] The claims in respect of the unlawful arrest and detention are upheld and judgment is given in favour of the plaintiff against the first defendant.

[68] I so order.



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**M SELLO**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

APPEARANCES

FOR THE PLAINTIFF: Adv VAN EEDEN

INSTRUCTED BY GILDENHUYS MALATJI INC

FOR THE RESPONDENT Adv MALOWA

INSTRUCTED BY THE STATE ATTORNEY, PRETORIA

DATE OF JUDGMENT

J