

**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No.: 81435/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 18/12/2023

SIGNATURE:

In the application between:

SAMUEL MARUTLA NTHINTE

1ST PLAINTIFF

MADILA BASHLEY

2ND PLAINTIFF

And

**THE MINISTER POLICE
GAUTENG PROVINCIAL**

1ST DEFENDANT

**GAUTENG PROVINCIAL
COMMISSIONER OF POLICE**

2ND DEFENDANT

JUDGMENT

NHARMURAVATE AJ:

INTRODUCTION

[1] The Plaintiffs are Madila Bashley (Madila) and Marutla Samuel Nthite (Nthite). They instituted an action for their unlawful arrest and detention and malicious prosecution against the Minister of Police and the Gauteng Provincial

Commissioner of Police (the Defendants). The Plaintiffs are claiming damages amounting to R750 000.00 individually which is comprised as unlawful arrest R250 000 and unlawful detention R500 000.00. The actions were issued by the Plaintiffs under different case numbers that is Madila under 81434/2019 and Nthite 81435/2019. However, an application to consolidate both matters was heard which was not opposed by the Defendants. Consolidation was thereafter granted accordingly.

- [2] The Defendants are defending the both actions reliance, being placed on section 40(1)(e) of the Criminal Procedure Act as a basis for the arrest and he contends that the arrest of the Plaintiffs was lawful under the circumstances.
- [3] The trial only proceeded by way of merits only. The Defendants bear the onus to prove the lawfulness of the arrest they started the trial by leading only one witness Sergeant Lesteku the arresting officer. In rebuttal the Plaintiffs led evidence of both Plaintiffs that is Nthite and Madila.
- [4] The issue to be determined is the lawfulness of the Plaintiffs arrest under the circumstances

EVIDENCE DURING THE TRIAL

SGT LESTEKU

- [5] The Defendants witness led evidence of the police officer Sergeant Letseku briefly as follows: that on the date in question they were doing a stop and search with his crew. There were about five of the Defendants members and he was the most senior. They were driving a police force marked combi. They came across a white bakkie carrying a huge load which looked suspicious as the back was covered with a dark sail. They decided to stop it. They introduced themselves and asked to search the bakkie. They discovered that the black sail was covering a substantial amount of liquor. They asked the driver for his license which he then volunteer thereafter they inquired about the receipt for the liquor.
- [6] The driver could not produce any receipt. They then inquired where he had bought the alcohol, he then informed the police that he had brought the alcohol from a lady named Mamazala a Diplomat and they were taking the alcohol to

their Tavern in Mamelodi. Sgt Letseku then asked to be taken to where they had bought this alcohol but the Plaintiff's refused. The Defendants were not happy with the explanation they then arrested the Plaintiffs. Later, Mamazala came to the police station to produce the receipts. The receipts did not correspond to the alcohol confiscated and he then gave Mamazala a chance to go and find the proper invoice as the invoice which she had submitted were not proper. That was the last time she saw Mamazala and He confirmed explaining to the Plaintiffs the reason for their arrest and explaining their rights. Further, he compiled the notice of rights with the Plaintiffs and that was the last time he saw them being sent to detention.

SAMUEL NTHITE MARUTLA

- [7] The evidence of Nthite was briefly as follows that: he was the driver of the white bakkie, and he was transporting liquor to the warehouse in Brooklyn. He was employed by the lady named Mamazala (Roselynn Mapundala) who was a diplomat to make such deliveries. Whilst transporting the liquor, he was stopped by the police who were in a combi marked clearly as a police vehicle, he first did not stop. They followed him flicked and they made a maneuver driving in front of him to force him off the road. The police then introduced themselves inquired about his license and asked to search the vehicle he allowed them to search the vehicle. They inquired about the receipt for the liquor, He informed them that he did not have the receipt, but he was taking the alcohol to the warehouse in Brooklyn.
- [8] He was asked to alight the bakkie and go inside the police combi whilst sitting he saw the police taking a few boxes about (5) and a few lose bottles of alcohol for themselves. They then released the two to go. Aggrieved by the actions of the policemen they decided to report to Mamazala. They went back to report to Mamazala who then called the Diplomatic police for assistance as she worked for the Diplomatic office of Malawi. Thereafter they decided to go and look for the policemen (Mamazala and the Plaintiff's). They all drove towards the direction where they had met them and indeed, they found them along the way, and they signaled for them to stop. The police stopped and the Plaintiff's showed Mamazala that these were the police who had stolen the liquor an argument ensued at that time the Diplomatic police had also arrived at the scene. This altercation led to the Plaintiffs arrest.

- [9] They were then arrested and made to sign certain documents without them being read or explained to them and they were subsequently released the next morning.

Bashley Madila

- [10] The evidence of the second Plaintiff Mr Bashley Madila to some level corroborates the first Plaintiffs' evidence that they were assisting Mamazala to deliver liquor to the Brooklyn warehouse. On their way they met up with the policeman in a combi who stopped them. The Police introduced themselves and wanted to search the vehicle. They inquired about the receipt for the liquor. They explained that the liquor does not belong to them it was Mamazala's and they were transporting it to the warehouse in Brooklyn.

- [11] The second Plaintiff testified that at all material times the Defendants members were communicating with the driver and not directly with him, but he could hear the conversation that was going on. Thereafter they were asked to go to the police combi, this is when they saw the police remove a few boxes (5) and a few lose bottles of alcohol. Thereafter the police told them they could go, instead of heading to the warehouse they went to report to Mamazala. She decided to report the incident, along their way they met up with the Defendants members, flagged them to stop which they did and started arguing with the Defendant's members as to the reasons why they had taken the alcohol. Mamazala was also noted to be screaming at the Defendant's members.

- [12] This led to their arrest upon their arrest they were informed that they were being arrested for being in possession of possibly stolen property, Mamazala then came at the police station to try and produce the receipts. He is not sure what happened because they were subsequently detained thereafter. The police read their rights but could not recall when he signed the documents bearing his signature that is the notice of rights and the statement regarding the interview.

- [13] Madila gave evidence in two days he started later on a Tuesday, and he finished Wednesday just before 11:30. I note that on a Tuesday his evidence was upon reporting to Mamazala she then decided they must report the matter

and they left following each other in different vehicles. The next morning Madilas evidence was that the police were speaking to both of them, and they were both answering the questions and they both inclusive of Mamazala decided to go and look for these police man who had stolen the alcohol. He was also a very reluctant witness on the last day of his evidence.

DEFENDANTS ARGUMENT

[14] The Defendant argued that the arrest of the plaintiffs at that stage was lawful under the circumstances as they had in their possession large quantities of alcohol which were unaccounted for as they did not have a receipt nor a license to carry same. The Defendant further argued that if the defendants are permitted to make an arrest without a warrant in terms of section 40(1)(e). The Defendant further argued that the Plaintiffs were contravening the Gauteng liquor act for various reasons as noted on the heads.

[15] The Defendant also argued that the version led by both Plaintiffs was new as it was not related anywhere be it on the pleadings or the letter of demand. The Defendant impressed the court to consider that no statement was made at the police station, but the Plaintiffs preferred to make such statement before the Magistrate in Court. The Defendant also criticized the failure of the Plaintiffs to call Mamazala to corroborate their evidence specially pertaining to the issue of Nthite being employed by Mamazala as this was not noted anywhere.

PLAINTIFFS ARGUMENT

[16] On the other hand, the Plaintiffs argued that the arrest of the Plaintiffs was unlawful as what the Plaintiffs did on the day was not a crime nor in contravention with any law or regulation. The arrest of Madila was also criticized as he was just a passenger. The Plaintiffs' Counsel argued that the arrest of the Plaintiffs was unreasonable and had no basis as they were not in possession of any stolen material. Reliance was also placed on the statement deposed to by Mamazala to corroborate the case that the Plaintiffs were arrested unnecessarily.

[17] The argument was also raised that the section 3 letter of demand did not need to contain material facts. It just needs to contain enough for the Defendants to

investigate the matter brought forward. The argument was also fortified that the particulars of claim contained enough. The particulars did not need to reflect evidence. These were inclusive of the grounds raised on the Plaintiffs particulars of claim respectively.

EVALUATION OF EVIDENCE

[18] There is a contradiction surrounding how and when the Plaintiffs were arrested. The Defendant's witness testified that it occurred immediately when they failed to both produce the receipt and take them to Mamazala where they claimed to have brought the liquor. Whereas the Plaintiffs version is that on their first encounter with the police they were not arrested but rather their arrest occurred on their second encounter upon arrival with Mamazala to question the police on the theft of the liquor. The two versions are mutually destructive, and logic dictates that where there are two conflicting versions or two mutually destructive versions both cannot be true only one can be true consequently the other must be false.¹

[19] In assessing the versions to test which is more probable in my opinion is to analyze the alleged theft of liquor by the Defendant's members as corroborated by the Plaintiffs. It is common cause that the alleged theft of liquor by the police was not reported by either Mamazala or the Plaintiffs. Sergeant Letseku was referred to the inventory form he testified that the inventory form reflects the liquor retrieved from the bakkie driven by Nthite and nothing was put to him in this regard under cross examination. Further, the inventory form was not rebutted by the Plaintiffs at any stage nor was it rebutted by the statement from Mamazala.

[20] The statement by Mamazala deposed as follows that: "*on the 8th of May 2019 I requested Samuel Nthite of 2[...] M[...] E[...] M[...] Streets to assist lift stock of about 21 cases of 12 each of alcohol to my office Malawi High Commission. He was using his bakkie. On the way Police stopped him and requested receipt which I have attached².*" (own emphasis)

¹ Stellenbosch Farmers Winery Group Ltd and another v Martell & Cie SA and others 2003 (1) SA 11 (SCA) para 5

² Paragraph 3

[21] The statement makes no mention of the liquor being stolen nor does it relate to the altercation between her, the Plaintiffs and the Defendants members which resulted in the arrest of the Plaintiffs. The inventory³ form listed 23 cases of (12 of each) alcohol. The inventory form is in contradiction to Mamazala's statement. The inventory form reveals that there were 23 cases of 12 of each (in fact in some instances its 2 x 12) as opposed to 21 cases of 12 of each. If indeed the Defendant's members committed any theft, there should have been lesser cases of liquor noted on the inventory form. In light thereof and in absence of any evidence rebutting the inventory form from the Plaintiffs it renders it improbable that the police officers stole any alcohol that day as testified by both Plaintiffs.

[22] In addition, Sgt Letseku's uncontested evidence was that when Mamazala came to submit the receipts requested, the receipts which she submitted to him did not correspond with the liquor confiscated. It was never put to him that his version was not true. In fact on a closer look of the invoices versus the inventory form there are some serious discrepancies for example: *Tanquery, Viceroy, ThreeShips, Firitinatch, Two keys, Threeships and the Smirnoff 1818* are not listed anywhere in the invoices which were submitted by Mamazala. Sgt Lesteku may have been a single witness whose evidence must be treated with caution, but such cannot displace common sense under these circumstances.⁴

[23] A further contradiction to the Plaintiffs version is that they testified that they were delivering the liquor to the Brooklyn "*warehouse*". They denied Sergeant Lesteku version that they informed him that they had brought the liquor from KwaMamazala and were taking it to their tavern in Mamelodi. Whereas the statement by Mamazala deposed that she had requested Nthite to assist her with taking the alcohol to her "*office*" the Malawian High Commission (which is in Arcadia) not a warehouse in Brooklyn. Mamazala's statement was written three days after the incident had occurred. Her memory was still fresh, why would she mention a different location from the Plaintiffs? This is another inconsistency which has persuaded me to not believe the version of the Plaintiffs. I raised criticism to the Plaintiffs for not calling Mamazala as a witness and Counsel for the Plaintiff informed me that she had gone back to Malawi (to which I answered virtual court could have been used) Counsel's answer was

³ Caselines 09-5 to 09-6

⁴ It is trite that evidence of a single must be approached with caution. *S v Artman and Another 1968 (3)SA 339 (SCA)*.

that the statement was enough she would have not said anything different even if she had been called.

[24] It is further not clear how the Plaintiffs were able to see the members of the Defendant stealing the alcohol. Their evidence was they were asked to alight the bakkie and go to the police combi where Nthite sat at the front seat and Bashley sat at the back. There was no satisfactory evidence on how both could see the alcohol being stolen at the back of the bakkie. There was no clarity provided around this issue as the version led was that the police combi was parked in front of them. It was not their evidence that they saw the police with the few boxes and lose bottles of liquor as they were coming inside the combi. Be that as it may this is not supported by the inventory form which was not disputed.

[25] In my opinion the version of the events as lead by Sgt Lesteku are more probable. Sgt Lesteku made an arrest and immediately deposed to a statement which supported his evidence during the trial. The arrest statement corroborated his evidence he was not tested on any improbability of his arrest statement versus the evidence led that day if any. Whereas the Plaintiffs version of the events is not noted anywhere prior to the trial to fortify their case. The pleadings⁵ filed are silent to the Plaintiff's version in my opinion the pleadings lacked material facts on how the arrest occurred⁶ this should have been pleaded with precision. Pleadings are made to assist the court and the other party to define the issues concerned in the matter. There is a duty to allege material facts which the parties rely on in the pleadings. Parties need to be informed with greater precision what the other party is coming to prove or disprove.

[26] Sgt Lesteku was a more credible witness in all aspects in my opinion⁷. Just to mention by way of an example when it was put to him under cross examination that the Plaintiffs and Mamazala went on a manhunt looking for them. He was adamant that such did not make sense that Mamazala and the Plaintiff decided to look for the police as opposed to reporting the matter. I also have a difficulty

⁵ Plaintiffs' particulars of claim

⁶ Minister of Safety and Security v Slabbert 2009 ZASCA163 at para 11 it is impermissible for the plaintiffs to plead a particular case and seek to establish a different case at the trial.

⁷ A Single Witness can be a competent witness.

with the version which was put to the Defendants witness why would they hunt for five policemen as opposed to laying a charge?

[27] The arrest of the Plaintiffs under the circumstances was reasonable and it was raised by several factors including the following facts that: the Plaintiffs were driving with a large quantity of liquor with the value of R44,000 and they had no receipt for the same. An inquiry was made as to where they had bought same, their answer was from Mamazala a diplomat. It is trite that in this country diplomats enjoy certain privileges, but they are not beyond or above the law. Sgt Lesteku testified under cross examination that his suspicion was raised when they mentioned that they had brought the alcohol from a Diplomat because Diplomats drive vehicles with specific registration neither were they escorted by the Diplomatic police⁸. I find his reasons for the arrest reasonable the Plaintiffs were not driving a diplomat's vehicle, nor was it marked as such on the body nor were they escorted by the Diplomatic police or employed by the Diplomatic office of Malawi. Let alone have any sought of documentation proving that they were taking the alcohol to the warehouse in Brooklyn.

[28] Loading liquor of substantive value without any document and knowing what is contained seems improbable in my opinion. Madila's evidence was that it was not the first time they had taken the liquor to the warehouse (the whereabouts thereof are not clear). He testified that he was not sure but at the gate the security would have a document at the gate which he would be ticking against to see if indeed all the liquor was there. This would involve checking the car versus what was reflected on the document. He is not sure where that document was coming from and had never paid attention to see if Nthite would be the one giving the security at the gate. However, he did confirm that he was not conveyed as a passenger to Nthite but the reason why he was in the bakkie was to assist Nthite with the boxes as he has always done as they were friends who often helped each other. He also confirmed being present at Mamazala house where he helped to lift the boxes. He also confirmed that the police questioned both and that they both answered the police officer's questions.

⁸ It is trite that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)** Rabie AJ explained : '*An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.*'

Therefore, in all instances they were both in possession of the liquor they were transporting.

[29] The evidence of the Plaintiffs holds less weight as discussed in the preceding paragraphs. Madila as a witness was very uncomfortable in court and half the time did not want to answer most of the questions posed to him fully. Madila further contradicted himself when explaining what occurred when they arrived at Mamazala's house to report the theft.

[30] In my opinion Sgt Lesteku exercised his discretion correctly in arresting the Plaintiffs. Any police officer of his statute would have reasonably assumed that the liquor which the Plaintiffs had in their bakkie was (suspicious) stolen because of the following: Firstly, the Plaintiffs did not stop when the police flagged them down. The bakkie is searched with no proof of where or how those quantities of alcohol were acquired. There is mention of a Diplomat, yet the Plaintiff were not driving a diplomatic vehicle nor were they in the company of the diplomatic police.

[31] Whether discretion is exercised properly the following was stated in ***Minister of Safety and Security v Sekhoto***⁹: “[39] *This would mean 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 exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.*”

[32] The requirements of section 40 of the Criminal Procedure Act of 1977 as amended were satisfied by the Respondents members. The act directs that:

40(1)(e) ***“A peace officer may without warrant arrest any person. Who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace***

⁹ 2011 (5) SA 367 (SCA).

officer reasonably suspects of having committed an offence with respect to such thing¹⁰."

- [33] In order to prove the lawfulness of the arrest the Defendants have to satisfy the following jurisdictional requirements that: (a) The arrestor must be a peace officer. (b) The suspect must be found in possession of property. (c) The arrestor must entertain a suspicion that the property has been stolen or illegally obtained. (d) The arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property. (e) The arrestor's suspicion must rest on reasonable grounds.
- [34] It was not disputed during the hearing that the arrest was indeed effected by peace officers¹¹. The second requirement is that the suspect must be found in possession of property¹². It is common cause that both plaintiffs were driving a bakkie which had the quantities of alcohol. It was well within their possession and control at the time. They had no appropriate explanation where they had obtained the liquor and they had mentioned a Diplomat. Reasonableness of the suspicion depends on the acceptability of the explanation given by the suspect for his possession of such property to the peace officers.
- [35] A reasonable suspicion can also be raised as a result of what the suspect says and does at the time when he is found in possession¹³ of the goods. In this matter it is the failure of the plaintiffs to stop when they're stopped by the police and failure to produce a receipt inclusive of the fact that they had mentioned a Diplomat without driving a diplomatic vehicle or being in the company of Diplomatic police. In law the suspect must have had personal and direct control over the goods if he had control of such nature that it could be said that he was caught in possession. The Plaintiffs did not plead that they were not in possession of the alcohol, and it is most certainly not the case led during the trial.
- [36] The Defendants members introduced themselves and asked to search the vehicle this is a proper conduct which one would expect from a peace officer who stops a person along the road. There was no evidence of any assault led by the Plaintiffs. Upon their arrest the police read their rights which were

¹⁰ Section 40(1)(e)

¹¹ *Duncan v Minister of Law and Order* 1984(3) SA 460(T) 466

¹² *Swalivha v Minister of Safety and Security*

¹³ *Brits v the minister of police and another*

confirmed by Madila. They acknowledged signing documents but denied knowing what they were signing. Their evidence was that they were made to sign documents without knowing what the documents contained. In my opinion this is improbable as the case of duress was not pleaded or anything closer to the evidence led. It is trite that once you sign documents you acknowledge contents thereof¹⁴.

[37] It is trite law that section 50¹⁵ permits the police to detain for at least a period of 48 hours. In line with the plaintiff's evidence that they were arrested and released the next day without going to court this was within 48 hours. Sgt Letseku testified that he could not grant any police bail in his capacity as he does not deal with such matters within his office as there are duties allocated for specific officers. Even the investigation of the matters are issues dealt with by the investigating officers, not him. When Mamazala came with wrong documentation he gave her a chance to come back with the right documents he testified that perhaps if the invoices were correct maybe the Plaintiffs would have not been detained. It is also clear that this was not a man hunt as there was a through investigation done regard being had to the size and contents of the docket. Therefore, it should follow that the subsequent detention of the Plaintiffs was also lawful.

[38] In my opinion the Defendants have discharged their onus, and they were able to prove that the arrest of the Plaintiffs was lawful under the circumstances.

[39] Claim B of the matter concerns malicious prosecution. The requirements for a successful claim for malicious prosecution have been discussed in various cases they are as follows: the Plaintiffs must allege and prove that: "(a) *that the defendants set the law in motion (instigated or instituted the proceedings)*; (b) *that the defendants acted without a reasonable and probable cause*; (c) *that the defendants acted with malice (or animus injuriandi)*; and (d) *that the prosecution has failed.*"¹⁶ It is trite that the subsequent withdrawal of charges

¹⁴ See *Da Silva v Janowsky* 1982 (3) SA 205 218F-219FA signature does not refer to merely to the written characters appearing on a document; it refers to the fact of signature in relation to the contents of the documents on which it appears

¹⁵ Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason shall soon as possible be brought to a police station or, in the case of an arrest by warrant to any other place which is expressly mentioned in the warrant... he or she shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest.

¹⁶ These requirements were set out in *Minister of Justice and Constitutional Development & others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8 and later restated in *Rudolph & others*

against the arrested person does not affect the lawfulness of the arrest¹⁷. There was no evidence led regarding claim B which is the claim for malicious prosecution of the matters which involves the National Prosecution Authority which has also not been cited as a party in both actions. Therefore, it should follow that there was no malicious prosecution that resulted from this incident.

[40] I therefore make the following order that:

[41] The Plaintiffs actions under both case numbers as consolidated is dismissed with costs in favour of the Defendant.

NHARMURAVATE AJ

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 20/11/2023

Judgment delivered: 12/12/2023

APPEARANCES:

Counsel for the 1st Plaintiff: Adv. Hlakudi Mpe
Attorneys for 1st Plaintiff: Ramaesele Mphahlele
Attorneys

Counsel for 2nd Plaintiff: Adv Makhene
Attorneys for 2nd Plaintiff: Ramaesele Mphahlele
Attorneys

Counsel for the Defendants Adv Ngoetjana

v Minister of Safety and Security & another [2009] ZASCA 39; (5) SA 94 (SCA) para 16. See also Moaki v Reckitt and Colman (Africa) Ltd & another 1968 (3) SA 98 (A).
¹⁷ Victor v Minister of Police case no 39197/2011 22 October 2014 at 49-50

Attorney for the Defendants

The State Attorney
Pretoria