

SOUTH AFRICA / JUDGMENT

Buso v Minister of Police (CA83/2019) [2020] ZAECGHC 87 (18 August 2020)

[2020] ZAECGHC 87

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B Hartle, R Griffiths, S Jikela

CASE / FILE NUMBER

CA83/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case no.

CA83/2019

NOT

REPORTABLE

In

the matter between:

LUNGA

BUSO

Appellant

and

MINISTER

OF POLICE

Respondent

APPEAL

JUDGMENT

HARTLE J

- [1] The appellant appeals, with the leave of the trial court, against an order dismissing his claim, in the main for unlawful arrest and detention, alternatively malicious arrest and detention.

- [2] It is common cause that he was arrested without a warrant by one Sergeant Mgobo during the course of carrying out crime prevention duties on 18 August 2015 near Berlin on a charge of robbery involving the hijacking of a British American Tobacco South Africa (“BATSA”) cargo carrying motor vehicle. The offence was said to have been committed in King William’s Town a short while before his arrest.
- [3] He was released on bail on 1 September 2015, fourteen days after the impugned arrest, and the charges ultimately withdrawn against him on 5 May 2016.
- [4] The basis for the alternative claim, according to the appellant’s particulars of claim is that the police, actuated by malice with the intention to injure him in his dignity, reputation and good name firstly set the law in motion against him without reasonable and probable cause (in this respect by arresting and detaining him without first investigating the offence levelled against him and without any reasonable belief in the truth of the information given to them) and, secondly, caused him “to appear before court on 1 September 2015 and opposed the granting of bail to (him)”, purportedly on the basis of “disinformation”

furnished by its members. As a result of this, so the allegation was framed, the prosecution and presiding magistrate “failed to exercise their discretion and refused bail and remanded the (appellant) to custody until he was released on 5 May 2016 by the regional prosecutor when the charges against (him) were withdrawn”.

- [5] In respect of the last alleged act it was conceded during the trial however that bail had in fact been granted to the appellant on 1 September 2015, thus attenuating the period of detention in contention and, in my view, removing the sting of any malice on the part of the police beyond this date and in the manner pleaded by him.[1] (The claim for malicious arrest and detention was made conditional on the trial court finding the arrest and detention from 1 September 2015 to 5 May 2016 lawful, but the common cause evidence is that the appellant was only detained until 1 September 2015.)
- [6] The respondent admitted the arrest and pleaded that the arresting officer was justified in arresting the appellant without a warrant pursuant to the provisions of section 40 (1)(b) of the Criminal Procedure Act, No. 51 of 1977 (“CPA”) since he was reasonably suspected of having been involved in the commission of the robbery, which is a Schedule 1 offence, and that the arrest and detention were in accordance with all legal prescripts.
- [7] The respondent pleaded further that the appellant, having been arrested on suspicion of an offence that resorts under Schedule 6 for bail purposes, the postponement of the case for seven days to enable the police to conduct further investigations and to afford him a reasonable opportunity to show the court that there were exceptional circumstances warranting his release on bail, was legally defensible.
- [8] In particulars furnished for trial, it was asserted for the first time on behalf of the appellant in relation to the claim for unlawful

arrest that the police had failed to exercise their discretion properly in arresting him, firstly, because there was no statement

implicating him in the robbery. Secondly, whereas the appellant had informed them that he was indeed in King William's Town (where the robbery was committed), but for a different purpose, namely to deliver certain goods he was hired to transport, they failed to follow up that information to ascertain whether it was true or false. He claimed that if the police had exercised their discretion by first investigating their case before arresting him, they would have discovered that he was innocent.[2]

- [9] In response to the respondent's question regarding the basis for the supposed malice pleaded in the appellant's particulars of claim, (concerning the alternative claim), it was asserted on his behalf that there were no reasonable grounds for his arrest but that the police arrested him "under the guise" that he had committed a Schedule 1 offence. It was further contented that the supposed suspicion entertained by the police was "so unreasonable as it was not based (on) any facts".
- [10] The facts relevant to the matter (and which were carefully appraised by the trial court) are indicated below.
- [11] On the morning in question Sergeant Mgobo was out and about in King William's Town performing crime prevention duties in a marked flying squad vehicle in the company of two colleagues. His attention was alerted to the presence of some people on the street. On approaching the group, an armed security guard amongst them informed them that they were in pursuit of two perpetrators who had reportedly just held up and robbed the driver of a BATSA motor vehicle carrying cigarettes. The robbers were said to have dropped some of the cigarette boxes as they ran away. He pointed out a house to Sergeant Mgobo where one of the perpetrators was said to be hiding. He also told Sergeant Mgobo that a second perpetrator had run off in the direction of the Ginsberg township.
- [12] Sergeant Mgobo saw for himself that there were packets of cigarettes discarded on the street. He, together with his colleague and the security guard, went into the yard of the house into which the alleged robber had run and found a person hiding.
- [13] The individual who came forth is one Luyanda Matholengwe. He informed Sergeant Mgobo that he and two others had robbed a truck carrying cigarettes. He volunteered that one of his accomplices had run away in the direction of the Ginsberg township and that the other had driven away from the scene in a Colt motor vehicle which would have been used to load the boxes of cigarettes. Matholengwe explained that the owner of this Colt had gone to fill petrol in at the nearby BP Garage but surmised that he must have decided to leave for East London when he saw that things were not going as planned. Matholengwe gave them a description of the driver of this vehicle, being a male of slender build with dreadlocks.

[14] He and his colleagues arrested Matholengwe as the first suspect in the matter and did not waste any time in going in search of the Colt motor vehicle, which he gleaned was travelling in the direction of East London on the N2. Near Berlin, Matholengwe pointed out the motor vehicle ahead of them which Sergeant Mgobo caused to be pulled over. He and his colleague, Malgas, got out and approached the driver (it is common cause that this is the appellant in this matter) who exactly fitted the description that had been given to them by Matholengwe of the driver of the fleeing motor vehicle. When they alighted at the scene of arrest, they identified themselves to him as police officers. Initially - evidently without informing him of any suspicion that he

was involved in the commission of an offence, they asked him where he had come from. He informed them that he had dropped a fridge in King William's Town and was presently returning to East London. They asked him where exactly he had dropped the fridge. He could not say but claimed to be unfamiliar with King William's Town. He could offer no details of the person who had supposedly requested that the fridge be delivered, neither was he able to provide a phone number for this person.

[15] Sergeant Mgobo was not satisfied with the answers being furnished to him. He at this point went to fetch Matholengwe from the flying squad vehicle and brought him over to the appellant. He asked him if he knew Matholengwe and, although the appellant had initially claimed that he had been travelling alone, he now conceded that he had given Matholengwe a lift in his vehicle. He could, however, neither clarify where Matholengwe had alighted nor where he had disembarked. Further, whereas the appellant had been bold in replying to him before he saw Matholengwe, he now appeared to be less confident and began to mumble.

[16] Once he was pertinently informed of Sergeant Mgobo's suspicion that he was involved in the armed robbery of a BATSA cigarette truck at King William's Town, the appellant denied any knowledge of the incident. This denial notwithstanding, Sergeant Mgobo arrested him and thereupon drove him in his own motor vehicle to the crime scene, being the place where he had been advised the BATSA vehicle had been hijacked. There the appellant was handed over to members of organized crime. His role in the matter ended there.

[17] Asked by Mr. Sandi, who appeared for the respondent at the trial, to justify his decision to arrest the appellant, Sergeant Mgobo confirmed that he had done so, firstly, on the basis of the information furnished by Matholengwe and, secondly, because in his view the appellant could not give him satisfactory answers to his questions regarding the supposed delivery of the fridge which made him to be "very suspicious that he (is) also involved". He clarified that if the appellant had indeed been more forthcoming with him regarding the details of this person, so that he could rule out his involvement in the robbery as it were,

he would certainly have acted or followed up on such information.

[18] He further testified that he had personally witnessed the presence of the selfsame Colt motor vehicle on video footage that was played at the magistrate's court (recorded by the camera of the BATSA vehicle at the time of the commission of the offence), albeit at a stage

after his arrest of the appellant. He saw for himself that the Colt motor vehicle was, in real time on the video, parked parallel to the hijacked motor vehicle; that two males embarked from it; and that it thereafter left the scene at “high speed”. He readily conceded that the driver of the Colt motor vehicle depicted in the video, although evidently bearing dreadlocks, was not clearly visible in the footage.[3]

- [19] He confirmed that his intelligence about the Colt motor vehicle had been ascertained purely from information provided by Matholengwe regarding its driver’s involvement in the offence and the specific route taken by it after the robbery.[4] He also readily conceded that the security guard who made the report of the crime to him had not mentioned the presence or involvement of a Colt motor vehicle before his pursuit and arrest of the appellant.[5]
- [20] He could not remember the exact time he arrested Matholengwe but claimed that it had taken him approximately ten minutes thereafter to reach the appellant’s motor vehicle and arrest him as well.
- [21] Captain Ndima, the leader of the special task team handling BATSA robbery investigations also testified regarding her interview with Matholengwe after his and the appellant’s arrest. According to information furnished to her by him during her initial and brief questioning of him, he explained that he had become involved in the robbery after an invitation from one Avumile Koyana (it is common cause that this was the third suspect arrested later), who invited him to King William’s Town to do some work. This work, so it later transpired, turned out to be the robbery of the BATSA courier vehicle. According to the further narrative furnished to her by him, he found Koyana sitting together with the appellant in the latter’s white Colt motor vehicle which was parked at a taxi rank. Matholengwe and Koyana boarded the appellant’s motor vehicle at the back of it and were driven by him to the street where the stationery BATSA motor vehicle was parked. By agreement the appellant was supposed to wait for them in order to later load the cigarette boxes into his Colt motor vehicle, but had gone to fill up with petrol at the BP Garage at the entrance to King William’s Town from East London in the meantime.
- [22] He and Koyana ascended the BATSA motor vehicle and dispossessed the driver of his car keys. Koyana drove the vehicle while Matholengwe remained in the back of it with its official driver. They moved from there to a road nearer to the BP garage where the appellant was waiting and started to take boxes out in order to place them under the bridge for collection later when the security guards arrived, and the police soon thereafter. At this point he and Koyana ran away, he himself to the yard of the

house where he was ultimately apprehended by Sergeant Mgobo. He confirmed having informed Sergeant Mgobo that three of them were involved in the robbery, one of whom was driving the Colt motor vehicle. The police pursued this vehicle based on a description given by him of the appellant, his vehicle and the route taken by him.

- [23] During her interview with the appellant himself she was similarly informed regarding the supposed delivery of a fridge by him in King William's Town, but according to her attempts to establish the name and telephone number of such a client came to naught. He claimed not to know the person neither could he say where he had ultimately delivered the fridge. As far as she was concerned, he offered no information that might have exculpated him in the circumstances. She was aware that he had indeed provided a name to her colleague who separately took a formal written statement from him later but denied that he had divulged such detail
- to her in response to her questioning.
- [24] At the appellant and Matholegwe's first appearance in court after their arrest, she approached the prosecutor to request a postponement of seven days, the purpose of which was to continue with her investigations. This entailed checking out the appellant's alibi and tracing Koyana who was still at large and ultimately arrested only about three months later. On the seventh day she confirmed to the prosecutor that bail should be set, and it was.
- [25] She was not inclined to agree to the appellant's release at his first court appearance because she was convinced, on the basis of what she had established through her own investigations, that he was involved in the commission of the robbery together with Matholengwe and Koyana. Indeed, she expressed surprise that the State could have withdrawn the charges against him later on the mere basis that "nothing was found in his possession" because, as far as she was concerned, he was "part and parcel of the robbery".
- [26] As for the discrepancies between Matholengwe's written statement made the following day and what she claimed in her testimony he had informed her on the day of his arrest, she reflected that arrestees often disclose one thing upon being questioned orally, but offer a different account when it comes to writing down their version in a formal statement. In such a statement, made the day after her oral interview with him, it appears that he did not focus pertinently on the role played by the appellant in the commission of the robbery.[6]
- [27] The appellant himself testified. Contrary to Sergeant Mgobo's testimony that he stunted on information given at the time of his arrest, he claimed to have gone into minute detail with him about his delivery of the fridge and also named the supposed client. He volunteered that he had been in the company of the third suspect, Koyana, who he described as a friend, clarifying that the latter had accompanied him to King William's Town that morning from East London.
- [28] After dropping the customer and the fridge and receiving remuneration for the delivery, he told Koyana that he was going back to East London via the N2, but still needed to buy food. He left Koyana together with Matholengwe at a taxi rank where the two of them were having discussions but met up with them again later next to Shoprite. He felt constrained to explain that he had told them that he was going to the BP Garage using the N2 route to East London when he dropped them off three streets behind the BP Garage.[7] He did not explain why or what Koyana and Matholengwe were going to be doing there. He then left for East London

and whilst driving along was pulled off the road by a police vehicle. He claims that two police officers accosted him, pointed a firearm at him and asked him about a knife, a firearm, and cigarettes, none of which he knew anything about. One of the officers arrested him and the other searched the back of his vehicle. He told them that he had delivered a fridge to someone in King William's Town, but they accused him of lying.

- [29] He was thereafter bound up with a piece of "wire" and taken to a police motor vehicle in which Matholengwe was seated. He was asked if he knew him and confirmed having just seen Matholengwe in town who had been introduced to him as Koyana's friend. Asked about the whereabouts of Koyana at that moment he supposedly invited them to ask Matholengwe. They were thereafter driven to a crime scene which he ambivalently claimed was a different place from the one at which he dropped Koyana and Matholengwe off. Later he was taken to the police station and interviewed.
- [30] He claims to have had no inkling of any plan to commit the robbery and no part in the commission of the offence, only finding out about it later from Matholengwe at the crime scene to which Sergeant Mgobo drove them after his arrest.
- [31] Surprisingly, despite the claim for unlawful arrest, he readily conceded under cross examination that all the circumstances conduced to a reasonable expectation on Sergeant Mgobo's part that he was involved with Matholengwe and Koyana in the commission of the robbery. However, he reasoned that the police had acted too hastily in arresting him and did not give him an opportunity to explain his innocence. Contrary to Sergeant Mgobo's testimony, he claims that he did tell him the name of the customer he had dealings with in delivering the fridge and even made his cellphone available to him in order to call the number from which this person had dialed him.
- [32] In assessing the evidence before it, the trial court firstly considered the requirements set forth in section 40 (1)(b) of the CPA against an objective conspectus of the relevant evidence and concluded, correctly in my view, that the respondent had discharged the onus of establishing the jurisdictional facts for the statutory defence in respect of the main claim.
- [33] The court made short shrift of the Matholengwe's supposed conscious effort by his formal statement made to the police a day after his arrest to exculpate the appellant. In this respect the court relied instead on the oral statement made to Sergeant Mgobo (and Captain Ndima thereafter for that matter) more or less contemporaneously with the robbery after his arrest, in which he had volunteered the information about the appellant and his role played in the matter. Further, so the court went on in its judgement, the details which Matholengwe conveyed to Sergeant Mgobo were "descriptive of the person and provided a lucid picture of the driver as well as a lucid description of the colour and make of the vehicle". Matholengwe also advised Sergeant Mgobo of the route the appellant had said he would take from the BP Garage. As was noted by the court, the

fact that the police caught up with the appellant near King William's Town in itself "reasonably leads one to the conclusion that the (appellant) had in fact left the robbery scene around the time of the occurrence of the incident". The court also commented on the short time lapse between the arrest of Matholengwe and the moment of the appellant's apprehension on the N2, describing it as "curiously minimal in the scheme of vehicles capable of reaching more than the twenty kilometer distance which the appellant had done when accosted near Berlin". This led it to fairly conclude that since they had come upon the appellant still in Berlin that the information furnished to Sergeant Mgobo that the appellant was involved and had fled the scene, accorded with his having been in the vicinity at the time of the robbery.

[34] Properly applying its mind to the onus and giving recognition to the trite legal principles of application whilst also factoring in the delicate interplay between the liberty of an individual and the power of an arresting officer to arrest without a warrant, the court found in favour of the respondent in respect of the question whether the suspicion held by Sergeant Mgobo at the time that the appellant was involved in the robbery was reasonably held. The court's reasoning appears from the extract below:

"I cannot fault Mgobo for having connected the Colt and the description of the (appellant) from the cogent and reliable information furnished by a suspect contemporaneous with his arrest. To expect Mgobo to have doubts concerning information that is logical in terms of time and situation is to expect conduct not contemplated in the law governing arrest in a Constitutional democracy. Moreover, it is patently clear that the (appellant) failed to answer truthfully when asked questions around the detail of the alleged fridge, its fate as well as for whom he was conveying the same to King William's Town.

Save to say it was picked up at the taxi rank, he could not even give a single number of even the person he delivered it to, nor the manner of transfer and pick-up from his vehicle to that of the other person he allegedly delivered it to. The entire conducting of a removal business without keeping simple basic and necessary records demonstrates that he was spinning the police a yarn, which he sadly repeated in this court."

[35] The court noted further that:

"the actions of Mgobo evinces objectively that he received information from an individual arrested on the scene of the crime about the whereabouts of an alleged co-perpetrator who drove a vehicle alleged to have been used in the commission of a crime. The nature of information was detailed and encompassed a description of the unique features (build, height, hair and dress) and vehicle used in the carrying out of the offence. He received the information, gave chase and met up with the vehicle described. This occurred in time and context within the occurrence of the robbery. All the descriptions fitted. The appellant failed to give even a plausible explanation and instead resorted to lies about even the alleged person he alleged engaged him to convey the fridge. In my view the arresting officer acted reasonably in apprehending plaintiff. This court cannot fault the manner in which the incident occurred and the arrest was made."

[36] Although not expressing so pertinently, the trial court preferred the evidence of the arresting and investigating officers at the expense of the appellant's, rejecting the latter's version of how he was supposedly not afforded an opportunity to exculpate himself, his professed co-operation before his arrest and other nuances thereof such as, for example, that a firearm was supposedly pointed at him and that he was bound up with a piece of wire. One only has to have regard to the court's

negative observations concerning the appellant's demeanor as a witness, which are in my view palpably justified on the record, to understand the premise upon which it examined and determined the reasonableness of the professed suspicion held by Sergeant Mgobo on the basis of the respondent's evidence adduced at the trial.

[37] Although the appellant challenged the court's findings of fact by asserting in his grounds of appeal that it had erred in rejecting his account that he was not involved in the robbery and that it had misdirected itself in finding that he failed to give a sound explanation concerning the alleged delivery of a fridge, the court's credibility findings against him were not seriously pursued during argument.

[38] The principles as set out in *R v Dhlumayo and another*[8] apply when the trial court's factual and credibility findings are challenged. These, in summary are that, because the judicial officer at trial has seen and heard the witnesses, an appeal court will consequently be slow to upset that court's findings made both on the facts and credibility. Where there is no misdirection of fact the presumption is that the conclusion is correct, and that it will only be reversed if the appeal court is convinced that it is wrong. Even if the appeal court is in doubt as to the conclusion's correctness, it will be upheld. Only in the face of a misdirection of fact, or other facts or probabilities overlooked, will the appeal court come to its own conclusion. To succeed it must be shown that there was some miscarriage of justice or violation of principle of law or procedure.

[39] I find no basis to upset the trial court's findings of facts and credibility in casu.

[40] Based on the acceptable evidence and facts proven on which the respondent relied to arrest him and in effect to justify his detention, there is no merit in my view to the appellant's contention that these fell short of objectively providing a solid ground on which a reasonable suspicion could be founded.

[41] The jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer, (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds. [9]

[42] The suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.[10]

- [43] Having admitted the arrest and detention of the appellant, the respondent bore the onus to justify the arrest in respect of the main claim.
- [44] The jurisdictional fact for an arrest without a warrant in terms of these provisions remains a mere suspicion. In *Duncan* the court found that the word “suspicion” implied an absence of certainty or adequate proof. In *Minister of Safety and Security v Magagula*[11] the Supreme Court of Appeal determined that the word “suspicion” means a “state of conjecture or surmise where proof is lacking; I suspect but I cannot prove.” Suspicion, said Lamont AJA in *Magagula*, “arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.”
- [45] In this instance the suspicion entertained by Sergeant Mgobo is that the appellant was one of three people involved along with Matholengwe in carrying out the robbery that had just taken place. Based on what Matholengwe had informed him, he clearly understood that there was a suspect involved who, using the agency of his motor vehicle, was supposed to have returned to the scene (after dropping Matholengwe and the third person off to commit the hijacking and robbery) in order to collect the stolen cigarette boxes which were going to be stashed away under the bridge in the meantime. He further understood that if this person had left the garage where he had gone to wait it was probably because, as Matholengwe had surmised to him, the planned heist had gone awry.
- [46] In *Mabona and another v Minister of Law and Order and others*,[12] the court observed how a reasonable suspicion is formed:

"Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me 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, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the 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 sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion." [13].

- [47] In Duncan the Court exhorts police exercising their powers of arrest without warrant who act “on the spur of the moment with scant time to reflect” to keep an open mind and take notice of every relevant circumstance pointing either to innocence or guilt.[14] In this instance Sergeant Mgobo was cautious both to ascertain that the person they pulled off the road was the same person as described by Matholengwe, and that the colt motor vehicle driven by the claimed perpetrator described by him accorded with that description as well.
- [48] Criticism was leveled against the trial court’s finding that Matholengwe did not when they came upon the appellant’s motor vehicle along the road then and there identify him as having been an accomplice to the robbery. But even if Matholengwe did not confirm to Sergeant Mgobo that the appellant was the same person he had mentioned as the person involved (who it must reasonably have occurred to Sergeant Mgobo could indeed have fled from the BP garage after things went awry as had been conveyed to him by Matholengwe was the plan), it must have followed from the clear description given by him to Sergeant Mgobo of the driver, his vehicle and the specific route taken by it as well as the confirmation when they caught up with him near Berlin and that “there is the motor vehicle,” that the appellant was it. Indeed, it must also have provided assurance to Sergeant Mgobo that Matholengwe could not be mistaken from an identification point of view that the appellant was the selfsame person he had in mind in the description given by him, when the latter conceded, after initially claiming to have been driving alone in his motor vehicle, to have earlier given Matholengwe a lift.
- [49] Apart from satisfying himself that he had the correct person, Sergeant Mgobo evidently tested whether the intelligence he had from Matholengwe concerning the appellant’s claimed involvement might be wrong by asking the appellant to account for where he had been just prior thereto. The reply he got was not helpful and indeed, certainly not as the appellant remembers it, exculpatory or offering a plausible alibi that could be checked out.
- [50] With hindsight it would have been better if the questions as to his whereabouts and who he transacted with etc. were asked of him after springing the surprise on him of the presence of Matholengwe in the police vehicle (and indeed after having informed him of the officer’s suspicion that he was involved in the commission of the robbery) but Sergeant Mgobo cannot be blamed for being strategic in this respect. The questions were innocent, but the cascading reply must have legitimately raised alarm because it lacked credibility. No doubt based on his experience and training as a police officer to test the reliability of information and complaints (and employing basic common sense in my view), he ineluctably concluded that the unaccommodating replies to his easy questions were not helping to erase the suspicion formed by him based on what Matholengwe had told him concerning the appellant’s involvement in the recent robbery that he had not innocently been elsewhere at the time. Further, the appellant’s after the fact correction that he had not been driving alone but had actually given Matholengwe a lift would reasonably have confirmed for him both that

- (a) Matholengwe's information that they had been in each other's company a short while before was probably correct and
- (b) that the appellant was spinning him a yarn and not being truthful. Sergeant Mgobo was also apparently alert to the bigger picture looking to find confirmation in all the surrounding circumstances (and nuances evidently), as was recognized by the trial court in its assessment of the evidence.

[51] The reasonableness of Sergeant Mgobo's suspicion was also challenged on the basis that upon returning to the scene of the robbery with the appellant, neither the driver who had been robbed nor the security officer who had chased the robbers had implicated him. This assumption or after the fact reasoning however ignores the fact that Sergeant Mgobo was informed by Matholengwe that the appellant was involved based on very specific information which, far from being of dubious veracity, instead turned out to be

"accurate" (in Sergeant Mgobo's words) and, as the trial court found, checked out in every respect. For a suspicion to be reasonable, corroboration is not a requirement. If the suggestion is however that he should have been alive to a perceived

improbability that, if the appellant was involved persons other than Matholengwe would have seen or placed him on the scene, this is putting the test beyond the realm of a reasonable suspicion.

[52] In conclusion I am satisfied that Sergeant Mgobo did analyze and assess the quality of the information at his disposal critically and with an open mind and that the trial court's finding, that a reasonable man in his position and possessed of the same information would have considered that there were good and sufficient reasons to suspect that the appellant was involved in the

robbery, cannot be faulted.

[53] The further premise of the appellant's appeal that in the written statement made by Matholengwe to the police the following day he did not implicate the appellant in the robbery, but only Koyana, and that this should upon an objective overview have weighed in the trial

court's assessment of the justification for the continued detention in effect, is without any merit and an overstatement in my view. Firstly, despite what was written in Matholengwe's statement, he had in fact unequivocally conveyed to two police officers before making it that the appellant was involved in the commission of the robbery on the basis described by him. Secondly, I cannot agree that the statement, even read on its own, is obviously exculpatory of the appellant or that its contents ought to have moved a reasonable police officer to believe that the appellant was not involved in the commission of the robbery.[15]

[54] Matholengwe's testimony was not adduced to confirm any disavowal of the appellant's involvement as per his oral statement made to Sergeant Mgobo and repeated shortly thereafter to Captain Ndimba. In my view the appellant purported opportunistically and after the fact to rely on the written statement as objectively constituting a negation of his erstwhile oral statements, whereas even semantically such an interpretation of the statement does not suggest itself to one. Even if it did, I am inclined to endorse Captain Ndimba's observation that it is not uncommon for arrestees to maintain one thing at the time of arrest and to say another when making a formal statement later on. But this is certainly not one of those cases where it can be said that the written statement irrefutably sought to clear the appellant of any involvement in the robbery despite what the maker had stated

previously, thereby raising a red flag that certain introspection by the investigating team was now called for.

[55] Although the appellant did not in his particulars of claim plead a basis to challenge the exercise of Sergeant Mgobo's discretion to arrest him, the trial court clearly also reviewed Sergeant Mgobo's decision to arrest the appellant and detain him against the background of their constitutionality. In my opinion, on the acceptable and proven facts (and bearing in mind the onus being on the appellant who obliquely challenged the exercise of discretion where the jurisdictional facts were found to be present to prove it),^[16] the bases upon which it was suggested by him in his reply to the respondent's request for trial particulars that it was an improper exercise of discretion are devoid of any merit. In summary, Sergeant Mgobo did give him an opportunity to account for where he had been before his arrest, but no plausible alibi was provided to either him, or to Captain Ndimba before she detained him. Further, quite contrary to the suggestion that there was no statement implicating the appellant, there was indeed an oral statement made by Matholengwe to this effect, not only to Sergeant

Mgobo at the time of the appellant's arrest, but also shortly thereafter to Captain Ndimba.

[56] It was also argued upon appeal that no evidence was placed before the trial court to even suggest that Sergeant Mgobo did anything remotely resembling the exercise of a discretion whether to arrest or not, "which (the respondent) was supposed to satisfy the Court that he had exercised" and we were invited on the basis of a rationality exercise to make an objective determination on the facts as to whether the discretion was properly exercised as is required by law. While there is no doubt that the Rule of Law requires of organs of state including the police to act in terms of the law,^[17] there is nothing from the evidence which suggests that Sergeant Mgobo was not properly acting within the law by arresting the appellant

under the circumstances without a warrant or Captain Ndimba by detaining him subsequently pending their further investigations into

the matter. The trial court properly assessed the lawfulness of the arrest and appreciated that Sergeant Mgobo was not obliged to arrest the appellant, but by implication found that it was necessary and proportional to the offence and unique factual circumstances at play that he did apprehend him and hand him over to the special investigation team led by Captain Ndimba for the law to take its course. It can hardly be suggested that because the officers did not muse aloud about how they were thinking or reflecting on which of the options, arrest or summons, was more suitable that they were not applying their minds or lacking an awareness of the consequences of the decisions taken by them. I am sure that had Sergeant Mgobo been asked pertinently, he would have confirmed that the object of the appellant's arrest was to bring him before court. No other reason appears from the

acceptable evidence and proven facts.

- [57] The appellant relied on a reply given by Captain Ndimba to the question posed to her, as opposed to Sergeant Mgobo himself, as to whether he would have investigated the robbery. She responded that he was a member of the flying squad and so would not have concerned himself with the investigation of the matter. To my mind she was referring to his job description and not confirming in favour of the appellant's case that he would therefore not have brought any investigative acumen to bear in making his decision to arrest the appellant. To the contrary he carefully explained the basis for the action which he took. The suggestion therefore "that his attitude was brazenly that there was no need for him to investigate before making an arrest" and that the apparent reason for the arrest was because the appellant had not "satisfactorily answered (his) questions by giving him all the details he thought were relevant," are so absurd as to be rejected out of hand.
- [58] As for the alternative claim, again on the basis of the acceptable and proven facts (not to mention the appellant's concession at trial that he was in fact released on bail on 1 September 2015), the appellant, on whom the onus rested in this respect, failed to establish the elements for such a claim.
- [59] In the result the appeal must fail.
- [60] Mr. Sandi urged the court to grant a punitive costs order against the appellant. However, in view of the fact that the trial court thought it prudent to grant the appellant leave to appeal, even though in its view the appellant had elected to proceed to trial "in the face of a claim based on such a sparse and un-creditworthy foundation", had made patent misrepresentations and told a "demonstrable untruth", such a costs order is in my view not justified in all the circumstances.
- [61] In the result I issue the following order:
1. The appeal is dismissed, with costs on the party and party scale.

B HARTLE

JUDGE OF THE HIGH COURT

I agree,

R GRIFFITHS

S JIKELA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 March 2020

DATE OF JUDGMENT:

18 August 2020*

*Judgement delivered electronically to the parties by email. The deemed date and time of delivery will be on 18 August 2020 at 12h00.

APPEARANCES:

For the appellant: Messrs T M Ntsaluba SC and N Nabela instructed by Mandla Falinthenjwa Inc., King William's Town. (Ref. Mr. Falinthenjwa)

For the respondent: Mr. N J Sandi, instructed by Mabece Tilana Inc., Grahamstown. (Ref. Mr. Goremusandu).

[1] The case which the appellant pressed upon appeal is that the respondent should have been liable to compensate him for the "entire

period of his detention" following his alleged unlawful arrest, including the period following his first appearance in court when the court ordered his further detention. This contention is correct and accords with the Constitutional Court's finding in *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC) at par 87, but in the particulars of claim filed on his behalf he appeared to be holding out for a substantial period of just under 9 months from 18 August 2015 to 5 May 2016, overlooking the common cause fact that he was released on bail on 1 September

2015. The concession that he was released from detention as early as 1 September 2015 already was made only during the course of the hearing. There was therefore obviously no substance to the pleaded allegation, which caused the trial court to remark upon the "patent misrepresentation" of the allegations forming the basis for the claim and the "regrettable manipulation" of the court thereby.

[2] The issue of an unlawful exercise of discretion was not pleaded by the appellant, but seemed to have been imported into the issues to be determined by the trial court following the manner in which the respondent had framed his questions to the appellant in the request for trial particulars as follows: "2.21 Is it the Plaintiff's case that the police officer who

arrested and detained him failed to exercise his discretion properly? Or is it only being alleged that the Plaintiff's arrest and detention were wrongful and unlawful? 2.22 If the contention is that he failed to exercise his discretion properly, in what way and in what respects is it being contended that he exercised his discretion improperly? A full explanation is requested. 2.23 Does the Plaintiff accept that the reason for his arrest was to bring him to court? 2.24 Does the Plaintiff contend that there was any other way to bring him to court? If yes, a full explanation is required. Please give a full explanation. The answer to the first two questions appears in paragraph [8] above. The answer to the third question is "No", and to the last one the appellant noted that this was "a matter for evidence".

- [2] The issue of an unlawful exercise of discretion was not pleaded by the appellant, but seemed to have been imported into the issues to be determined by the trial court following the manner in which the respondent had framed his questions to the appellant in the request for trial particulars as follows:

"2.21 Is it the Plaintiff's case that the police officer who arrested and detained him failed to exercise his discretion properly? Or is it only being alleged that the Plaintiff's arrest and detention were wrongful and unlawful?"

2.22 If the contention is that he failed to exercise his discretion properly, in what way and in what respects is it being contended that he exercised his discretion improperly? A full explanation is requested.

2.23 Does the Plaintiff accept that the reason for his arrest was to bring him to court?

2.24 Does the Plaintiff contend that there was any other way to bring him to court? If yes, a full explanation is required. Please give a full explanation.

The answer to the first two questions appears in paragraph [8] above. The answer to the third question is "No", and to the last one the appellant noted that this was "a matter for evidence".

- [3] What Sergeant Mgobo claims he saw on the video is irrelevant to the issue of whether or not he entertained a reasonable suspicion at the time of the arrest because this evidence only became available after the fact. It should however have been a relevant consideration concerning the justification for the appellant's continued detention after his arrest, but it is not clear from the evidence when exactly the video was downloaded and its contents made available to the police in the form of real evidence so as to convince or dissuade them of his involvement in the commission of the robbery. Nothing turns on this however as on the acceptable and proven facts of an honest belief in the guilt of the appellant on reasonable grounds was held by Sergeant Mgobo, and Captain Ndima thereafter, primarily based on what they were told by Matholengwe.
- [4] Whilst the video evidence (evidently available after the fact) would certainly have conduced to the reasonableness of Sergeant Mgobo's suspicion, the absence of such intelligence at the time of arrest (as a fact) does not axiomatically detract from the otherwise reasonable premise offered by Sergeant Mgobo for the appellant's arrest on the basis of the limited

information which he claimed was furnished to him by Matholengwe concerning the appellant's role in the commission of the crime and the other indicia discovered by himself. To his credit, Sergeant Mgobo did not hesitate to concede that the video corroboration only surfaced much later and did not play any role in the decision taken by him to arrest the appellant.

- [5] In response to the suggestion that if the Colt motor vehicle had been “used for the robbery”, the security guards would surely have seen it, Sergeant Mgobo dealt a swift blow to the underlying contention that he could not therefore have reasonably thought that the appellant could have been involved in the commission of the offence or that there was a link between his motor vehicle and the offence. He replied, “Yes, the security (guard) did not see it. The person who saw it was the one being chased by the security. And he's also the one who identified the motor vehicle and the route that it took.”
- [6] I say so guardedly, because he mentions the appellant's name and places him on the scene at a place called “Paboo”, from whence he and Koyana went on foot to hijack the BATSA motor vehicle and to rob the driver of boxes of cigarettes which were later hidden under the bridge. Matholengwe never testified at the hearing to explain his statement or to disavow that he had orally informed Sergeant Mgobo and Captain Ndimma of the appellant's involvement in the commission of the robbery on the bases testified to by them. Whatever one might wish to read into Matholengwe's statement there was never any express or unequivocal declaration by him before the trial court that the appellant who had been arrested together with him had not been involved or was innocent of his and Koyana's criminal conduct. The submission on behalf of the appellant at the appeal that the statement exculpated him and that there was, after its deposition, “nothing more indicating that (he) had been involved in the crime of robbery” is a bit of a stretch and an oversimplification of the matter. There is also no warrant for the further suggestion that it must have become “irrefutably clear” to the police once the statement was made that there was “nothing else connecting (him) to the robbery and therefore ...no justification for (his) continued detention”.
- [7] This fits in with the respondent's evidence of what Matholengwe conveyed to them concerning his knowledge of where the appellant's vehicle would wait in relation to the crime scene and what route it would take thereafter.
- [8] 1948 (2) SA 677 (A)
- [9] Duncan v Minister of Law and Order 1986 (2) SA 805 (A).
- [10] Duncan, Supra, at 818H.
- [11] [2017] ZA SCA 103 (unreported, SCA case no. 991/2016, dated 6 September 2017).
- [12] 1988 (2) SA 654 (SE) [also reported at [1988] 3 All SA 408 (SE) – Ed].

[13] At 658E–J

[14] At 466F

[15] See footnote 6.

[16] Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) at [45-9]

[17] Ngqukumba v Minister of Safety and Security and Others 2014 (5) SA 112 (CC) at [12-3].

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