

SOUTH AFRICA / JUDGMENT

Cooper v Mbombela Local Municipality and Another (59120/2010) [2014] ZAGPPHC 359 (30 May 2014)

[2014] ZAGPPHC 359

COURT

North Gauteng High Court, Pretoria

BEFORE

Maseti

CASE / FILE NUMBER

59120/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO.

59120/2010

DATE: 30 May 2014

In the matter

between:

GARRY

COOPER.....PLAI

NTIFF

AND

MBOMBELA LOCAL

MUNICIPALITY.....FIRST

DEFENDANT

MINISTER OF

SAFETY AND

SECURITY.....SECOND

DEFENDANT

JUDGEMENT**MASETI AJ**

[1] This is a claim for damages in which Plaintiff is suing both defendants for unlawful arrest and detention.

[2] The plaintiff, on 13 February 2010 at about 10H00 in the morning, was a passenger in a motor vehicle which was driven by De Oliveira, Plaintiff's coworker, along N4 at Nelspruit in Mpumalanga.

2.1. Sergeant Mogale, a traffic officer employed by the first defendant, was on duty on the 13 February 2010 at about 10H00 monitoring the speed camera along N4 at Nelspruit in Mpumalanga.

2.2. Mogale, whilst in the course of his duties, trapped a vehicle that was apparently driving at 85 km per hour instead of the permissible 60 km per hour. It transpired that the plaintiff was a passenger in this particular vehicle.

2.3. Mogale stopped the vehicle and approached the driver thereof who admitted that he exceeded the speed limit allowed in that particular zone. The driver of the said vehicle was apparently De Oliveira. At that stage plaintiff intervened stating that they were driving at 60 km per hour and not 85 km per hour as alleged.

2.4. Mogale requested De Oliveira to hand over his driver's licence so that he could issue a ticket having informed him that the ticket was R750-00. At all this stage plaintiff kept on interfering that they were driving at 60 km per hour though Mogale ignored him and at a later stage warned Plaintiff not to interfere otherwise he would arrest him for interfering with his duties.

2.5. De Oliveira drew out his driver's licence to hand it over to Mogale for the processing of the ticket and whilst Mogale was taking over the driver's licence from the driver, the plaintiff grabbed the driver's licence and kept it into his possession.

2.6. De Oliveira took the licence from the plaintiff and handed it over to Mogale and while Mogale was about to write the ticket still holding the ticket book, the plaintiff hurriedly got out of the vehicle and went to the back of the van, opened the canopy door appearing to be taking something from the back of the vehicle; closed the canopy and proceeded to the right hand side of the vehicle towards Mogale.

2.7. Plaintiff pointed fingers at Mogale using vulgar language and at that stage Mogale warned the Plaintiff that he was then arresting him.

2.8. Mogale obtained handcuffs from Fikile Zwane his colleague with whom he was monitoring the speed camera. Whilst attempting to put his handcuffs on the plaintiff's wrists, plaintiff refused and a struggle ensued. With the assistance of Ms Zwane he ultimately succeeded in handcuffing the plaintiff.

2.9. During that process of handcuffing and pushing the plaintiff into Mogale's vehicle, Mogale's Supervisor, Mr Patrick Pule, arrived and enquired as to what was happening and got explanation from Mogale. Pule further approached the plaintiff and introduced himself to Plaintiff as the Supervisor of Mr Mogale but Plaintiff said he had nothing to do with Pule.

2.10. Mogale took the plaintiff to the local police station where he was detained on 13 February 2010 and charged with defeating the ends of Justice and interference.

2.11. The plaintiff was detained by the Second Defendant at the instance of Mogale from 11H45 on 13 February 2013 to 16H20 on 14 February 2010 whereupon he was released on bail.

- [3] The issue before this Court is whether the arrest by the employee of the first defendant and subsequent detention of the plaintiff from 13 February 2013 at approximately 10H00 to 16H20 on 14 February 2013 by the second defendant were unlawful or not.
- [4] The issue between the plaintiff and second defendant related to the period of detention at the police station between the hours of 11H00 on 13 February 2013 and 16H20 on the 14 February 2013.
- [5] The parties agreed that the onus of proving the lawfulness of the arrest rests with the first defendant and the subsequent detention of the plaintiff rests with the second defendant.
- [6] This case was heard on 17 March 2014 and finalised on 19 March 2014 when the judgment was reserved.
- [7] Since the onus was on the defendants to prove the lawfulness of the arrest the duty to begin rested with the first defendant.
- [8] The first defendant contended that the arrest was justified for the following

reasons:

8.1. Plaintiff was arrested pursuant to him committing an offence in the presence of the peace officer, namely Veli Mogale.

8.2. The first defendant further contended that the plaintiff wilfully obstructed Mogale in the execution of his duties.

8.3. The first defendant relied for its defence on two grounds to justify the arrest. The aforesaid grounds of justification are to be found in Section 40 (l)(a) and (j) of the Criminal Procedure Act 51 of 1977.

Section 40 (1) provides:

"A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence
- (j) who wilfully obstructs him in the execution of his duty."

[9] Plaintiff insisted that his stay at the police station was not sanctioned by law.

[10] The second defendant submitted that this was fallacious reasoning on the following grounds:

10.1. The effect of an arrest is that the arrested person shall be in lawful custody and detained in such custody until he is lawfully discharged or released and refers to Section 39 (3) of the Criminal Procedure Act 51 of 1977.

Section 39 (3) of the Criminal Procedure Act 51 of 1977 provides:-

" The effect of an arrest shall be that the person arrested shall be in lawful Custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

10.2. By reason of the fact that Section 50 of the Criminal Procedure Act 51 of 1977 lays down the procedure to be followed after the arrest, the conduct of the police at Nelspruit Police Station that of opening cells to accommodate the plaintiff during his detention was not wrongful. The police were doing what the law commands them to do.

Indeed plaintiff was released on bail on the following day once a determination was made that the offence with which he had been charged warranted admittance to bail. He referred to the provisions of Section 50 as a whole which I need not re-write.

10.3. The second defendant relied on the provisions of Section 50 of the Criminal Procedure Act and DUNCAN VS MINISTER OF LAW AND ORDER 1986 (2) SA 805 (A) AT 820 C-E in which he submitted, the police were allowed to detain for questioning and to release such detainees within 48 hours if no charges were preferred against them.

10.4. The second defendant's Counsel further challenged an argument by the plaintiff's Counsel that there was failure on the part of the police to exercise properly the discretion conferred on them by Section 40 of the Criminal Procedure Act in which reference had been made to the Supreme Court Judgment in Minister of SAFETY AND SECURITY VS SEKHOTH0 2011 (5) SA 367 saying Sekhotho's case is distinguishable from the present case. In the present case Plaintiff made no allegation in his particulars of claim impugning the exercise of the discretion conferred on the police by Section 50, whilst in the Sekhotho case the Supreme Court of Appeal was dealing with the discretion which Section 40 (1) (b) confers on a peace officer.

10.5. The second defendant submitted that for the Plaintiff to succeed against the second defendant, Plaintiff should point out a transgression by the police of the provisions of Section 50 failing which the second defendant's employees had committed no wrong.

[11] The plaintiff argued that Section 40 (1) referred to powers of an arrest by a peace offer. It was therefore for the first defendant to prove that

Mogale was indeed at the time of the arrest a peace offer.

- [12] The plaintiff referred to Section 334 of the Criminal Procedure Act 51 of 1977 which makes provision for the Minister to declare certain persons Peace Officers for specific purposes. He referred to Section 334 (2)
- (a) which stipulates that no person who is a peace officer by virtue of a notice issued under subsection (1) shall exercise any power conferred upon him under that subsection unless he has at the time of exercising such power been in possession of a certificate of appointment issued by his employer, which certificate shall be produced on demand.
- [13] The plaintiff argued that no Certificate of Appointment was produced in Court and therefore the Court is entitled to assume that no certificate of appointment existed. The court noted that at paragraph 4.2.2. of his plea the first defendant pleaded that Mogale was a peace officer and that there has been no request for further particulars for the purposes of trial in terms of Rule 21 (2) of the Rules of this court.
- [14] In his Heads of Argument Plaintiffs Counsel sought to amend his particulars of Plaintiff by introducing the exercise of a discretion by Mogale in the arrest of the plaintiff that Mogale was not objectively rational.
- [15] Plaintiff argued that he could apply for leave to amend Plaintiff's particulars of claim at anytime before judgment. He further stated that particulars of claim were drafted and issued during 2010 when judgment pertaining to the Minister of Safety and Security Vs Sekoto was not yet reported and that in the circumstances this court would be empowered to effect the amendment in terms of Rule 28 (10).
- [16] Plaintiff argued further that Mogale failed to properly exercise his discretion alternatively failed to exercise his discretion in good faith rationally and not arbitrarily.
- [17] The Court noted that Rule 28 provides:-
1. "Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
 2. The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, amendment will be effected.
 3. The Court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or other matters as it deems fit."

- [18] This Court is unable to allow the amendment brought through the Heads of Argument as it failed to comply with Rule 28 (1) and (2) above. Failure to comply with Rule 28 (1) and (2) undoubtedly prejudiced the first and second defendants. This matter was heard on 17 March 2014 and finalised on 19 March 2014 but judgment reserved. The Notice of Intention to apply for leave to amend was only served and filed on 26 March 2014 whilst only waiting for the filing of Heads of Argument.
- [19] The first defendant called Mogale who testified to the effect that he was a traffic officer during February 2010 employed by the first defendant and was a peace officer. He was on duty as a traffic officer monitoring speed camera with his colleague, Fikile Zwane, when they stopped a motor vehicle driven by Mr Oliveira in which plaintiff was a passenger.
- [20] To avoid repetition of what has already been said in paragraph 2 above the Court will only analyse the evidence given by all three witnesses called by the first defendant to testify.
- [21] Mogale gave a clear evidence as to what happened on that day. There were some omissions in his statement to the police compared with his evidence in Court and his evidence during the criminal trial where the plaintiff was charged with defeating the ends of justice. There were totally no contradictions in his evidence in chief and cross examination by the plaintiff. He gave a very consistent version. His version was also corroborated by the second and third witnesses for the first defendant namely PULE and ZWANE.
- [22] When the plaintiff testified he denied that Pule was at the scene. He testified that De Oliveira and himself were driving on their way from Maputo towards Kimberley and when stopped by Mogale, De Oliveira disputed that he was travelling at 85 km per hour. The plaintiff said he told Mogale to take De Oliveira to view the speed camera and Mogale told him to shut up otherwise he would arrest him or that he would open a case for interference. Mogale asked De Oliveira how much money did he want to pay and denied that at some point in time he grabbed the driver's licence from Mogale. According to plaintiff when Mogale asked De Oliveira how much he wanted to pay he assumed that Mogale was soliciting a bribe.
- [23] Under cross examination the plaintiff kept on introducing new facts that were initially not stated during his evidence in chief. He attempted to hide a statement that he had earlier made to the police on 17 February 2010 and conceded under cross examination that the only truthful evidence was what was stated in his statement made on 17 February 2010. The said statement contradicted most of his evidence in chief.
- [24] The plaintiff denied ever seeing Mogale's supervisor at the scene, Mr Patrick Pule, as the next question anticipated would be concerning his failure to report Mr Mogale for the alleged solicitation of a bribe to his Senior, Mr Pule. Plaintiff did not report Mogale for soliciting a bribe at the police station when in a position to do so. He failed to produce proof of opening a criminal case of bribery in Johannesburg.
- [25] The plaintiff's credibility in Court was damaged beyond repair. The version presented by Plaintiff in Court was improbable.

[26] As to the balancing of probabilities, the first defendant's Counsel referred to GOVAN VS SKIDMORE 1952 (i)SA 732 (N) at 734 WHERE SELKE J had this to say:" in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on EVIDENCE 3rd edition paragraph 32, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one".

In GOVAN VS SKIDMORE case SELKE 3 gave the word "plausible" a connotation which conveyed the words such as acceptable credible or suitable.

The court, in drawing inferences from the proven facts, should act on a balance of probabilities.

[27] It is for this Court therefore to look at the version of the first defendant's witnesses and that of the plaintiff and decide which of the two versions is more plausible or probable or credible or acceptable. The standard of proof would be that of a balance of probabilities or a preponderance of probabilities.

[28] In supporting the lawfulness of the arrest, the first defendant's Counsel referred to S.V. NAIDOO 1977 (2) SA 123 (N) wherein a traffic inspector informed Court that while driving on his way to assume duty at a speed trap he noticed a vehicle approaching from the opposite direction. Its lights were flashing at all the oncoming vehicles to slow down.

He made a "U" turn and followed the flickering vehicle and stopped it. He asked the driver to explain his actions and the driver said it was not him but the passenger who flashed the lights while he was driving. The driver was charged with attempting to obstruct the ends of justice and convicted. The Court held that an actual interference in the speed trap would constitute obstruction of the due administration of justice.

[29] In S V MAKHATHINI 1975 (2) SA 690 (N) the appellant had been convicted by a Magistrate of Contravening Section 162 of Ordinance 21 of 1966 (N) in that he had wrongfully and unlawfully obstructed and hindered a traffic officer in the exercise of his powers. It appeared that the appellant had been stopped at a road block by the traffic officer and after producing his driver's licence he refused to get out of his car to enable the traffic officer to test the brakes of his car. The traffic officer made several requests that the appellant gets out of his car but the appellant refused. The Court held that his conduct amounted to an interference and obstruction of the traffic officer in the exercise of his powers.

[30] In applying the law into the facts the Court had to consider the following:

30.1. Plaintiff referred to Section 334 of the Criminal Procedure Act during argument challenging the evidence of Mogale that he is a peace officer in that Mogale failed to produce a certificate of appointment by the Minister. Plaintiff only demanded the certificate during cross examination in Court and never gave first defendant notice to produce a certificate of appointment as a peace officer. The Court cannot therefore assume that Mogale is not a peace officer unless prior notice or request in terms of the Rules was given to him to produce the certificate in Court.

30.2. It is trite law and beyond any doubt that defeating the ends of justice and obstructing the police officer wilfully in the execution of his duties are both Criminal Offences.

30.3. The plaintiff was accordingly charged with defeating the ends of justio and acquitted in Court after evidence was led.

30.4. The record of the Criminal proceedings in Nelspruit had been discovered as proofs as well as the record of the disciplinary enquiry where the Plaintiff was disciplined for his disgraceful conduct on the date of the incident and dismissed by his employer. Plaintiff failed to lead evidence of his witness, Mr De Oliveira.

The record of the disciplinary enquiry which was discovered revealed that De Oliveira gave evidence against the Plaintiff which led to plaintiff's dismissal.

The version of the Plaintiff is marred with incongruities and tainted with lies.

30.5. Having looked at the version of the first defendant's witnesses and that of the Plaintiff the Court is satisfied that the first defendant's version is more probable or plausible.

30.6. Reference to NAIDOO'S CASE as well as to MAKHATINI'S CASE cited in paragraphs 28 and 29 above clearly confirms that a traffic officer performs the functions of a peace officer.

30.7. In the case of S. V GREENSTEIN AND ANOTHER 1977 (3) SA 220 (RA) the court made the following observation:- The offence commonly described as defeating or obstructing "the course of justice" or the "ends of justice", properly defined, consists of defeating or obstructing the administration of justice. In modern systems of law, the administration of justice has, with the development of the police forces, become increasingly involved in the investigation and prevention of crime. If a person, knowing that police investigations are based on a suspicion that a crime may have been committed, does acts which obstruct the police in their investigations with the intention of doing so, it should, in the light of modern developments in the administration of justice, be no defence for the accused to plead that he never foresaw the possibility of a prosecution and that his motive for the intended obstruction was purely to harass the police and not to prejudice the end result of the investigation.

30.8. In the present matter the plaintiff's conduct was directed at refusing and thus obstructing the traffic officer who was lawfully executing his duties from doing so. In so doing and in view of the aforementioned cases the plaintiff indeed committed an offence. In the circumstances he opened himself to arrest without a warrant as provided for in terms of Section 40 (i)(j) of the Act. Therefore the arrest was not unlawful.

30.9. The Court is fully convinced that the first defendant has discharged the onus in a preponderance of probabilities that both the arrest of the Plaintiff on 13 February 2013 by the first defendant and the subsequent detention by the second defendant were lawful.

30.10. In the result the plaintiff's claim for damages must fail and the judgment is granted in favour of both defendants.

[31] The following order is made.

- (a) Plaintiff's claim against the first and the second defendants is dismissed with costs.
- (b) Costs include costs of both Counsels calculated on the High Court scale.

PLC MASETI

ACTING JUDGE OF THE GAUTENG DIVISION,

PRETORIA

DATE OF HEARING: 19 MARCH 2014

DATE OF JUDGMENT: 30 MAY 2014

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