

SOUTH AFRICA / JUDGMENT

Dikwidi v Minister of Police and Another (292/2021) [2023] ZANCHC 87 (30 November 2023) [2023] ZANCHC 87

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

292/2021

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IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: 292/2021

In the matter between:

PIET KGOLOLO DIKWIDI

PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

THE MEC FOR TRANSPORT, SECURITY AND

LIAISON, NORTHERN CAPE

SECOND DEFENDANT

Neutral citation: Dikwidi v Minister of Police and Other (Case no. 292 (30 November 2023)

Heard: 07-08 August 2023 & 10 August 2023

Delivered: 30 November 2023

Judgment

Phatshoane DJP

- [1] The plaintiff, Mr Piet Kgololo Dikwidi, instituted a R500 000 claim for damages against the Minister of Police and the Member of the Executive Council for Transport, Security and Liaison, Northern Cape, the first and second defendants. The claim has its origin in his alleged wrongful arrest of 14 December 2018 and subsequent detention. In terms of rule 33(4) of the Uniform rules of this Court the trial proceeded on the question of liability with the issue of quantum standing over for later

determination.

- [2] On 14 December 2018 Mr Malais Malgas, a senior provincial inspector (traffic officer) in the employ of the Department of Transport Safety and Liaison with 20 years of service, was on duty on the R359 Road, a regional route near Marchand, Kakamas, Northern Cape. Acting within the course and in furtherance of his employment, as a peace officer, Mr Malgas stopped a Mercedes minibus taxi then driven by the plaintiff. He requested him to produce his drivers' licence and the operating licence (the permit). He examined the vehicle's licence disk; counted the number of passengers to establish whether this accorded with the information captured on the permit and conducted some general vehicle inspection.
- [3] The driver's licence was valid for the period 07 September 2016 to 16 September 2021. Endorsed on the licence was the professional driving permit which expired on 15 September 2018, approximately two months before this encounter. The plaintiff was unable to produce a valid professional driving permit. He reported to Malgas that he made an application for its renewal and that proof of the application was at home. Mr Malgas explained to him that such proof, which is valid for a period of three months from date of issue, had to accompany the licence card and be in his possession. Malgas merely warned the plaintiff as he may not have been furnished the information to keep proof of the application and drivers' licence card together and in his possession.
- [4] Mr Malgas turned his attention to the minibus operating licence (the permit). The information on the vehicle's discs affixed to its windscreen accorded to that on the permit. The permit has to be accompanied by an Annexure 1 token and are issued together. The information on the permit and the Annexure 1 token must correspond but did not. For instance, the permit number (LNCPB257420/1) did not correspond with the number reflected on the Annexure 1 token (LNCPB27360/1). Their date stamps also differed in that the Annexure 1 token was date-stamped on 17 October 2007 whereas the permit on 22 August 2018. The permit bore the signature of the secretary of the 'Northern Cape Provincial Regulator Entity' whereas the Annexure 1 token had not been signed. In addition, the permit in issue did not authorise its owner to operate on the route where the vehicle was stopped. It was confined to certain specified long-distance routes: from Marchand to Cape Town CBD; Marchand to Khuis; Marchand to Vryburg; Marchand to Johannesburg; Marchand to

Rustenburg and Marchand to Kimberley.

- [5] The operating licence in question was restricted to conducting 'charter services' which Malgas described as the conveyance of a group of people (e.g, a soccer team) from one destination to the next. A 'charter service' is defined in s 1 of National Land Transport Act 5 of 2009 (NLTA) as a public transport service operated by road involving the hire of a vehicle and a driver for a journey at a charge arranged beforehand

with the operator, where- (a) neither the operator nor the driver charges the passengers individual fares; (b) the person hiring the service has the right to decide the route, date and time of travel; and (c) the passengers are conveyed to a common destination, and includes vehicles hired with drivers contemplated in section 67.

- [6] In terms of s 67(1) of the NLTA an operating licence may authorise the holder to undertake pre-booked charter services in the areas or zones as specified by the entity granting the operating licence, which may or may not be in addition to other services authorised by that licence. The plaintiff, contrary to the Annexure 1 token did not conduct a charter service. He operated a taxi from one taxi rank to the next (from Marchand to Kakamas). The operating licence belonged to a certain KB Moorcroft and so was the vehicle.
- [7] Mr Malgas confronted the plaintiff on the discrepancies highlighted in the preceding paragraphs. He further informed the plaintiff that he suspected that there had been tampering with the operating licence and that the documents the plaintiff furnished to him suggested that he had committed fraud. Even though there appeared to be no actual or physical tampering on the face of the permit and the Annexure 1 token, insofar as the information contained in the two documents differed, this was indicative of fraud according to Mr Malgas.
- [8] Mr Malgas afforded the plaintiff an opportunity to call the owner of the vehicle upon the plaintiff's request. They waited in vain for some 40 minutes for the owner to arrive. He read the plaintiff's rights to him and arrested him for fraud as he had been in control of the vehicle and it had been his responsibility to see to it that the correct documents were furnished to Mr Malgas. It was also his responsibility to ensure that the owner of the vehicle provided him with proper documents, he went on. He took the plaintiff to Augrabies Police Station where he opened a docket and handed him over to the police. Mr Malgas also made a statement to the police before his departure. He did not know if the plaintiff appeared in court following the arrest. Although no evidence was led on this score it was pleaded that the plaintiff was detained at Kakamas on Friday, 14 December 2018, at 16h40 and released on Tuesday, 18 December 2018, at 08h00.
- [9] The above is the sum total of the evidence adduced at the trial by the defendants. The plaintiff elected not to testify and closed its case at the end of the defendants' case. It must be borne in mind, as it will be shown in due course that the defendants bore the onus to justify the arrest and detention

[10] In his particulars of claim the Plaintiff alleged that he was unlawfully arrested without a warrant and unlawfully detained because

he did not commit a Schedule 1 offence as envisaged in the Criminal Procedure Act 51 of 1977 (the Act), alternatively, the arresting

officer did not harbour a reasonable suspicion that he had committed a Schedule 1 offence. He further submitted that the arresting officer failed to appreciate that he had a discretion on whether to arrest or detain him, alternatively, the arresting officer failed to exercise his discretion rationally or not in an arbitrary manner. He contended that he was released without appearing in court and or outside of the 48-hour period.

[11] The MEC for Transport, the second defendant, conceded the arrest without a warrant but argued that it was lawfully executed within the purview of s 40(1)(a) of the Act. The Minister of Police, on the one hand, pleaded that the arrest was not executed at the instance of any of its employees or officers.

[12] In terms of s 40(1)(a) and (b) of the Act a peace officer may without warrant arrest any person who, inter alia, commits or attempts to commit any offence in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. It is not in dispute that traffic officers are peace officers as defined in s 1 of the Act[1] and are authorised in terms of s 40(1) to effect an arrest without a warrant of persons who, inter alia, commit or attempt to commit any offence in their presence or those whom he reasonably suspects of having committed an offence referred to in Schedule 1.

[13] The principal issue in dispute is the lawfulness of the plaintiff's arrest and his subsequent detention. In determining this key question, it should first be considered whether the plaintiff committed or attempted to commit fraud in the presence of Mr Malgas or whether Mr Malgas reasonably suspected that the plaintiff committed fraud. Secondly, it should be considered whether Mr Malgas was aware that he had a discretion to arrest the plaintiff and whether in exercising that discretion he acted within the bounds of rationality.

[14] It was contended for the plaintiff that the defendants failed to show, at the time of the arrest, that the plaintiff had committed a crime of fraud in the presence of the arresting officer. It was argued that Mr Malgas had no idea what fraud entailed and failed to exercise his discretion at all in executing the arrest. Nothing prevented him, it was argued, from opening a case docket against the plaintiff and the owner of the vehicle without executing the arrest.

[15] In any event, so it was argued, Mr Malgas knew who the owner of the vehicle was who had been responsible for obtaining the permit and the Annexure 1 token yet he arrested the plaintiff. It was further argued that "the mere driving of a vehicle with incorrect papers supplied by the owner of the minibus did not amount to fraud". In addition, so it was argued, on a visual inspection of the documents, they had not been altered or defaced to suggest any fraudulent activity on the part of the plaintiff. It was contended that Mr Malgas merely

suspected that the documents the plaintiff produced had been tampered with.

- [16] The operating licences are issued and regulated in terms of the NLTA. Section 62(2) of the NLTA provides that any operating licence granted, renewed, amended or transferred in terms of the NLTA must be issued in the prescribed manner and form by an authorised official of the entity concerned. In terms of s 62(3) an operating licence must contain the prescribed particulars. Section 76 provides that the holder of an operating licence or permit must comply with NLTA and the prescribed regulations. An authorised officer (whom Mr Malgas was) may, in terms of s 89 (1)(g) require that the driver or other person in charge of a motor vehicle used for public transport, produce any documents whatsoever, that were issued by a competent authority, in terms of the NLTA, or the Transition Act, with regard to the vehicle or the public transport for which it may be used in terms of this Act, or the Transition Act, as the case may be, and which, in terms of those Acts have to be kept in that vehicle.
- [17] No person may operate a road-based public transport service, unless they are the holders of operating licences[2] or permit, subject to sections 47, 48 and 49, issued for the vehicle concerned. A person is guilty of an offence, inter alia, in the following circumstances: where they operate a public transport service in contravention of section 50[3]; if the person, with the intent to deceive, forges, alters, defaces, damages or adds to any operating licence or permit other official

document issued under this Act[4]; if, knowing that a document is not an operating licence or permit or such other official document or that it has been altered, defaced, damaged or added to, utters or uses the document[5]; and if a person uses a vehicle for a public transport service in contravention of the NLTA[6].

- [18] The Plaintiff was required to have a valid operating licence or permit. He did not. Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[7] There is a pronounced difference on the documents the plaintiff presented to the officer. It remained the plaintiff's responsibility to ensure that the operating licence he carried was valid. The plaintiff's conduct, insofar as he furnished the officer with documents, which he ought to have reasonably known were invalid, amounts to misrepresentation. He plainly must have acted with the necessary intent. The plaintiff's failure to testify, in the face of a prima facie case against him that he committed

fraud, when he was available to give an account on his possession of the bogus documents, was ill-conceived.

- [19] What is to be considered next is whether the State suffered prejudice. In *S v Jass*[8] Cloete J referred to the following seminal remarks by Schreiner JA in *R v Heyne and Others*[9]:

‘... The State, on the other hand, has interests peculiar to itself. It is unnecessary in the present case to hold that prejudice to the State's interest in upholding the law will always be sufficient. That may or may not be the position. But the Liquor Act of 1928, consistently with a long-established tradition, treats the trade in intoxicating liquor as one in which the State as society's guardian has a special interest. The Government on behalf of the public controls the trade, and the Act lays special duties upon the police and gives them special powers in order that the control may be effective. False representations, calculated to weaken that control by deceiving the police, are also calculated to harm the State really and not only theoretically. The requirement of prejudice is thus satisfied by the risk of harm to the State and it is unnecessary to consider the cases of the other persons and bodies who, it is alleged, might be prejudiced...’

And held:

‘These remarks are, in my view, apposite to the present case. The control of motor vehicles driven on the public roads and the competence of the drivers thereof is a matter in which the State, as society's guardian, has a special interest. The Road Traffic Ordinance, 19 of 1955 (C), is designed to this end. Traffic officers are given wide powers in this regard by reg. 173 published thereunder and the Ordinance itself contains similar provisions; see e.g., secs. 109, 114 and 120. The Ordinance being intended to facilitate control of motor vehicles and drivers, it follows that the false representation made to Ristow, who was performing a function provided for by the Ordinance, must necessarily be calculated to weaken the control over drivers of motor vehicles which the State has assumed, since the false representation would have had the effect, if believed, of frustrating the purpose of sec. 114 of the Ordinance. Thus, in my view, the false representation was calculated to harm the State really and not only theoretically, and prejudice to the State has thus been proved.’

[20] The remarks in Jass albeit made in a slightly different context applies with equal force to the present matter. By means of the NLTA the State exercises control over the licencing and use of public transport in respect of its citizenry. There can be no question in the present case that the State stood to suffer prejudice because it is required to ensure that properly licenced vehicles which are safe for the conveyance of passengers are on the roads and that the public transport requirements for routes are adequately served by the existing public transport services. The production of bogus operating license is designed to emasculate the exercise of such control. The harm to the State, in my view, is not remote and or fanciful.

[21] Insofar as the plaintiff furnished Mr Malgas fake documents it can hardly be argued that the offence did not take place in the presence of the peace officer. What was directly observed or heard by the arresting officer would be sufficient to sustain the conclusion that an offence has been committed. The test is an objective one and the question to be answered is whether the arresting officer was aware, at the time of arrest, of such facts which would, in the absence of any further facts or evidence, constitute proof of the commission of the offence. The aim is not to determine whether the arrested person is guilty of the offence on which he was arrested. It accordingly matters not that the arrestee was not prosecuted or was acquitted at a subsequent trial on the basis of evidence other than what the arresting officer

had in his possession at the time when he executed the arrest. [10]

[22] The next enquiry is whether the arresting officer exercised his discretion properly in executing the arrest. In *Minister of Safety and Security v Sekhoto and Another*[11] Harms DP said 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 — so long as the discretion is exercised within this range, the standard is not breached.'

[23] Mr Malgas was asked a pertinent question whether he was aware that he had a discretion whether to effect an arrest to which he responded “No”. On further probing he was asked if he knew he had a choice to execute an arrest his response was affirmative. He intimated having executed the arrest because the documents that the plaintiff produced showed that he committed fraud. Mr Malgas further intimated that fraudulent activities were prevalent in the taxi industry for which he would have no option but to execute an arrest where he suspected that fraud had been committed. He went on to further testify that there was also a standing order in the Northern Cape to this effect. What demonstrates that Malgas knew and understood that he had a discretion is his testimony to the effect that not all traffic offences would warrant an arrest. He went on to say that there had been instances where he issued fines or summons for a suspect to appear before court as opposed to effecting an arrest.

[24] An arrestee who attacks the exercise of the discretion where the jurisdictional facts are present bears the onus to prove that the discretion was not properly exercised.[12] As already stated, the plaintiff did not testify. On the foregoing exposition the arresting officer exercised his discretion properly

and within the bounds of rationality. I conclude that the defendants discharged the onus reposed upon them that the plaintiff's

arrest fell within the ambit of the statutory provisions and therefore justified in law.

[25] Even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto. Failure by a police officer to properly do so is unlawful.[13] Section 50(1)(c) of the Act stipulates that an arrestee shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after his arrest. As already alluded to, the plaintiff was arrested on Friday 14 December 2018 at 14h40 and released on Tuesday 18 December 2018 at 08h00, before his first

appearance in court according to his counsel. Monday 17 December 2018 was a public holiday. It goes without saying that the 48 hour-period expired outside ordinary court hours or on days which were not ordinary court days.

[26] The circumstances or the grounds upon which the plaintiff pleaded rendered his arrest unlawful applied to his alleged unlawful detention, without more. No additional facts were placed before the Court from which a different conclusion could be drawn that his detention was unlawful. It follows that the plaintiff's claim must fail.

[27] The question of costs present no difficulty and they must follow the result. The following order is therefore made:

Order:

1. The plaintiff's action is dismissed with costs.

Phatshoane DJP

Appearances:

For the plaintiff: Adv MCC De Klerk Instructed by SP Law, Pretoria. Elliot Maris Attorneys, Kimberley. For the defendants: Mr C Davis Instructed by Office of the State Attorney, Kimberley.

[1] See - GN R209 in GG 23143 of 19 February 2002 (Declaration of Peace Officers in terms of Section 334 (2002) of the Criminal Procedure Act 51 of 1977 read with GN R707 in GG 34583 of 2 September 2011.

[2] See s 50(1) of the NLTA

[3] Section 90(1)(a)

[4] Section 90(1)(e)

[5] Section 90(1)(f)

[6] Section 90(1)(n)

[7] Snyman's Criminal Law, 7th Ed p 461. See also S v Gardener and Another 2011

(1) SACR 570 (SCA) para 29.

[8] 1965

(3) SA 248 (E) .

[9] 1956 (3) SA 604 (A).

[10] See Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG) para 17-18.

[11] 2011

(1) SACR 315 (SCA) (2011 (5) SA 367 (SCA); [2011] 2 All SA 157 (SCA); [2010] ZASCA 141) para 39.

[12] Ibid- para 49.

[13] See Hofmeyr v Minister of Justice and Another 1992

- (3) SA 108 (C); referred to in *Mvu v Minister of Safety and Security and Another* 2009
- (2) SACR 291 (GSJ) para 10.
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