SOUTH AFRICA / JUDGMENT

Janse Van Rensburg v Minister of Police (12186/14) [2017] ZAGPPHC 1087 (20 September 2017)

[2017] ZAGPPHC 1087

COURT
North Gauteng High Court, Pretoria

BEFORE
M J Teffo

CASE / FILE NUMBER
12186/14

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
CASE NO: 12186/14
(1)
NOT
REPORTABLE
(2)
NOT OF INTEREST TO
OTHER JUDGES
(3)
REVISED

In the matter between:

CASPARUS
JANSE VAN RENSBURG
Plaintiff
and
THE
MINISTER OF
POLICE
Defendant

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] The plaintiff sued the defendant for damages for unlawful arrest and detention.

[2] The issue for determination relates to liability only. The parties have agreed on payment of the sum of R150 000, 00 to the plaintiff as damages in the event he succeeds with the action against the defendant.

THE PLEADINGS

[3] At paragraph 4 of his amended particulars of claim the following allegations are made:

"The plaintiff' was wrongfully arrested and or maliciously arrested and detained on a matter without any merit and/or reasonable suspicion for justifying arrest and/or reasonable suspicion of committing an offence and/or consideration of the plaintiffs explanation and without any justification for arrest or detainmen.t The Defendant and or its employees acting within the course and scope of their employment, were negligent in one or more of the following respects:

4.1 The arresting officers failed to take into account the fact that the plaintiff could provide a fixed residential address;

4.2 The offence of driving without a valid driver's licence or unroadworthy vehicle is not an arrestable offence, alliteratively a schedule 1 offence;

4.3 There was no reasonable suspicion by the arresting officer that the plaintiff had committed an offence such as culpable homicide as the only witnesses to the accident were the deceased and the plaintiff;

4.4 The plaintiff provided a reasonable explanation, which indicated that the plaintiff had in fact tried to avoid the collision with the deceased, and there was no evidence to the contrary indicating that the plaintiff was negligent, which would have been a requirement for a charge of culpable homicide;

4.5 There were no reasonable grounds for the arresting officer to suspect under the circumstances and taking into account witnesses that the plaintiff had committed an offence of culpable homicide;

4.6 The arresting officer failed to take into account the fact that the plaintiff had waited at the scene of the collision despite being the only witness to the accident at the time of the accident;

4.7 The plaintiff attempted to avoid the collision, there was no information from the plaintiff, which would have implicated him in the charge of culpable homicide and there was no objective evidence at the time of the alleged offence, justifying an arrest of culpable homicide."

[4] The defendant's defence to the allegations is premised on the provisions of sections 40(1)(a) and (b) of Act 51 of 1977 (“the Criminal Procedure Act”). It pleaded that both the arrest and detention of the plaintiff relating to the charges of driving a motor vehicle without a licence and driving an unroadworthy motor vehicle were lawful in terms of section 40(1)(a) of the Criminal Procedure Act, in that:

"4.2.1 The arresting officer, Constable M W Shibambu, was a peace officer as defined in Act 51 of 1977;

4.2.2 The plaintiff committed the offences of 'driving a motor vehicle without a valid licence' and 'driving an unroadworthy motor vehicle' in the presence of the arresting officer.

4.3 The defendant furthermore pleads specifically that pertaining to the charge of 'driving a motor vehicle without a valid driver's licence', the plaintiff in fact admitted guilt and paid an admission of guilt fine in the amount of R300,00 on 5 August 2015 into court.

4.4 The defendant furthermore denies specifically that the arrest and detention pertaining to the charge of culpable homicide were wrongful and/or malicious and pleads that the arrest and detention were lawful in terms of S 40(1)(b) of the Criminal Procedure Act 51 of 1977 in that:

a) The arresting officer, Constable M W Shibambu, was a peace officer as defined in Act 51 of 1977;

b) The arresting officer had a reasonable suspicion that the plaintiff committed an offence as contemplated by schedule 1 of the Criminal Procedure Act 51 of 1977 namely the offence of 'culpable homicide'.

4.5 The defendant furthermore pleads specifically that Constable Shibambu arrived on the scene and the plaintiff in fact admitted to Constable Shibambu that he was the driver of the motor vehicle which collided with the deceased."

THE FACTS

[5] The facts which gave rise to the plaintiff's arrest and detention are largely common cause and can be summarised as follows: On 28 June 2013 Constable Shibambu, who was stationed at Villa Nora SAPS at the time, received a complaint about an accident which took place at Shongwane 2 while he was performing his duties. He immediately rushed to the scene of the accident where he found a cyclist who was knocked down by a motor vehicle. The plaintiff was also at the scene. He approached him and told him that he was the driver of the motor vehicle that was involved in an accident with the deceased. He requested to see his driver's licence and found that it had expired in February 2013. He also inspected the motor vehicle the plaintiff was driving and found that its licence disc had also expired. The plaintiff was driving a Ford Ranger with registration letters and numbers FZL 797 NW ("the motor vehicle").

[6] The motor vehicle was towing a trailer which was transporting wild animals. He was travelling from Lephalale to All Days.

[7] Constable Shibambu testified that the plaintiff told him that while on his way to All Days, at Shongwane 2 he saw a cyclist who was at close range. He tried to avoid the collision. Unfortunately the trailer collided with the cyclist.

[8] His further evidence which is not disputed was to the effect that after the plaintiff told him that he was the driver of the motor vehicle that was involved in an accident with the cyclist who was certified dead by the paramedics and subsequent to finding that the plaintiff did not have a valid driver's licence and the fact that the motor vehicle he was driving at the time of the accident's licence disc had expired, he explained to him that he was arresting him for driving a motor vehicle without a valid driver's licence, that he drove a motor vehicle which was not roadworthy and which caused the accident. He also told him about the offence of culpable homicide. He eventually arrested the plaintiff and requested him to follow him and Constable Makgai, who were driving in two separate motor vehicles to the police station, in the motor vehicle he was driving.

[9] The plaintiff was arrested on a Friday morning after 10:00 without a warrant. As a

result of the arrest he was later detained. The motor vehicle with the trailer carrying wild animals was not impounded. It was fetched by other people at the police station. Constable Makgai who later arrived at the scene, was assigned as the investigating officer in the matter.

[10] Constable Makgai corroborated the above evidence about what he found the accident scene at the time of his arrival, the cyclist and the plaintiff and what he was shown by Constable Shibambu whom he found at the scene and the report he gave to him in relation to what the plaintiff told him. He further testified that he was present when the plaintiff was arrested. He took down the warning statement of the plaintiff but in the statement he only said he will give his version in court. He also testified that there was no need for Constable Shibambu to have obtained a warrant. The plaintiff committed a serious offence, namely, culpable homicide, which is a schedule 1 offence.

[11] The plaintiff was arrested and detained on Friday 28 June 2013 for seventy (70) hours as he was

released on bail on Monday 1 July 2013. He attended court on 5 August 2013 and the charges of culpable homicide and driving an unroadworthy motor vehicle were withdrawn against him while he paid an admission of guilt fine in respect of the offence of driving a motor vehicle without a valid driver's licence.

[12] In his evidence the plaintiff mentioned that the cyclist was about ± 30 cm from the edge of the tarred road when he saw him. He was driving at a speed of± 80 km/h when he noticed him. He reduced the speed of the motor vehicle he was driving and veered to the right to give the cyclist enough space and allow himself to drive past. The cyclist suddenly swerved to the right. He also swerved the motor vehicle he was driving further to avoid colliding with

him. He managed to avoid colliding with him with the bakkie but unfortunately noticed that he had hit the trailer.

[13] Constable Shibambu disputed that the plaintiff told him that the cyclist swerved to the right while the plaintiff testified that he did. Nothing turns out of this in that it is common cause between the parties that the victim was knocked down after swerving in front of the motor vehicle driven by the plaintiff .

[14] The issues for determination in this trial are whether the arrest and detention of the plaintiff were justified and lawful.

THE APPLICABLE LEGAL PRINCIPLES

[15] It is so that in the context of this matter, the defendant bore the onus to justify the arrest in respect of the admitted arrest and detention (see Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 at 589E F). The defendant relied on the provisions of section 40(1)(a) and (b) of the Criminal Procedure Act in its plea in defence of its claim. Section 40 reads:

"(1) A peace officer may without a warrant arrest any person

(a) Who commits or attempts to commit any offence in his presence;

(b) Whom he reasonably suspects of having committed an offence referred to in schedule 1, other than an offence an offence of escaping from lawful custody, ..."

[16] The jurisdictional facts necessary for arrests under section 40(1)(a) of the Criminal Procedure Act are the following: the arresting officer must be a peace officer, an offence must have been committed or there must have been an attempt to commit an offence; and the offence or attempted offence must be committed in his or her presence.

[17] The jurisdictional facts for a section 40(1)(b) defence are the following: the arrestor must be a peace officer; the arrestor must entertain a suspicion, the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1; and the suspicion must rest on reasonable grounds (see Duncan v Minister of Law and Order [1986] ZASCA 24; [1986] 2 All SA 241 A at 248).

[18] In Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) at paragraph [28] of the judgment the court said:

"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of S 40(1) or in terms of S 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises ..."

[19] Van Heerden JA in Duncan v Minister of Law and Order at 249 said:

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (of HolgateMohammed v Duke E [1984] 1 All ER 1054 HL at 1057. No doubt the discretion must be properly exercised."

[20] As regards s 40(1)(b) the court in R v Van Heerden 1958 (3) SA 150 (T) held that the suspicion must be reasonable and the test for such reasonableness is objective.

[21] The approach to be adopted in considering whether the suspicion was reasonable is the one followed

by Jones J in Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 SE at 658FH:

"It seems 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; i.e. 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 only 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 sufficient 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 on solid grounds. Otherwise, it will be flighty or arbitratory and not a reasonable suspicion."

[22] The Supreme Court of Appeal at para [25] of the Sekhoto judgment said:

"It could hardly be suggested that an arrest under the circumstances set out in Section 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause, in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary."

[23] At paragraph [44] of the judgment it proceeded to say:

"While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in the process. He or she is not called upon to determine whether the suspect ought to be detained pending trial. That · is the role of the court (or in some cases a senior officer). The purpose of arrest is no more than to bring the suspect before court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime and those listed in schedule 1 are serious, not only because the legislature thought so a peace officer could seldom be criticised for arresting a suspect for that purpose."

APPLICATION OF THE LAW TO THE FACTS

[24] The plaintiff admits that his driver's licence had expired and therefore he drove the motor vehicle up to the scene of the accident without a valid driver's licence. Consequently as at the time when the accident

occurred the plaintiff was driving the motor vehicle without a valid driver's licence.

[25] The motor vehicle which the plaintiff was driving as at the time of the collision was unroadworthy in that its licence disc had expired.

[26] The plaintiff paid an admission of guilt fine for driving a motor vehicle without a valid driver's licence. For some reason unknown to the court the offence relating to the expired licence disc of the motor vehicle was withdrawn.

[27] The question is whether these two offences on their own were sufficient for the police to formulate a reasonable suspicion and effect an arrest.

[28] In answer to this question ordinarily the two offences attracts a fine in the form of punishment in which event the police might have used their discretion to issue summons and confiscated the motor vehicle.

[29] However, in this particular case, two aggravating factors are present, namely:

29.1 the motor vehicle was involved in an accident;

29.2 the accident was fatal in that a person has died, both factors which are not disputed.

[30] Therefore in examining the question whether the police had a reasonable suspicion to effect an arrest, it is my view that these factors played a role. This scenario should be distinguishable from an instance where a person is stopped on a roadblock and found to be without a valid driver's licence and/or a valid roadworthy certificate on the motor vehicle. Such an instance would only constitute a threat to the lives of other road users. However, in the present instance, the plaintiff as a driver admitted being involved in an accident where a life was lost. Therefore I am unable to see how a reasonable police officer given the circumstances of this case, would have just allowed the plaintiff to leave the scene without effecting an arrest (see the Mabona judgment).

[31] Having regard to the evidence as a whole, I am of the view that the arrest and detention

of the plaintiff were lawful and justified. Accordingly the plaintiff's claim must fail.

[32] In the premises I make the following order:

32.1 The plaintiff's action is dismissed with costs.

M J TEFFO

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff

Etienne Botha

Instructed by

Gildenhuys Malatji Inc

For the Defendant

L A Pretorius

Instructed by

The State Attorney Pretoria

Date of Judgment

20 September 2017

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