

SOUTH AFRICA / JUDGMENT

Koker v Minister of Safety and Security (5676/2007) [2010] ZAKZDHC 31; 2010 (2) SACR 595 (KZD) (13 August 2010) [2010] ZAKZDHC 31

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Dhaya Pillay

CASE / FILE NUMBER

5676/2007

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

CASE

NO.: 5676/2007

Heard:

19

July 2010 REPORTABLE

Heads delivered: 27 July 2010

Judgment

delivered:

13 August 2010

In the matter between

T

DE KOKER

PLAINTIFF

and

THE

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

DHAYA PILLAY J

Introduction

Hijacking occurred frequently in Pinetown, a police officer testified for the Defendant, the Minister of Safety and Security. The plaintiff, Theodore De Koker, a 52 year old self employed male, honestly believed he was being hijacked when he drove away from unmarked vehicles driven by people dressed in civilian clothes and bearing firearms. Those pursuing the plaintiff later turned out to be police officers. They suspected that the plaintiff had broken the law. Their pursuit resulted in the plaintiff crashing into a VW Golf.

The plaintiff claims damages from the defendant in the amount of R260 260.64 for unlawful arrest and detention, which resulted in emotional shock and distress and for damages to his Opel Monza and the Golf.

The Plaintiff's Version

The plaintiff was the registered owner and driver of the white Monza registration number NPN 38277. On 21 December 2006, at about 20h00 and at Pinetown he was driving along Fields Hill after picking up his niece from choir practice at Kearsney College. In his vehicle were his niece and her boyfriend in the backseat. In the front passenger seat was his 9 year old son. He approached the intersection of Fields Hill and Richmond Road cautiously as the robot was red. His car skidded over gravel near the intersection.

He stopped before the white stop line, reversed for about 3 to 4 metres to avoid the gravel and waited until the robot turned green. He then proceeded, turning right into Richmond Road.

A vehicle approached him at a speed from behind. His niece shouted to him that they were being hijacked. He calmed her down saying that the other driver was being silly and having fun. However, he became alarmed when another white vehicle drew up along side him and a white bakkie drove in front of his vehicle and boxed him in.

They forced him to stop at the curb near a BP service station. By that stage his passengers were hysterical. They had seen the people in the other vehicles carrying guns. They screamed that they were going to be killed. A man alighted from the white vehicle parked parallel to his Monza. The man wore a "beanie" hat; he was not wearing or carrying any police identification. He shouted to the plaintiff, "Get out of your fucking car!" as he pointed his firearm at the Monza.

By that stage the plaintiff too believed that he was being hijacked. He reversed to avoid the bakkie in front of the Monza, then accelerated forward, climbing over the pavement on the left to escape. In the course of doing so, his tyre burst. Three white vehicles pursued him as he head for the police station.

He handed his cellular telephone to his son instructing him to call his wife and ask her to alert the police. He asked his niece to also telephone the police and inform them that they were being hijacked.

As the tyre of his Monza was damaged it could not speed. So he zigzagged along the road thus preventing the pursuing vehicles from overtaking him. He passed through several intersections controlled by traffic lights all of which were in his favour.

He reached the intersection at Old Main Road. The robot was red. He proceeded into the intersection and collided into the black Golf driven by Mr Nimela. By that stage the children were hysterical; he had instructed them earlier that when the car stopped they should run away as far and as fast as possible. That is what the children did after the Monza crashed into the Golf.

The vehicles pursuing him arrived at the scene of the crash. A man jumped out of the vehicle and shouted at him, "Why did you not stop the fucking car?" In order that residents in the nearby flats could hear him, the plaintiff shouted that he thought that he was being hijacked. At that point the man who had alighted informed him that he was a police officer and he produced his identification. The plaintiff replied that as he had seen no identification, no blue lights or sirens and had not known that they were the police, he thought he was being hijacked.

The officer informed the plaintiff that he was arresting him for drunken driving. The plaintiff insisted that they take him to the district surgeon for blood tests as he was a teetotaler.

The plaintiff recognised Vicki van Biljon who was then an inspector with South African Police Services (SAPS). She was the mother of one of the boys schooling with his son. He asked van Biljon to inform his wife that he had been arrested. His wife arrived on the scene. She collected the children.

He got in the police vehicle together with the driver of the Golf. He feared for his life even after he was arrested because he knew that the police officers were aware of their wrong-doing. They drove around apparently not knowing what to do with him. He had been in the police force many years before for a brief period and feared that the SAPS might try to conceal their wrong-doing.

The plaintiff was tested at the Pinetown district surgeon before being brought to the police station. He was kept in a holding cell until he was charged and released on bail that night. A few hours later he appeared in the Pinetown Magistrates' Court on charges of reckless and negligent driving. The charges were withdrawn.

The Defendant's Version

About ten SAPS members were on a suspect search and raid operation that night. Hence they bore no police identification. Setting out in a convoy of four unmarked vehicles and travelling at about 40 kilometres per hour on Richmond Road, they approached the intersection with Fields Hill. The first bakkie proceeded through the intersection. As the second bakkie proceeded into the intersection the Monza skidded through the red robot past the white stop line into the intersection almost crashing into the bakkie. The Monza then reversed about 20 metres, slowed down then drove through the red robot, turning right into Richmond Road.

The robot was still green in favour of the SAPS vehicles. Warrant Officer Ramsawak, the first of three witnesses for the defendant, testified that he u-turned, switched the hazard lights of his Almera and chased the Monza to stop it. Constable Shandu, the second witness who was a passenger in the second bakkie and Superintendent Sibiya, the third witness who was a passenger in the Corsa also chased the plaintiff.

When Ramsawak was immediately behind the Monza, he flicked the lights of the Almera. The Monza increased speed to between 80 and 100kms/hr.

Just beyond the BP garage the Monza stopped. Officer Govender who travelled with Ramsawak shouted to the driver that they were police officers. Ramsawak approached the Monza cautiously from behind. The Corsa stopped parallel to the Monza. Sibiya, who was in the Corsa, opened his window and identified himself as the police to the plaintiff. Sibiya carried a firearm. Suddenly, the plaintiff reversed almost hitting Govender as he drove off over the pavement on the left. The Corsa, the bakkie and the Almera pursued the Monza, although not at high speed, as the Monza was not travelling fast.

The plaintiff drove through several robots before crashing into the Golf.

At the crash scene, Ramsawak and Sibiya produced their police identity card. They interviewed the plaintiff. The plaintiff explained that he drove away because he had thought that he was being hijacked. The policemen did not believe him.

Although the plaintiff did not appear to be drunk they took him for testing to make sure that he was not under the influence of alcohol. They then went in search of a testing machine. After testing him they arrested him on charges of reckless and negligent driving. The next day, the charges were withdrawn.

Issues for

Determination

The following issues arise for

determination:

At the Fields Hill-Richmond Road intersection:

Did the plaintiff proceed through a red robot?

Did the plaintiff almost collide into the defendant's bakkie?

At the BP service station stop:

Did the police officers box the Plaintiff in when he stopped?

Did any of the policemen identify themselves to the plaintiff?

Did the plaintiff drive through several red robots before colliding with the Golf?

At the crash scene:

Was the police officers' suspicion that the plaintiff was under the influence of alcohol reasonable?

Was the police officers' rejection of the plaintiff's explanation that he believed he was hijacked, reasonable?

At all times, was the police conduct reasonable and justifiable?

Findings

It was common cause that the defendant bore the onus of proving the lawfulness of the arrest.¹

A bird's eye view of the evidence as a whole reveals that both parties tended to tweak and trim, puff and prune their versions here and there to suit their cause. Consequently, the Court has to pick its way carefully to establish in respect of each disputed fact where the probabilities lie. Assessing the credibility of witnesses is critical to determining the disputed facts. Much of the plaintiff's evidence is common cause or not disputed. He was also corroborated substantially by von Biljon; however, the Court is cautious in evaluating her evidence.

Von Biljon resigned from the SAPS on 6 January 2009 and seemed to bear a grievance against the SAPS. Furthermore, the Court was informed during the long adjournment that von Biljon had indicated to the plaintiff's attorneys that she wished to testify in his favour. Until then, she had not been in contact with the plaintiff since the incident. Hence, the defendant had not been informed that she would be a witness. Consequently, counsel for the defendant needed an opportunity to consult with her clients after the plaintiff testified. This necessitated an adjournment.

Although she was not cross-examined about why she elected to testify at such a late stage, the Court is not convinced that she had no contact with the plaintiff over the three and a half years following such a traumatic incident during which she firmly distanced herself from the conduct of her colleagues. Furthermore, her son schooled with the plaintiff's

son. Hence the Court treats her evidence with caution.

As for the defendant's witnesses, they contradict themselves and each other in several material respects. The most telling discrepancies are between their statements and their oral testimony. An important part of the defendant's case was that the plaintiff broke the law by driving through red robots at the Fields Hill intersection and after the stop near BP. None of the statements of the defendant's witnesses mention these breaches of the law.

An explanation for this omission is that Shandu and Sibiya copied their statements from Ramsawak's statement, which was silent about the plaintiff driving through red robots. Sibiya persisted that he wrote his own statement independently of Ramsawak's; however, he could not explain the substantial similarities in parts of the statements. After a lapse of six months it would be remarkable for police officers who often deal with traffic offences to remember with such precision details such as the plaintiff reversing 20 meters from the intersection at Fields Hill.

Ramsawak and von Biljon made their statements simultaneously on the night of the incident. Shandu and Sibiya made their statements after the plaintiff served notice of this litigation on the defendant. Their counsel submitted that they made their statements as a routine procedure to close the docket and not in anticipation of this litigation. It is coincidental that they made their statements only after the defendant received the notice.

Nevertheless, assuming in favour of the defendant that its witnesses had not acquainted themselves with either the notice in terms of section 3 of The Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002 or the summons, they could have been in no doubt that they had to justify their actions by proving that the plaintiff broke the law. Their statements omit any mention of the plaintiff driving through red robots. Accordingly, the Court rejects their oral evidence on this issue.

Another dimension is that all the defendant's witnesses emphasised that they chased and arrested the plaintiff on suspicion of driving under the influence of alcohol; none of them testified that they arrested him for driving through a red robot. This allegation is their embellishment to criminalise the plaintiff's conduct and thereby justify their behaviour once they realised that the drunken driving charge would not hold.

As to whether the plaintiff nearly crashed into the bakkie in which Shandu was driven, only Shandu mentioned this in his statement and gave that evidence. Shandu was the only witness who testified that at the fields Hill intersection the plaintiff zigzagged as he reversed. Although Ramsawak witnessed the incident at the Fields Hill intersection, he did not mention either the near crash or the zigzagging in his statement.

Von Biljon testified that she and her colleagues thought that the plaintiff was drunk because of the way he had skidded and reversed at the intersection; therefore she also thought it was a good idea to "check out" the Monza.

At best for the defendant, the question whether the plaintiff nearly collided into the bakkie is inconclusive. However, notwithstanding the variation and contradictions in the evidence of the defendant's witnesses, what is clear, is that the plaintiff's driving at the intersection of Fields Hill was so odd that it attracted the attention of the police.

However, the Court accepts in favour of the defendant that the plaintiff's conduct at the Fields Hill intersection was sufficient to cause the police to be suspicious of the plaintiff. The Court also accepts that the police officers had a duty to pursue the plaintiff to investigate his conduct.

Following the plaintiff's explanation that he believed he was being hijacked, the police must also have known that they would have to prove when and where they identified themselves to him. Ramsawak and Sibiya testified that, at the stop at BP, as Sibiya drove past the plaintiff he shined his torch at the plaintiff and shouted that they were the police. This evidence is consistent with their statements. Shandu testified similarly but omitted this vital evidence from his statement.

In her statement, Von Biljon did not mention anything about Sibiya identifying himself at the stop at BP. She testified that one member, she could not say who, got out of the Corsa carrying a gun. He said something but she could not say what he said. Her version coincides in part with the plaintiff's evidence.

The Court accepts that at the stop at BP, Sibiya and Govender did announce themselves to be police officers. However, they did not communicate this clearly to the plaintiff. Their conduct instilled fear instead of reassurance. Even if Sibiya had produced his identity card whilst driving past the plaintiff, the latter would not have been able to see it as it is as small as a driver's licence card.

Notwithstanding the conflicting versions are about whether the police identified themselves at the stop at BP, the Court is convinced that the plaintiff would not have risked driving off if he knew that it was the police who had boxed him in on three sides. His second hand Monza 1800 could not have matched the three police vehicles. Even if he had shot the red robot at the Fields Hill intersection, to put his and his passengers' lives at risk merely to avoid conviction for a traffic offence is beyond the range of probabilities.

It was common cause that the police officers boxed in or as Shandu testified, "jammed and blocked" the plaintiff when he stopped at BP. This fortified the plaintiff's belief that he was being hijacked. This was contrary to police procedure according to von Biljon as the police were trained not to approach suspect vehicles from the front as that rendered the police more vulnerable.

As to whether the police officers' suspicion that the plaintiff was under the influence of alcohol was reasonable, it was common cause that at the crash scene, the plaintiff manifested none of the typical signs of having consumed alcohol. The defendant's witnesses denied that von Biljon mentioned to them that the plaintiff was teetotaler. However, the hesitant tone in which they testified about the plaintiff being under the influence of alcohol, signalled to the Court that they knew that their suspicion was baseless.

Clearly the police officers' rejection of the plaintiff's explanation that he believed he was hijacked was unreasonable. His explanation was consistent with his conduct preceding the crash. The conduct of the children running away confirmed that his belief was genuine. Testifying in chief, Shandu said that at the stop at BP, he could see that the plaintiff "looked scared". Von Biljon testified that she held her colleagues back when the chase resumed from the stop at BP as the plaintiff was "petrified" and seemed to be heading in the direction of the police station. When testifying that he rejected the plaintiff's explanation, Ramsawak smiled in a way that suggested that he knew he was not being truthful.

As to whether police conduct is reasonable and justifiable depends on the facts of each case.² In *Oliver v Minister of Safety and Security and Another* 2009

(3) SA 434 (W) a police officer arrested a suspect without a warrant without considering the reasonableness of the suspect's explanation. In a constitutional democracy personal freedom is highly prized, the Court observed.³

Eksteen J increased the sentence of two young accused policemen who shot at a motorist who did not stop at a road block simply because they thought that they were entitled to do so. The learned judge found that such a proposition was so unreasonable for trained policemen that no court could accept that their belief was in good faith.⁴

As to whether the police conduct was reasonable and justifiable at all times in this case, the following must be considered:

An alleged road traffic offence set in motion a four-car chase through suburban roads.

The plaintiff stopped at BP soon after Ramsawak started flicking his lights.

The chase ended in a collision at an intersection.

The distance travelled during the chase was 3,8 kilometres.

Three unmarked vehicles jammed the plaintiff on to the roadside in a style atypical of police procedure and typical of hijackers.

The plaintiff headed in the direction of the police station.

The collision occurred about 400 metres from the police station.

Incredibly, it never occurred to Ramsawak that the plaintiff was heading for the police station.

The defendant's witnesses bore no visible signs of being police officers.

According to Shandu, one of the police vehicles had a blue light, but the police officers did not use it.

It is common cause that none of the police officers attempted to contact the police control room for back up from a police vehicle with sirens and blue lights.

Although the police officers' suspicions were peaked because the Monza had tinted windows, typical of vehicles used in crime, none of them called the control room to authenticate its details to allay their suspicions that it was stolen or had previously been used in crime.

The Court accepts that the plaintiff's conduct initially triggered genuine suspicion amongst the police officers. However, the defendant's witnesses made out no case that a reasonable person would have known that they were police officers. As senior experienced police officers they must have realised that the plaintiff believed that he was being hijacked irrespective of whether van Biljon mentioned this to them.

It was not reasonable and proportional for three unmarked police vehicles to pursue an old Monza 1800 through suburban streets to effect an arrest for a drunken driving offence. The risks of a car chase in those circumstances to civilians are probably as great as drunken driving itself. Furthermore, the police did not apply less risky procedures for arresting the plaintiff, such as summoning help from marked police vehicles.

However reasonable the police officers' suspicion was initially, after the crash they could have had no doubt that the plaintiff honestly believed that he was being hijacked. They could also have had no doubt that he was drunk.

Instead of apologising for the mutual misunderstanding triggered by their conduct and trying to remedy the damages, the police officers compounded their liability by arresting the plaintiff on a spurious suspicion of drunken driving.

Excluding their initial suspicion, legitimately kindled by the incident at Fields Hill, and their pursuit up to the BP stop, the conduct of the employees of the defendant was otherwise unreasonable and disproportionate to the offence for which they sought the plaintiff. The ensuing pursuit, arrest, detention and charging of the plaintiff was consequently unlawful.

In conducting themselves thus the defendant's employees violated several provisions of Standing Order (9) 341. They disregarded the caution sounded in the Standing Order that as arrest is one of the most drastic infringements of an individual's rights, rules regulating the arrest and treatment of arrestees must "be strictly adhered to". Despite this warning, they effected an arrest when they did not hold a reasonable suspicion. The defendant should consider disciplinary action against the employees involved, if it has not done so yet.

Conclusion

This case spotlights the potentially tragic consequences for people who genuinely believe that they are being hijacked. Other similar cases are known to have ended more tragically than this. The potential for loss of life and property in the heat of a hot pursuit is almost always a reality.

A countervailing concern is that police officers have powers and duties to, arrest without a warrant, any person who commits or attempts to commit any offence in their presence, or whom they reasonably suspect of having committed an offence.⁵

Therefore, a balance has to be struck to better protect the public on the one hand without impeding the police in their fight against crime on the other hand.⁶ Standing orders should be issued to guide the police on the proper course of conduct in a similar situation present to minimise the risks of hot pursuit arrests.

In the circumstances, the Court finds that the conduct of the police officers who acted in the course and scope of their employment with the SAPS in pursuing, arresting, charging and detaining the plaintiff was unlawful.

The plaintiff has consequently suffered damages to his person and property.

Order

The Court orders the defendant to pay to the plaintiff agreed or proven damages to:-

the plaintiff's person;

the plaintiff's motor vehicle, being NPN38277;

the Golf NU26603 driven by Mr T.P. Nimela;

The defendant is ordered to pay the plaintiff's costs.

DHAYA PILLAY J

COUNSEL

Counsel for the Plaintiff : Adv KC McIntosh

Instructing Attorneys : McClung Mustard McGlashan & Bosch

Counsel for the Defendant : Adv S. Jikela

Instructing Attorneys : F.T Gray (Snr Assistant State Attorney)

The State Attorneys

Date of hearing : 19 July 2010

Date of

Judgment

: 13 August 2010

1 Newman v Prinsloo & Another 1973 (1) SA 125 (W) at 126H; Walters v Minister of Safety and Security of the Republic of South Africa 2009 JDR 0648 (KZD)

2 Le Roux v Minister of Safety and Security & Another 2009 (4) SA 491 (N); Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA); Minister of Safety and Security v Van Niekerk 2008 (1) SACR 56 (CC); Mvu v Minister of Safety and Security & Another 2009 (6) SA 82 (GSJ); Ngamekam v Minister of Safety and Security 2009 JOL 23874 (ECP); R. v Oosthizen 1961 (1) TPD at 605; Rudolph and Others v Minister of Safety and Security & Another 2009 (5) SA 94 (SCA); Sydney v Minister of Safety and Security 2010 JDR 0278 (ECG); Ward v Vancouver (City)

[2009] 186 CRR (2d)1

3 Zealing v Minister of Justice and Constitutional Development

[2008] ZACC 3; 2008 (4) SA 458 (CC) 468 – 469; Minister of Justice v Hofmeyr 1993 (3) SA 131 (AD) 153

4 S v Nel and Another 1980

(4) SA 28 E at 35

5 Section 40(1)(a) of the Criminal Procedure Act 51 of 1977

6 Ex Parte Minister of Safety and Security: in re S v Walters 2002 (2) SACR 105 (CC); April v Minister of Safety and Security

[2008] 3 All SA 270 (SE) para 8

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