

SOUTH AFRICA / JUDGMENT

Oberholzer v Ekurhuleni Metropolitan Municipality and Another (57431/17)

[2024] ZAGPPHC 1273 (29 November 2024)

[2024] ZAGPPHC 1273**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mogotsi

CASE / FILE NUMBER

57431/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 57431/17

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

DATE:

29/11/2024

SIGNATURE

In

the matter between: OBERHOLZER
MARK DAVID
PLAINTIFF
and
EKURRHULENI
METROPOLITAN MUNICIPALITY
1st
DEFENDANT
MINISTER
OF POLICE
2nd
DEFENDANT

JUDGMENT

MOGOTSI AJ

Introduction

1. The plaintiff instituted a delictual action for damages against both defendants arising from his alleged unlawful arrest and detention,

which arrest was effected without a warrant. The plaintiff and the second defendant settled the aspect of detention. In his defence, the 1st defendant alleges that the arrest was executed by virtue of section 40 (1) (a) of the Criminal Procedure Act[1] (The act).

2. The issues before this court related to the arrest and detention of the plaintiff by the 1st Defendant and the matter proceeded on both merits and quantum.

Background

3. The issues emanate from an incident that occurred on the morning of the 30th of November 2015 on the N12 Highway near Boksburg. The plaintiff, who was the driver, was in the company of his colleague travelling from Springs towards Emperor's Palace to pick up a Minister who had an appointment at Sandton. There was traffic congestion and the plaintiff drove on the emergency lane. He was confronted by the 1st defendant, a member of the Ekurhuleni Metropolitan Police Department (hereinafter referred to as EMPD).
4. The plaintiff and his passenger were escorted to the OR Tambo Police Station where they were arrested on the charges of impersonating a police officer, reckless and/or negligent driving; disobeying a police instruction; and negligent handling of a firearm. The plaintiff was detained at the OR Tambo Police Station, a Police Station at Tembisa South and eventually, transferred to the Boksburg North Police Station where he remained in detention until 2 December 2015 when he was admitted to bail pursuant to his appearance at the Boksburg Magistrates Court. At a subsequent hearing, the Senior Public Prosecutor issued a nolle prosequi certificate withdrawing all the charges against him.

The facts

5. The Plaintiff, a retired police officer, testified that he is a VIP security officer and his scope of duties was inter alia to escort Ministers of Burundi and Morocco. On the morning of 30 November 2015, he was driving with his colleague along the N12 High Way en route to pick up a Minister. Traffic was heavy, and slow and at some point came to a halt. He drove into the emergency lane after switching on the stroke light on the dashboard and the hazards. He noticed an EMPD vehicle, driven by the 1st defendant, showed them his VIP card and signalled to assist him through the traffic to no avail. He continued driving on the emergency lane at a speed of about 40 to 60 km/h.
6. When approaching Widwaters at Boksburg, he noticed the first defendant's vehicle driving next to his and the latter signalled to him to stop. He thought it was dangerous to come to a halt immediately and he took a detour and stopped. He alighted and extended his hand intending to greet the 1st defendant and request him to assist him in driving to Emperor's Palace. The latter refused informing him that he was impersonating

the police and instructed him to follow him to OR Tambo Police Station where he was arrested and detained.

7. He further testified that his vehicle had no boards indicating that he was a police officer and that the stroke light on the dashboard did not comply with traffic regulations because his vehicle was not registered under a security company. He confirmed that he resigned from the police force in 2010 and that he carries his expired police appointment card for sentimental value and the firearm for protection
8. Superintendent Mashudu Mushaniki testified for the 1st Defendant that on 30 November 2015, he was on duty when he saw a white Ford Ranger driving in the emergency lane. The plaintiff upon noticing his vehicle, the plaintiff cut into the traffic. He stopped him and he continued driving. The plaintiff drove past him again on the emergency lane saying they were late and I was wasting his time. He contacted the control room enquiring about the vehicle and was advised that the vehicle was not registered under a security company.
9. He pursued the plaintiff who took the Kempton Park off-ramp. He manoeuvred through the traffic and finally managed to block the road. He approached the plaintiff's vehicle. The plaintiff showed him his appointment card alleging that he was a police officer stationed at Benoni. Upon verification, he established that the plaintiff was an ex-police officer. When he confronted the plaintiff about this, the latter apologised conceding that he was supposed to have returned the appointment card to his former employer. He instructed the plaintiff to follow him to OR Tambo Police Station where he apprehended both the plaintiff and his colleague for impersonating the police.

10. Whilst at the police station, he noticed that one of them had a firearm holster and they informed him that their firearms were in the vehicle. Upon his request, they proceeded to the vehicle where he found one firearm on the driver's side, the other on the floor and a South African Police Service badge inside the car.

Common cause issues

11. The following issues are common causes:
 - 11.1 The plaintiff drove on the emergency lane because he was in a hurry to pick up a Minister.
 - 11.2 The Plaintiff drove with white stroke lights on and his vehicle was not registered under a security company.
 - 11.3 The traffic was congested and there were road works.
 - 11.4 The plaintiff had a South African Police Service appointment card although had retired from the Police Service.
 - 11.5 The parties proceeded to OR Tambo Police Station.
 - 11.6 Two firearms and a South African Police badge were found inside the plaintiff's vehicle.

Issues

in dispute

12. The issues in dispute are the following:
 - 12.1 Whether or not the arrest of the plaintiff was lawful;
 - 12.2 Whether the detention of the plaintiff was lawful.

The law

13. Before evaluating the evidence, reviewing the applicable legislative framework and legal principles may be appropriate.
14. Section 40(1)(a) of the Act reads as follows:

“(1) A peace officer may without warrant arrest any person-

 - (a) *who commits or attempts to commit any offence in his presence;”*
15. In *Minister of Law and Order and Others v Hurley and Another*[2] the Court stated the following relating to the burden of proof.

“An arrest constitutes an interference with the liberty of the individual concerned, and it, therefore, seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

16. The same principle was reaffirmed by the Supreme Court of Appeal in *Zealand v Minister of Justice and Constitutional Development*[3] the Court held the following:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily

or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of

liberty, whatever form it may have taken.”

Evaluation

17. As mentioned earlier in the judgment, it is common cause that the plaintiff was driving in the emergency lane. His vehicle was not registered with any security company and therefore the stroke light on the dashboard did not comply with traffic regulations. Counsel for the plaintiff argued that driving on the emergency lane does not amount to an offence but it is a road traffic infringement. In my view, a perpetrator commits an offence when he/she intentionally or negligently acts unlawfully or wrongfully. Driving a vehicle in contravention of the traffic regulation in the emergency lane is an unlawful or wrongful act on the part of the plaintiff and it amounts to an offence. Therefore, the plaintiff’s counsel’s submission is not persuasive and falls to be rejected.
18. In the premise, I find that the plaintiff's act of driving a vehicle not authorised to drive on the emergency lane constitutes an offence of reckless and/or negligent driving of a motor vehicle which offence was committed in the presence of the 1st defendant.
19. The matter of *National Employers General Insurance Co Ltd v Jagers*[4] sets out the approach that should be adopted when faced with two mutually destructive versions. Eksteen AJP stated: “...

Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.”

20. The approach on mutually destructive versions as enunciated above obtained a stamp of approval from the Supreme Court of Appeal in 2003 in the case of Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others[5] , where the court restated the law as set out in the National Employer General Insurance Co. Ltd case supra.
21. The plaintiff avers that he cut into the traffic because there were road works which impeded his continued driving on the emergency lane and the defendant, on the other hand, avers the plaintiff cut into the traffic after noticing him. In my view, the probabilities favour the version of the 1st defendant because he would not have manoeuvre through the traffic to block a busy highway if the plaintiff had not committed an offence.
22. It is common cause that at some stage the vehicles were parallel. The plaintiff testified that at that stage he showed his VIP card to the 1st defendant pleading with him to assist him through the traffic and the 1st defendant, on the other hand, testified that the plaintiff showed him his South African Police Service Appointment Card. Later, after the vehicles came to a halt, the plaintiff showed the 1st defendant a police appointment card alleging that he was a police officer stationed at the Benoni dog unit. Upon verification of his allegation, the 1st defendant established that the plaintiff was an ex-police officer. When approached with this information, the plaintiff apologised and this version was not gainsaid. The 1st defendant, at OR Police Station, found a South African Police Badge and two firearms in the plaintiff's vehicle. In my view, the probabilities are that at the stage when the vehicles were driving parallel the plaintiff showed the 1st defendant his expired police appointment certificate and not his VIP card.
23. The plaintiff testified that he took a detour because it was a safe option for him before stopping. The fact that the 1st defendant's uncontroverted evidence that he had to manoeuvre through the traffic and block the road with his vehicle to stop the plaintiff renders his version more probable than that the plaintiff and I find that the plaintiff was disobeying his instructions.
24. The version of the 1st defendant was coherent and he impressed me as an honest and reliable witness. The plaintiff on the other hand adjusted his version to suit his case and the balance of probabilities is in favour of the 1st defendant's version. Therefore, I find that the plaintiff committed an offence of reckless and/or negligent driving, impersonating the police, failure to obey the police instructions and negligent handling of a firearm in the presence of the 1st defendant in compliance with section 40(1)
 - (a) of the Act. In the premises, I find that the defendant proved on the preponderance of probabilities that the arrest of the plaintiff was lawful.
25. Regarding unlawful detention, the first defendant testified that the plaintiff did not apply for police bail and that he had no authority to admit him to bail. Therefore, the defendant cannot be held liable for the plaintiff's alleged unlawful detention.

Costs

26. I see no reason why costs should not follow the results. As an ex-police officer, the plaintiff is aware of the implications of taking an oath, yet he fabricated the facts to enhance his case. He unlawfully carries his South African Police Service card and badge. This court has a heavy roll and the litigants must carefully consider their cases before setting the matters down. In my view, a punitive costs order is appropriate in the circumstances of this case.

Order

1. The Plaintiff's claim against the first respondent is dismissed with costs on attorney and own client.
2. The Draft Order marked "X" is made the order of the court.

P J MOGOTSI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Plaintiff: JSM Guldenpfening SC Attorney for the Plaintiff: K Rontgen Counsel for 1st Defendant: J Janse van Rensburg Attorney for 1st Defendant: A Van Niekerk Date heard: 12 November 2024 Date of Judgment: 29 November 2024

[1] 51 of 1977

[2] 1986

(3) SA 568 (A) at 589E-F

[3] 2008

(4) SA 458 (CC)

[4] 1984

(4) SA 437 (ECD) at 440 D - G

[5] 2012 (5) SA 363 (SCA)

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