

SOUTH AFRICA / JUDGMENT

Smit and Others v Minister of Police (410/2018; 411/2018; 409/2018) [2022] ZANWHC 62 (3 November 2022) [2022] ZANWHC 62

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

410/2018; 411/2018; 409/2018

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IN THE HIGH COURT OF SOUTH AFRICA, MAHIKENG

CASE NO: 410/2018

411/2018

409/2018

Reportable:

YES / NO

Circulate to Judges:

YES / NO

Circulate to Magistrates:

YES / NO

Circulate to Regional Magistrates: YES NO

In the matter between:

JUAN SMIT 1

st PLAINTIFF

RUAN LIEBENBERG 2ND

PLAINTIFF

RUPERT RICHTER 3

RD PLAINTIFF

And

THE MINISTER OF POLICE DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 03 November 2022

JUGDMENT

REDDY AJ

INTRODUCTION

- [1] In actions based in the actio iniuriarum which commenced separately, all three plaintiffs issued summons out of this court on the 22nd February 2022 claiming damages for their alleged unlawful arrest and detention against the defendant, the Minister of Police. Each plaintiff respectively prayed for payment in the sum R535 -000-00, interest on the said sum at the prescribed rate of interest from the date of service of the section 3 notice of the Institution of Legal Proceedings Against Certain Organs of the State Act, 2002 and costs of suit.
- [2] By virtue of an order granted in terms of Rule 11 [a] of the Uniform Rules of Court, the distinct actions of the plaintiffs were consolidated. It was averred by the plaintiffs that they were unlawfully arrested and detained on the 12th April 2017 until their release at the Lichtenburg Magistrate's Court later the same day. The issues pertaining to the merits and that of quantum were separated in terms of Rule 33[4] of the Uniform Rules of Court by order of court.
- [3] The defendant admitted the arrest and detention of all plaintiffs but pleaded that the arrests were justified in terms of section 40[1] [b] of the Criminal Procedure Act 51, 1977 ["the CPA"] alternatively section 40[2] [CPA]. A reference was made to the Standing Orders pertaining to the South African Police Services [SAPS] and in particular Standing Order G 341.

THE CASE FOR THE DEFENDANT

- [4] The complainant Mr I.H Nchoe [Nchoe] deposed to a statement on the 10th April 2017 wherein he alleged that a firearm was pointed at him in contravention of section 120 [6][a] of the Firearm Control Act 60 of 2000 ["the FCA"]. Nchoe's statement formed the basis of police case docket: Lichtenburg CAS 17/04/2017. In terms of Nchoe's statement the third plaintiff who was identified as his employer was present with two unknown males at his residence in the early hours of the morning of the 10th April 2017. The unknown males as well as third plaintiff were in possession of firearms. One of the unknown males pointed him with a firearm, although all three were in possession of firearms.

- [5] According to W/O Nortman: a singular witness for the defendant, the case docket relating to Nchoe was handed over to her on the 10th April 2017. The only statement in the docket was the statement of the complainant Nchoe which she read. On the 11th April 2017, W/O Nortman telephonically arranged with third plaintiff that first and second plaintiff meet with her on the following morning, the 12th April 2017 at the SAPS Lichtenburg.
- [6] The three plaintiffs duly arrived as prearranged. Nchoe was not present to identify or confirm the identity the plaintiffs as those allegedly involved in the incident of the 10th April 2017. The plaintiffs were taken to the detective offices where all three were arrested by W/O Nortman. The processing of all the plaintiffs followed inclusive of each being fingerprinted and the collection of DNA swabs.
- [7] Importantly the plaintiffs were officially documented in the cell register and the occurrence book indicative of their detention. Once processed the plaintiffs were led by W/O Nortman to court, through an inter-leading gate between the SAPS Lichtenburg and the Magistrate's Court Lichtenburg. At court the plaintiffs were handed over to the court orderly with the accompanying body receipts. An attorney that was contacted earlier to appear for the plaintiffs present at court. W/O Nortman was not privy to the court proceedings as she left prior to the criminal case that involved the plaintiffs having being called.
- [8] The high watermark of W/O Nortman's evidence was that a suspect had to be arrested and taken to court if a criminal allegation had been registered. No rebutting evidence on the merits were led by the plaintiffs.
- [9] During the presentation of the defendant's case a court bundle marked Exhibit A comprising 121 pages was introduced into the record with the consent of counsel for the plaintiff. The contents and correctness of the Exhibit A, was admitted in its entirety by counsel for the plaintiff.
- [10] At the close of the respective cases on the 17th October 2022, counsel for both parties were afforded the opportunity to submit written heads of argument by 19th October 2022. The heads of argument of the plaintiff were filed as per the time lines whilst the defendant filed heads a day later. As agreed by counsel, the action could be decided on the written heads without the need for the hearing of oral argument.

PLAINTIFF'S WRITTEN SUBMISSIONS

- [11] Advocate Du Plessis for the plaintiffs opined that three of the four jurisdictional factors justifying the arrest of the plaintiffs were absent from the evidence of W/O Nortman. But, for W/O Nortman being a peace officer, the evidence of W/O Nortman did not establish that she entertained a suspicion; that there was no evidence that the suspicion was that the plaintiffs committed an offence in Schedule 1 [CPA]; the latter being the case as a contravention of section 120

- [6] [a] of the FCA was not an offence that fell within the ambit of Schedule 1 [CPA]; and finally the suspicion must rest on reasonable grounds. As such, the arrest and detention was unlawful.

DEFENDANT'S WRITTEN SUBMISSIONS

- [12] The submissions of Advocate X Shibe—Nkosi for the defendant can succinctly be set out by borrowing directing from her written heads where the following is encapsulated.

"5.1 Warrant officer Nortman met 3 of the 4 jurisdictional facts in that she is a peace officer that acted on a suspicion that was raised upon the contents of the docket and that was handed to her and gave her reasonable grounds to arrest the suspects.[sic].

5.2. There may have been an oversight on her side in terms of the schedule under which the pointing of firearm falls under, but she did in accordance with the law exercise her discretion as to whether to effect an arrest on not. " [sic]

- [13] Apart from reliance on section 40[1][b] of the CPA, the concluding arguments ran in the alternatives both of which justified the lawfulness of the arrest. The first alternative was section 40 [2] [CPA] and the second alternative was the Police Standing Order G341. Disjunctively or conjunctively section 40 [1] [b], section 40 [2] of the CPA and the Police Standing Order G 341 cloaked the conduct of W/O Nortman with lawfulness it was advocated.

LEGAL PRINCIPLES

- [14] The defendant admitted the arrest and detention. Consequently, the defendant bore the onus of proof on a balance of probabilities

justifying the lawfulness of the arrest and the subsequent detention of the plaintiffs. This much was conceded to by counsel for the defendant. This concession was correctly in accordance with the principle enunciated in *Minister of Law and Order and Others v Hurley and Another* [1986] 3 SA 568[A] where the following was said:

"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."

- [15] In *JE Mahlangu and Another v Minister of Police* 2021 ZACC 10 at paragraph [32] this position was reiterated as follows:

"It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred -Once this has been established the deprivation is unlawful and the defendant bears the onus to prove that there was a justification for interference. "

[16] A good point of departure would be to examine the purport of the empowering provision, section 40[1] [b] of the CPA as pleaded by the defendant. It reads as follows:

[1] A peace officer may without warrant arrest any person-

[a].....

[b] whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

[17] In *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141, [2011] 2 All SA 157[SCA], 2011[5] SA 367[SCA] at paragraph [6] the SCA said the following in respect of the jurisdictional requirements of the section 40[1][b] of the CPA:

"As was held in *Duncan v Minister of Law and Order*, the jurisdictional facts for a section defence are that [i] the arrestor must be a peace officer; [ii] the arrestor must entertain a the suspicion must be that the suspect[arrestee] committed an offence referred to in schedule 1; and [iv] the suspicion must rest on reasonable grounds. '

THE ISSUES THAT FALL TO BE DETERMINED

[18] Two intertwined issues fall for adjudication, firstly were the plaintiffs lawfully arrested and secondly if not, were the plaintiffs physically detained?

THE LAWFULNESS OF THE ARREST

[19] It is against the set jurisdictional requirements that the conduct of W/O Nortman's had to be evaluated to ascertain if it passes the muster justifying the arrest of the plaintiffs. There is no discordant that W/O Nortman is a police officer and was acting vicariously as a servant of the defendant.

[20] In respect of the other three jurisdictional requirements W/O Nortman's evidence was woefully inadequate for the following

reasons:

(i) It was conceded to by W/O Nortman that at the time a decision was made to arrest the plaintiffs, the case docket that related to the plaintiffs only contained the statement of the Nchoe which she had read. This averment that the statement of the complainant was read appears to be disingenuous.

(ii) The complainant's statement reads as follows quoting strictly from paragraphs 1, 2 and 3:

1

"That on Monday 2017 /04/10 at approximately 01:30 while sleeping with my girlfriend with the name of Dimakatso awoken by three white men one whom I identified as my employer Rupert Regter the other two unknown to me. Both wearing camouflage [soldiers uniform] [my underlining]. All of them were in possession of firearms.

2

By awakening me, knock harshly on my shanty door and then on the sink. When open one of the both unknown to me point me with firearm then forced me that I was from my employer. Since I was not aware what was happening the employer explain to me that some African people did made housebreaking at his place

3

To see that one kept pointing me with firearm on my head I did scream looking for help to my neighbours my girlfriend also did come to see on what is happening. The bother to my father with the name of Sagws Ompjes did shout to those people telling them what they are doing to my son through the window.

(iii) Had W/O Nortman read the statement of Nchoe her seasoned investigation skills would have honed in on few aspects in these paragraphs that necessitated urgent further investigation or at least a further interview with Nchoe and the recording of a probable follow up statement. The statement of Nchoe in the raw form that it was in at that point could not have given rise to a suspicion on the part of W/O Nortman.

(iv) Firstly, given the estimated time, notwithstanding prior knowledge of the third plaintiff was there any light [natural or artificial] that assisted Nchoe in the identification of the third plaintiff? Secondly, the interviewing of Dimakatso [later identified as Dimakatso Seronwane] before the arrest of the plaintiffs was critical to the progress of the case as she was identified as the girlfriend of Nchoe and had a presence at the time he was pointed with a firearm. Thirdly, the complainant indicated that on the date that he deposed to the affidavit two of the persons that entered his abode were unknown to him. In this respect Dimakatso may have been able to assist in the identification of the unknown persons that entered on the morning in question. Fourthly, mention is made of another potential witness Sagrys Ompies [Ompies] who should have been interviewed. Fifthly, the statement of Nchoe divorces the third plaintiff from the physical pointing of a firearm, if a hypothetical acceptance of Nchoe's statement was allowed. Sixthly, the first and second plaintiffs are not linked to the alleged crime.

[21] On clarification with W/O Nortman as to her failure to secure a witness statement of Dimakatso, she was unable to provide a plausible explanation. She acknowledged the relevance and importance the statement to the investigation, more specifically in assisting in the decision to execute an arrest. The issue of the statement of Ompies was not canvassed with her.

[22] The concerns as regards the failure to secure a statement of Dimakatso and Ompies statements appears to be well-founded as about 6 days after the arrest of the plaintiffs Dimakatso deposed to an affidavit. For purposes of completeness the affidavit of Dimakatso is filed. The affidavit at best is terse, it speaks to the presence of two males that had confronted Nchoe, not three. Ompies statement was also recorded. There is no indication when this statement was recorded. Given the tenure of W/O Nortman's evidence, it could

have only been probably after the arrest of the plaintiffs.

- [23] W/O Nortman attempted to bolster her decision to arrest the plaintiffs by referring to certain conversations that she may or may not have had with the plaintiffs. Extra curial statements with the plaintiffs as then accused with regards their presence or absence at the crime scene is generally inadmissible. Even if these statements were admissible and accurate it is peculiar that the plaintiffs' exculpatory statements denying any involvement in any criminal allegations were not afforded due weight. Police officers who act in terms of section 40(1)(b) of the CPA should investigate exculpatory explanations by a suspect before they can form a suspicion. [See *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 [T at 184, *Liebenberg v Minister of Safety and Security* 2009, ZAGPPHC 88].
- [24] When an arresting officer has a suspicion, investigative steps should be pursued to determine the reasonableness of the suspicion. [R v Heerden 1958 (3) SA 150 71.
- [25] In *Mabona v Minister of Justice* 1988 (2) SA 654 SEC the following was stated as regards suspicion:

.the reasonable man will therefore analyse and assess the quality of information at his disposal critically and 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 allow himself to entertain a suspicion that will justify the arrest. This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However the suspicion must be based on solid grounds. '

- [26] On application of the law to the facts it could not be found that W/O Nortman had a suspicion of any crime been committed based on the evidence at her disposal at the time the plaintiffs were arrested.
- [27] On the conspectus of the evidence as a whole, there existed no suspicion to effect an arrest of the plaintiffs. The arrest of the plaintiffs in the absence of a suspicion automatically renders the arrest unlawful. That normally would sound the death knell for the case for the defendant as the jurisdictional factors set out in section 40(1)(b) of the CPA are symbiotic in nature.
- [28] I am, however, constrained to deal with the other jurisdictional requirements as set out in section 40(1) (b) of the CPA, considering W/O Nortman's remissness in this regard and as guidance to other arresting officers. Once a suspicion is formed on the reasonable ground, the suspicion must be that the plaintiffs committed an offence referred to in Schedule 1 of the CPA.
- [29] Within the parameters of Schedule 1 of the CPA a *numerus clausus* of offences are set out. On a reading of Schedule 1 of the CPA, pointing of a fire arm in contravention of the FCA is not specified. In order to bring this offence within the ambit of Schedule 1, the elasticity of open ended category of offences would have to be used to determine if the pointing of firearm falls broadly therein. These open ended category of offences are covered in

Schedule 1 where it provides for statutory offences, "the punishment wherefore may be a period of imprisonment exceeding six months imprisonment without the option of a fine.

[30] In terms of section 121 of the FCA the following penal provision is set out "any person convicted of contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4 may be sentenced to a fine or to imprisonment in Column 2 of that Schedule." Clearly a person convicted of the pointing of a firearm may be sentenced to a fine or to imprisonment not exceeding 10 years. The amount of the fine would be calculated with due cognizance of the Adjustment of Fines Act 101 of 1991. [See Borenotswe George Mekwe and The Minister of Police [2016] ZANWHC 40 paragraph 10-13]. The availability of the imposition of a fine declassifies the pointing of a firearm as a Schedule 1 offence. As such, had W/O Nortman formed a suspicion, the case of the defendant would still have been jettisoned in that the pointing of firearm is not a Schedule 1 offence. Therefore, it is inimical to the defendant's case that W/O Nortman entertained a suspicion that the plaintiffs committed an offence denoted in Schedule 1.

[31] The absence of a suspicion would circumvent an inquiry into the reasonableness thereof. In sum, three of the jurisdictional

requirements justifying the arrest of the plaintiffs had not been met.

[32] Notwithstanding W/O's Nortman's extensive experience in the SAPS exceeding thirty years , of which twenty years has been a docket carrying officer in the detective branch it was apparent that the inherent legalities surrounding the decision to effect an arrest on the plaintiffs in this action was clearly misconstrued . It is concerning that the plaintiffs were telephonically instructed to appear at the SAPS Lichtenberg in the absence of any evidence that prima facie connected each of them to the allegation of Nchoe.

DETENTION

[33] W/O Nortman seemed to suggest that the plaintiffs were not detained. This contention was further developed in the heads of argument of the defendant. The detention of the plaintiffs was admitted in the plea. The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies.

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It is impermissible for the defendant to plead a particular case and seek to establish a different case at trial. It is equally impermissible for a trial court to have recourse to issues falling outside the pleadings when adjudicating on a case. [See *Moaki v Reckitt & Colman [Africa] Ltd and Another* 1968[3] SA 98[A] at 103A *Imprefed [Pty] Ltd v National Transport Commission* 1993[3] SA 94[A1 at 107, *Buchner and another v Johannesburg Investment Co Ltd* 1995 [1] SA215 [T] at 216H-J; *Jowel v Bramwell-Jones and others* 1998[1] SA 836[W] at 902, *Minister of Safety and Security v Slabbelt* 2009 2 All SA 474 [SCA] para 11]. I undeniable that the plaintiffs were unlawfully detained.

[34] It is accordingly found that the arrest and detention of the plaintiffs on the 12th April 2017 was unlawful.

Order

[35] Resultantly, the following orders are made:

[i] The defendant is 100% liable for all agreed or proven damages of the plaintiffs.

[ii] The quantum proceedings are postponed sine die for a date to be determined by the Registrar.

[iii] The defendant to pay the costs of suit on a party to party scale.

A REDDY

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances:

Date of Hearing:

17 October 2022

Date of Submission of Heads: 19 October 2022

Date of Judgment:

03 November 2022

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