

SOUTH AFRICA / JUDGMENT

Sungisai and Another v National Prosecuting Authority and Another (62274/2012) [2019] ZAGPPHC 308 (17 July 2019)

[2019] ZAGPPHC 308

COURT

North Gauteng High Court, Pretoria

BEFORE

Rangata

CASE / FILE NUMBER

62274/2012

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
Case No: 62274/2012
17/7/2019
In

the matter between:

S
SUNGISAI
1ST
PLAINTIFF
S
THOMANI
2ND
PLAINTIFF
And
THE
NATIONAL
PROSECUTING
1ST
DEFENDANT
AUTHORITY
OF SOUTH AFRICA
MINISTER

OF
POLICE
2ND DEFENDANT

JUDGMENT

RANGATA AJ,

Introduction

- [1] This is a claim for damages instituted by the first Plaintiff, Mr S. Sungisai and second Plaintiff, Mr S Thomani against the Minister of Police (2nd Defendant) for Unlawful arrest as well as claim for malicious prosecution against the National prosecuting Authority (1st Defendant). The Plaintiffs' claims were brought separately under case number 62274/2012 and 62275/2012, respectively, which cases were subsequently consolidated under case number 62274/2012.
- [2] It is the Plaintiffs' claim that on the 13th August 2010 at around 20h00 and at Musina, Limpopo province, they were unlawfully arrested without a warrant of arrest by Warrant Officer S.J Sathekge, a member of the South African Police Office, for allegedly having committed the following criminal offences in the presence of a police officer:
- (a) Attempted Murder
 - (b) Obstructing the police from performing their duties
 - (c) Failing to comply with the instructions of a police officer,
- [3] Subsequent to the arrest of the Plaintiffs, they were detained until the 16th of August 2010, on which date both Plaintiffs appeared in the Musina Magistrate's Court. The criminal matter was postponed to the 23rd of August 2010. The Second Plaintiff was released on bail on the 23rd of August 2010. The First Plaintiff released on bail on the 24th of August 2010. The Plaintiffs claim that the First Defendant instituted the proceedings against them without reasonable and probable cause. Further that it acted with malice and animus injuriandi.
- [4] By agreement between the parties, the merits and quantum was to be separated. The matter proceeded only on the merits.
- [5] At the commencement of the trial, legal representative for the Plaintiffs addressed the court on compliance with Section 3 of Act 40 of 2002 as previously raised by the Defendant. The Defendant conceded that the Plaintiffs complied with the requirements of section 3 of Act 40 of 2002. The Defendant will not be proceeding with the special Plea of non-compliance against the Plaintiffs due to compliance, such application was withdrawn.

Background

- [6] The First Plaintiff testified that on the 13th August 2010 he went with his friend Mr Thomani, the second Plaintiff to visit his sister, whom was at the time working at a farm at the Malala area, i.e. ZZ2. They went to the farm, using private lifts which they had to hike. They spent the afternoon with his sister until around 17h00. On their way back they went to the hiking spot wherein they stopped a BMW. As the driver of the BMW stopped, they got into the vehicle, then they discovered that the driver was Michael Sephuma. They both knew Mr Sephuma.
- [7] They proceeded to drive on the Malala 2 road, which is a gravel road, travelling towards the Tshipise/ Musina tarred road. As they were travelling he noticed a bakkie parked on the right side of the road, facing the direction that they coming from and it was dark. He noticed a person holding a torch, flickering it up and down. Mr Sephuma stopped the Motor Vehicle. The person who stopped the vehicle, a police officer started to shoot at their vehicle on the right front bumper as well as the rear right wheel. The officer approached their vehicle and instructed them to alight and lie on the ground. Whilst lying on the ground he was handcuffed
- together with the 2nd Plaintiff, with one handcuff. Mr Sephuma was handcuffed alone. They were assaulted by the police.
- [8] He testified that the police officer took Mr Sephuma to the side and spoke to him, although he could not hear what they were talking about. He confirmed that a Range Rover motor vehicle stopped at the scene, shortly after they had stopped. The driver of the Range Rover informed the police officer that the BMW drove in front of his motor vehicle. Further that at some stage he had attempted to pass the BMW and the driver blocked him from overtaking, which he (1st Plaintiff) denied.
- [9] They were arrested on the 13th August 2008 and appeared in court on Monday, 16 August 2010. The case was remanded to 23rd August 2008 for formal bail application. On the 23rd August 2008 Mr Thomani and Mr Sephuma were released on bail, whilst his bail granted the following day, 24th August 2008. They had at least five court appearances before the case was withdrawn on the 21 June 2012. He stated that he was unemployed at the time of the incident.
- [10] The second Plaintiff, Mr Thomani, testified that on the 13th August 2010, he accompanied his friend, the first Plaintiff to see his sister at her place of employment, ZZ2 farm. On their way back to their place of residence, they got a lift from Mr Sephuma, who was at the time driving a BMW. He recognised Mr Sephuma as someone he knew. He stated that Mr Sungisai was not working at the time of the incident, as a result he could not confirm if Mr Sephuma could be Mr Sungisa's employer.

[11] As they were travelling towards Tshipise / Musina road, he saw the police officer who was flickering the torch up and down for them to stop. The police vehicle was about 50m from their vehicle when he noticed the flickering light of the torch for the first time. As the driver of their vehicle stopped after being ordered to do so, the police officer started shooting at them, with 2 to 3 shot fired to the front bumper as well as one shot to the right rear wheel, whilst shouting for them to get out of the vehicle. He instructed them to lie on the ground. The police officer was outside the vehicle when he was shooting at the BMW.

[12] He confirmed that the police officer who was flashing the torch was wearing reflective clothes. When asked if he saw a Nyathi combi, which was travelling ahead of the BMW, he said that did not see it, he only saw some dust on the road. He confirmed that there was a Range Rover that was driving behind the BMW. He denied the allegation by the driver of the Range Rover that Mr Sephuma blocked him from passing their vehicle. He denied any wrongdoing as there were just passengers.

[13] For the Second Defendant, Warrant Sathekge testified that the 13th August 2010, around 19h00 him and his colleague, Warrant Officer Lefila ("Lefila") received information that two vehicles

were loading illicit cigarettes at the Malala Drift Road near Musina. They went closer to the T-junction where the Malala Drift Road joins the Musina-Tshipise Road and parked their vehicle on the side of the road. Their vehicle was fitted with a flashing blue light and the hazards were on. They were wearing reflective clothing. They had a torch which they used to flicker for vehicles to stop. Their vehicle was parked on the right side of the road with its front part inside the right road facing the left lane, across the road.

[14] Whilst waiting, he stood inside the road. At that time he noticed lights of a motor vehicle approaching from the gravel road, travelling towards the tarred road. He used the flashlight (torch) to indicate to the motor vehicle that it must stop. He identified the motor vehicle that was approaching as a combi. Despite the instruction to stop, the Cambi continued to drive at a high speed. He had to jump out of the road to avoid being hit by the combi. He started to shoot at the combi but could not get it to stop.

[15] Immediately thereafter he noticed another motor vehicle approaching from the same direction where the combi approached. He did the same thing by flashing the torch for the vehicle to stop. Warrant officer Lefila was also flashing the blue lights. Whilst flickering for the BMW to stop, the vehicle continued to drive at high speed straight towards him and he had to jump out of the way. He started to shoot at the BMW until it came to a standstill. After the BMW had stopped, three African males got alighted. They were arrested for attempted murder, obstructing police from doing their duty and not complying with police instructions.

[16] The BMW was about 20m in front of him when he realised that it was not going to stop and he started shooting. It had already passed the lights of the stationary police vehicle, and entered the section of the road that was unlit. As a result it was dark and he could not see

who the driver of the BMW was. He shot the BMW at the right rear wheel and it stopped. The area where the BMW stopped was dark and he could not see who the driver was. A Land Cruiser approached from the same direction that the BMW approached from. It stopped at the scene and the driver informed them that he was driving behind the BMW. Further that at some stage whilst following the BMW, he attempted to pass it, however the driver blocked him from doing so.

- [17] Mr Du Plessis testified for the first Defendant that he was the prosecutor at the Musina Magistrate's Court on the morning of the 16th of August 2010, the day when the Plaintiffs appeared in Court for the first time. He perused the docket and considered its contents, i.e. Warning statements of the Plaintiffs as well as that of Mr Sephuma. He noticed that it was only the first Plaintiff who made the statement whilst the others refused to do so. He could not confirm as to whether the photos of the scene were taken, however he confirmed that it is standard procedure that photos would have been taken, further that there was an investigator assigned to the case.
- [18] He considered the investigation diary wherein he noticed that instructions were given to the investigating officer for further investigation to be done, including obtaining information regarding the combi that drove off from the scene. He was also provided with the profile system, indicating the criminal records of the Plaintiffs which confirmed that they had previous convictions of contraventions of the Customs and Excise Act, No 91 of
1964. He further noted that the First Plaintiff is a Zimbabwean and had provided an address in Zimbabwe. He requested that the matter to be postponed on the 16th August 2010, for the further investigation to be done and to confirm the addresses of the accused. The case was postponed to 23rd August 2010.
- [19] He further considered the statement of Mr C Theunissen, the driver of the Land Cruiser vehicle who stated that he followed the combi and BMW. He attempted to catch up with the combi, driving in the direction of the roadblock. The combi overtook the BMW, Thereafter the driver of the BMW began to block his way in order to prevent him from overtaking. Mr Theunissen informed the police officers at the scene that the BMW was escorting the minibus and blocking the way for him to overtake. He also considered the statement of Warrant officer Lefila, which corroborated the statement of Warrant officer Sathekge in all material facts.
- [20] The facts outlined above informed his decision to proceed with the prosecution. The Second Plaintiff and Mr Sephuma were granted bail on the 23rd August 2010. As for the first Plaintiff the case was postponed to the 24th August 2010 for the finalisation of his bail application. From the docket he confirmed his suspicion that the BMW was an escort vehicle. Given the previous convictions of the Plaintiffs of smuggling illegal cigarettes as well the fact that the other two witnesses did not make statement, he came to a conclusion that they were all acting on common purpose, further that it was not known as to who the driver of the BMW was. The accused were charged in Common purpose and common intent and were kept in

custody, so that investigation could be done.

- [21] Mr Mostert testified for the first Defendant that during March 2011 he was the senior public prosecutor for the region of Musina. The docket was submitted to him to decide whether a prosecution should be instituted. He stated that from his experience, Malala Drift Road is known as a smuggling route and the modus operandi used by smuggling syndicates. He decided that a prosecution should be instituted against both Plaintiffs and the third accused. It was then decided that the Plaintiffs and third suspect should be charged with (a) attempted murder and (b) obstructing the police in the performance of their duties, being a contravention of section 67(1) of the Police Service Act, No 68 of 1995.

Issues

- [22] The court will deal with the following

issues:

- (a) Whether the BMW adhered to the instruction by Police Officer to slow down and stop, when instructed to do so;
- (b) Whether the shots were fired at the BMW whilst it was moving or stationary;
- (c) Whether Warrant officer Sathekge and/or Lefila knew who the driver of the BMW was.
- (d) Whether the Defendant acted with reasonable and probable cause

The law

- [23] Section 40(1) of the Criminal Procedure Act, 51 of 1977 ("the CPA") provides that:

- (1) A peace officer may without 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 the offence of escaping from lawful custody
 - (c) ...
 - (d)
 - (e) Who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing.
 - (i) Who wilfully obstructs him in the execution of his duty;

- [24] In the case of *Beckenstrater v Theunissen* 1955(1) SA 129 (A) 136 A-B it was stated that:

"When it is alleged that a defendant had no reasonable cause for prosecuting, understand this to mean that he did not have such information as would lead to a reasonable man to conclude that the Plaintiff had probably been guilty of the offence charged; if, despite him having such information, the defendant is shown not to have believed in the Plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause"

Analysis

[25] The Plaintiffs' claims are based on the alleged unlawful arrest by Warrant Officer S J Sathekge, without a warrant of arrest. As a result of the arrest, they were subsequently detained at the Musina Police Station. It is their claim that their arrest and detention were unlawful as pleaded in paragraphs 6.1 to 6.20 of the particulars of claim.

[26] Officer Sathekge and his colleague officer Lefila receive a tip-off about an illegal activity that was taking place at the Malala 2 road. In his testimony, Officer Sathekge confirmed that as they arrived at the Junction of Tshipise/ Musina road, with Malala gravel road, after positioning themselves, they noticed lights approaching from the direction of Malala road. They had no reason to shoot at any vehicle, unless there existed a reason to do so. At that time he was standing on the road surface and flagging down the approaching traffic with a torch. He noticed that the approaching vehicle which was identified as a "Nyathi"

combi was driving at high speed. He only started shooting at it as it could not stop despite attempts to instruct the driver to stop. Having failed to get the combi to stop, he noticed another motor vehicle, which was later identified as a BMW, approaching from the same direction as the combi. He made attempts to stop the BMW by flashing the torch

[27] Whilst in the process of stopping the BMW, the vehicle almost ran him over, which necessitated for him to jump out of the way and he started shooting at it. The Plaintiffs denied seeing a combi driving ahead of their motor vehicle at any stage. The Officer was consistent in his testimony that he only started shooting at the combi when he could not to get it to stop. Police officers are empowered by the provisions of Section 40(1) of the Criminal Procedure Act, to arrest such people that interfere in the execution of their duties. They had a reasonable suspicion that the combi, refused to stop as it might have been the vehicle carrying illegal goods. When the BMW approached, observing the similar pattern of not stopping, they had to force them to stop.

[28] Although the Plaintiffs testified that they did not see the combi, an independent person, driving the land Cruiser confirmed that he saw it. Warrant Officer Sathekge testified that a land cruiser vehicle following the BMW had stopped at the roadblock shortly after the occupants of the BMW alighted; he confirmed that he saw the combi. Although the driver of the land Cruiser did not testify, both Plaintiffs conceded to the land Cruiser stopping at the scene. This aspect could not be taken further in the absence of the land Cruiser's testimony.

[29] The question is whether the BMW driver refused to stop when instructed by the police officers. Warrant Officer Sathekge testified that the drivers of both the combi and BMW refused to slow down at the roadblock and they accordingly had no choice other than to fire shots at the motor vehicles in an attempt to stop or slow them down. Officer Sathekge had to take evasive action so he could avoid being ran over by both the combi and the BMW. It is not disputed that Sathekge was wearing reflecting clothing and had a torch with which he indicated to the approaching vehicles to slow down and stop. The Plaintiffs also confirmed that the police

officers were visible, as they were wearing reflective clothes.

[30] The second Plaintiff confirmed that the SAPS vehicle was marked on the sides. From the version of the Plaintiffs, police presence on the road seems to have been visible. The Plaintiffs could not answer the court as to what would have made the police officers to shoot at them, if they had followed the instruction to stop. There is sufficient evidence to support that the driver of the BMW refused to follow the instruction of the police to stop when instructed to do so.

[31] The testimony of Warrant Sathekge was consistent, starting from the time they were tipped of an illegal activity that was about to take place at the Malala-Drift road to the time of the arrest. Given the number of illegal activities that are reported to be taking place on that road, they had to secure the road and stop vehicles approaching. The police vehicle was well lit, with the torch that was supposed to caution motorists of police presence.

[32] Same cannot be said when it comes to the evidence of the Plaintiffs. Firstly they could not corroborate each other's version as to when they first saw the Police vehicle. Although the second Plaintiff conceded that the police vehicle was marked they could not state why they did not see the vehicle timeously. Again when asked as how many shots were fired at the BMW, they had different versions. The First Plaintiff made a statement to the police, wherein he stated that the police officer fired one shot at their vehicle whilst inside the bakkie. He later changed his version that the police officer was outside the vehicle when he shot at the BMW. He testified that although the police officer approached the driver 's door when he ordered then to alight from the vehicle,

the police did not know who the driver of the BMW was, the list goes on.

[33] The Plaintiffs stated that as they were both not the drivers, only the driver of the BMW was to be arrested. However, from the evidence of the Plaintiffs it is supported that there was no way that the police officers could have known who the driver was. The BMW drove past the section of the road that was lit. The driver as well as the passengers had already alighted from the vehicle when the police officer approached them. The second Plaintiff as well as Mr Sephuma did not make statements to the police. There was no way that the police officer could have correctly guessed who the driver of the BMW was, hence all the passengers were arrested and

charged in common purpose.

[34] It is my view that the Plaintiffs were lawfully arrested in accordance with the provisions of section 40(1) (a) and/or (b) and/or (e) and/or U) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The 2nd Defendant had a reasonable suspicion of the Plaintiffs being involved in an illegal activity. The Plaintiffs ignored the instruction from the police officer to stop and almost drove over him. It is therefore my view that the arrests of the plaintiffs was lawful and that there was a good cause for the arrests to be effected.

[35] The plaintiff's further claims that they were unlawfully prosecuted. For the Plaintiff to be successful in a claim for malicious prosecution, they must prove on a balance of probabilities the following:

- (a) The Defendant instigated the proceedings
- (b) The defendant have acted without reasonable and probable cause
- (c) The defendant have acted with malice
- (d) The defendant prosecution failed.

[36] It is the duty of the Prosecutor to carefully consider all the versions of the witnesses, statements and determine whether there are contradictions, if so, establish whether they are material or not before making a decision to prosecute. The First Defendant should satisfy itself that there is reasonable and probable cause, not just a prima facie case against the Plaintiffs. The prosecutor has a duty to interrogate the docket in its entirety and apply his mind properly before he makes a decision to prosecute.

[37] The two witnesses on behalf of the First defendant, Du Plessis and Mostert, both took decisions to proceed with the prosecution against the Plaintiffs, albeit at different stages. This they testified was decided after taking into account the contents of the docket as testified. Du Plessis stated that on 16th of August 2010, when the Plaintiffs appeared in Court for the first time, he had access to the docket. Further that the First Plaintiff

is a Zimbabwean and inter alia had provided an address in Zimbabwe. He applied for a postponement in terms of the provisions of section 50(6) (d) of the CPA, in order for further investigation to be done and for the investigating officer to verify the addresses of the accused. It was on this basis that the case was postponed for a period of seven days until the 23rd of August 2010.

[38] On the 23rd of August 2010 he made the decision to proceed with the prosecution. The Second Plaintiff and the third accused were granted bail on the said date and the criminal case was postponed till the following day, on which date First Plaintiff was also granted bail.

[39] Du Plessis was a credible witness; he was consistent in the process that he followed in evaluating the facts of the case. Also having worked along the Malala Drift road, being aware of the illegal activities taking place, which he testified is a well-known smuggling route and the modus operandi of smugglers, they use two vehicles, the one transporting the illicit goods and the other acting as an escort in order to protect the vehicle transporting the illicit goods.

[40] It is my view that there are reasonable grounds for the prosecution to have decided to prosecute the Plaintiffs, based on the circumstances around the case. The First Plaintiff was not a credible witness. He was not honest about his relationship with the driver of the BMW. When asked about him being employed by the driver of the BMW, he answered in the negative. He only admitted to it when he was referred to his statement, wherein he stated that he is employed by the family of Mr Sephume. It was the evidence of the Plaintiffs' that they are friends, however the second Plaintiff testified that he did not know that the first Plaintiff was employed, further that he was employed by Mr Sephume. If they claimed to be friends, it is very doubtful

that he would not have known that his friend was working. It is my view that it is too much of a coincidence that the Plaintiffs' find themselves hiking a BMW at night, which happens to be the Motor Vehicle of the First Plaintiff's employer.

[41] I cannot find that the decision by Du Plessis to proceed with the prosecution as well as the decision by the senior Prosecutor, Mr Mostert, who decided to institute a prosecution, was not reasonable and fair. Mr Mostert corroborated the version of Mr Du Plessis on his experience on the Malala Drift Road known was a smuggling route and the modus operandi used by smuggling syndicates as confirmed by Mr Du Plessis. The behaviour of the Plaintiffs' when instructed to stop did

not assist. The prosecution had sufficient information pointing the Plaintiffs to be involved in illegal activities. Their attempt to refuse to stop when ordered to do so by police officers, confirmed that the suspicion of them being involved in illegal activities.

[42] Having considering the contents of the docket, Mostert decided that a prosecution should be instituted against both Plaintiffs and the third accused. He decided that the Plaintiffs and third suspect should be charged with (a) attempted murder and (b) obstructing the police in the performance of their duties, being a contravention of section 67(1) of the Police Service Act, No 68 of 1995. Further, based on his personal experience of the modus operandi used by the smuggling syndicates he decided to charge the three accused on the principle of common purpose. I therefore cannot find that the conduct of either Du Plessis or Mostert were unreasonable or grossly negligent to support a claim for malicious prosecution.

[43] I therefore make the following order;

(a) The plaintiffs' claims against the Defendants are dismissed with costs.

B. RANGATA, AJ

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Heard on 20 May 2019

Date of Judgement: 17 July 2019

Counsel for the Plaintiffs: Advocate N Swart

Counsel for the Defendants: Advocate NMW Van Zyl SC.

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