

SOUTH AFRICA / JUDGMENT

William v Minister of Police (1911/2017) [2019] ZAMPMHC 5 (15 October 2019)

[2019] ZAMPMHC 5**COURT**

Middelburg High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

1911/2017

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Source record**THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MIDDELBURG LOCAL SEAT****CASE****NO: 1911 / 2017****In****the matter between:****KABINI
WILLIAM PLAINTIFF
and
MINISTER
OF
POLICE DEFENDANT****Summary:**

Civil
Law – Claim for damages – Claim against Minister of Police for unlawful arrest. Plaintiff was arrested for being is possession of suspected stolen property and failing to give a reasonable explanation for his possession. Property – a motor vehicle was reported stolen some 10 days earlier in a robbery. Plaintiff and two companions found pushing it on the street. It had bullet holes, false registration number plates, no keys in the ignition and its rear windscreen was missing. State withdrew charges against the Plaintiff after a statement was submitted in which the Plaintiff indicated he had nothing to do with the motor vehicle.

Held

– that a decision to withdraw charges has no bearing on the lawfulness of the arrest.

J U D G M E N T

RATSHIBVUMO AJ:

1.

Introduction.

This

is a claim for damages based on unlawful arrest and detention against the Minister of Police. Initially, there was a claim

on malicious

prosecution which was withdrawn and the Plaintiff tendered costs. The Defendant disputes that the arrest was unlawful

and that the

subsequent detention was ordered by the court and therefore lawful.

The Plaintiff was arrested by the police acting

on a tipoff while

pushing a suspected stolen motor vehicle on 19 September 2016. The

said motor vehicle had been reported stolen

10 days earlier in an

incident of robbery. The Plaintiff was arrested and detained before

he was taken to court. His further detention

for seven more days was

ordered by the court before being he was released on bail of

R2 000.00. As a result, the Defendants

pleads that the police

officers who effected the arrest were authorised in terms of section

40(1) (b) of the Criminal Procedure

Act (the Act).[1]

2.The court is called

upon to decide if there was a reasonable suspicion that the Plaintiff

committed a Schedule 1 offence and if

so, whether he gave a

reasonable explanation regarding the said offence (possession of a

suspected stolen property in contravention

of section 36 of Act 62 of

1955) upon his arrest.

3.The parties did not

agree to separate merits from the quantum pursuant to Rule 33 (4) and

as a result, the trial dealt with both

the merits and the quantum.

4.

Case for the Defendant:

Mr. Ericson Thabang Mahlangu: He is a Detective Constable in the South African Police Services (SAPS) attached to Kwaggafontein Police Station. He was on duty on 19 September 2016 when he received information about a stolen motor vehicle that was at Stand no. 1889 Vlaaglaagte no. 2. Together with Const. Gula, he proceeded to the said address. They found no motor vehicle there. As they drove around, he spotted a motor vehicle with features matching the description he had received earlier as a suspected stolen motor vehicle at the address they had just visited. It was in the middle of the road being pushed by three men. The Plaintiff and a man later known as Mr. Mnguni were pushing the car from behind, while another man later known as Mr. Sithole pushed it from outside the driver's door with its window open, and at the same time, he controlled the steering wheel. Upon seeing them, Mr. Sithole ran away. He was however arrested moments later. The Plaintiff and Mr. Mnguni could not run because there was another police van that approached from behind while he and Const. Gula approached them from the front. The Plaintiff and Mr. Mnguni appeared frightened.

5.The Plaintiff and Mr. Mnguni were pushing a Toyota Tazz motor vehicle. It did not have a rear windscreen and the key was missing in the ignition. None of the men pushing the motor vehicle had the motor vehicle key. It also had bullet holes one on the rear right side and another on the front left side door. Upon testing the registration number attached to this motor vehicle, it turned out that the registration plates attached to it were false in that they were for a light delivery van. It also turned out that this motor vehicle was reported stolen in a robbery some 10 days earlier. He testified that he regarded cases of possession of suspected stolen motor vehicle as serious in that in some cases, the owners may have been killed in the process of robbery. The three men were arrested and detained at the police station before being taken to the court. The motor vehicle was later handed over to its lawful owner. Mr. Sithole was later convicted for possession of a suspected stolen motor vehicle and sentenced to a

fine.

6.

He disputed that the Plaintiff did not know where the motor vehicle came from, because on that day he told him that they were taking the motor vehicle to the mechanic. He was certain that the holes he spotted on the motor vehicle were bullet holes because he could even see the bullet projectile inside the car. It was put to him that the Plaintiff was only made to sign a witness statement on pages 55-56 of Exhibit A without it being read to him. He however could not comment since W/O Mahlangu who obtained the statement from the Plaintiff on 01 November 2016 was another officer who shared the surname with him and when he obtained the statement from the Plaintiff, he was not with him. In that statement, the Plaintiff is said to have alleged that he helped Mr. Sithole to push the motor vehicle from his uncle's yard because he (Sithole) suspected it to be stolen. The Plaintiff distanced himself with that content as it is inaccurate. He further disputed the Plaintiff's version that that the officers who arrested him did not ask him for an explanation regarding his possession of the said motor vehicle or that they refused to give him a chance to speak. He also denied that they told the Plaintiff that he will give an explanation at the police station. According to him, the Plaintiff gave an explanation as indicated above; but he considered it to be unreasonable.

7.

Jotham Senzeni Gula:

He too is a Detective Constable in the SAPS stationed Kwaggafontein Police Station. He was in the company of Const. Mahlangu when they arrested the Plaintiff and two of his companions on 19 September 2016. Prior to arresting them, the Plaintiff and Mr. Mnguni (who had remained while Mr. Sithole fled the scene when they arrived) informed them that they were helping out Mr. Sithole by pushing the motor vehicle to a mechanic who would help to start it. The Plaintiff was pushing the motor vehicle from the rear right side from which a bullet hole was visible. When confronted by the police, the Plaintiff was very frightened. The three were arrested and taken to the police station. Mr. Sithole was later sentenced to a fine of R12 000 for contravening sec 37 of Act 62 of

1955 following a guilty plea. He could not say that the explanation offered by the Plaintiff was unreasonable.

8.

Case for the Plaintiff:

William

Kabini: He is the Plaintiff in this case. He testified that on the date of his arrest, he left his home going to the shops. While on his way, he came across Mr. Sithole and Mr. Mnguni who were pushing a motor vehicle on the street. Without any interaction with the two, he decided to join in pushing so as to help his neighbours. Nobody told him where the motor was being taken to. He had just pushed for about 10 meters when the police stopped them. Mr. Sithole pretended to be attending to his cell phone and fled. Later on Mr Sithole came back and told the police that the Plaintiff was merely helping him and that he had nothing to do with the motor vehicle, yet he was arrested. When he gave a warning statement to the police he told them he did not know that the motor vehicle was stolen.

9.

He only observed the bullet holes in this motor vehicle after he was arrested. The motor vehicle rear windscreen was indeed broken.

He was detained overnight at a police station before being taken to court where his further detention was ordered by the court.

Had he seen the bullet holes, he would not have pushed the motor vehicle in question because he would have suspected it to be stolen.

He conceded that the police were right to suspect that he was involved in theft of the motor vehicle for that reason. He however blames them for arresting him even after he gave them an explanation that he had nothing to do with the motor vehicle. He pushed the motor vehicle with his companions up the hill without knowing where it was being taken to.

10.

He disputed a signature on a witness statement that was taken by W/O Mahlangu saying it was not his and that he does not sign like

that. He disputed the content of a statement attributed to Mr. Sithole to the effect that he pushed a motor vehicle from Mr. Sithole's

parental home together with Mr. Mnguni saying he only met the two on the street. He also denied that Mr. Sithole told him

Lindokuhle Abraham
Mnguni:

that
he was going to dump the motor vehicle.
11.

He testified that on 19 September 2016 he left his home going to visit a friend named Sampie. On a way there he met Mr. JJ Sithole who asked him to help push a motor vehicle from a garage where it was parked to the mechanic's place, and he agreed. They then proceeded to the respective yard where the car was parked. Just as they exited the garage but still in the yard, the Plaintiff arrived and they asked him to join in pushing the motor vehicle and he agreed. They pushed it out of the yard and through the street. They were confronted by the police on the street while still pushing it. When the police stopped them, Mr. Sithole fled while pretending to attend to his cell phone; only to reappear later in a police motor vehicle, under arrest. Const. Mahlangu asked him how he was connected with the motor vehicle they were pushing and he told him that they were only helping Mr. Sithole.

12.
He only saw a bullet hole on the front left door after he was arrested. It did not occur to him that the motor vehicle could have been stolen. He had not seen Mr. Sithole drive that motor vehicle before and he knew that the yard from which they pushed the motor vehicle did not belong to Mr. Sithole. He conceded that he did not ask Mr. Sithole as to where the mechanic they were taking the car to would be found, but he was prepared to push it, whatever the distance. He confirmed that he is also in the process of suing the Minister of Police. He also admitted that had he observed the bullet holes before his arrest, he would have refused to push the motor vehicle.

13.
With this evidence, case for the Plaintiff was closed.

14.
Common facts

It is common cause that the Plaintiff, Messrs. Mnguni and Sithole were found pushing a Toyota Tazz motor vehicle following a tipoff given to the police. The motor vehicle had at least two bullet holes on it and

its rear windscreen was broken and not there. The motor vehicle was reported stolen following robbery from the owner ten days earlier. The offence of contravening of section 36 of Act 62 of 1955 is listed in Schedule 1 of the Act as one of the offences for which peace officers are authorised to arrest even without a warrant of arrest, provided they reasonably suspect that an offence so listed was committed.[2] For contravening of section 36 of Act 62 of 1955, one can be liable to a sentence exceeding six months imprisonment without an option of a fine.

15.

Issues for determination

Was the accused's

arrest lawful? In order to answer this, the court must unpack if the facts evince a case in which the Plaintiff

can be said to have been

in possession of this motor vehicle? If so, did the Plaintiff give an explanation regarding such possession?

Equally in dispute is the

version he gave in that explanation if he gave one. In essence, the court is called to decide if there

was a reasonable suspicion that

the motor vehicle was stolen and whether the Plaintiff gave a reasonable explanation. Findings

on these disputes facts will

determine the lawfulness or otherwise of the Plaintiff's arrest.

16.

Onus

As

a general rule, the onus to prove the lawfulness of any arrest rests with the Defendant.[3]

17.

Applicable law.

The

starting point is whether in pushing the motor vehicle the Plaintiff was in possession thereof. Being in possession of an item

does not

necessarily require the possessor to have been in physical possession of the property in his person. According to CR

Snyman[4],

having physical control over an item is sufficient. In S

v Langa and Others[5]

the

court held that it is not even required that the suspect should have physical detention of the property or to have been present

when the

same is found for it to be said it was in his possession. In pushing

the motor vehicle in circumstances such as in casu,

I have no doubt that one is in physical control at least for a period that he pushes it.

18.

Obviously, the distance the motor vehicle was pushed, the duration and the circumstances as a whole will play a role in reaching a decision. If the court will accept that the Plaintiff pushed this motor vehicle from the yard where it was parked, out to the street together with the three companions until the arrival of the police, it would entail that the three men were in control of this motor vehicle. Sight need not be lost that an item such as a motor vehicle can be possessed by several people depending on who is in control thereof; especially when none of them is the lawful owner. Pushing a motor vehicle in circumstances such as in this case should suffice for a definition of possession.

19.

As for circumstances under which a peace officer can arrest without a warrant of arrest, it is necessary to read section 40 of the

Act alongside section 36 of Act 62 of 1955. Section 40(1) of the Act provides,

40. Arrest by

peace officer without warrant

(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;

(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;

20.

Section 36 of Act 62 of 1955 provides,

36.

Failure to give satisfactory account of possession of goods.—Any person who is found in possession of any goods, other than stock or

produce as defined in section one of the Stock Theft Act, 1959 (Act No. 57 of 1959), in regard to which there is

reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft. [Own emphasis].

21.

In

order to understand and interpret these provisions, one needs to be alive to the historical background and the need for this legislation.

According to S

v Nader[6]

and S

v Sepiri[7],

the purpose of section 36 is to combat theft. This was to make it less difficult for the State to successfully prosecute cases of theft

in circumstances where the complainant or the owner of stolen goods is to the State unknown and/or where he is only known by the suspect

and in exercising his/her right to silence, is unwilling to disclose his/her identity.

22.

As a result of this legislation, even where the property owner is unknown to the State, the suspect can be prosecuted for its possession,

provided evidence is sufficient to show that the property was stolen; and that evidence is lack of a reasonable explanation for

such possession. The two requirements emphasized above are to ensure that only those guilty of theft can be convicted.

First, there

must be a reasonable suspicion that the goods were stolen. Secondly, the suspect should after being afforded an opportunity to

explain the suspicion, be unable to give a satisfactory account of his/her possession.

23.

In casu, there

can be no doubt that there was a reasonable suspicion on the part of Const. Mahlangu. The Plaintiff conceded to this. Const

Mahlangu

received information from an informer about a stolen motor vehicle and he went out to investigate. Upon finding the motor vehicle being

pushed by three men the following unravels,

a)

One of three men ran away.

b)

The two remaining men appear frightened to the

police.

c)

Upon inspecting the motor vehicle Const. Mahlangu realised that it has two bullet holes and the projectile is still inside the car, suggesting the bullet holes are fairly fresh.

d)

The motor vehicle does not have keys in the ignition and none of the men pushing the motor vehicle has them.

e)

The registration number plate attached to the motor vehicle is false in that upon testing it, it comes out as a registration number of a light delivery van, not a Toyota Tazz.

f)

Upon further tests, it comes out that the motor vehicle was hijacked some 10 days earlier. There can be no doubt that there was a reasonable suspicion that this motor vehicle was indeed stolen, something the officer took care of before effecting arrest.

24.

Did the Plaintiff give a reasonable explanation for his possession? The answer to this depends to whom is the question directed and when was the question posed. First is the Plaintiff's version as given by his counsel during cross examination of the Defendant's witnesses. The answer is that the police were not interested in knowing; for they simply said the Plaintiff will explain himself at the police station and did not ask him or his companions of their explanation for possession of the motor vehicle.

If the same question is posed to the Plaintiff when giving evidence, the second version is that he told the police that he had nothing to do with the motor vehicle as he was just helping in pushing. The third version is from the Plaintiff's witness which coincidentally is also the version by the Defendant's witnesses to wit; they were taking the motor vehicle to the mechanic. Further evaluation of the evidence and the witnesses who gave it is necessary to close the curtain on this question.

25.

Evaluation

With so many versions on the table, the court can only evaluate the credibility of the witnesses in order to decide the version that is acceptable. The two Defendant's witnesses had no interest in arresting the

Plaintiff and his companions and they also bore no grudges or scores to settle. To them it was just another day at work. They simply received information and did not know whom to anticipate as the suspect. Their version on what explanation was given by the Plaintiff finds corroboration in an unexpected corner, being that of the Plaintiff's witness. I am therefore satisfied with the credibility of the police officers who testified for the Defendant.

26.

I am unable to reach the same conclusion in respect of the Plaintiff's credibility. First is the very contradiction between his version and that of his witness on whether he gave any explanation to the police and what that explanation was. He is not only contradicted by his witness but by himself through his counsel, when it was alleged that he gave no explanation to the police.

This is not the only time where the two contradict each other. Up to now the court is in the dark on whether the Plaintiff was merely asked to sign a statement by Mahlangu, which was not read to him; or whether he did not sign it at all.

27.

Secondly, the Plaintiff portrays a picture of a person who innocently found the two men pushing a motor vehicle on the street and decided to help in pushing without being invited to. This is contradicted by his witness who testified that the Plaintiff pushed this motor vehicle right from the yard where it was parked straight into the street where they were arrested. Lastly, the Plaintiff's unconvincing version to the effect that he did not see the bullet hole right under his nose from the side where he was pushing the motor vehicle. From the pictures handed in as exhibits, the holes are clearly visible, let alone for a person pushing the motor vehicle from that side for a long distance. This prompted the Defendant to quote a proverb in relation to him saying, there is none so blind as those who will not see.

28.

The Plaintiff did not prove to be a credible witness to the court, and so is his version. I am willing to accept the version by the Defendant's witnesses to the effect that the Plaintiff and his witness told the police that they were taking the

motor

vehicle to the mechanic to help start it. I also accept the version by the Plaintiff's witness to the effect that he and the Plaintiff pushed the motor vehicle from the yard where it was parked right to the street. That was long enough distance for the

Plaintiff to see even that which he refuses to observe – the bullet holes.

29.

It is

against this background that the explanation by the Plaintiff regarding his possession of this motor vehicle should be evaluated.

I

am of the view that even if the court was to hypothetically speaking accept his version that he gave the explanation to the effect that he

knew nothing, given the background and circumstances stated above, that version would not be reasonable. In fact in my view, the day

that the police officers would stop arresting suspects found in the circumstances in which the Plaintiff and his companions were, all

because they say "they know nothing about the motor vehicle being stolen," they could be opening themselves to some

litigation by the victims of car thefts who expect the police to arrest those in possession of their recently stolen goods. This is

because, as the Supreme Court of Appeal held in *S v De Vries and Others*,^[8]

theft

is a continuous crime.

30.

The

fact that the State withdrew charges against the Plaintiff does not mean the arrest was unlawful in the first place.^[9]

The other reason why a later decision to withdraw charges cannot impact on the lawfulness at the time of the arrest is that the suspect may not be able to give a reasonable explanation at the time of his/her arrest, but the door remains open until the date of his

trial, for him to give a reasonable explanation for his possession of the goods and when one is given, he/she would be entitled to an

acquittal.^[10] It would appear

the same happened in

casu wherein

an explanation that the prosecution considered to be reasonable was made available to it and it decided to withdraw the

charges. I am

mindful of the fact that the Plaintiff disputes the said statement,

but that does not alter the fact that it formed the basis for charges to be withdrawn against him.

31.

I am therefore satisfied that the Defendant was able to discharge the onus on the balance of probabilities that the arrest of the

Plaintiff was not unlawful. To the contrary, his arrest was sanctioned by section 40(1) of the Act.

32.

Consequently, the following order is made.

The Plaintiff's claim is dismissed with costs.

TV
RATSHIBVUMO
ACTING
JUDGE OF THE HIGH COURT
FOR
THE PLAINTIFF: MR. ADV HE MPE
INSTRUCTED
BY: JM MASOMBUKA ATTORNEYS
MIDDELBURG
FOR
THE DEFENDANT: MR. DPA SCHUTTE
INTRUSCTED
BY: KARIEN SCHUTTE ATTORNEYS
C/O
MOHUBE SETSOALO MABUSELA INC
DATE
HEARD: 03 AUGUST 2019

JUDGMENT

DELIVERED: 15 OCTOBER 2019

- [1] Act no. 51 of 1977.
- [2] See section 40 of the Act.
- [3] See Minister of Law and Order and Another v Dempsey 1988
- (3) SA 19 (A) at 38B - C; and Zealand v Minister of Justice and Constitutional Development and Another[2008] ZACC 3; 2008
- (4) SA 458 (CC) (2008 (2) SACR 1 Minister of Safety and Security v Tyulu 2009
- (5) SA 85 (SCA).
- [4] Criminal Law 6th Edition

(2014) at p 515

[5] 1998

(1) SACR 21 (T).

[6] 1963

(1) SA 843 (O) at 848.

[7] 1979

(2) SA 1168 (NC) at 1171.

[8] 2012 (1) SACR 186 (SCA) at para 27.

[9] See Lekhuleni v Minister of Police 2014 JDR 2202.

[10] See S v Khumalo 1964

(1) SA 498 (N) at 514 A

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