IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 1743/2020

In the matter between:

MLUNGISI ZIMANGA **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT

LOWE J

INTRODUCTION

1. In this matter plaintiff instituted action against defendant arising from his alleged unlawful arrest and detention on 5 June 2018.

2. It is also alleged that the arresting officers neglected and failed to exercise their discretion in favour of not arresting plaintiff.

3. It is further alleged that plaintiff was detained for seven days whereafter he was transferred to the provincial hospital in Port Elizabeth for further treatment.

4. The original claim B for assault was abandoned at trial.

5. The defendant delivered a plea to plaintiff's claim relying on sections 39 and 40 of the Criminal Procedure Act 51 of 1977 ("CPA"). In essence, the main defence, however, lay in the application of section 40(1)(h) of the CPA. The defence admitted the arrest by approximately six members of the SAPS, it being alleged that plaintiff was arrested on a charge of being in possession of dependence producing drugs (Schedule 2 of the CPA read with section 4 of the Drugs and Trafficking Act 140 of 1992). It was alleged that upon inspection of plaintiff's premises at the time, he was found to be in illegal possession of illicit drugs, in this instance marijuana.

6. It was further pleaded that upon the discovery of the said illicit drugs plaintiff fled the scene when it was clear that an attempt to arrest him was being made, and was subsequently arrested when brought back to the premises.

THE LAW

7. In **Duncan v Minister of Law and Order** [1], it was held that the jurisdictional facts for a Section 40(1)(b) defence are that (i) the arrestor must be a peace officer, (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.[2]

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[1] 1986 (2) SA 805 (A).
[2] At 818H-I; See also **Minister of Safety and Security v Sekhoto and Another** 2011 (5) SA 367 (SCA).

8. The suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.[3]

9. The jurisdictional fact for an arrest without warrant in terms of these provisions remains a suspicion. In **Mabona & Another v Minister of Law and Order and Others** [4], the following was said in relation to how a reasonable suspicion is formed:

> "Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he 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 which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."[5]

10. In **Minister of Police and Another v Du Plessis**[6] Navsa ADP stated as follows:

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[3] **Duncan v Minister of Law and Order** 1986 (2) SA 805 (A) at 818H. This applies equally here as to the suspicion issue.
[4] 1988 (2) SA 654 (SE)
[5] At 658 E-H.
[6] 2014 (1) SACR 217 (SCA) at paragraphs 14 – 17.

"[14] Police bear the onus to justify an arrest and detention. In **Minister of Law and Order and Others v Hurley and Another** 1986 (3) SA 568 (A) at 589E – F the following is stated:

> '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] Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[16] In **Zealand v Minister of Justice and Constitutional Development and Another** 2008 (2) SACR 1 (CC) (2008 (4) SA 458; 2008 (6) BCLR 601) para 24 the following is said:

> '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.'

[17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention."

11. It is trite that police officers purporting to act in terms of Section 40(1) of the CPA should usually investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.[7] It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify on arrest.[8]

12. The Supreme Court appeal recently held in **Biyela v Minister of Police**[9] that the suspicion need not be based on information that would subsequently be admissible in a court of law. The court explained that the standard of a reasonable suspicion is very low – it should be more than a hunch, and should not be an unparticularized suspicion. It must of course be based on specific and articulable facts or information.

THE PROPER APPROACH TO THE EVIDENCE, ITS ASSESSMENT AND RELEVANT LINKED ISSUES THERETO

13. In respect of the analysis and resolution of disputed issues in a civil trial a Court must consider the credibility of witnesses and their reliability against the inherent probabilities and improbabilities of the matter.

14. In **National Employers General Insurance Co. Ltd v Jagers** [10] it was stated as follows:

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[7] **Louw & Another v Minister of Safety and Security & Others** 2006 (2) SACR 178 (T); **Liebenberg v Minister of Safety and Security** [2009] ZAGPPHC 88 (18 June 2004).
[8] **Mabona (Supra)**
[9] [2022]ZASCA 36 paras[33][40]
[10] 1984 (1) SA 437 (ECD) 440 – 441.

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the evidence of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless 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 be bound up with a consideration of the probabilities of the case and if the balance of probabilities favour 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's, 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." [11]

15. In **SFW Group (supra)** the following was said:

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external

[11] See also: ***SFW Group (supra)***.

> contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it."

16. It is important to emphasise that *"an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues"* is required in order to evaluate the effect of the probabilities on the evidence of the witnesses. Only once all the above is considered can a decision be taken as to whether the requisite onus has been discharged.

17. One must of course have regard to a conspectus of all the evidence. Probabilities must be distinguished from conjecture and speculation, within the four corners of the proved facts.

18. Mendacity must be considered.

19. In respect of a witness who has been mendacious this does not necessarily warrant the rejection of the evidence in its entirety as false. It is permissible to either accept or reject the evidence of a witness who has lied previously or in

relation to a particular aspect of fact. As pointed out in Principles of Evidence[12], everything depends on the particular circumstances of the case. In **S v Oosthuizen** [13] the following was said and is equally applicable to a civil witness:

> "All that can be said is that where a witness has been shown to be deliberately lying on one point, the trier of fact *may* (not *must*) conclude that his evidence on another point cannot safely be relied upon ... The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it has been deliberately fabricated. In such a case the fact that the witness has been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question. But in this context the fact that he has been honestly mistaken in other parts of his evidence is irrelevant, because the fact that his evidence in regard to one point is honestly mistaken cannot support an inference that his evidence on another point is a deliberate fabrication."

20. Principles of Evidence points out[14]:

> "In *Goodrich v Goodrich*[15] it was also emphasised that a court should carefully guard against the acceptance of the fallacious principle that a party should lose its case as a penalty for its perjury or lies under affirmation. It was pointed out that the specific circumstances of each case should be considered and that in each case the court should ask itself whether the fact that a party has attempted to strengthen or support its case with lies proves or tends to prove the belief of a party that its case is ill-founded: as a general rule a carefully considered and prepared false statement (and *a fortiori* a conspiracy with others that they should give false evidence in support of the

[12] Schwikkard, Juta, 4th Edition, § 30 4
[13] 1982 (3) SA 571 (T)
[14] Page 577
[15] 1946 AD 390 at 396-7

> case of the party concerned) would more likely be an indication of a party's awareness of the weakness of its case than a story contrived on the spur of the moment."

THE FACTS

21. The plaintiff gave evidence in support of his claim, saying that whilst he normally resided in a particular area, on the date in question he was house sitting for a friend at extension 6 Ethembeni Makhanda. He explained that the friend was a traditional healer. During the night, sometime before midnight on 5 June, 2018, he heard a knock on the door and attempted to call his friends on his cellphone as he feared for his safety, and thereafter being advised by his girlfriend to do so, opened the door. He immediately saw that it was the police at the door, but he did not know how many, but noted some were wearing police uniform. With his permission the police searched the one room in that part of the premises, but he says then asked for permission to enter a further room of the premises from an outside door. He said that he did not have the key for the room at which stage he was slapped and kicked by the police. He said that due to the assault he ran away and hid until the police left the premises to which he then returned. He took his bag to a neighbour's house, but leaving that house saw a person in pyjamas holding a firearm which was discharged into the air. He ran away again towards a stream in the valley. He said, although not pursuing the claim, that he was severely assaulted by the police at the stream. He said that the assault continued until the community members intervened by shouting and that he was then put in a police vehicle and taken to the hospital because he had been assaulted. He

said at the hospital he was kept in handcuffs at all times. He said in his evidence in chief that he did not know why he had been arrested and that he had not seen any marijuana at the place where he stayed save traditional medicine and iimpepha.

22. He did not fare well in cross-examination, to say the least, save confirming that the search of the premises had been with his permission and that he had no complaint against the police, except the alleged assault, and that he could not deny or dispute that marijuana was retrieved from the premises.

23. In an effort to support plaintiff's evidence a neighbour relevant to where he was staying was called as a witness. This witness, N Krantz, stated that she was the traditional healer's neighbour and at about midnight heard a sound and a person shouting "*police, police*". She looked out of the door and saw people at the traditional healer's house in respect of which a door was open and the police going into the house. She said that a man came out wearing shorts covering himself with a blanket (the plaintiff), as well as a lady who was carrying a child. She said the plaintiff was running, the police giving chase. She said the police later returned and spoke to Ms. Krantz and then left. After a time she heard a call and found the plaintiff outside. He requested that she keep his identity document and his bag with clothes and said he would not sleep at the traditional healer's home as he was afraid the police would return and find him there. She said that the police returned at that stage and chased plaintiff firing a shot in the air. She heard a man crying and pleading for forgiveness in the valley, being joined by community members who noticed

marked police vehicles. The community shouted that the police should not assault the person and rather arrest him, but could not see as it was dark. Plaintiff, she said was taken to the van, but they were not allowed closer. On 6 June 2018 a man arrived at her house claiming to be plaintiff's brother. He said he must enquire at the police station as to what had happened and he wanted her to accompany him, which she did. They were informed that plaintiff was at the hospital, they then proceeded to go to the hospital, finding plaintiff lying in bed in handcuffs, something inserted in his right side draining blood. She visited the plaintiff again on 7 June 2018 as she had been asked to bring his clothes. She found plaintiff at the hospital alone in the bed, there being a police official present. She disputed that it was extension 6 where she was staying, saying that it was extension 7.

24. Defendant, in turn, called Constable Masa, who had been in service since 2012. He was on duty on 6 June 2018 and said that he received an instruction from his Captain that there was a suspect that was dealing in marijuana and that the captain had made the necessary arrangements for him to charge the plaintiff who was in Settlers Hospital. He said that he went to Settlers Hospital and charged plaintiff in the usual way. He identified the documents that had been used and completed, including the giving to plaintiff his rights. He said he found plaintiff in hospital, not handcuffed or guarded, in bed on 6 June 2018. He confirmed that plaintiff had signed his statement and that they had conversed in plaintiff's home language. He also took photographs of plaintiff doing so while plaintiff was standing out of/not close to his hospital bed.

25. The second state witness was Constable Zuzani. The Constable was employed in a Crime Intelligence Unit relevant to surveillance duties and investigations. On 5 June 2018 he was on duty on night shift starting at 7 pm, and was involved in plaintiff's arrest. At about 10 pm he received information that there was a drop-off at the traditional healer's house relevant to drug sales. He undertook the surveillance of the premises and saw three persons going in and out. He then assembled a team to go to the premises, arriving with Constable Daniels and others. Constable Daniels knocked on the door and they introduced themselves to plaintiff. Daniels informed the plaintiff why they were there, in a language he understood, and asked permission to enter and search the premises to which plaintiff consented saying they were his premises. In the search, he found a bowl next to the bed containing "*bompies*" of marijuana and money. He heard the alarm of his police vehicle and went outside to investigate at which stage plaintiff ran out of the premises. He gave chase in the dark and eventually catching him in the valley near a stream. He apprehended plaintiff and returned to the place of residence to continue with the search. Upon arrival at the premises the second room was opened, searched, and inside was found a plastic bag containing marijuana. At this stage plaintiff was informed that he was being arrested and his rights were explained to him. He said that the marijuana in the bag was clearly to be identified as such, from its look and smell, and that he had been working in the drug section of the police for a long time and was familiar with marijuana. He said that a constable then took plaintiff to the Pick and Pay to weigh the marijuana but got a call from the constable to say they

had not in fact gone into Pick and Pay as plaintiff could not breath well and he was taken then to the hospital[16].

26. In respect of the marijuana in the second room he said that this was packed in the usual way that drug dealers utilized in order that the marijuana dogs not pick up the smell.

ANALYSIS OF THE WITNESSES

27. It must be appreciated, that the crucial time relevant to the cause of action in this matter relates to the finding of the marijuana on the first and then on the second occasion. What happened in the valley and at the hospital is of far lesser importance to the merits of the arrest. Shortly after the marijuana was found, on the first occasion on the version of the police, plaintiff fled, he being arrested after the finding of the marijuana in the second room. What happened at Settlers Hospital, is irrelevant to the legality of the arrest itself, and relevant only to the period of his detention.

28. As I have already said plaintiff did not fare well under cross-examination, nor was his demeanour impressive. It was pointed out to him that it had been pleaded on his behalf (and never amended) that he had been arrested at his place of residence described in paragraph 1 of the pleadings as an address other than that of the traditional healers. He denied, without conviction, that no marijuana had been in the room where he was found. During his cross-

[16] In cross-examination it was put to him that the hospital notes on admission recorded that the suspect's symptoms on admission were shortness of breath. Plaintiff said he suffered from asthma.

examination, when in difficulty, he simply repeated his entire version over and over again, denying the police's version that when he was caught at the valley he was having breathing difficulties, and had been taken to the hospital for that reason. There was no evidence led to support his version that he had been injured in the assault, nor was he able to satisfactorily contest the evidence of the police officer who put the charges to him in hospital that he had not been in handcuffs. He was also unable to meet the evidence that he had not been confined to his bed with drains from his body. He was unable to explain why it had been mentioned on his behalf in a Rule 37 minute that he been released into the care of the medical staff on 6 June 2022 at approximately just after midnight, this completely contradictory to his version of the evidence. He maintained that he had not signed the arrest documents presented when he was charged, which on the face of it was devoid of creditability. When in difficulties he would resort to asking whether what had been asked of him was a "*question*". In short, he was an unimpressive witness, who struggled in cross-examination and against his originally pleaded version of the events.

29. The evidence of Ms.Krantz, similarly failed to impress, it seeming that her evidence was tailored to meet that of plaintiff, also without regard to what had been pleaded on his behalf.

30. On the other hand, the state witnesses were impressive, the evidence accorded with the documentation presented in the trial bundle, which was referred to, and in the context of what had happened and against the

probabilities made good sense when compared with that of the plaintiff and his witness. Applying the standard approach to the evidence and contradictory versions, I have no doubt that that of the defendant is to be preferred. The cross-examination of the plaintiff's witnesses disclosed no material differences and did not cast that evidence in any doubt.

THE FINAL ANSALYSIS

31. At the end of the day, on the evidence which must prevail being that of the defendant, the question is whether on the lawfulness of the arrest issue, defendant's arrest of plaintiff was legitimate on the basis pleaded.

32. Against the test which I have enunciated above, there can be no doubt that the arresting officers were police officers and that they entertained a suspicion relevant to plaintiff as pleaded. Not only did the police officers act on reasonable inference, they were entitled to take into account what they had observed immediately before the arrest, during the surveillance and took into account all the surrounding circumstances. Whilst the suspicion held by the police officers must be a reasonable one and objectively sustainable, this, in the sense that it must rest on reasonable grounds, on an analysis of the relevant facts and circumstances and the police officers' knowledge of marijuana, it seems to me, clearly established that the necessary reasonable suspicion was clearly established.

33. The plaintiff not only conceded that the premises were his to the police officers, but consented to the search of those premises, and was unable to explain or contradict the evidence of the police officers as to the presence of a substance identified by the experienced police officers as marijuana. The initial finding of the substance identified as marijuana, caused plaintiff to flee, this clearly adding to the police officer's suspicion as to the fact that marijuana was present, but that plaintiff was reasonably suspected of a crime as required in section 40(1)(h) of the CPA.

34. In my view, there is no basis for concluding that the discretion to arrest was wrongly exercised. No serious evidence or cross-examination addresses this alternative ground put up by the plaintiff in his pleadings, and the plaintiff fell well short of satisfying the onus he bore in this regard.

COSTS

35. The costs of two counsel are usually allowed where this is regarded as a "*wise and reasonable precaution*", and where this is not regarded as "*luxury*".

36. In this regard, as generally in respect of costs, the Court has a discretion[17].

37. In **De Naamloze Vennootschap Alintex v Von Gerlach**[18] 1958 (1) SA 13 (T) 13 the Court (referring to the previous authorities) mentioned the following factors as some warranting the granting of costs of the second advocate; the

[17] **International (Pty) Ltd v Lovemore Brothers Transport CC** 2000 (2) SA 408 (SE) 413H.
[18] 1958 (1) SA 13 (T) 13

length of the hearing or argument, the importance of questions of principle or of law involved and the number of legal authorities quoted.

38. In my view and in the Court's discretion the decision turns on the circumstances of each individual case.

39. Put otherwise, was it proper and reasonable to brief two counsel in the circumstances relevant to the matter, and the costs of two counsel should never be allowed as some kind of penalty analogous to an award of attorney and client costs.[19]

40. As examples, the costs of two counsel may not be allowed where the matter is of no unusual difficulty, or straight forward on the papers, or where the whole case turns on simple issues of fact where little law is involved or where the matter is of no great difficulty or complexity.

41. In the circumstances the costs of two counsel in this matter should not be allowed, as this was in my view not such as to warrant this decision, on the facts, law or complexcity.

CONCLUSION

42. In the result, plaintiff's claims falls to be dismissed with costs.

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[19] **Rand Townships and Small Holdings (Pty) Ltd v Griebenow** 1956 (2) SA 42 – 45.

43. The scale of those costs is the ordinary scale, the issue being whether such costs should include the costs of two counsel. In my view the matter warranted the attention of an experienced counsel certainly but not that of two counsel on all the considerations relevant.

ORDER

44. The plaintiff's case is dismissed with costs.

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M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Plaintiff:	Mr. Mdeyide, instructed by Cloete and Co attorneys, Grahamstown.
Appearing on behalf of the Defendant:	Ms. Ntsepe and Ms. Masiza, instructed by Dullabh Attorneys, Grahamstown.
Date heard:	1 – 3 February 2023.
Date judgment delivered:	28 February 2023.