



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

Case Number: **16581/2012**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 18 July 2023
SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

BRIAN

Plaintiff

RADEBE

and

THE MINISTER OF POLICE
Defendant

First

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Defendant

Second

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The plaintiff claims for damages he suffered as a result of his unlawful arrest and detention by a member of the first defendant (referred to herein after as “the defendant”). The plaintiff also claimed damages against the second defendant for malicious prosecution but did not persist with the claim.
- [2] The only issue in dispute between the parties is whether reservist captain Janse van Rensburg who effected the arrest of the plaintiff acted within the jurisdictional requirements contained in section 40(1)(b) of the Criminal Procedure Act, 51 of 1977.

Evidence

- [3] The defendant bore the onus to establish on a balance of probabilities that captain Janse van Rensburg acted within the ambit of section 40(1)(b).
- [4] Captain Janse van Rensburg (the captain) testified in respect of the arrest. In order to establish whether the captain had a reasonable suspicion that the plaintiff committed a crime. It is first of all, incisive to have regard to the contents of the witness statement he deposed to on the day of the arrest.
- [5] I will only refer to the relevant portions of the statement:

“

2.

On Sunday the 5th of April 2009 at about 13:37 I received a phone call from a Mr Madiro Godfrey Fungurandi. He told me that on his way from church he got pulled over by police officers near Wemmerpan and was kept in the back of a police van. He was apparently later taken out and he paid R50 to a police officer at the roadblock.

5.

Part of the description of the one suspect is that he was wearing braces on his teeth.

7.

While we were standing at the back of the CSC office waiting to get a chance to speak on the radio the complainant told me that it is the three police officers coming out of the door.

8.

The police officers became known to me as:

.... Cst. M.L. Tshabalala;

....Cst. A.E. Mabasa;

....Cst S.B. Radebe [the plaintiff in casu].

9.

I asked the complainant if he was sure that these were the policeman. He confirmed.

10.

Cst S.B. Radede had braces in his mouth as described by the complainant.

11.

The complainant identified Cst. M. L. Tshabalala as the police officer he gave the money to.

13.

Cst. Tshabalala (sic) and Cst. Radebe told me that they were using BS 39. A marked VW City Golf Chico.. Cst Mabasa stated that he was driving a Ford Ranger [a police van].

14.

I arrested the three members and disarmed them. I informed them of their rights and the reason I was arresting them for. The reason for their arrest being that of suspected corruption.”

[6] In his evidence in chief the captain elaborated on his statement. I only refer to the further facts that are relevant to determine the issues in dispute. The captain testified that the complainant, subsequent to identifying the three police officers, informed him that one police officer was in the police van and two in the Golf.

[7] It seems that after the complainant pointed out the three officers, constable Mabasa, whom the captain presumed was a student, said: *“I am sorry! I am sorry!”*. The plaintiff spoke to constable Mabasa in a language the captain did not understand, but he presumed that the plaintiff told constable Mabasa to keep quiet.

- [8] The captain then asked the three police officers whether they wanted to explain what happened, to which they replied: *"No, we will wait for a lawyer."* Whilst waiting for their lawyer the captain arrested them.
- [9] The captain further testified that he was told by Fungurani that Fungurani was taken to a police van and told to sit in the back. There were several people seated at the back. The persons at the back were called one by one and never returned to the police van. Fungurani was the last person to be called and he was taken to constable Tshabalala who said to him: *"Let's talk"*. Fungurani presumed that meant that constable Tshabalala wanted money / a bribe and he told him that he did not have any money on him.
- [10] He enquired from his wife and a friend that was with him in the car, whether they had money and the friend said she had R 100,00 in her possession. Fungurani had R 50, 00 in his possession. The Golf vehicle stopped next to him and he placed the R 50, 00 on the passenger seat next to constable Tshabalala.
- [11] During cross-examination the captain admitted that the spontaneous exclamation by constable Mabasa and the fact that neither of the police officers were willing to give a version of events, were essential facts. When confronted with the fact that he neglected to include these essential facts in the statement he deposed to immediately after the arrest, the captain could not offer a reasonable explanation for his failure to do so.
- [12] The captain was referred to a judgment in the Magistrate's Court dated 8 December 2015 in a matter pertaining to constable Tshabalala in which the Magistrate stated that the captain testified that he did not give the three police

officers an opportunity to give him a version of events. The captain admitted that the judgment was correct in this regard, thereby conceding that he did not grant the three police officers an opportunity to give their version. This admission contradicts the captain's evidence in chief in this regard.

- [13] The defendant closed its case after the testimony of the captain and the plaintiff closed his case without presenting any evidence.

Legal principles and discussion

- [14] Mr Bester SC, counsel on behalf of the plaintiff, referred to a recent Supreme Court of Appeal matter, which in essence confirms the test applicable to section 40(1)(b) as set out in *Mabona and Another v Minister of Law and Others* 1988 (2) SA 654 SECLD at p. 658 E – H, to wit:

"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 without checking 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 engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

- [15] The problem with the captain's evidence, which Mr Malowa SC, counsel for the defendant, to his credit readily conceded, is the absolute lack of any facts

that would form the basis for a suspicion that the plaintiff committed bribery. At best and due to the fact that the plaintiff did wear braces at the time, one can presume that the plaintiff was one of the police officers at the roadblock.

[16] There is, however, absolutely no evidence as to how, when and where the plaintiff committed bribery. On Fungurani's version the plaintiff was not even present when constable Tshabalala interacted with him. The R 50, 00 was also, according to Fungurani placed on the passenger seat next to constable Tshabalala.

[17] A further factor that disposes of any notion that the captain could have formed a reasonable suspicion, is his failure to give the plaintiff an opportunity to give his version of events.

[18] In the result, I find that there was no information to the captain's disposal on which he could form a suspicion that the plaintiff committed bribery.

Conclusion

[19] After the first defendant closed its case, Mr Bester applied for a separation of merits and quantum and an order in terms of rule 33(4) for the separation was granted.

[20] Insofar as the costs are concerned, I was informed by the parties that costs were reserved on 17 January 2022 and requested to include such costs in the cost order.

ORDER

The following order is issued:

1. The first defendant is ordered to pay the plaintiff's proven or agreed damages.
2. The first respondent is ordered to pay the costs, which costs include the reserved costs of 17 January 2022.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

24 May 2023

DATE DELIVERED:

18 July 2023

APPEARANCES

For the Plaintiff: Advocate TWG Bester SC

Instructed by: Loubser van Wyk Inc

For the Defendant's: Advocate M Malowa SC

Instructed by: The State Attorney, Pretoria