

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23923/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
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DATE	SIGNATURE

M[...] D[...] T[...]

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE GAUTENG DEPARTMENT OF COMMUNITY
SAFETY SECURITY AND LIAISON**

Second Defendant

JUDGMENT

NEUKIRCHER J:

1] This claim for unlawful arrest and detention arises out of events that took place on 3 December 2014 on the N14. The parties agreed that the issue of liability should be separated from that of quantum and this order was granted at the commencement of the trial.

2] The defendants also raised special pleas which were not proceeded with at the hearing.

3] It is common cause that on 3 December 2014 the plaintiff was on his way home from writing an exam in Kyalami, to Amersfoort, Mpumalanga. It was the first time he had driven this road. He was travelling in the right hand lane from west to east in his silver Land Rover Freelander on the N17. On his left was a truck which he was attempting to overtake before his lane merged with the left-hand lane at the start of a painted island which was on his right.

4] According to the plaintiff that portion of the N17 was very busy but the opposite traffic not as heavy as in his direction, with cars both in front of and behind the truck. His evidence was that he could not slow down to fall in behind the truck because of the heavy traffic and because the vehicles behind the truck would not have let him into that lane.

5] The truck sped up as he was trying to pass it, he was forced to drive over the painted island¹ but he did not drive into the lane of the oncoming traffic. He also testified that he used his indicators.²

6] Just before the bridge further up the highway, he saw a traffic officer whose headlights were on and who indicated that he should pull over, which he then did.

7] When he stopped he was asked for his driver's license which he gave and he was told that he'd overtaken the truck incorrectly. The plaintiff admitted that he'd driven over the island and explained that he had no choice - it was peak hour traffic and he could not apply his brakes as the other vehicles would have collided with him.

8] He was then told that he was being arrested and he was put into the traffic police vehicle and driven to the Springs Police Station. His vehicle was driven by another officer to the station.

9] His evidence was that the arresting officer never identified himself, never told him why he was being arrested, never read him his rights, never told him that his offence was so serious he must be arrested and he was not asked to give an explanation for his conduct.

10] He also testified that he had Tramacet with him which is a strong painkiller because he had 2 burst discs in his back.

¹ Which he said was approximately 4 vehicles wide and 100m long - this evidence was not placed in dispute by either defendants.

² Which was also not disputed

11] At the Springs Police Station, he was given a document to sign - which was never explained to him. He signed it because he thought this was standard procedure. He was then told to hand over his belongings and was put into a cell and detained by SAPS. At approximately midnight he was released and appeared in court the following day ie 4 December 2014. On 4 December 2014 he signed an admission of guilt form. According to this document he admitted guilt of “a Sec 58(1) Act 93/1993. *Disobey a barrier line marking on public road whilst driving.*” His admission of guilt fine was R500-00.

12] Importantly, the plaintiff actually (in his evidence) denies driving over a barrier line.

13] His evidence is that he has never had any previous traffic violations and that there was no reason for the arrest.

14] Cross-examination by the first defendant (SAPS) revealed that the arrest was effected by the second defendant and that the second defendant took the plaintiff to Springs Police Station with the intention of detaining him there.

15] Cross-examination by the second defendant was important not for its impact, but for the fact that much of the evidence of its sole witness³ was never put to the plaintiff. It was put to plaintiff that Mr Nkambule would testify:

- a) that the plaintiff drove into the lane of the oncoming traffic when he overtook the truck;
- b) that he informed the plaintiff why he was arresting him;

³ Principal Provincial Inspector Nkambule

- c) that he was read his rights;
- d) that he told the plaintiff that he was arresting him for reckless and negligent driving and therefore was not being issued with a ticket.

16] All of this was denied by the plaintiff.

17] None of the remainder of the cross-examination moved the plaintiff's evidence. The fact is that the plaintiff signed both his reading of rights form and the admission of guilt form without reading them - he admitted as much, but said he thought this was the way it worked as he had never been arrested before and did not know what the procedure was.

18] In my view, the plaintiff made a favourable impression on me – cross-examination did not move his evidence at all and there were no discrepancies in his evidence. He also conceded the important fact that he had overtaken the truck by crossing over completely into the painted island. This is an important concession as it, in my view, demonstrates his willingness to concede relevant evidence.

19] At the close of plaintiff's case, the first defendant moved for absolution. The test for absolution is the following: "*whether there is evidence upon which a Court, applying its mind reasonably to such evidence court or might (not should, or ought to) find for the plaintiff.*" The plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim.⁴

⁴ Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H

20] I refused absolution as I was of the view that *prima facie* first defendant had a case to answer in relation of the detention of the plaintiff. It was common cause that the first defendant detained the plaintiff until midnight on 3 December 2014 and that:

- a) whilst it is so that the arrest was effected by members of the second defendant, the evidence is that the plaintiff was detained by members of SAPS at the Springs Police Station;
- b) furthermore, the fact is that the plaintiff was released from detention at midnight on 3 December 2014. No cross-examination was put to him that this was at the behest of the second defendant or that SAPS had no discretion but to detain the plaintiff at the behest of the second defendant;
- c) Mr Mhambi argued that the reason why the first defendant detained the plaintiff is because the second defendant does not have its own detention centre facilities – but this was never put to the plaintiff in cross-examination and thus it was never introduced into evidence.

21] Therefore, in my view, at least *prima facie*, the first defendant had a case to meet. Therefore absolution was dismissed.

22] The first defendant closed its case without leading any evidence.

23] The second defendant's sole witness was Mr Nkambule. He is employed in the Department of Community Safety as a Principal Provincial Inspector. On 3 December 2014 he was a Provincial Inspector.

24] On 3 December 2014 he was deployed to patrol the N17 between Wemmerspan until the Mpumalanga border. At ± 16h00 he saw a silver Land Rover in the fast lane overtaking vehicles at a high speed at the place where the two lanes converged. He observed the Land Rover drive over the painted island, over a barrier line and into the oncoming traffic lane to pass the other vehicles.

25] He was driving behind the truck and his evidence was that the truck could not have accelerated as there were vehicles in front of it⁵. As plaintiff overtook the truck, the road was “steep” and so oncoming vehicles could not see him and had to swerve suddenly to avoid him⁶.

26] He then pulled the plaintiff over. The plaintiff rolled down his window and told Mr Nkambule that he was epileptic. He got out of his car and opened his boot. There was an orange bag and he searched inside and took out a toiletry bag and breathed deeply into it and then said “*I am fine now.*”⁷

27] Mr Nkambule then testified that he explained to the plaintiff why he had stopped him, told him that he was driving recklessly and negligently and he had put other people’s lives in danger. He then asked the plaintiff for his driver’s license which plaintiff gave him, and he then told plaintiff he was arresting him and read plaintiff his rights.

28] According to him plaintiff asked permission to place a call, which Mr Nkambule allowed. Plaintiff then handed him the phone. The person identified

⁵ None of this was put to the plaintiff in cross-examination

⁶ Also not put to the plaintiff in cross-examination

⁷ This was not put to the plaintiff

himself as an attorney. Mr Nkambule explained what had transpired and the attorney said that the violation was not an arrestable offence which Mr Nkambule disputed. The attorney then told him he would meet them at the Spring Police Station.⁸

29] Mr Nkambule then called a colleague to drive the plaintiff's vehicle to the Springs Police Station and he transported the plaintiff there where he opened a docket and charged him with reckless, negligent and inconsiderate driving. He explained the charges to him and explained that plaintiff could have caused a head-on collision. He testified that plaintiff explained that it was the first time he's driven that road and that he wasn't feeling well because he's epileptic. When Mr Nkambule asked to see the tablets, the plaintiff told him they were not there.⁹

30] Mr Nkambule was adamant that he could not issue a ticket because the offence of reckless and negligent driving is a serious one.

31] He testified that once he opens the docket at the Police Station, the SAPS Investigating Officer takes over and lets him know when to come to court. He was never called to appear in court and he only found out later that the plaintiff had signed an admission of guilt fine. According to him, his role is done once the docket is opened.

32] In cross-examination by the first defendant, Mr Nkambule conceded that the plaintiff was detained at Springs Police Station because the second defendant does not have its own detention facilities. He also admitted that it was his decision to

⁸ This was not put to the plaintiff

⁹ This was not put to the plaintiff

detain plaintiff after he had arrested him, but he was unsure whether SAPS had a discretion to release plaintiff once he had arrested him.

33] It appears from the cross-examination by the Plaintiff that although Mr Nkambule is a “peace officer”¹⁰ he is not vested with the ability to perform an arrest. Mr Nkambule conceded that his powers were limited in terms of Government Gazette R209 of 19 February 2002 (R209), but testified that in terms of his “466 book”, the procedure prescribed is that on a charge of reckless and negligent driving, he must arrest the perpetrator. It is his testimony that the “466 book” does not confer any discretion on him as to whether he can procure plaintiff’s attendance at court by any other method. He admitted that this “466 book” had not been discovered and this prescribed procedure was not placed before this court other than via Mr Nkambule’s testimony.

34] He conceded that the arrest was without a warrant but could not name the section in the Criminal Procedure Act, 1997 (the CPA) he could rely on to effect an arrest (ie in this case s40(1)(a)¹¹).

35] Mr Nkambule also conceded that, as plaintiff had provided his identity document he could have verified his identity, that he co-operated during the arrest, that he was not aggressive and he could have verified his address. He also identified the plaintiff’s motor vehicle. He was adamant that the arrest was effected because it is “expected procedure”.

¹⁰ By virtue of the fact that he’s a “traffic officer” in terms of National Road Traffic Act 29 of 1989

¹¹ “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”

36] Mr Nkambule then conceded that he is not a police officer, but that he is a traffic officer.

37] Mr Nkambule conceded that an arrest was a drastic infringement of plaintiff's Constitutional rights, but was steadfast in his position that only a court had the discretion to release plaintiff and that he has no discretion not to effect an arrest. His evidence was further that SAPS also had no discretion whether or not to detain the plaintiff - they had to detain him: this statement he walked back in his re-examination.

38] The second defendant then closed its case.

39] The plaintiff's case is based on 2 legs:

- a) the first argument is that Mr Nkambule is not empowered to arrest the plaintiff and that, under the provisions of R209, his powers are extremely limited;
- b) the second is that even were he to be so empowered, he was vested with a discretion whether or not to arrest the plaintiff once certain jurisdictional facts are present.

40] According to R209:

"...every person who, by virtue of his/her office, falls within any category defined in column 1 of the Schedule to this notice, shall, within the area specified in column 2 of that Schedule, be a peace officer for the purpose of exercising with reference to the

offences specified in column 3 of that Schedule, the powers defined in column 4 there;”

41] Part 4 of R209 states the following:

PART 4			
(a) Provincial Inspectors appointed by the Provincial Administrations of the Transvaal and the Orange Free State and Provincial Traffic Officers appointed by the Provincial Administrators of the Cape of Good Hope and Natal.	The area of jurisdiction of the Provincial Administration which made the appointment and area of the jurisdiction of the provincial administration in which the Provincial Inspector or Provincial Traffic Officer, as the case may be, are deemed thus to be appointed	Any offence	(i) The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977. (ii) The execution of warrants of arrest in terms of section 44 of the Criminal Procedure Act, 1977.

42] Thus, according to the plaintiff's argument, Mr Nkambule's powers were limited and he had no power to arrest the plainiff. But the argument of the second defendant was that the metro police perform their functions in terms of the National Road Traffic Act No 93 of 1996 (NRTA), that they are "traffic wardens"¹² as defined in

¹² "‘traffic warden’ means a person who has been declared by the Minister of Justice to be a peace officer in terms of section 334 of the Criminal Procedure Act (Act 51 of 1977), and has been appointed as a traffic warden by the chief executive officer, the MEC or another competent authority to appoint a traffic warden, as the case may be."

a1(xlvii) of the NRTA and that, in the course and scope of the performance of their duties, they also apply the provisions of the CPA. It was also submitted that in as much as the JMPD are qualified peace officers by the South African Police Services Act 68 of 1995, they are entitled to effect an arrest in terms of s40(1)(a) of the CPA. But it must be borne in mind that Mr Nkambule was very clear that he is not a police officer and that his authority to effect an arrest lay in the provisions of his “466 book”.

43] Whilst the provisions of the NRTA clearly define Mr Nkambule as a “peace officer”, his duties have been prescribed by R209 – neither of those entitled him to effect an arrest under that act. As the “466 book” was never put into evidence, I have no other evidence that Mr Nkambule was entitled to effect an arrest.

44] In any event, in my view, the weight of the evidence placed before me does not support Mr Nkambule’s version of events: important details of his evidence were never put to the plaintiff, and the plaintiff’s evidence remained unshaken by cross-examination. I have already found the plaintiff to be a credible witness and, on the balance of probabilities, his version is preferred over that of the second defendant. This being so, his evidence was that he admitted driving onto the painted island but not into oncoming traffic, that Mr Nkambule had failed to identify himself, failed to inform him properly of the reason for his arrest and failed to read him his rights.

45] In **S v Thebus and Another**¹³ the court stated that s35(1) of the Constitution required the police to warn people when they were arrested that they had the right to remain silent and of the consequences of not remaining silent. Thus a failure to give the warning would infringe s35(1)(b). However, one must be careful of conflating the

¹³ 2003 (6) SA 505 (CC) at par [91]

unlawfulness of an arrest with the right to a fair trial. In my view, the failure to read someone their rights relates to the issue of the right to a fair trial and not necessarily to the issue of whether or not the arrest itself was unlawful.

46] There is nothing before me to suggest that Mr Nkambule was empowered to arrest the plaintiff. In fact, the evidence suggests the contrary. The fact is too that on his version he opened a docket which details the charges against the plaintiff – the docket was not put into evidence. What was put into evidence was the admission of guilt fine which details a substantially less serious charge than that stated by Mr Nkambule.

47] Furthermore, even were I to accept that Mr Nkambule could invoke the provisions of s40(1)(a) of the CPA, the fact is that he was vested with a discretion whether to effect an arrest – a fact of which he was not even aware. In **Syce and Another v Minister of Police**¹⁴ the court stated:

“[22] A peace officer who makes a warrantless arrest has a discretion whether or not to make the arrest. The discretion arises once the jurisdictional requirements stipulated in s 40(1) of the CPA are satisfied. In Groves NO v Minister of Police (Groves), the Constitutional Court confirmed this principle in relation to a warrantless arrest, as follows:

‘The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to

¹⁴ (1119/2022) [2024] ZASCA 30 (27 March 2024)

justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.'

[23] *Although the Constitutional Court in Groves was dealing with an arrest made pursuant to a warrant, it provided important guidance in relation to the circumstances which trigger the discretion. It stated that:*

'Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and "[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries". An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.'"

48] It is clear that the principles set out in **Groves** and **Syce** were not followed. The fact of the matter is that Mr Nkambule had no reason to arrest the plaintiff: he had provided his identity documents and his address which was easily verifiable, he co-operated at all times, his motor vehicle registration was easily verifiable and along with that his personal information. In my view, on the evidence placed before me, the arrest by the second defendant was unlawful.

49] As to the detention, the first defendant argued that the detention occurred at the instance and behest of the second defendant and that the first defendant had no

discretion to refuse to detain the plaintiff. But this ignores the fact that an arrest and a detention are two separate occurrences, each of which requires that each party exercise a separate and discrete discretion from the other:

"[39] Once the plaintiff was placed in the custody of the second defendant, the SAPS members were obliged to consider afresh, prior to detaining the plaintiff further, whether the continued detention by the second defendant of the plaintiff was justified and lawful, in fact, "whether detention [was] necessary at all".

*[40] The failure of the SAPS members to do so was unlawful."*¹⁵

50] Furthermore, the first defendant elected to close its case without calling any witnesses and thus no evidence was provided by it to refute the plaintiff's assertion that the detention was unlawful. Added to this is the evidence of the second defendant that, once a police docket is opened, it is then up to SAPS to take the matter further. I thus find that the detention of the plaintiff by the first defendant was unlawful.

51] Given this, the plaintiff's claim on the merits as against both first and second defendants must succeed.

COSTS

52] I have considered the question of costs on the appropriate scale upon which the costs should be granted. This is not the usual "run-of-the-mill" matter. Issues were raised relating to Mr Nkambule's authority to effect an arrest as well as whether

¹⁵ Nqibisa v City of Johannesburg Metropolitan Municipality and Another (2018/14594) [2023] ZAGPJHC 1053 (11 August 2023)

or not the first defendant had a duty to exercise a discretion discrete from that of the second defendant. I am of the view that costs on Scale B are justified.

ORDER

53] The order is the following:

1. The first and second defendants are ordered to pay the plaintiff's proven or agreed damages.
2. The quantum is postponed sine die.
3. The first and second defendants are ordered to pay the plaintiff's costs, to be taxed in accordance with Scale B.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for hand-down is deemed to be 7 June 2024.

Appearances

For the plaintiff	:	Mr W Dreyer
Instructed by	:	GMI Attorneys
For the first defendant	:	Mr MH Mhambi
Instructed by	:	State Attorney - Pretoria
For the second defendant	:	Mr M Maelane
Instructed by	:	State Attorney - Pretoria
Matter heard on	:	13 and 14 May 2024
Judgment date	:	7 June 2024