REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT - MTHATHA)

CASE NO. : 1680/2009
Heard on : 29, 30 and 31 May 2013
Delivered on : 06 September 2013

In the matter between:

RAUTA MOTHIBEDI **Plaintiff**

And

MINISTER OF SAFETY AND SECURITY **First Defendant**
CONSTABLE MHLATHI **Second Defendant**

JUDGMENT

MAJIKI J:

[1] On 18 August 2009 the plaintiff sued the defendants for unlawful arrest, unlawful detention and contumelia for a sum of R300 000.00.

[2] The plaintiff's case is that on 15 January 2009 he was arrested by the second defendant at Sterkspruit on charges of driving a motor vehicle without a valid driver's licence. The second defendant alleged that the plaintiff was

under influence of liquor and he detained him from about 11h00 to 20h00, so as to gain sobriety.

[3] It is common cause that on the said date the plaintiff was arrested at Lepota location and taken to Sterkspruit Central Police Station, he was issued with a written notice to appear in court or pay a sum of R100.00 admission of guilt on or before 05 February 2010.

[4] The issue for determination was whether the arrest was lawful and the duration of subsequent detention, if any.

[5] According to the defendants the arrest was lawful and was effected in terms of Section 40 (1) (a) of the Criminal Procedure Act ("the CPA"). Further, the plaintiff had contravened section 12 of National Road Traffic Act No. 93 of 1996 "(the NRTA").

[6] Section 40(1)(a) of the CPA provides that

> "a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence."

Section 12 of the NRTA provides that

> *"no person shall drive a motor vehicle in a public road*
> (a) *except under the authority and in accordance with the conditions of a licence issued to him or her in terms of this Chapter or any document deemed to be a licence for the purposes of this Chapter; and*
> (b) *unless he or she keeps such licence or document or any other prescribed authorisation with him or her in the vehicle"*.

[7] The parties agreed that the matter should be heard both on merits and quantum. The defendants bore the onus to prove the lawfulness of the arrest and they had to adduce evidence first.

[8] The second defendant testified that on 18 January 2009 at about 11am +15-20 km away from Sterkspruit town, he was in company of Constable Gumata and reservist Yakobi. In an uphill at Lepota location he saw a motor vehicle, combi driven by the plaintiff slanting and obstructing the roadway. He stopped behind it and signalled with a hooter, alerting its driver that he was behind it, the motor vehicle jerked. He went to the motor vehicle, he found the plaintiff and some passengers in the motor vehicle. He enquired from the plaintiff if there was a problem, the plaintiff answered in the negative. He asked the plaintiff to move the motor vehicle, because the road was bad. The plaintiff started the motor vehicle and it jerked again. He then asked if the plaintiff had a driver's licence. The plaintiff answered that he did not have it. He asked for the plaintiff's identity document, and the plaintiff said he did not have it as well.

[9] He then advised the plaintiff that he had committed an offence and he was arresting him for driving without a licence. He took the plaintiff and told him that he would drive the plaintiff's motor vehicle and the plaintiff would seat as a passenger. Gumede then drove the state's motor vehicle. They proceeded to the police station with the passengers still inside the plaintiff's motor vehicle. Upon their arrival at the police station the passengers requested to alight and they alighted. He gave the plaintiff a J534 form, a notice to appear in court alternatively, to pay a fine as an admission of guilt. He explained the contents of the form to the plaintiff. The plaintiff was calm and composed. He co-operated during the arrest. He told the plaintiff that he could not release the motor vehicle to him, he would have to bring someone with a driver's licence.

[10] In about 15 minutes the plaintiff came with someone to fetch car, he inspected the driver's licence of the said person and gave him the motor vehicle's keys in the plaintiff's presence. He denied that he detained the plaintiff until 20h00 but insisted that he released him at about 11h30. He had already knocked off duty by 20h00; his shift was 07h00 to 19h00. There would not have been a need to either detain the plaintiff for longer or draw his blood as he was not arrested for an offence that involved drunkenness. He also denied that he hand - cuffed the plaintiff or that he had locked him at the back of the police van.

[11] Under cross examination he conceded that he was working under a station commander but he did not hand the plaintiff to the station commander. They do record their work in the occurrence book, albeit not all the time. He stated that he did not know what the standing orders require of them in that regard. He only has recollection of hearing about standing orders during the lessons on his training but has never seen one. He would not say if he complied with the standing order G341 during the arrest of the plaintiff because he was not familiar with it.

[12] He also conceded that he never completed the rights form because he had already advised the plaintiff of his rights, and the plaintiff was not going to be detained. He did not make a record in his pocket book as he did not have it at the time. He said even if all this was required of him by the standing orders, in practice they do not do it when the suspect would be released, they only issue the suspect with a ticket. He denied that he had ulterior motives in arresting the plaintiff. The plaintiff was arrested in order to be issued with the notice to appear in court for driving a motor vehicle without a licence. He was not sure of the Act or section that empowered him to arrest the plaintiff. He

only knew that the offence was in terms of the Road Traffic Act. He did not lock the plaintiff at the back of the police van as required by standing order G250 because the plaintiff was co-operative. He confirmed that in the J534 his name appears as an investigating officer and therefore was both an arresting and investigating officer in the matter; that he did not fill in the serial number of registration of J534 because the notice had not been captured in the system yet by the administration staff.

[13] He denied that the plaintiff was out of the motor vehicle, he said the plaintiff was at all times in the motor vehicle's steering wheel. He also denied that there was only one person, one Lukhanyo inside the motor vehicle. He denied that he ever escorted the plaintiff into the holding cells. He disputed that the plaintiff could have walked on foot at night after his release. He re-iterated that the plaintiff was under his control for about 30 minutes only, from around 11h00 to 11h30. He conceded that he had no record of this and that his name did not appear in the occurrence book because he was not based in the station for the performance of his duties but was working away from the station.

The defence case was closed.

[14] The plaintiff testified that he was arrested by police on 18 January 2009 around 11h00. Their motor vehicle was parked outside the road, other motor vehicles could drive in the road. They were two (2) when the police arrived. He was outside the vehicle, the other one was inside the vehicle. The police parked their police van behind their motor vehicle. The police officers said they were drunk behaved as if they were traffic officers and a male police officer came to him; handcuffed him and put him at the back of the van. He could not balance at the back of the motor vehicle; it was driven at a very high speed on the gravel road.

[15] At the police station he was taken inside charge office. He was issued with a ticket and taken to the cells with the ticket. The cell was far away from the charge office. He stayed there until 20h00 when he was released by another police officer whom he did not know. He was handcuffed throughout. He walked alone and arrived home at about 22h00. The police officer had no reason to arrest him.

[16] Under cross examination he stated that he was not driving the motor vehicle. The police officers did not ask him anything. He was calm at the time of his arrest but was handcuffed. He was not given any explanation or told of any charge. He was issued with a ticket contents of which he could not read. He could not explain why his name did not appear in the detention register but he did see the second defendant completing the register. According to him the motor vehicle that the police alleged he was driving was left by its owner with the keys in its ignition, the owner had gone to buy tobacco. He did not know who collected the motor vehicle after his arrest, but it was removed the same day from the police station. He never paid a sum of R100.00 fine.

He was not given food during the period of his detention. He confirmed that no blood was drawn from him because he was sober. He also confirmed that he did not have a driver's licence, but the second defendant never asked him for it.

[17] Mr Luzipho pointed out in defendants' heads that there are two irreconcilable versions in the matter. In such circumstances, the applicable principle is clearly set out by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 473 (E) at 440 D-G.*

> "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 case of the party on whom the onus rests..."

Mr Hinana on the other hand on behalf of the plaintiff argued that if the defendant as the party that bears the onus has failed to discharge it, there is no need for the plaintiff to adduce credible evidence.

[18] The second defendant impressed me as a truthful and credible witness. He was quick to acknowledge that some of his actions fell short of procedural standards that are prescribed by various standing orders. As regards the facts his evidence was reliable he was consistent even during cross examination.

[19] I am unable to come to the same finding about the plaintiff's evidence. The plaintiff's evidence seemed to be very convenient and is not supported by the undisputed facts and inherent probabilities against which it was adduced. In *Mabona and another v Minister of Law and Order 1988 (2) 654 (SECLD)* at *662 C-F* the court stated as follows with regard to the approach in two conflicting versions:

> "The upshot is that I am faced with two conflicting versions only one of which can be correct. The *onus* is on each plaintiff to prove on a preponderance of probability that her version is the truth. This *onus* is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a s ingle investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demand and impression are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against inherent probabilities, so that at

> the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety."

[20] The plaintiff stated that he was not inside the motor vehicle, he was never asked about the driver's licence. He testified that he does not have a driver's licence, how then would the second defendant have known that he does not have one, if he had not asked him about it. He said he was with one Lukhanyo, they were told that they were drunk and behaving as if they were traffic officers, if he was not associated with the driving of the motor vehicle, what would have been the reason for Lukhanyo not to be arrested for the same "wrong reasons" as him. He said he did not know who collected the motor vehicle. According to the plaintiff, this motor vehicle was taken whilst it was him and Lukhanyo who were in or near it. They somehow would have had to account about it in the circumstances, but according to him, he does not know how and when the motor vehicle was taken from the police station . Finally, he said he was released at 20h00 by another police officer. Undisputed evidence was led that his arrest was not recorded anywhere, the second defendant had knocked off at 19h00, how then would another police officer had become aware of his presence in the cells and take it upon himself to release him after the second defendant had already left. I therefore accept the second defendant's evidence that he arrested the plaintiff for driving the motor vehicle without a driver's licence and that the plaintiff was released at about 11h30 after he was issued with the notice to appear in court.

[21] Having rejected the plaintiff's evidence it still remains to be determined if the defendants discharged the onus resting on them that the arrest was lawful. A driver in the NRTA is defined as one who drives or attempts to drive any motor vehicle, drive has a corresponding meaning with driving. To start the engine of a vehicle therefore is to drive it. In *S v Vorster 1968 (2) SA 59 (0)* an accused found to be asleep behind the steering wheel with engine not running

was held not to have attempted to drive the motor vehicle under influence of liquor.

The plaintiff started the vehicle more than once on the day but it jerked, which is why the second defendant went to him to ask if there was a problem. In terms of s.89(1) failure to observe the requirement of section 12 of the NRTA, which requires any person who drives a motor vehicle in a public road to be duly licenced to do so, and to keep his licence with him in the vehicle, is an offence. The plaintiff did commit an offence in the presence of the second defendant.

[22] The second defendant failed to comply with a number of the standing orders during the arrest of the plaintiff. Standing Order 350 regulates the restraining measures on a person in custody. The measures are taken as precautions to prevent the escape of the person in custody. The use of the restraining measures is discretionary depending on circumstances including, the behaviour of the arrested person. The restraining measures are effected until such time that the arrested person is handed over to the Community Service Centre Commander or until he is placed in a police cell. In my view, there was no need to hand over the plaintiff to the Community Service Centre Commander because he was dealt with as soon as he arrived at the police station. He was issued with a J534 form and not taken to the cells. Standing Order No. 4 about the recording of the use of restraining measures in the occurrence book applies to a person who is being detained in a police cell. This also applies to Standing Order No. 7(4) as to the transportation by a police van and the provision that the arrested person who is transported at the back must be handcuffed. They are used as restraint measures to prevent such person from escaping. There is nothing that precludes the arresting officer from not taking the precautions if the arrested person's behaviour is not such that in the view of the police officer is likely to escape.

[23] The second defendant had stated that he could not record in his pocket book that he had informed the plaintiff of his constitutional rights because he did not have a pocket book at the time, further according to their practice they issue SAP14A, which is a record of constitutional rights, to people who are detained. The evidence establishes that the plaintiff was arrested for driving a motor vehicle without a valid driver's licence. It establishes further that he was given a written notice in terms of s56 of the CPA and thereafter released. One aspect that still requires determination to conclude on the lawfulness or otherwise of the arrest in this case, is whether the plaintiff ought to have been appraised of his rights in the circumstances, in terms of ss (4) and (8) of the standing order G341.

[24] Standing Order No G341 of the police Act creates obligations on the part of the police officers concerning what police officers are required to do when effecting an arrest and how the arrested person should be treated. The rules in terms of the Standing Order must be strictly be adhered to. The background to the Standing Order makes a very compelling statement that arrest constitutes one of the most drastic infringements of the rights of an individual. This Standing Order, in line with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and other relevant legislation regulates the framework and lays rules concerning the circumstances of an arrest of an individual. S 35 of the Constitution Act provides amongst others, that :

(1) Everyone who is arrested for allegedly committing an offence has the right
    (a) to remain silent;
    (b) to be informed promptly-
        (i) of the right to remain silent; and
        (ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(2) Everyone who is detained, including a sentenced prisoner, has the right :

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

[25] Sections (4) and (8) of the standing order G341 in a sense are a summary of both S.35(1) and (2) of the Constitution.

Section 4 provides:-

(a) In terms of section 35(1) of the Constitution, 1996, the information that must be furnished to a person at the time of or immediately after his or her arrest is as follows:

(i) the reason for his or her arrest;

(ii) that he or she has the right to remain silent and that anything he or she says, may be used as evidence against him or her in a court of law;

(iii) that he or she has a right to consult with a legal practitioner of his or her choice or that he or she may, if he or she so prefers, apply to the Legal Aid South Africa to have a legal practitioner assigned to the case at state expense; and

(iv) that he or she has the right to apply to be released on bail.

(b) Section 39 (2) of the Criminal Procedure Act, 1977, requires that the person who effects an arrest must, at the time of effecting the arrest or immediately thereafter, inform the person who has been arrested of the reason for his or her arrest. It is not necessary to use the actual words of the charge – mentioning the offence would be sufficient. If the arrest took place by virtue of a warrant, a copy of the warrant must, upon his or her demand, be handed to the person who has been arrested.

(c) The information in subparagraph (a) must be furnished to the arrested person in a language which he or she understands. For this purpose the said information is printed on the first pages of the Pocket book (SAPS 206) in all eleven official languages. To ensure that a person is fully informed of these rights, the arresting member must read this information from the Pocket to the arrested person in a language which the arrested person understands.

Section 8 provides:-

(1) Recording of the fact that the arrested person has been informed of his or her rights:

(a) A member who arrests a person must, as soon as possible after having furnished the information in paragraph 6(4)(a) (above), to the arrested person, record in his or her Pocket book the fact that the information was so furnished.

(b) The member must request the arrested person to acknowledge that he or she has been informed of his or her rights and that he or he understands the contents thereof,

by signing next to the recording in the Pocket book, referred to in subparagraph (a).

(c) If the arrested person refuses to sign in the Pocket book, a third person (whether a civilian or another member) who witnesses the person being informed of his or her rights, must be requested to sign next to the recording to certify that he or she has witnessed this and that the arrested person refused to sign. If a third person is not available, the member must make a recording in the Pocket book to the effect that a third person was not available to certify that the arrested person was informed of his or her rights and that the arrested person refused to sign the Pocket book.

The courts have over a number of times strongly condemned of all acts that seek to undermine the constitutionally protected rights of an individual. As stated in the preamble of Standing Order G341 arrest is a drastic infringement of right to freedom. This was confirmed in *Minister of Safety and Security v Van Niekerk 2008 (1) 56 CC* at paragraph 19 and the court went further to hold that the decision to arrest depend on the circumstances of the case. At paragraph 20 the court concluded that nuanced guidelines already exist to determine constitutionally acceptable arrests in relation to the facts of the situation. Guidelines themselves, underline, that the lawfulness of an arrest will be closely connected to the facts of the situation.

[26] The conduct of the second defendant in this case with regard to the compliance with standing order G345 is inexcusable. The concession that, it is their practice not to record that an arrestee, who is not to be detained, had been advised of their rights is even more concerning. An arrest is not a confirmation of the suspect's guilt, it is not a matter of choice whether the fact that they

were informed of their rights should be recorded. This Standing Order is a safeguard so as to ensure that there is a record of compliance with the law when effecting an arrest.

[27] In the circumstances, the failure goes to the root of lawfulness of the arrest. Accordingly, the arrest of the plaintiff was unlawful. I have already rejected the plaintiff's evidence regarding the duration of his detention. The evidence of the second defendant is the only probable evidence in this regard.

Quantum

The plaintiff claimed R75 000.00 for his unlawful arrest. He claimed a further R150 000.00 in a sense, for loss of earnings, in that he did not perform his work as a motor mechanic during the detention. Furthermore, that his dignity self esteem and integrity were impaired; that he had to walk about 5 kilometres on foot back to his home. The plaintiff is a self employed motor mechanic who cannot read or write. His arrest lasted less than an hour. No evidence was led as to what extent his arrest became public knowledge except to the passengers that were in his motor vehicle. There was also no evidence as to his earnings.

In *Minister of Safety and Security v Seymour 2006 (6)SA 320 SA* at para 17 the court concluded that in assessing general damages the facts of the particular case must be looked at as a whole. The court can rely on previous awards for guidance, but the task is discretionary. None of the cases I was referred to by counsel for the plaintiff could assist me in the circumstances of this case. In *Minister of Safety and Security and Others v Ndlovu 2012 ZACA 189,* on 30 November 2012 Petse JA confirmed an award of R55 000.00 for arrest and detention that lasted 48 hours. The award made therein provided me with some guidance in arriving at an appropriate award in this case.

In my view, an award in the sum of R2 200.00 is appropriate.

I therefore make the following order :

1. Judgment in favour of the plaintiff is granted

   (a) First and second defendants are to pay the plaintiff jointly and severally, one paying other to be absolved damages in the sum of R2 200.00 for unlawful arrest.

   (b) Interest at the rate of 15.5% from the date of judgment to the date of payment.

   (c) Costs of suit.

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B MAJIKI
JUDGE OF THE HIGH COURT

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