

**IN THE HIGH COURT OF  
(EASTERN CAPE**



**SOUTH AFRICA  
DIVISION, MTHATHA)**

**CASE NO: 802/2020**

Reportable	Yes / No
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In the matter between:

**LUDWE SKEPE**

**PLAINTIFF**

and

**MINISTER OF POLICE**

**DEFENDANT**

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## **JUDGMENT**

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**CENGANI - MBAKAZA AJ**

### **Introduction**

[1] On 28 February 2020, Mr Ludwe Skepe (the plaintiff) issued a combined summons in this court for damages arising out of unlawful arrest and detention against the Minister of Police (the defendant). The defendant is sued in his capacity as the Minister in charge of the members of his department, the South African Police Services (SAPS). In law, the defendant is vicariously liable for the delicts committed by the members of SAPS while acting within the course and scope of their employment.

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[2] In the pleadings, the plaintiff alleged that on 26 September 2017 around 14h40, the plaintiff was wrongfully and unlawfully arrested by the members of SAPS without producing a warrant for his arrest. The plaintiff was accused of having committed an offence of theft of a motor vehicle tyre at or near Sprigg Street, Mthatha.

[3] Following his arrest, he was transported to Madeira police station where he was detained. He appeared in court on 27 September 2017 and was later released after numerous postponements of the matter.

[4] The plaintiff holds the defendant vicariously liable for the pleaded breaches including the sequelae suffered as a result thereof. The plaintiff seeks payment of damages as a *solatium* for injuries to dignity, liberty and personal feelings. Ultimately, the plaintiff seeks:

- (a) R200 000 (Two hundred thousand rand) for unlawful arrest;
- (b) R300 000 (Three hundred thousand rand) for unlawful detention; and
- (c) R600 000 (Six hundred thousand rand) for contumelia.

[5] In resisting the claim, the defendant filed a plea and alleged that the arrest and subsequent detention of the plaintiff was justified. To substantiate, the defendant alleged that the arrest was effected in terms of Section 40(1) (a) of the Criminal

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Procedure Act 51 of 1977 (CPA). It was alleged that the plaintiff, together with his erstwhile co-accused, stole a motor vehicle tyre from a Nissan bakkie with registration letters and numbers NP 200 which was parked at Sprigg Street. The said offence was committed in the presence of the members of the SAPS.

[6] On the date of trial, the defendant withdrew a special plea regarding the plaintiffs' compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of the State, Act 40 of 2002. In terms of Uniform Rule 33(4), I made an order that the merits be separated from quantum as agreed by the parties. The parties agreed further that the defendant bore the onus to justify the arrest and that they would begin to lead evidence.

### **The defendant's case**

[7] Warrant officer Sikhundla (the arresting officer) testified that he has been working for SAPS, attached to the Crime Prevention unit for 33 years. In September 2017, it was the police strategy to report on duty, conduct some checks and balances and map a plan on how to prevent crime in their area of jurisdiction. In their approach, it was decided that some officers would be visible, patrolling in their police uniform and some in civilian clothing.

[8] On 26 September 2017, W/O Sikhundla was in the company of his colleague, Warrant Officer Sidima Nongoloza (W/O Nongoloza) patrolling around Sprigg Street in civilian clothing, driving an unmarked police vehicle. In the tour of their patrol,

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they parked their motor vehicle, had a little break opposite the Buildit warehouse. Whilst sitting in their motor vehicle they saw the plaintiff calling a man who was standing on the other side of the road. He addressed this man as 'uncle'. The man approached the plaintiff.

[9] Together with this man, the plaintiff went to a Nissan bakkie (the bakkie) which was close by, parked in front of where the unmarked police vehicle was stationed. According to the arresting officer, they thought that the plaintiff and his companion had locked their car keys inside the vehicle and were trying to retrieve them. On looking closer, they saw the man(uncle) opening the driver's door, the plaintiff opened the passenger door and took a tyre that was placed behind the front passenger seat of the bakkie.

[10] The plaintiff rolled the tyre whilst simultaneously walking towards the direction of the police vehicle. The arresting officer and his colleague approached the plaintiff and produced their identification cards. The plaintiff dumped the tyre and started to run. He tripped and fell and at that moment the police caught up with him.

[11] When asked where he was taking the tyre to, the plaintiff informed the police that he was going to sell it. The arresting officer left the plaintiff in the custody of W/O Nongoloza. He went to the other man (the plaintiff's erstwhile accused). He asked for permission to search him, which permission was granted. He found an instrument he believed was used in the breaking in of the bakkie at the back pocket of the

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plaintiff's erstwhile accused. Nothing was found in the plaintiff's possession. Both the plaintiff and his erstwhile accused were put under arrest and advised of their Constitutional rights.

[12] The arresting officer informed the court that when both suspects were still in their custody, the owner of the bakkie emerged. The plaintiff identified the owner and alerted the arresting officer and his colleague. The arresting officer asked the owner to conduct a proper check of her bakkie. The owner of the bakkie who was later identified as Ms Abegail Notununu (the complainant) informed the police that her spare wheel was stolen and the driver's door of her bakkie was damaged. She then identified the tyre that was found in the plaintiff's possession as hers.

[13] The arresting officer requested a police van and both suspects were conveyed to the Madeira police station where a case was opened. The tyre was registered under SAP 13 number A6/09/2017, however, the complainant sought permission to leave with her tyre as she needed to use it as a spare wheel. The plaintiff was asked to formally release the tyre to its lawful owner which he did. He was asked to sign a form which was exhibited before the court as proof that he formally released the tyre to the complaint. The plaintiff was later detained at Central police station.

[14] When asked why the plaintiff was detained, the arresting officer testified that he had broken into a motor vehicle and stole a tyre. Furthermore, he stated that it

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was after office hours and the courts had already closed. On the following day, the plaintiff appeared before court and the matter was handled by the magistrate until his release.

[15] The next witness who testified on behalf of the defendant was W/O Nongoloza who briefly informed the court that he detained the plaintiff due to the fact that he committed an offence in their presence. Furthermore, he detained the plaintiff so as to appear in court and be released on bail. He took a warning statement and the plaintiff admitted having committed the offence of theft. He informed the court that he also witnessed the plaintiff removing a tyre out of the bakkie.

[16] During cross-examination, it was alleged to the police officers that they arrested the wrong person and they denied this. When W/O Nongoloza was informed that a warning statement was defective, he conceded that he made a mistake by not giving the plaintiff an opportunity to endorse his signature after the statement was obtained. That concluded the evidence adduced by the defendant.

[17] The plaintiff testified that on this day he was walking along Sprigg Street next to Chweba tavern. He explained that the day was busy with lots of people roaming around. As he was walking, he observed a certain man ahead of him pushing a tyre. When this man was about to cross over to Victoria Street, he let the tyre slip.

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[18] Since the tyre was rolling away from this man, he blocked it as he could see that it would cause accidents. He saw the man running away, he let loose of the tyre. At a distance of about four paces from where the tyre was, he felt something cold, apparently a firearm was put at the back of his neck. He identified the person who put a firearm on his neck as W/O Nongoloza.

[19] According to the plaintiff's testimony, W/O Nongoloza asked him to disclose the identity of the person who ran away. He had no knowledge of such a person but despite that, he was handcuffed. At that stage, the other police officer came with a second person whom he identified as the plaintiff's co-perpetrator in the commission of the crime of theft. They were both handcuffed. When he explained that he blocked the tyre so as not to cause accidents, he was advised that he should have let go of the tyre instead of pushing it.

[20] The plaintiff testified further that after his arrest he was detained and only appeared in court on the following day. After his first appearance in court, he spent seven days in custody and bail was later fixed in the amount of R3000 (Three thousand rand). He could not afford to pay bail until it was reduced to R1000 (One thousand rand). He was released in January 2018 after the case was struck off roll due to lack of evidence.

[21] During cross-examination, the plaintiff denied that he stole the tyre in the complainant's bakkie. He testified that he was never searched and his rights were

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not explained. The plaintiff further testified that he knew the person who was rolling the tyre before arrest. He testified that it was his first time to see his erstwhile co-accused and he never addressed him as uncle. With this evidence, the plaintiff closed his case.

### **Issues**

[22] The issues up for determination are:

- (a) Whether the plaintiff committed an offence of theft in the presence of the police officers.
- (b) Whether the police officers satisfactorily identified the person who stole the complainant's item.
- (c) Whether the plaintiff's arrest and his subsequent detention were justified.

### **The law**

[23] The defendant relies on section 40 (1) (a) of the Criminal Procedure Act (CPA)<sup>1</sup> to justify the arrest of the plaintiff. This provision allows a peace officer to effect an arrest without a warrant in circumstances where a person commits or attempts to commit any offence in the presence of a police officer. Section 40(1)(a) of the CPA provides:

“40. Arrest by peace officer without warrant ss39-40

(1) A peace officer may without a warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence”

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<sup>1</sup> Act 51 of 1977.



[24] In *Loubser*<sup>2</sup>, the court referred to the case of *Minister of Justice and Others v Tsose*<sup>3</sup> where Malan J explained that if a peace officer, honestly and reasonably comes to the conclusion that a crime is being committed he may act upon such opinion or belief even though in subsequent proceedings whether civil or criminal it is not proved that a crime was in fact committed. Moreover, in order to justify the apprehension and to determine whether or not a crime is being committed, the arrestor should not be confined to what he perceives at the time of arrest but may import into his decision the antecedent conduct of the arrested person as well as his knowledge of all the relevant surrounding circumstances and thus supplement what is perceived by him. *As per Malan J*<sup>4</sup>:

“He is not obliged to delve into the mental attitude or the mental processes or reservations of the person arrested. It is sufficient, in my opinion, if he acts upon facts capable of ascertainment and conveyed to him through one or more of his senses. If facts are present which are apparent to the arrestor and which, reasonably interpreted, lead to the inference that a crime is in the course of being perpetrated, the arrestor is protected.”

[25] In the case under consideration, the plaintiff allegedly committed an offence of theft in the presence of the police officers. A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which

- (a) belongs to, and is in possession of, another;
- (b) belongs to another but is in the perpetrator's own possession; or

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<sup>2</sup> S v Loubser 1977(4) SA 546 (T) 549.

<sup>3</sup> 1950 (3) SA 88 (T).

<sup>4</sup> Supra note 3 at 93A.

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- (c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession. Provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property.<sup>5</sup>

[26] There is a wealth of jurisprudence which accentuates that where an arrest is admitted the onus rests on the defendant to present facts which prove justification for the arrest.<sup>6</sup> In *Zeeland v Minister of Justice and Constitutional Development*<sup>7</sup>, the Constitutional Court said:

"It has long been established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.....

There can be no doubt that this reasoning applies with equal, if not greater force under the Constitution."

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<sup>5</sup> Snyman Criminal Law 7<sup>th</sup> edition, Chapter XVIII Page 421.

<sup>6</sup> Minister of Law and Order v Hurley and Another 1986(3) SA 568(A). At page 589, paragraphs E-F, the following was said, 'an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just that the person who arrested or caused the arrest of person should bear the onus of proving that his action was justified in law'; see also Mhaga v Minister of Safety and Security [2001] 3 ALL SA 255(Tk); Scheepers v Minister of Police 2015 (1) SACR 284 (ECG) paragraph [2] at 287C; Minister of Police v Du Plessis [2014] (1) SACR 217 SCA paragraphs [9] and [10] at 342H to 343 B.

<sup>7</sup> 2008 (2) SACR 1 (CC) at para 25.

[27] Section 12 of the Constitution of the Republic of South Africa<sup>8</sup> pledges *inter alia* the right not to be deprived of freedom arbitrarily without a just cause. It is well settled that the approach towards discharging of onus to prove wrongful detention is like the approach adopted towards proving wrongful arrest. The authority for this proposition is *De Klerk v Minister of Safety and Security*<sup>9</sup>.

[28] Section 50 of the CPA deals with the procedure to be adopted after a person has been arrested for any other reason or for allegedly committing an offence. In terms of Section 50(1) the procedure below is imperative:

- (a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.
- (b) A person who is in detention as contemplated in paragraph (d) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.
- (c) Subject to paragraph (d), if such an arrested person is not released by reason that:-
  - (i) Bail is not granted to him or her in terms of Section 59A, he or she shall be brought before court as soon as reasonably possible, but not later than 48 hours after the arrest.

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<sup>8</sup> Act 108 of 1996, the Constitution.

<sup>9</sup> 2021 [4] SA (CC) at para.14; see also *Sabisa and Another v Minister of Police* (2889/2016[2023] ZAECMHC 30 (20 June 2023)).

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## **Evaluation of evidence**

[29] There are conflicting versions on whether the plaintiff committed an offence of theft in the presence of the police officers. I am therefore called upon to decide on the credibility of the opposing witnesses who testified in the proceedings. In *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others*,<sup>10</sup> a case that was cited by the parties' legal representatives in their written heads of arguments, the court held:

“The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors 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 contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and 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

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<sup>10</sup> *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

discharging it. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[30] To settle the issues raised, an analysis of evidence as a whole is required.<sup>11</sup> In the present matter, there is corroboration and consistency in the essential features of the defendant’s case. The police officers were alerted that there was a high rate of criminal activities that were committed in some streets in Mthatha which included Sprigg Street. As a result, they had to strategize to prevent and curb crime. Amongst others, it was decided that some police officers would perform their duties in civilian clothing and some in police uniform.

[31] The police officers corroborated each other that they witnessed the plaintiff stealing a tyre in the complainant’s bakkie. The fact that they had to compromise their little break time and pay attention to the complainant’s bakkie demonstrates that something amiss was happening. I accept their version that their view was not obscured since their attention was already drawn to the bakkie in question. The police officers’ version is consistent with the proven facts, in that the plaintiff admitted having been in the vicinity where the complainant’s bakkie was stationed. He admitted that he was found in possession of the tyre. There is no dispute that the tyre was stolen. The complainant in her statement to the police confirmed this fact. She had to open a case at Central police station. The fact that the police officers were wearing civilian clothing must have caused laxity on the part of the plaintiff and his erstwhile co-accused to commit an offence of theft in broad daylight without any fear of being apprehended. The probabilities are such that he was caught in the act

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<sup>11</sup> Santam bpk v Biddulph [2004] 2 All SA 23 (SCA) at para 6.

hence he started to flee. The only reason that he could easily be apprehended is because he tripped and fell.

[32] I therefore find that the police officers were credible witnesses. The probabilities point to the plaintiff as the person who acted in concert with his erstwhile co-accused and committed an offence of theft in their presence. The plaintiff's version that the culprit who had exercised control over the tyre fled, is improbable, in my view. I accept that the plaintiff informed the police officers that he would sell the tyre. In the mind of the police officers, there could never have been any other explanation to account for the stolen item other than what they observed and what they were informed by the plaintiff. Considering the above, the police officers honestly and reasonably held a belief that a crime was committed in their presence. Applying *Tsose's*<sup>12</sup> principle (*supra*), the fact that the criminal case was later struck off roll has no bearing on the issues at hand.

[33] In addition, the provisions of Section 50 of the CPA were adhered to. In view of the fact that on the day of his arrest, the court day had ended, the plaintiff was brought to court on the next day.. Following his detention from police custody, the plaintiff appeared in court within a reasonable time. The Magistrate detained him for seven days. Clearly, this detention was a result of the Magistrate's orders. I find that the purpose of the plaintiff's detention was to bring him to justice.

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<sup>12</sup> *Supra* note 3.

[34] In terms of the law, once the jurisdictional facts for an arrest are established, the discretion whether or not to arrest arises.<sup>13</sup> In the present matter, this issue was never canvassed in the plaintiff's pleadings nor during the trial.<sup>14</sup> I am alive to the fact that the Constitution protects the liberty of an individual concerned. In this instance, it would be unreasonable to place restraint upon the two police officers in the execution of their duties. In my opinion, the police officers acted responsibly in exercising the authority granted to them by the South African Police Act and the Constitution.<sup>15</sup> I therefore conclude that the arrest and subsequent detention of the plaintiff were lawful. It then follows that the plaintiff's claim should fail. The costs should follow the result.

### **Order**

[35] In the result, the plaintiff's claim is dismissed with costs.

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**N CENGANI-MBAKAZA**  
**ACTING JUDGE OF THE HIGH COURT**

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<sup>13</sup> *Duncan v Minister of Law and Order for the Republic of South Africa* (38/1985) [1986] ZASCA. 24; *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 (19 November 2010).

<sup>14</sup> *Minister of Safety and Security v Slabbert* (668/2008) [2009] ZASCA 163 (30 November 2009).

<sup>15</sup> Section 205 (3) Constitutions empowers police officers to prevent, combat and investigate crime, to maintain public order and to protect and secure inhabitants of the Republic, and to uphold and enforce the law. The South African Police Act, on the other hand, permits police officers to exercise their authority and to carry out the responsibilities granted to or delegated to them by law, subject to the Constitution and with proper consideration for each person's fundamental rights.

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**APPEARANCES:**

Counsel for the plaintiff : Adv T. H. Melane

Instructed by : L.L Ketani Attorneys  
Suite No: 138 & 40  
EDC Building, Cnr York Road & Elliot Street  
Mthatha

Counsel for the defendant : Adv V. Calaza

Instructed by : State Attorney  
Defendant's Attorney  
Broadcast House, 94 Sisson Street,  
MTHATHA

**DATE HEARD : 03 November 2023**

**DATE DELIVERED : 14 November 2023**

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