

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL325/13

ECD926/13

In the matter between:

SIHLE BANZANA

1st PLAINTIFF

VIZICELO ZEMBE

2nd PLAINTIFF

and

MINISTER OF POLICE

RESPONDENT

JUDGMENT

MBENENGE J:

A Factual background

[1] This is an action for damages wherein the plaintiffs seek to hold the defendant, sued on a various liability basis, liable in damages for alleged wrongful and unlawful conduct allegedly committed by members of the South

African Police Service (the Service) on 16 and 18 August 2012,¹ and subsequent thereto. It is alleged that the plaintiffs were arrested by members of the Service, including Constable Toni and Constable Mbande, without a warrant, at Duncan Village on 18 August 2012. Upon their arrest, so the plaintiffs' case goes, they were detained at Duncan Village Police Station until 20 August 2012 at which point the charges that had been preferred against them were withdrawn, due to insufficient evidence. The plaintiffs further allege that during their interaction with members of the Service they were assaulted, resulting in them sustaining injuries for which they were hospitalised from 20 to 26 August 2012 at Frere Hospital, East London (the Hospital).

[2] The claims of the plaintiffs commenced separately, but at some convenient stage were consolidated to proceed as one action, as indeed the issues falling to be determined are substantially similar.²

[3] The action is being resisted by the defendant, who seeks to justify the conduct of the members of the Service concerned by resorting to section 40(1)(b) of the Criminal Procedure Act³ (the CPA). The section permits a peace officer to arrest, without a warrant, a person reasonably suspected of having committed an offence in Schedule 1 to the CPA.

[4] It is contended that the first plaintiff (herein after referred to as Sihle) was reasonably suspected to have committed robbery with aggravating circumstances and possession of an unlicensed fire arm, whilst the second plaintiff (hereinafter referred to as Vizicelo) was suspected to have committed housebreaking and theft, and malicious injury to property. It is further

¹ 16 August 2015, in the case of the second plaintiff, and 18 August 2015, in the case of the first plaintiff.

² In terms of an order of this court dated 15 April 2015

³ Act 51 of 1977

contended that the detention of the plaintiffs, having been a sequel to a lawful arrest, was justified and complied with section 50 of the CPA. The defendant denies that the plaintiffs were assaulted and that they sustained injuries for which they were hospitalised, or at all.

[5] The parties invited the court to determine the merits of the action whilst holding in abeyance the determination of quantum. I granted an order to that effect, pursuant to an application made from the bar for such separation, in terms of rule 33(4) of the Uniform Rules of Court (the Rules).

[6] The issues that have fallen to be determined are whether the arrest and the resulting detention of the plaintiffs is wrongful and unlawful, and whether, whilst in police custody, the plaintiffs were assaulted by members of the Service. Notwithstanding the provisions of rule 39(13) of the Rules, which places the duty to adduce evidence first on a plaintiff in instances such as here, where the onus rests on the plaintiffs to establish, *inter alia*, that they were in fact assaulted, the defendant nevertheless adduced evidence first.

[7] Constable Mbande was the first to testify. He is a member of the Service attached to the detective section, stationed at Duncan Village Police Station. He effected the arrest on Vizicelo. He testified that the arrest was a sequel to a complaint of housebreaking and malicious injury to property that had been lodged by David Gontsi (Gontsi) under Cas 38/08/2012. A copy of the crime docket in that case was handed in as exhibit “A”. The docket points to housebreaking, theft and malicious injury to property as having been committed at 841 C-Section, Duncan Village on the night of 4 August 2012. A firearm is said to have been used in committing the offence.

[8] A team of members of the Service of which Constable Mbande and Constable Toni were a part was involved in an investigative operation under the command of Captain Van Wyk at Duncan Village. One of the homesteads

attended upon on this day (16 August 2012) was that of the Zembes, occupied by Vizicelo and his father, Vusumzi Zembe (Zembe). How the police got to be there, in the first place, according to Constable Mbande, were the contents of a statement deposed to by Gontsi in the related criminal case and what Gontsi allegedly told the police concerning Vizicelo. According to the statement, Gontsi was informed by one of his friends, Xolisa, that Vizicelo had been among the perpetrators.

[9] According to Constable Mbande, Gontsi led the police to the Zembe homestead. When the police arrived there, Vizicelo was still taking a bath. Zembe told them as much, during an interaction the police had with him. When Vizicelo eventually emerged, Constable Mbande informed Vizicelo that he was a suspect in a criminal case of housebreaking, theft and malicious injury to property that had been instituted; the police were there to arrest him in connection therewith. Gontsi also pointed out Vizicelo as being one of the culprits, whereupon Vizicelo was informed that he was under arrest and warned about his constitutional and legal rights, including the right to remain silent. Vizicelo was taken to a police vehicle which was part of a motorcade formed by police vehicles. He appeared to be limping and stated that he had been assaulted by unknown TRT⁴ members on a previous occasion. The motorcade did not immediately proceed to the police station as the police had a few other pending matters to investigate. Vizicelo was booked into the cells at 10h40. Constable Mbande also referred to an entry made in the occurrence book of the relevant day, which reads:

“Suspect detained, detective Constable Mbande detained one black male Vizicelo Zembe for housebreaking and theft on Cas 38/08/12 SAP 14/71/8/2012 and the rights were given and explained to him with no visible injuries”

⁴ Technical Response Team

[10] Constable Mbande denied that the police ever kicked “*[Vizicelo] with booted feet or hit him with clenched fists or squeezed him into handcuffs, injure him with handcuffs or tortured him without just cause.*” He further denied that any one of the police who visited the cell in which Vizicelo was incarcerated received complaints of assaults or injuries sustained by Vizicelo.

[11] The arrest on Sihle was effected by Constable Toni, but Constable Mbande was present, even though not actively or directly involved therein. Constable Mbande also claimed not to have played any role in the interrogation of Sihle. When the complainant withdrew the charges against Vizicelo, the latter was released from custody on 20 August 2012 without having to appear in court. He believed that charges were withdrawn because the complainant also ended up being incarcerated in the same cell occupied by Vizicelo in respect of another matter and Vizicelo had discussed the matter.

[12] Under cross examination by counsel for the plaintiffs, Mr Chithi, Constable Mbande reiterated that, based on Gontsi’s statement, he harboured a belief that Vizicelo had acted in concert with the culprits that broke into his shack, stole some of his items and maliciously injured other property. He conceded that Gontsi had not implicated Sihle in his statement. A question regarding whether “*Xolisa*” referred to in Gontsi’s statement had also deposed to a statement implicating Vizicelo was answered in the negative.

[13] Moment was made, during Constable Mbande’s cross examination, of the fact that Vizicelo had been booked off the cells after he had elected to remain silent. Initially, Constable Mbande could not dispute that the purpose of such booking off had been to conduct further investigations in relation to the offence for which he was arrested, but later adopted the stance that the purpose had been to facilitate the pointing out of Sihle by Vizicelo.

[14] Constable Mbande distanced himself from the injuries allegedly suffered by the plaintiffs, adding that, had the injuries depicted on exhibit “C” been observed at the time the plaintiffs were being arrested, they would surely have been taken to hospital for treatment and the injuries recorded in the occurrence book before their incarceration. Vizicelo, so Constable Mbande testified, bore none of the injuries depicted on exhibit “C” at the time of their release on 20 August 2012. He proffered no version regarding how the injuries were sustained. Constable Mbande said he had no experience of the type of injuries around one’s wrists associated with the tightening of handcuffs. When a suggestion was made that Vizicelo had been assaulted in the early hours of the morning of 18 August 2012 when he had been booked off the cells, Constable Mbande distanced himself from that saying he was not present and only reported for duty after 07:00 at a time when Vizicelo was being brought back to the cells. He saw no injuries on Vizicelo even at that stage.

[15] No statement relating to the arrest of Vizicelo was compiled by Constable Mbande. He had been bent on compiling the statement, and stated that once charges against the plaintiff had been withdrawn the need therefor fell away.

[16] Constable Mbande said he never saw the condition in which the plaintiffs were at the time of their release, having last seen them on the previous day, Sunday 19 August 2012.

[17] The next witness to be called to testify on behalf of the defendant was Constable Toni.⁵ He was on duty on Thursday 16 August 2012, and was present when Vizicelo was being arrested. He confirmed that Constable Mbande effected the arrest on Vizicelo after the latter had been pointed out by Gontsi. After Vizicelo had been placed in custody he went about conducting

⁵ He was, at all times relevant hereto, a member of the Service and a Constable stationed at the Sanlam Building, East London. He resigned from the Service to join politics on 31 May 2014.

investigations in other matters. Before Vizicelo was incarcerated he volunteered to assist the police locate a person who had supplied them with firearms. On the strength of information received from Vizicelo, Constable Toni and Detective Williams left the police station on a mission to trace other suspects.

[18] In the early hours of Saturday 18 August 2012, Vizicelo pointed out a house in Duncan Village allegedly occupied by a supplier of firearms, colloquially known as “*GTF*”. A search was conducted, resulting in the recovery of ammunition and a report being made concerning the whereabouts of an R5 rifle.

[19] One of the cases the police were investigating involved a Somalian national who ran a Spaza shop and who had previously laid an armed robbery charge with the police. Sergeant Jele had deposed to a statement in relation to the armed robbery, which culminated in investigations being conducted. Constable Toni further testified that he had met the Somalian complainant the previous Friday (17 August), and that the Somalian had indicated that he knew one of the perpetrators and could lead the police to the perpetrator’s homestead.

[20] Constable Toni, together with his colleagues, including TRT members, were, according to Constable Toni’s testimony, led to Sihle’s shack. The Somalian pointed out Vizicelo’s shack. The occupant of the shack took some time before responding to Constable Toni’s knock. Eventually, Vizicelo emerged from the shack and the Somalian identified him as one of the culprits. When Sihle saw Constable Toni, he took a retreating step and tried escaping, but was apprehended with the aid of TRT members and thereupon handcuffed. Constable Toni placed Sihle under arrest and explained his legal and constitutional rights, including the right to remain silent. The motorcade proceeded to the Duncan Village police station, whereupon Sihle was booked

into the cells. Constable Toni further testified that Sihle bore no injuries when being incarcerated. According to the relevant entry in the occurrence book Sihle was detained for “*possession of firearm*” and for “*robbery*”

[21] Constable Toni, too, denied assaulting any one of the plaintiffs, and testified that he saw no one assault them.

[22] Under cross examination, Constable Toni testified that he arrested Sihle because he suspected him of having committed robbery, and for no other offence. When further questioned and referred to the defendant’s plea in so far as it mentioned “*possession of an unlicensed firearm*”, he added that this was an additional offence for which Sihle had been arrested.

[23] Even though Sihle had been arrested for possession of a firearm, none was found in his possession. A certain Msutwana was found in possession of the firearm. Msutwana was, however, never arrested. According to Constable Toni the police had been in possession of information that Sihle had previously been in possession of a firearm. He confirmed that the statement concerning the robbery did not implicate Sihle regarding the possession of a firearm.

[24] When showed the injuries depicted on exhibit “C” allegedly suffered by the plaintiffs, Constable Toni said he never saw the injuries during his interacting with the plaintiffs. He said if they bore such injuries he would have seen them. Constable Toni confirmed that he had seen Zembe at the police station engaged in a heated debate with Constable Mbande, but could not confirm that Zembe had seen any injuries such as those depicted on exhibit “C” borne by the plaintiffs.

[25] Constable Toni denied that Nongoloza, and not the Somalian complainant, had led the police to Sihle’s shack. He also said he never saw the plaintiffs being tortured in a hall located in Duncan Village police station, and described as having no ceiling.

[26] Upon the closure of the defendant's case, the plaintiffs called Dr Boado to testify in relation to the injuries they sustained, allegedly caused by the police. She is a doctor at the emergency section at the Hospital. Her section attends to emergency cases, but randomly holds general consultations. She was on duty on 20 August 2012. She was referred to photo albums embodying pictures depicting the plaintiffs' injuries (Exhibits "F1" and "F2"). She confirmed having seen a patient by the name of Sihle Banzana on 20 August 2012 at 16:44.

[27] Sihle narrated a story to Dr Boado concerning his arrest on 18 August and claimed that he had been hit with sticks and had been released from police custody on the same day. The doctor examined Sihle; she noticed a little scratch on the right side of his parietal area, redness on both eyes and healing scratches on both sides of his neck. Sihle also bore a healing abrasion on both left and right arms, on the left forearm and on the right hand. There was a bit of swelling on the right hand and handcuff marks on both wrists. There were healing abrasions on both lower limbs and some swelling on the left foot and on the right leg. The doctor was of the view that the handcuffs had been caused prior to Sihle attending upon the Hospital. No fractures were detected in the forearms and both hands. He also bore healing abrasions on fingers and wrists.

[28] Sihle was also referred to a surgeon who made his own observation, and whose diagnosis was "*crush syndrome arising from compression*". She was also of the view that a person pressed with booted feet against a chair could suffer from crush syndrome. Sihle was hospitalised from 20 to 27 August 2012, whilst receiving treatment for the injuries he had sustained.

[29] Turning to deal with recordings made on exhibit "F2" (medical records in respect of Vizicelo), the doctor confirmed having examined Vizicelo on the same day, 20 August 2015 at 16:55. He, too, gave an account of having been

assaulted by the police. He bore abrasions on both forearms, handcuff marks on both wrists, swelling on both hands, and abrasions on both lower limbs. No fractures were detected on both hands and in his wrists. Vizicelo, too, was diagnosed as suffering from crush syndrome.

[30] Under cross examination the doctor stated that the majority of the injuries were healing in respect of Sihle. The healing injuries would have occurred before 18 August 2012. According to the doctor, healing takes approximately a week in respect of injuries on the arms and legs, or even five days in the case of persons with a good immune system. The injuries that were healing should have still been visible on 18 August. The injuries on the wrists were consistent with tightening of handcuffs. The same marks on the wrists, consistent with handcuffing, could have been caused by handcuffing taking place whilst arms are stretched from the rear so as to be around the back rest of a chair.

[31] Vizicelo was next to testify. He resides at Duncan Village. He knows Sihle. He was arrested on 16 August 2012. Whilst taking a bath in his shack he overheard a heavy knock on the door of the shack occupied by his father, Vusumzi, on that day. When he emerged from his shack he saw a number of police officers, including Constable Mbande and Constable Toni. A certain “Whitey” was also there tied with a belt around his wrists. The police told him they had come to fetch him in order to question him about a housebreaking that had taken place at Whitey’s homestead. They pledged to bring him back after the questioning. He was not handcuffed because Constable Toni was of the view that he was limping and could not outpace them. He said the limp had been caused when he was stabbed during 2007. Another policeman asked where the “spanners”⁶ were. He was led to the vehicles that were part of the police motorcade. Initially, Vizicelo was taken to police offices at Sanlam building, where he was kept till the afternoon. He was questioned about the

⁶ Another term they use for “firearms”

whereabouts of Sihle, a robbery and “*spanners*”. He was also asked about firearms that he had possessed. Eventually, he was locked in police cells at the police station.

[32] Nothing eventuated from the side of the police during the day on 17 August. During the night of Friday 17 and 18 August Vizicelo was awakened in his sleep by Constable Toni who accosted him about the whereabouts of firearms. He denied knowledge of the firearms stating that as far as he was concerned he had been arrested in connection with an alleged housebreaking. A threat was made that if he denied knowledge of firearms, unlike his companion who was said to have surrendered four firearms to the police, he would “*shit*” at the hands of TRT members who were reported to be on their way.

[33] Vizicelo was then returned to the cell, but was booked off later, in the early hours of the morning. Constable Toni urged him to co-operate, mentioning that Vizicelo had been part of a gang comprising 15 people who had been armed with firearms and broke into Whitey’s place. At that point Vizicelo had been handcuffed on both his wrists from his back. He was led into the hall at the police station with 10 police officials, most of whom were TRT members, who were wilding high calibre firearms, threatening to shoot him. He was questioned further about the whereabouts of firearms. When he denied knowledge of the firearms one of the police officers delivered a fist blow to his chin, whilst another kicked him. He was dragged to the back of the hall. One of his shoes slipped off. The police caused him to sit on a chair, stretched his handcuffed arms over the back rest of the chair. A plastic bag and a spray gun were taken out. They sprayed the plastic bag with the spray gun before pulling the plastic bag over his face. This act suffocated him.

[34] The police enquired from Vizicelo about his friends who had been in his company, amongst whom was “*GTP*”. The police threatened that if Vizicelo did

not say something they would subject him to further suffocation. He eventually yielded and undertook to lead the police to GTI's shack, which he did. The police kicked the shack's door open, and a young boy named Nongoloza came out. GTI was in the main house. Vizicelo pointed him out. GTI was also handcuffed. Both Nongoloza and GTI were apprehended. Nongoloza volunteered to point out Sihle's place.

[35] Nongoloza led the police to Sihle's shack. Sihle was apprehended by the police and taken into one of the motor vehicles that were part of the motorcade. Another person that the police approached, being led by Vizicelo, was Shuta. A toy gun was recovered from Shuta. The motorcade returned to the police station. On arrival there and upon entering the hall located at the police station, Vizicelo and Shuta were caused to lie on their tummies. A policeman by the name of Williams beat them with a spade-like object on their buttocks.

[36] On the suggestion of Constable Toni, Vizicelo was handcuffed from the back, lifted up, suspended in the air with arms stretched over the hall's roof rafters. One policeman sprayed him with a pepper spray gun on his eyes whilst the other hit him on his knees. Constable Mbande ordered that his face be covered; he dipped Sihle's head in a bowl of water several times. Thereafter, Constable Toni suggested that Sihle be taken back to the cells, to avoid Sihle's father seeing the condition of his son. Vizicelo said he saw Sihle being handcuffed, with a pole stretching behind his knees and running through the arms and legs, whilst both pole ends rested on desks that lay side by side. Sihle swung on the pole between the two desks, whilst being assaulted on his thighs.

[37] Vizicelo said he was booked off on the following morning, so as to be charged, but, at the instance of Whitey, the charges were eventually withdrawn. On the following day the plaintiffs were taken to court, but released from holding cells, without being caused to appear before court. Zembe took them to

Captain Van Wyk, a senior member of the Service, where the assault incident was reported. Van Wyk instead implicated TRT member in relation to the assault. Thereafter, the plaintiffs were taken to the Hospital.

[38] The plaintiffs were examined, admitted, treated and discharged from the Hospital after about a week. Van Wyk confirmed that the photographs depicted on the relevant photo album were the injuries he had sustained resulting police assault. Vizicelo denied involvement in breaking into the complainant's house. He said the assault was meted out in the early hours of Saturday, 18 August 2015. The plaintiffs bore the injuries through Sunday, and were seen by a doctor at the Hospital on Monday afternoon, upon their release. He denied ever seeing a Somali national during the investigative procedures.

[39] Zembe was also called to testify. He was at his homestead when the police arrived looking for his son, Vizicelo, on 16 August 2012. The police said they had come to ask for permission to fetch Vizicelo so as to question him in relation to a house breaking incident that was said to have taken place at Whitey's house. They undertook to bring his son back on the same day, once done with questioning him. The permission was granted. The police took away Vizicelo.

[40] At sun set, being concerned that the police had not returned Vizicelo as pledged, Zembe approached Captain Van Wyk at Sanlam Building, enquiring about the whereabouts of his son. Captain Van Wyk confirmed that Vizicelo had been in the care of Constable Toni at Duncan Village police station. Zembe thereupon made his way to the police station, but could not find Constable Toni, who was reported as having already knocked off. Zembe's request to see Vizicelo was not successful as Constable Toni was reported to have left instructions to the attending police not to let anyone see Vizicelo as he was still under investigation. He spent the night without having had sight of his son.

[41] In the morning of Friday 17 August 2012 Zembe returned to the police station, but Toni refused him access to Vizicelo saying the law did not allow such access. A further visitation Zembe made on the following day, Saturday 18 August, also yielded nothing.

[42] In the afternoon of Sunday 19 August 2012, Zembe returned to the police station. Upon arrival there he asked Constable Toni's whereabouts. He was reported to be in another office. When Zembe turned around he saw Constable Toni, who, in turn, changed course. Zembe gained the impression that Constable Toni was avoiding him. He followed Zembe to another office where he found Constable Mbande taking fingerprints from Vizicelo and Sihle. Zembe saw handcuffed marks on Vizicelo's wrists. Vizicelo's pants had blood marks. The same fate befell Sihle. He protested to Constable Toni about the condition and appearance of the plaintiffs. Constable Toni said Vizicelo had been handcuffed because he was not co-operative with the police, hence tightened handcuffs had resulted in the wrists being injured. After exchanging words with the police on that occasion, Zembe returned home.

[43] On the following morning Sihle and Vizicelo were released. Zembe observed that they walked with difficulty. He ferried them to Captain Van Wyk's office, where he laid an assault complaint. Captain Van Wyk referred them to Constable Toni. They drove to the police station, but they received no assistance from the police, who refused to open a case due to "*lateness of hour*".

[44] Because of the injuries Sihle and Vizicelo had sustained and the complaints they raised about bodily pain, Zembe took them to the Hospital, where they were admitted for treatment. Upon further questioning, Zembe stated that on Saturday night (18 August) Constable Mbande had been to conduct a search at his place, being in the company of Sihle, who was bleeding.

He became panic-stricken, for some days had passed without him seeing his son.

[45] Sihle was the last to testify. Police arrived at his shack on 18 August 2012. The police assaulted him with a stick. They said they were looking for firearms. He had no firearms, and none were recovered. He said Nongoloza had led the police to his shack. Upon being apprehended he was taken to Duncan Village police station.

[46] Sihle testified that at the police station he was led to a hall where he and Vizicelo were questioned about the whereabouts of firearms. When they denied knowledge of firearms they were assaulted. Sihle was handcuffed. A spade was placed on two tables that lay side by side. In the space between the tables he was caused to swing over with the spade placed behind his knees, whilst being handcuffed. He was sprayed on his eyes with a pepper spray. A plastic bag was pulled over his face. This had the effect of suffocating him. He said he was also handcuffed and caused to hang from the hall's roof rafters and left suspended in the air. He denied that there was ever any Somali national at the time of his arrest.

[47] At some stage during his incarceration, Sihle was booked off the cells and taken to Ziphunzana location at Duncan Village. He was already injured at that stage, and Zembe, whose homestead was also visited, witnessed his physical condition. The police were still pursuing their quest for the recovery of firearms. When the search for firearms at Sihle's place yielded naught, he led the police to Zembe's homestead with a view to having Zembe intervene on his behalf as he was being subjected to continued assaults. A firearm was recovered from Zola's place during that bout. He claimed to have no connection with that recovery. Thereafter he was returned to the cells.

[48] Sihle and Vizicelo were released on Monday 20 August 2012. Zembe took them on his vehicle, first to Captain Van Wyk's office and, ultimately, to the Hospital, where they were examined, admitted and treated for the injuries they had sustained. Sihle confirmed that the injuries he had sustained caused by the police were those observed by the doctor and recorded in the relevant medical report. He said he neither committed robbery nor possessed any firearm. According to Sihle the injuries on his wrists were caused by tightened handcuffs. The marks on his arms and legs were sustained when he was caused to swing between two desks.

B Legal position

[49] A pronouncement on the lawfulness or otherwise of the impugned arrest and resulting detention can only be made upon a consideration of the legal principles granting the police authority to arrest without a warrant.

[50] The law permits arrest without a warrant where the peace officer entertains a reasonable suspicion that the person being arrested has committed an offence listed in Schedule 1 to the CPA. Therefore, for the defendant's defence to be upheld, the following jurisdictional factors must be established, namely:

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the arrestee committed an offence referred to in Schedule 1; and
- (d) the suspicion must rest on reasonable grounds.⁷

⁷ *Duncan v Minister of Law & Order* 1986(2) SA 805 (A) at 818 G-H; and *Minister of Safety and Security v Sikhotho and Another* 2011(1) SACR 315 (SCA) at [6] and [28].

[51] Both Constable Mbande and Constable Toni were, at the relevant time, peace officers⁸ within the meaning and contemplation of section 1 of the CPA.⁹ That the Constables had harboured a suspicion was not contested. Sihle was suspected of having committed robbery and possession of an unlicensed firearm, whilst Vizicelo was suspected of having committed housebreaking, theft, and malicious injury to property. These offences are set out in Schedule 1.¹⁰ What remains to consider, however, is whether the suspicion harboured by Constable Mbande and Constable Toni when arresting the plaintiffs was reasonable. That question must be approached objectively.¹¹ The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence.¹²

C Lawfulness of the arrest

[52] Vizicelo was first to be arrested, on 16 August 2012. It is convenient to deal first with his arrest. According to Constable Mbande the suspicion that Vizicelo had committed housebreaking, theft and malicious injury to property was based solely on the statement of Gontsi, who laid a complaint with the police under Cas 38/08/2012, the relevant portion of which reads:

“2. On Saturday 2012-08-05 at about ± 21:30 I left my shack no 841 C-section with Sinazo (my girlfriend’s friend) I was accompanying Sanazo to Entilini where she stays. Inside my shack I left Yamkela Faku, my girlfriend who was still waiting her other friends. While I was leaving with Snazo I told Yamkela

⁸ Constable Mbande arrested the second plaintiff; Constable Toni arrested the first plaintiff

⁹ Police officials are peace officers

¹⁰ In terms of section 121 of the Firearms Control Act 60 of 2000 a person convicted of possessing an unlicensed firearm may be sentenced to a fine or to imprisonment not exceeding two years. This renders possession of an unlicensed firearm a Schedule one offence as it is “[a]ny offence..., the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine.”

¹¹ *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 (GST) at [9]; *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) at [20].

¹² *R v Van Heerden* 1958 (3) SA 150 (T) at 152; *S v Reabow* 2007 (2) SACR 292 (E) at 297 c-e.

(my girlfriend) to lock the shack and sleep because I heard from a friend that Vizicelo and his friends were looking for me and they are armed with firearms.

3. At about ± 22:10 the same night I came back from accompanying Snazo. When I opened my shack I noticed that the door latch was broken and the door is not locked. I entered my shack and noticed that my sofa was turned around (bottom facing up) and everything was upside down. I noticed a bullet hole on my 74 cm colour Television. My TV is valued ±R900-00.
4. I checked to see if there was anything missing or stolen and I noticed that my laptop (Acer laptop valued ±R7000-00) and my girlfriend's takkies (Black, All-star, size 4, valued at R400-00) were stolen.
5. I went outside to call my girlfriend who told me that she was at Xoliswa's tavern. I asked if she locked the shack hence I told her to lock. She told me she locked and left to Xoliswa's tavern. I asked her to come and witness what happened.
6. **I then called my friend Xolisa who told me that Vizicelo and his friends were in front of my shack and others were inside my shack. He said they were a group of about ± (15) fifteen guys. He also told me that he heard the gun shot while they were in and around my shack.**
7. I went to sleep in Xolisa's shack fearing that they will come and shoot me.
8. I didn't give Vizicelo and his friends permission to steal and damage my property. I require police investigation in this matter." (My emphasis.)

[53] The statement requires scrutiny. The reasonableness or otherwise of the suspicion harboured by Constable Mbande must be considered against what is set out in paragraph 6 of Gontsi's statement. It is clear from a reading of the statement that a group of persons broke into Gontsi's shack, stole his property and damaged other items mentioned in the statement. It is also plain, from a reading of the statement that some of the culprits stood by whilst others committed the offences in question. Arguably, a suspicion might have been harboured that those who stood by in front of the shack whilst the rest actually committed the offences were acting in concert with one another.

[54] Gontsi alleges that he gleaned the information implicating Vizicelo as having been one of the culprits from Xolisa. Constable Mbande did not obtain any statement from Xolisa. There is nothing on the strength of which it could be said Constable Mbande formed his own suspicion. He never interviewed

Xolisa who implicated Vizicelo as having been in front of Gontsi's shack. Gontsi's statement is clearly hearsay in nature. He was absent when the offences were committed. In so doing, Constable Mbande acted contrary to the trite legal position that makes it incumbent on an arresting officer to critically analyse and assess the quality of the information at the officer's disposal critically and not to accept the information lightly or without verification, where it is possible to do so.¹³

[55] Constable Mbande's suspicion that Vizicelo had committed a Schedule 1 offence did not rest on reasonable grounds. The defendant has therefore failed to discharge the onus of justifying Vizicelo's arrest.

[56] Sihle was arrested under different circumstances, on 18 August 2012, by Constable Toni, being suspected of having committed robbery with aggravating circumstances and possession of unlicensed firearm.

[57] Evidence established that there was a complaint lodged with the police of a Somali national running a Spaza shop at Duncan Village who was robbed at gun point in his shop in the early hours of 9 August 2012. The complaint had resulted in a docket being opened at Duncan Village police station under Case 66/08/2012.

[58] On Constable Toni's own showing, Sihle had initially been arrested for the robbery committed at the Somali's Spaza shop. At arrest stage, the charge relating to possession of unlicensed firearm did not feature. No statement implicating Sihle as having been in possession of a firearm was obtained. During the investigations conducted, upon Sihle's arrest, no firearm was recovered from him.

¹³ *Mabona and Another v Minister of Law and Orders* 1988 (2) SA 654 (SE) at 658 F-H; *Manqalaza v MEC for Safety and Security* 2001(3) AllSA 255 (TK) at [18]; *Gellman v Minister of Safety and Security* 2008(1) SACR 446 (W) at [73] and [74].

[59] According to entries made in the investigation diary, the robbery was perpetrated by “*four unknown males armed with firearms*”. The diary goes on to say “*enquiries made from community members who mentioned that they know one suspect by the name of Athi who stays around there.*” There was evidence that “*Athi*” is another name by which “*Sihle*” is known. A further entry, which is also of some significance, made on 12 May 2013, reads:

“Spoken with the complainant and he reported that he does not know the suspect. The said suspect who knows by the community address is unknown. Docket to the commander for closure.”

[60] The only member of the community who knew the suspect as being “*Athi*” turned out to have been a faceless and unidentified informer. Constable Toni had no knowledge of other community members who knew “*one suspect by the name of Athi who stays around there.*” A note made by Constable Toni for the attention of the prosecutor stated that “*no witness was willing to submit statement yet.*”

[61] Constable Toni mentioned that a statement deposed to subsequent to the pointing out made by the Somali complainant had been compiled, but no tangible account was given of what eventually became of the statement. Nor is there a statement corroborative of the fact that the Somali had accompanied the police to Sihle’s shack. None of the police who were in Constable Toni’s company when the alleged pointing out was made deposed to affidavits or was called to testify.

[62] I am, therefore, satisfied that, prior to arresting Sihle, Constable Toni did not harbour a reasonable suspicion that Sihle had committed a Schedule 1 offence. The arrest of Sihle was, in these circumstances, not justified by section 40(1)(b) of the CPA.

[63] In light of the above, the detention resulting from the plaintiffs' arrest was similarly not justified and constituted a serious restriction on their right to freedom of movement.

D Issue of assault

[64] The Defendant did not only deny the assault in the pleadings, but Constable Mbande and Constable Toni, who were, during the trial, implicated as having assaulted the plaintiffs, distanced themselves from the assault as one would a leper coming one's way. According to the Constables, the plaintiffs bore no visible injuries when being arrested and detained. Not even the injuries usually caused by the tightening of handcuffs were owned by the police during their testimony.

[65] Only during the cross examination of Sihle by Mr Beningfield, Counsel for the defendant, was it faintly and tentatively suggested that the "*injuries to your wrists [were] caused by you being restrained in handcuffs not by any assaults.*" When called upon to unpack the question, Counsel stated that "*the marks were not as a result of an assault*", but "*were simply marks left by handcuffs that were put on the plaintiff when he was arrested.*" Quite correctly so, in my view, no such contention was persisted in during argument, as indeed the version put to Sihle was not consistent with the defendant's pleaded case or the testimony given by Constable Mbande and Constable Toni,¹⁴ the only defendant's witnesses.

[66] No account was given by the defendant's witness of what had caused the injuries on the plaintiffs, observed by Dr Boado shortly after their release from police custody.

¹⁴ The principle being that a pleador cannot be allowed to direct the attention of the other to one issue and then, at the trial, attempt to canvass another (*Nyandeni v Natal Motor Industry Ltd* 1974 (2) SA 274 (D) at 297B-C; also see *Kali v Incorporated General Insurances Ltd* 1976 (2) 179 at 182A.)

[67] The plaintiffs, on the other hand, presented a coherent picture regarding how they were assaulted whilst they were in police custody. Their version found corroboration from the testimony of Zembe, Dr Boado and pictures taken of their injuries upon their discharge from the Hospital. I have had no hesitation in accepting the version of the plaintiffs even in relation to how they suffered at the hands of the police.

[68] The assault meted out by the police on the plaintiffs caused the injuries that became the subject of the plaintiffs' testimony. The existence of these injuries was confirmed by Dr Boado during her testimony. Sihle had a swelling on the right hand and handcuff marks on both wrists. He bore a swelling on the left foot and on the right leg. He also suffered from a crush syndrome.¹⁵ Vizicelo sustained an abrasion on both forearms, handcuff marks on both wrists, swelling on both hands and abrasions on both lower limbs. He, too, is on record as having suffered from a crush syndrome. Dr Boado also observed redness on Vizicelo's eyes, which she associated with sub-conjunctiva haemorrhage, caused by pressure on a patient's blood vessels. Evidence established that Vizicelo was sprayed with pepper on his eyes. The healed scars and marks recorded by Dr Boado, however, cannot be attributed to the police as they relate to incidents or events that have no bearing on this action.

E Conclusion

[69] From the above synopsis, it does appear that a police raid was conducted at Duncan Village, East London, pursuant to crime reports received by members of the Service, including Constable Mbande and Constable Toni. The plaintiffs became suspects, but the suspicion harboured by the police regarding the plaintiffs' involvement in criminal activities fell short of being reasonable as contemplated in section 40(1)(b) of the CPA, hence the plaintiffs' arrest and

¹⁵ Clinical condition caused by compression of muscle with subsequent rhabdomyolysis which can then cause the complications of electrolyte disturbances, fluid sequestration and myoglobinuria.

resulting detention has been found to have been unlawful. During the plaintiff's interaction with the police, whilst they were in police custody, they were assaulted and sustained injuries for which they were hospitalised and received treatment. The assault was without justification.

[70] The plaintiffs' claims must, therefore succeed, with the result, that the following order is made:

- 1. The defendant is held liable to the plaintiffs in proven or agreed damages resulting from the plaintiffs'-**
 - (a) arrest on 18 April 2012, in the case of the first plaintiff and 16 April 2012, in the case of the second plaintiff;**
 - (b) subsequent detention, up to and including 20 April 2012; and**
 - (c) assault by members of the South African Police Service, which caused injuries on them whilst the plaintiffs were in police custody.**
- 3. The determination of the quantum of the damages suffered by the plaintiffs consequent upon their wrongful and unlawful arrest and detention, and assault is hereby postponed to a date to be arranged with the Registrar of this Court.**
- 2. The defendant shall pay costs of the action incurred to date.**

S M MBENENGE

JUDGE OF THE HIGH COURT

Plaintiffs' Counsel:

Mr M M Chithi

Instructed by Makaula Zilwa & Co

Mthatha

C/O Msesiwe Vapi Inc

East London

Defendant's Counsel:

Mr P G Benningfield

Instructed by the Bhisho State Attorney

East London

Heard on:

4 to 7, and 24 August 2015

Delivered on:

08 September 2015