



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. 1407/2021

In the matter between:

XOLANI QANQANE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

GQAMANA J:

- [1] Central to this action is an allegation of an infringement of the plaintiff's¹ rights to liberty, good name and reputation.² That arises against the following background: on 16 June 2014, Warrant Officer *Swanepoel* and Sergeant *Fredericks* who are the members of the South African Police Services ('SAPS') arrested the plaintiff for reckless and negligent driving and intimidation. Following such arrest, he was detained at Fleet Street police station in East London and was released the following day, ie 17

¹ Mr Xolani Qanqane, an adult male, Taxi driver.

² Pleadings; p15 para 10.

June 2014. He was warned to appear in court on 19 June 2014. On the latter date, the aforementioned charges against him were withdrawn. Resentful of the actions of the abovementioned police, the plaintiff caused summons to be issued against the Minister of Police, the defendant, seeking to hold the latter vicariously liable for the alleged wrongful arrest. The matter proceeded before me on both merits and quantum and the plaintiff claimed an amount of R800 000 under two separate heads of damages, namely, general damages and unlawful arrest.³

- [2] The plaintiff's case as pleaded in his recent amended particulars of claim is that, the aforementioned members of SAPS wrongfully and unlawfully arrested him for an alleged reckless and negligent driving and intimidation. The plaintiff contends that such arrest was wrongful and unlawful because he committed no offence and even if he did, it was not an offence that he ought to have been arrested and detained for.⁴ According to his pleadings, at the time of his arrest at or near St Peters and N2 Road, Southernwood, his motor vehicle had broken next to the road, and he was assisted by one, Mr *Mhlambi*, another taxi driver who was driving a Nissan Livina. As a result of such arrest, he suffered damages as set out in paragraphs 12.2 and 12.3 of the amended particulars of claim.
- [3] The defendant in resisting the plaintiff's claim pleaded that, the arrest was lawful and authorised by law in terms of s 40 (1) (a) of the Criminal Procedure Act 51 of 1997 (the CPA) which empowers a peace officer to arrest any person who commits or attempt to commit any offence in the presence of the arresting officer. The defendant contends that that the plaintiff committed the offences of reckless and negligent driving and intimidation in the presence of the arresting officer. The defendant specifically pleaded that, Sergeant *Fredericks* and *Swanepoel* had observed the plaintiff driving his vehicle and blocking the path of Mr *Mhlambi*'s vehicle, preventing the latter from driving forward to his destination⁵ and was also threatening to assault him. Sergeant *Fredericks*

³ For general damages, he claimed R500 000.00 for pain and suffering, temporal disability in hands, anxiety, stress, shock and depression *in contumelia* (para 12.2 of the amended particulars of claim) and R300 000.00 for unlawful arrest (para 12.3).

⁴ Pleadings pp 14–15 paras 7 to 8.

⁵ Pleadings pp 19–20 paras 5–7 and para 11 and 12.

and *Swanepoel* had to intervene and prevent the plaintiff from assaulting Mr *Mhlambi*. The defendant also denied that the plaintiff suffered by the damages as pleaded.

- [4] Glaringly clear from the pleadings and the pre-trial minutes, the plaintiff's arrest was admitted and that, both Sergeant *Fredericks* and Warrant Officer *Swanepoel* were acting within the course and scope of their employment by the defendant. Further, it was admitted that the arrest was effected without a warrant and based on that, the defendant was saddled with the *onus* to prove the lawfulness of such arrest.
- [5] Further from the pre-trial minutes,⁶ the issues for determination as agreed between the parties were for inexplicable reasons recorded as if the defence raised by the defendant was based on s 40 (1) (b) of the CPA. In truth and having regard to the pleadings, the real issues are whether the plaintiff's arrest was wrongful and unlawful, and if so, the appropriate amount of damages suffered by the plaintiff consequent thereto. Because there was no separation of merits and quantum, the *onus* to prove the damages was on the plaintiff.
- [6] Only two witnesses testified at trial, the plaintiff and Sergeant *Fredericks*. Upfront, let me state that their evidence is like water and paraffin, its mutually destructive, save for the date, place of the arrest and detention and the date of his release. As a result, in my assessment of the probabilities of the versions at my disposal, the approach that I intend to follow is that set out in *National Employers General Insurance Co. Ltd v Jagers*,⁷ by *Eksteen* AJP (then) that:

“... in any civil case, ... the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests on [the defendant] as in the present case, and where there are two mutually destructive stories, [the defendant] can only succeed if he satisfies the court on a pre-ponderous of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by [the plaintiff] is therefore false or mistaken and falls to

⁶ Pleadings p 40.

⁷ 1984 (4) SA 437 ECD at 440 A – B.

be rejected. In deciding whether that evidence is true or not the court will weigh up and test [the defendant's] allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours [the defendant], then the court will accept his version as being probably true. If however the probabilities are heavily balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, [the defendant] can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that [the plaintiff's] version is false"

- [7] The plaintiff testified that on the day in question, at approximately 10h00 am, he was driving his vehicle, a white Toyota corolla sedan from Steers in Oxford Street, East London. He was a taxi owner / driver at the time, but he was not on duty. His vehicle was giving him mechanical problems in that, it would simply stall after driving 500 metres to a kilometre. He suspected a blockage in the carburetor or petrol pump. He decided to drive his vehicle from Steers and had no specific destination in mind.
- [8] As he was driving on the N2 to Butterworth, it gave him the same problem and he had to pull it off the road, next to what he called "*something like a bus stop*" and he sat there not knowing what to do. While still there, a Nissan Livina stopped behind him and he immediately recognised the driver of this vehicle as one of his colleagues, Mr *Mhlambi*. He approached Mr *Mhlambi* and explained to the latter his problem. At that moment, Mr *Mhlambi* was in the driver's seat and loading hitchhikers. Mr *Mhlambi* told the plaintiff that the problem with the latter's vehicle could be a petrol pump or a carburetor. As he was talking to Mr *Mhlambi*, an unmarked police vehicle, a double cab bakkie, pulled up and there were three police in full uniform inside it, an african female, a coloured male and a white male.
- [9] Without uttering a word, the police arrested him and handcuffed him with cable ties from the back. No explanation was given to him of the reasons of his arrest. After his arrest, the police put him at the front passenger seat of their double cab bakkie with his hands still on handcuffs. He had difficulty to sit due to his body stature, because he is

a huge and relatively tall man loaded with extra kilograms around his abdomen. The police took a statement from Mr *Mhlambi* and also asked him his destination, which he responded that he was going to Mthatha. In the course of taking such statement, hitchhikers were boarding onto Mr *Mhlambi*'s vehicle and thereafter it drove off. One of the hitchhikers said "*Oh shame what has this businessman done,*" referring to the plaintiff.

- [10] One of the same police officers went to the plaintiff's vehicle and the plaintiff told him that his vehicle had a mechanical problem. However, the police disregarded that and started it and drove off with the plaintiff's vehicle. Within a distance of 200 or 300 metres from there, his vehicle stalled and he repeatedly told the police that his vehicle has a mechanical problem. That landed in deaf ears, because the police took out a 5l petrol container from their bakkie and went to buy petrol at Shell garage. Again the plaintiff told the police that the problem with his vehicle was not the petrol but the police played no heed to that because they poured petrol in his vehicle and tried to switch on the engine. However, the vehicle could not start.
- [11] The police called a breakdown truck. It arrived and the driver was a coloured man. At that time, the plaintiff was sweating and the driver of tow-truck asked him what was happening. The plaintiff responded that he was unaware of the reasons for his arrest. The tow-truck driver then refused to tow away the plaintiff's vehicle instead he left. The police called a second tow-truck from *Rululu* breakdown services in Mdantsane and his vehicle was towed to group 8, where police store stolen vehicles. The police followed the tow truck to group 8 while the plaintiff was also still in the same uncomfortable position in the police bakkie.
- [12] From there, the same police drove with the plaintiff to Fleet Street police station. At the police station, the plaintiff was informed for the first time that he was arrested of reckless and negligent driving and intimidation. Immediately he contested and told the police his side of the story that, he knew Mr *Mhlambi* and that his vehicle had

mechanical problem hence he was talking to him. Despite his explanation, the police proceeded to detain him.

[13] He was detained in a cell together with other six inmates and the cell was in an inhumane living condition, infested with lice, blocked toilets with no privacy of any nature whatsoever. He was only released from custody on 17 June 2014 in the afternoon by the Investigating Officer. He was warned to appear in court on 19 June 2014. After his release, he went to check for his vehicle and to his surprise it was broken into and stripped, the gearbox, starter, battery and an alternator were all missing. He opened a criminal case at Fleet Street police station but it was never investigated and nobody was ever arrested. The plaintiff never recovered the above mentioned items that were stolen from his vehicle. The plaintiff's present claim does not include the aforementioned items.

[14] The sturdy cross-examination of the plaintiff by the defendant's counsel unearthed inconsistencies between the version pleaded on his behalf and his evidence in chief. For instance, it was pleaded that the plaintiff was arrested while he was assisted by Mr *Mhlambi*. However, it transpired that Mr *Mhlambi* gave no assistance. Further it was pleaded that the police arrived at the scene and alleged that the plaintiff was driving reckless and negligent and was intimidating Mr *Mhlambi*. However, the plaintiff's evidence in chief was that the police never gave him the reasons at the scene for his arrest. Only at the police station was he made aware for the first time of the reasons of his arrest.

[15] The plaintiff was squeezed further in cross-examination that, he was furious, agitated, pointed a finger and shouted at Mr *Mhlambi* in the presence of the police, to extent that Mr *Mhlambi* had to lean side-ways from the driver's seat to avoid him. Appreciating the hurdle created by that proposition, the plaintiff fabricated a version that Mr *Mhlambi* was leaning sideways because he had to open the seats for the passengers to come in and fill up the back seat. That version was contrary to his evidence in chief, that he was talking to Mr *Mhlambi* when the police arrived. The plaintiff conceded that as taxi

operators, they do not approve the practice of giving lift to hitchhikers at hiking spots as that affects their business operations.

- [16] Further, the plaintiff was bombarded with questions about his purpose of speaking to Mr *Mhlambi*, whereas on his own version he had already diagnosed his vehicle's mechanical problem. Evidently, that became an insurmountable hurdle for the plaintiff. He conceded that Mr *Mhlambi* was not a mechanic and would not have knowledge of mechanical problems with a Toyota corolla. Further and most importantly, the version that the plaintiff was test driving his vehicle surfaced for the first time during cross-examination and he could not provide an explanation to that either.
- [17] Furthermore, the plaintiff testified for the first time in cross-examination about the injuries that he sustained consequent to his arrest. Again, he could not provide any explanation why such evidence was not given during his evidence in chief. The impression created to me by the plaintiff was a determination and zeal to exaggerate the nature and the extent of his alleged injuries. There was not a shred of evidence produced by the plaintiff to support that the alleged injuries were casually link to his arrest. That much was conceded during argument by his counsel.
- [18] The defendant led evidence of Sergeant *Fredericks*, who was together with Warrant Officer *Swanepoel* at the time of the plaintiff's arrest. It was placed on record that Warrant Officer *Swanepoel* has since become incapacitated in that, he was shot during a robbery while he was on duty and is now blind and wheelchair bound. Sergeant *Fredericks* denied that there was a third female police member that was with them in their police bakkie at the scene when they arrested the plaintiff.
- [19] Sergeant *Fredericks*' version is that, on the day in question, he was patrolling with Warrant Officer *Swanepoel* at Southernwood area. A member of the public flagged and stopped them and informed them that, there was a taxi, a Toyota quantum with drivers intimidating hitchhikers near North-East Express Way. They then proceeded to

the relevant hiking spot. As they approached the off ramp, they noticed three Toyota quantum taxis parked on side of the road. They stopped next to these taxis and they approached the drivers and instructed them that, they should move away from that area immediately. Without resistance, all three taxis took off and left the area and thereafter he and *Swanepoel* proceeded with their own patrol.

- [20] They patrolled roughly for ten minutes or so, and again decided to make their way back to the same hiking spot and the time was approximately 12h00 noon. As they were approaching the hiking spot driving from the direction of Eastern Cape Motors, he noticed a silver Nissan Livina that had stopped at the hiking spot giving a hitchhiker a lift. He also observed the plaintiff's vehicle pulling in front of the above-mentioned Nissan Livina, parking sideways blocking it from driving away. At that moment, when he first observed the plaintiff's vehicle, he was at a distance of approximately 15 metres to 20 metres away, and there was nothing blocking his view. It was daylight and the windows of their police bakkie were open. He saw the plaintiff getting out of his vehicle, approaching Mr *Mhlambi*, shouting and pointing a finger at him. The plaintiff was speaking in an agitated voice.
- [21] They stopped the police bakkie, he got out and approached the plaintiff. Even then, the plaintiff continued shouting and aggressively pointing a finger at Mr *Mhlambi*. The plaintiff was furious and threatened to assault Mr *Mhlambi*. Mr *Mhlambi* was leaning side-ways from his seat away from the plaintiff, avoiding confrontation from the latter. Sergeant *Fredericks* enquired from the plaintiff on what was going on. The plaintiff turned towards him with an agitated voice screaming and shouting using both isiXhosa and English languages. Sergeant *Fredericks* understands both languages.
- [22] The plaintiff informed Sergeant *Fredericks* that, Mr *Mhlambi* was from their taxi association and was not permitted to load hitchhikers from a hiking spot. That piece of evidence corroborates the concession already made by the plaintiff that taxi operators do not approve giving lift to hitchhikers. That also lends credence on the reasons and behaviour of the plaintiff towards Mr *Mhlambi*. Notwithstanding the presence of the

police the plaintiff continued to intimidate Mr *Mhlambi*. Warrant Officer *Swanepoel* spoke to Mr *Mhlambi* and after that, he turned around and informed the plaintiff that he was being placed under arrest for reckless and negligent driving and intimidation. The plaintiff was also warned of his constitutional rights. The plaintiff was never handcuffed, instead he was instructed to drive his vehicle to the police station and he did so, but it got stalled on the way. Hence the breakdown tow truck was summoned to tow it to a place of safety.

[23] Before the plaintiff's vehicle was towed away, Sergeant *Fredericks* removed the face of the radio from it and other valuables and handed them over to the plaintiff. The plaintiff's vehicle was then towed to a place of safety and from there the police and the plaintiff proceeded to Fleet Street police station.

[24] Again at Fleet Street police station, the plaintiff's constitutional rights were explained to him and the reasons for his arrest. Furthermore, the plaintiff requested to make a phone call and he was overheard by Sergeant *Fredericks* speaking to someone about Mr *Mhlambi*'s vehicle that, it must be stopped wherever they could find it and that it was driving towards the direction to Mthatha. From that conversation Sergeant *Fredericks* gathered that, the plaintiff was so determined to ensure that Mr *Mhlambi* is stopped. After all the administrative paper work was completed, the plaintiff was handed over to the cell unit and was detained. From thereon Sergeant *Fredericks* had no dealings with him. Sergeant *Fredericks* further testified that they arrested the plaintiff and took him to the police station in order for him to be dealt with in terms of justice.

[25] Despite the increasingly pugnacious cross-examination by the plaintiff's counsel, Sergeant *Fredericks*' testimony remained intact. He maintained his version and denied the plaintiff's testimony of how the events unfolded on the day in question. *Fredericks*' evidence was coherent, consistent to the case pleaded on behalf of the defendant and also corroborated by the police docket which was part of the plaintiff's trial bundle the content of which was never placed at issue.

- [26] There are two competing constitutional rights and/or mandate at play herein. The protection of the plaintiff's right of liberty and the police constitutional obligation to combat, prevent crime, uphold and enforce the law. For the police to execute their constitutional mandate, they are statutory empowered to arrest and detain any person who commits an offence or attempts to commit an offence in their presence.⁸
- [27] The *onus* to prove the lawfulness of the arrest effected without a warrant rests with defendant.⁹ The defendant relied on the provisions of section 40 (1) (a) of the CPA as the empowering provisions for the justification of the plaintiff's arrest. The relevant section empowers a peace officer to arrest without a warrant any person who commits or attempts to commit any offence in his/her presence. For such arrest to be lawful, the jurisdictional facts that the defendant has to establish are that, (a) the arrestor must be a peace officer, (b) the arrestee must have committed or attempted to commit an offence and (c) such an offence or, attempt must have been committed in the presence of the arrestor.
- [28] I am alive to and mindful of the fact that, the police's authority to arrest without a warrant must be exercised having considered the balance between the protection of an individual's liberty on one hand and without unnecessarily restricting them in the execution of their duties.¹⁰ In *Duncan v Minister of Law and Order*,¹¹ the courts were warned that, care must be taken not to unnecessarily hamper the power of the police to arrest without a warrant by creating extra limitation not intended by the legislature. However, that being said, an arresting officer must still exercise his discretion within the bounds of rationality, and the decision to arrest must be based on the intention to bring the arrestee to justice.¹²

⁸ Section 40 (1) (a) of the Criminal Procedure Act 51 of 1977.

⁹ *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk).

¹⁰ *Minister of Safety and Security v Glisson* 2007 (1) SACR 131 (E).

¹¹ 1984 (3) SA 460 (T) 466.

¹² *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 30.

- [29] In the instant matter, it is common cause that both Warrant Officer *Swanepoel* and Sergeant *Fredericks* are peace officers and therefore the first jurisdictional fact is not an issue. The plaintiff however, contends that he did not commit any offence and that contention places at issue the second and third jurisdictional facts. In addition, the plaintiff in his pleadings contends that, even if he had committed an offence, it was not an offence that he ought to have been arrested for. During argument, however, plaintiff's counsel unequivocal placed on record that the exercise of the discretion by the arresting officer was no longer an issue. Based on that concession, the defendant's counsel advanced no submissions on the issue of the exercise of discretion.
- [30] *Fredericks* in his evidence was clear that they were driving approaching from Eastern Cape Motors at a distance of approximately 15 to 20 metres, he saw the plaintiff's vehicle pulling at a high speed in front of Mr *Mhlambi*'s vehicle blocking him from moving. Then the plaintiff alighted from his vehicle and approached Mr *Mhlambi*, shouting, aggressively pointing a finger and speaking to the latter in an agitated manner to the extent that Mr *Mhlambi* had to lean sideways to avoid the confrontation from the plaintiff. When they stopped their police bakkie, the plaintiff was not deterred from his actions despite their presence. He spoke to the plaintiff, but the latter was not perturbed because he unabatedly continued shouting and charging at Mr *Mhlambi*, confronting him. Warrant Officer *Swanepoel* spoke to Mr *Mhlambi* as detailed in paragraph 22 above. The plaintiff was then arrested for reckless and negligent driving and intimidation.
- [31] Sergeant *Fredericks* impressed me as an honest and reliable witness. His version was consistent with the pleadings and supported by the source documents contained in the police docket. Sifting through the evidence, I encountered no difficulties to pin point the triggering event that caused the plaintiff to conduct himself in the manner as described by *Fredericks*. From the plaintiff's own version, the taxi operators do not take kindly the practice of giving lift to hitchhikers at hiking spots as it affects their business. It is common cause that Mr *Mhlambi* was giving hitchhikers a lift at a hiking spot and not from a designated taxi rank, hence the plaintiff was shouting, aggressively pointing a finger and threatening to assault him. The manner in which the plaintiff blocked Mr *Mhlambi*'s vehicle also lends credence to the defendant's version. Sergeant *Fredericks* observed all these actions by the plaintiff as they occurred in his presence.

Notwithstanding the police's presence, the plaintiff unabatedly continued intimidating Mr *Mhlambi*. The evidence of Sergeant *Fredericks* in my assessment, is more probable than the plaintiff's version, which was saturated and riddled with inconsistencies. The lies imbedded in the plaintiff's testimony were exposed without difficulties during cross-examination by the defendant's counsel. There were serious and material contradictions between the plaintiff's oral testimony in chief compared to his version under cross-examination. Coupled thereto, his oral testimony was also inconsistent with the case pleaded on his behalf in the amended particulars of claim. The plaintiff's version is false.

- [32] Despite all the above-mentioned inconsistencies in the plaintiff's case, his counsel argued that Sergeant *Fredericks*' evidence was customised to fit the defendant's case. I disagree, Sergeant *Fredericks* from his demeanour, impressed me as an honest and reliable witness. He gave a clear and consistent version of the events.

- [33] Although it was pleaded that even if the plaintiff had committed an offence, which was denied, but he ought not to have been arrested for such an offence. However, that issue was not persisted with as counsel for the plaintiff placed on record that the exercise of the discretion by the arresting officer was no longer an issue. Sergeant *Fredericks* testified that the discretion to arrest the plaintiff was based on the intention to bring him to justice. From the plaintiff's version, as soon as the investigating officer interviewed him and attended to the necessary administrative procedures, he was released and warned to appear in court on 19 June 2014. The police docket showed that the plaintiff was released at 12h20 on 17 June 2014. The 16th of June was a public holiday. It was never the plaintiff's case that the investigating officer could and should have attended to him earlier and secured his release from detention sooner.

- [34] Accordingly, on the conspectus of all the evidence at my disposal, the defendant has discharged the *onus* and has proved that the plaintiff's arrest under the circumstances was lawful. In the light of this finding, the issue of damages does not find its way for consideration.

- [35] On the issue of costs, there is no reason why the general rule should not be applied, namely, that the costs follow the results.

[36] In the circumstances, the following order shall be issued:

1. The plaintiff's claim is dismissed with costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the plaintiff : *Mr Bishoti*

Instructed by : M. T. Klaas Inc.
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Counsel for the Defendant : *Mr Mapoma SC*

Instructed by : State Attorney
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Date heard : 5 October 2022

Date judgment delivered : 20 October 2022

