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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2013/08028

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

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DATE

SIGNATURE

In the matter between:

GOELST, BRETT

Plaintiff

and

MEC SAFETY AND SECURITY

1st Defendant

CELE, BHEKAMANDOSI

2nd Defendant

JUDGMENT

NICHOLLS, J

- [1] The plaintiff, a [...] year old male, claims general and special damages arising out of an unlawful arrest and detention and assault allegedly suffered at the hands of the second defendant, Bhekamandosi Cele (“Cele”), a Gauteng traffic police officer, acting in the course and scope of his employment with the first defendant. The special damages relate to legal costs, medical fees and damage to his wrist watch, motor vehicle and sunglasses.
- [2] The defendants plead that the arrest was lawful in terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”) read together with “*section 64F of the South African Police Service Act 68 of 1995 in contravention of the Traffic Act and for crimen injuria*”. Section 40(1)(a) provides that a peace officer can arrest any person without a warrant who commits a crime in his/her presence. The defendants further plead that the plaintiff was resisting arrest and that minimum force was applied in terms of section 49 of the Act in order to effect the arrest. It is common cause that the defendants bear the onus of justifying the arrest.
- [3] After the close of argument but before judgment the defendants sought to amend their reply to the plaintiff’s request for particulars for trial. In response to the question as to what provisions of the Traffic Act the plaintiff allegedly contravened, the defendants replied “*Section 63*”. The amendment now sought is the addition of the words “*and Section 64 of the National Road Traffic Act*” to paragraph 4.1 thereof. Section 63 relates to

reckless and negligent driving while section 64 refers to inconsiderate driving. This amendment is opposed by the plaintiff.

- [4] An amendment should always be allowed, even at an advanced stage, to allow a proper ventilation of the dispute, as long as there is no prejudice to the parties and the amendment is not male fide.¹ In this matter there is no prejudice to the plaintiff as the issue of inconsiderate driving has been fully canvassed in the trial. The amendment is accordingly allowed.
- [5] The defendants raised two points in limine. The first, relating to compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, was abandoned. The second is a plea of non-joinder in that the plaintiff was detained at Honeydew police Station at the instance of the South African Police Service who it is alleged should have been joined. This was not vigorously pursued and in any event has no merit.²
- [6] The following facts are either common cause or not seriously disputed. On 7 May 2012 Cele was conducting a police operation with 8 other officers to apprehend motorists driving in the emergency lane. It was approximately 17H30 - peak hour traffic and the traffic was bumper to bumper. The police were positioned, partially hidden, on Beyers Naude Drive in Roodepoort near the Christian de Wet Road off ramp. They were not issuing traffic tickets on the scene but taking offenders to Honeydew police station where

¹ *Moolman v Estate Moolman* 1927 CPD; *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA)

² *Minister of Safety and Security v Ndlovu* 2013 (1) SACR 339 (SCA)

the traffic fines would be processed. The high speed unit of which Cele was a member at the time, and which was conducting the operation, does not carry the necessary documentation to write out fines.

[7] Cele testified that he was standing hidden behind a road traffic sign waiting to apprehend motorists. The plaintiff who was driving a silver Volvo in the emergency lane was the first motorist he stopped. Cele informed him that he had committed an offence. The plaintiff's response was that he was driving in the emergency lane in order to report a dangerous driver who appeared to be under the influence of alcohol. When the plaintiff was unable to identify the alleged drunk driver, Cele informed him that he would have to wait at the side of the road with the other offending motorists and go to Honeydew police station where the paper work would be completed for the payment of a fine.

[8] The plaintiff refused to wait and insisted on leaving the scene. Cele then warned him that if he disobeyed this order he would be placed under arrest. The plaintiff was adamant that he would not remain. When he refused to hand over his car keys, Cele leaned into the car and pulled the keys out of the ignition. The plaintiff refused to get out of the motor vehicle and resisted Cele's attempts to handcuff him. Cele managed to place the handcuffs on the plaintiff's right hand by climbing into the car and pinning him down while he was still in his seat. He then pulled the plaintiff out of the motor vehicle by the handcuff which he attached to the roof rack of the motor vehicle. Cele returned to the vehicle with an armed policeman. He removed the plaintiff's handcuff from the roof rack, and demanded that he give him his left hand so it too could be cuffed. When the plaintiff refused to do so, Cele

pushed him face down on to the tarmac and then handcuffed both his hands behind his back.

[9] Thereafter the plaintiff was placed in the front seat of a police vehicle and Cele busied himself with other offenders. Once the operation was over the plaintiff was driven by Cele to the Honeydew police station in convoy with the vehicles of the other motorists who had been apprehended. The plaintiff's car was driven to the police station by another policeman. At Honeydew police station Cele completed the docket and handed over the plaintiff. The cell register reflects that the plaintiff was placed in the cells at 19H00; his constitutional rights were read to him and signed at 20H21; and he was finally released at 23H37.

[10] The plaintiff was charged with reckless and negligent driving and resisting arrest. The other motorists were charged with inconsiderate driving and released immediately once they had paid an admission of guilt fine. The plaintiff's contention is that this amounted to racial discrimination on the part of Cele who treated him unfairly because he is white. There is no substance to this allegation which is not borne out by the facts. It is an unnecessary and inflammatory statement in view of the fact that other motorists of all races were stopped and taken to the police station for the same alleged offence.

[11] Cele explained that the main charge is reckless and negligent driving and inconsiderate driving is the alternative charge for which the other offenders paid an admission of guilt. Once a person resists arrest then the payment of a fine is not an option. The standard procedure is to charge an offender

with the main charge of reckless and negligent driving and it is the prerogative of the state prosecutor to decide what the final charge will be.

- [12] The charges against the plaintiff were withdrawn pursuant to oral representations to the prosecutor by the plaintiff. Cele was not called to testify against the plaintiff. The day after the incident the plaintiff laid assault charges against Cele. These charges were also withdrawn.
- [13] The plaintiff's version is that he drove in the emergency lane in order to report a drunken driver. He approached Cele on his own volition. Instead of assisting him, Cele who was standing behind a taxi but still visible to him, was aggressive and belligerent and started shouting at him. Cele refused to identify himself and did not wear a name tag. This the plaintiff found "*strange and abnormal*" and it immediately came to mind that he was being hijacked. His suspicions were exacerbated when Cele took the keys of his car by force. He felt "*threatened and scared*". The reason that he was unable to point out the drunk driver was because Cele spent a lengthy time verbally abusing him during which time the traffic had moved on and the vehicle was no longer visible.
- [14] The plaintiff admits he resisted arrest but justifies it on the basis that as a result of Cele's behavior he believed that he was being hijacked. He does not dispute that there was a scuffle between the two of them. He said that Cele grappled with him to put the handcuffs on his right hand and then handcuffed his hand to the roof rack of his motor vehicle. After Cele left, the plaintiff leaned into his car and secretly managed to phone his wife. Pursuant to this call his wife drove to Honeydew police station with her

friend Stacey Cochrane ('Cochrane') and her fiancé. The plaintiff agrees that on Cele's return there was an altercation between himself and Cele when he was pushed to the ground and both hands handcuffed behind his back.

- [15] The plaintiff describes a period while he was seated in a police vehicle without a seat belt when Cele drove him around flinging him forward and driving over the middle island. The reason why Cele drove like this is not clear but it seems it was to apprehend other motorists who were trying to get away. That the plaintiff was driven around in the police vehicle was confirmed by Cochrane. She and the plaintiff's wife had by chance come across the plaintiff while on their way to Honeydew Police Station. This sequence of events was not put to Cele and nothing much turns on it. The erratic driving apparently added to the plaintiff's feelings of vulnerability.
- [16] By the time Cele and the plaintiff had arrived at the police station the plaintiff's wife was already there with Cochrane and her fiancé. Cochrane testified that when she asked Cele why the plaintiff was being held, he was rude and abrupt and refused to speak to her. When she took a photograph of him with her cellphone he became very aggressive and threatened to arrest her. He refused to give his name to her until ordered to do so by the commanding officer.
- [17] Cele left the police station once he had written up the docket. The other offenders paid fines and were released. The plaintiff said that he too was given an option to pay bail but he refused to pay as he felt he had done nothing wrong. The plaintiff was released on bail several hours later once

his attorney arrived. The plaintiff states that this was between 12h00 and 1H00. The cell register indicates he was released at 23H37.

[18] The plaintiff said that on his release he went straight to the Wilgeheuwel hospital where he had an aids test done and an X-ray taken. No explanation was provided why he believed an aids test was necessary in the circumstances. All results came back normal. Later in the day he attended on his general practitioner, Dr Richard Jardim (Jardim) who completed a J88.

[19] Jardim testified that he noted abrasions on the front of the plaintiff's hands, the right wrist, the right shoulder and the right chest. No injuries were noted on the face. The plaintiff came back to see Jardim three months later complaining of tenderness over the left rib. He was sent for x-rays of this area on 14 August 2012 which indicated an undisplaced crack fracture of the left rib. The reason for this not being visible in the earlier x-ray Dr Jardim opined was because the x-rays taken at casualty were not specific to the ribs and the crack only became evident due to the callus formation of the fracture. Dr Jardim said the injuries were consistent with an assault as well as a scuffle where the plaintiff had to be forcibly removed from the car and pressed to the ground.

[20] The assault contended for by the plaintiff was that Cele hit him in the face with his knee, punched him with a clenched fist in his ribs and pushed his face into the tar. It is further submitted that the handcuffs were applied so tightly as to cause physical harm to the plaintiff. Despite several requests to loosen them Cele refused to do so. Photographs apparently taken

immediately afterwards, and considerably magnified, were produced by the plaintiff. These show some minor abrasions to the hands and shoulders and prominent marks around the wrists where the handcuffs were placed. One photograph was identified as depicting a scratch to the paint of the roof rack. According to the plaintiff this occurred when Cele was struggling to handcuff his right hand to the roof rack. He said that his sunglasses and wrist watch were damaged in the course of the skirmish when Cele returned to the vehicle, pushed him to the ground and handcuffed both hands behind his back.

[21] Cele readily conceded that in in the course of attempting to arrest the plaintiff a struggle ensued which may have resulted in the abrasions. He denies kicking or punching the plaintiff. Significantly Jardim said no marks were visible on the plaintiff's face. Cele denies that the handcuffs were overly tight when he put them on, stating that if plaintiff leaned against something this would have the effect of tightening the handcuffs. This proposition was not disputed. Cele conceded that plaintiff asked him to loosen the handcuffs while driving to the police station but denied that he had been previously requested to do so. Cele said he was unable to do so while he was driving but loosened them when they arrived at the police station.

[22] Cele remembered that the plaintiff wore sunglasses and accepted that they may have been broken in the scuffle. Although he did not see any damage to the roof rack, he did not dispute that the scratches could have occurred while plaintiff was struggling and moving around when his right hand was being handcuffed to the roof rack. Cele has no memory of the plaintiff

wearing a wristwatch and no wristwatch appears in the photographs taken of plaintiff's wrists at the police station.

[23] Cele came across as an extremely honest witness, willing to make concessions of those facts he could not dispute. He readily conceded that he could have been responsible for some of the injuries and damages suffered by the plaintiff. If regard is had to the testimonies of Cele and the plaintiff, the real factual dispute seems to be whether Cele stopped the plaintiff or whether the plaintiff voluntarily drove to Cele to report a drunk driver. That the plaintiff resisted arrest is common cause. The further question is whether the conduct of Cele justified the plaintiff's belief that he was being hijacked.

[24] The version that the plaintiff approached Cele to report an alleged drunk driver is in my view highly improbable. The plaintiff was unable to point out the suspected drunk driver to Cele. The explanation that this driver had already driven away is unlikely in view of the fact that the traffic was, on all versions, extremely slow and the plaintiff had driven ahead of the alleged drunk driver by using the emergency lane. When the plaintiff was stopped at 17H24 he was on his way to a meeting at 17H30. That the plaintiff would see fit to further delay his journey in order to report the dangerous driving of another motorist is highly improbable. What is more probable is that the plaintiff became impatient and drove on the emergency lane in order to bypass the slow-moving traffic.

[25] Cele's version is that he was hiding behind a traffic sign to catch unsuspecting motorists driving in the emergency lane. The plaintiff's vehicle

was the first car he stopped. On the plaintiff's version Cele was behind a stationary taxi. If the plaintiff's stated aim in driving in the emergency lane was to report another motorist, it is not clear how Cele would have been visible to him. Even if the plaintiff's version is accepted, namely that he approached Cele to report the alleged drunk driver, this means that Cele was identifiable to him as a police officer or traffic officer.

[26] That the plaintiff feared he was being hijacked by Cele is equally improbable. The incident took place in broad daylight in full view of peak hour traffic. Cele was in uniform although he did not have a name tag. The plaintiff said that he was the one who approached Cele. It would be more plausible if Cele had stopped the plaintiff in order to hijack him but that the plaintiff would coincidentally choose to report the drunk driving to a hijacker posing as a policeman stretches the imagination. The fact that the plaintiff phoned his wife soon after his right hand had been handcuffed to the roof rack to tell her that he was being taken to Honeydew police station belies his version that he believed he was being hijacked. In the circumstances the plaintiff has no justification for resisting the arrest. Moreover, it appears that he has chosen to fabricate a version to put a police officer in a bad light in order to conceal his own disregard for authority.

[27] Regarding the assault, both men are middle aged and healthy. Cele is short and stocky and the plaintiff is tall and of medium build. Cochrane said that due to his height the handcuffs behind his back made him hunch over. Certainly considerable force would be required to subdue him if he were resisting arrest. The photographs of the plaintiff's injuries do not reveal any marks on the face consistent with being punched or kicked in the face. That the handcuffs were tight cannot be denied. Whether this was deliberately

done by Cele is unclear. The evidence is that the plaintiff did thrash around when his right hand was initially handcuffed to the vehicle roof rack. Cele's version that the plaintiff's handcuffs would have been tightened when he leant against the car seat was not challenged.

[28] Taking into consideration the facts of this case the balance of probabilities clearly favours the defendant. It was argued that the plaintiff was submitted to inhuman and degrading treatment in flagrant violation of his constitutional rights and that the force used to effect the arrest was not minimum force, but excessive force tantamount to "torture". It is manifestly clear that this was not the case. Any injuries suffered by the plaintiff were largely of his own making. It seems that the plaintiff's attitude was symptomatic of the schizophrenic conduct displayed by many motorists towards law enforcement agencies: anger that they do not enforce the law of the land but a sense of outrage when there is proper enforcement and they themselves fall foul of the law and are inconvenienced thereby.

[29] With regard to the arrest, section 40(1)(a) provides that a peace officer can arrest any person without a warrant who commits a crime or attempts to commit a crime in his presence. The jurisdictional facts which must exist for an arrest in terms of this section are that (i) the arresting officer must be peace officer; (ii) an offence must have been committed; and (iii) the offence must have been committed in the presence of the peace officer.³

³ *Duncan v Minister of Police* 1986 (2) SA 805 (A)

- [30] Once the jurisdictional requirements are satisfied, the arresting officer has a discretion whether or not to arrest. Peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The fact that there may be less invasive means of bringing a person to justice does not mean that the discretion was wrongly exercised by virtue of the arrest. However an arrest may still be unlawful if the arrest was not done for the purposes of bringing the offender to justice.⁴ Whilst it is desirable that arrests be confined to more serious charges, the fact that the arrest may be for a lesser offence does not render the arrest unlawful.⁵
- [31] The plaintiff argues that the necessary jurisdictional requirements for a lawful arrest in terms of section 40(1)(a) have not been met. Firstly, defendants have failed to prove that Cele was a peace officer. In the alternative it is argued that the defendants have failed to show that an offence was committed in the presence of Cele.
- [32] A “peace officer” is defined in section 1 of the CPA as follows:
- “peace officer includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section;”*

⁴ *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 367

⁵ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA)

[33] Section 334(1) of the CPA permits the Minister of justice to declare certain persons peace officers for specific purposes. The section provides:

“(1) (a) The Minister may by notice in the Gazette declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

(b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.”

[34] The Minister has, in terms of section 334(1)(a) of the CPA, declared Provincial Traffic Officers to be peace officers. (See Part 4 of Column 1 of the schedule in GNR 1396 of 22 July 1977: Regulations under Section 334 as amended.)

[35] Cele testified that he was a provincial police officer and same was admitted pleaded by the plaintiff and admitted by the defendant. As a provincial traffic officer Cele is a peace officer for the purpose of exercising any powers in terms of the Act, including Section 40. This jurisdictional requirement has accordingly been met.

[36] The next question is whether the plaintiff committed an offence in the presence of Cele. The crime in question could conceivably be one of the following: driving on a yellow line or emergency lane; failing to obey a traffic officer's order (hindering the police in the performance of his duty); inconsiderate driving; reckless or negligent driving; passing on the left hand

side; or driving on the shoulder of the road. These offences fall under the National Road Traffic Act 93 of 1996, with the exception of hindering a police officer in the performance of his duty which is an offence in terms of section 67 of the South African Police Services Act 68 of 1995. In order to be charged with resisting arrest it would first have to be established that a crime was committed in the presence of Cele for which arrest was necessary.

[37] The case of the defendants as pleaded is that the offence was reckless or negligent driving, alternatively inconsiderate driving. The police docket consistently refers to reckless and negligent driving. I am satisfied that by driving in the emergency lane and passing on the left the plaintiff committed an offence in the presence of Cele. This entitled him to exercise a discretion ranging from issuing a spot fine to effecting an arrest. It is important to note that had the plaintiff not refused to stop and hand over his car keys when requested to do so by Cele, he like the other offenders, would have been escorted to the police station and issued with a fine. It was the plaintiff's own conduct that led to his arrest and detention.

[38] Once the version of the plaintiff is rejected, his conduct in driving in the emergency lane must amount to an offence. It is the prerogative of the prosecutor to draw up the final charge sheet. Plaintiff's counsel referred to various criminal cases where accused persons were acquitted on charges of inconsiderate driving. The test in terms of section 40(1)(a) can never be whether the plaintiff would have been convicted of the offence but rather whether there was prima facie evidence of an offence being committed in the presence of the peace officer. That the plaintiff committed a traffic violation in the presence of Cele is undeniable.

[39] As stated by Mpati P in *National Commissioner of Police and Another v Coetzee*⁶ it is not necessary that the arresting officer conduct an enquiry before effecting an arrest. Once the jurisdictional requirements are satisfied the peace officer has a discretion whether to exercise his powers of arrest. Whether the person should be released and under what conditions, arises at a later stage. The court cautioned against imposing duties on police officers, which the CPA does not impose, under the guise of protection of rights enshrined in the Bill of Rights⁷.

[40] This warning is equally applicable to this case. Considering the facts of this case I am of the view that the defendants have succeeded in discharging the onus that Cele was justified in arresting the plaintiff and that he applied only the necessary force to arrest him. The plaintiff's action must accordingly fail.

In the result I make the following order:

The plaintiff's case is dismissed with costs

⁶ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA)

⁷ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA), paragraph 16

**C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Appearances

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Instructing Attorneys : SHAUN NEL ATTORNEYS

Counsel for the defendant : ADV. Z. GUMEDE

Instructing Attorneys : STATE ATTORNEY

Date of hearing : 26 MARCH 2014

Date of judgement : 10 JUNE 2014