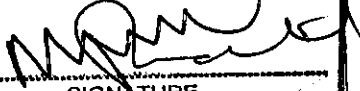




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
16/10/2014	
DATE	SIGNATURE

Case No: 66631/2012; 66632/2012
Date heard: 08 – 12 September 2014
Date of judgment: 16 October 2014

In the matter between:

MORGAN GOMBAKOMBA

1st Plaintiff

TRANSPORT LOGISTICS SOUTHERN AFRICA (PVT)

2nd Plaintiff

and

MINISTER OF POLICE

1st Defendant

**NATIONAL PROSECUTING AUTHORITY
OF SOUTH AFRICA**

2nd Defendant

JUDGMENT

A.M.L. PHATUDI J:

Introduction:

[1] The plaintiffs under case numbers 66631/2012 and 66632/2012 claim damages against the Minister of Police and National Prosecuting Authority of South Africa, jointly and severally. The plaintiffs allege to have sustained damages occasioned by the unlawful arrest and detention of the plaintiff in case number 66631/2012 and for loss of income of the plaintiff in case number 66632/2012. The two matters are interrelated. I ordered consolidation of the two cases under case number 66631/2012. This resulted in citing the plaintiff in case number 66632/2012 as the second plaintiff.

[2] The first plaintiff is Morgan Gombakomba (Gombakomba), a Zimbabwe citizen. He was employed as a truck driver by the second plaintiff, Transport Logistics Southern Africa (Pvt), a private company duly incorporated in terms of the Statutes of Zimbabwe. The defendants are the Minister of Police, Republic of South Africa and the National Prosecuting Authority of South Africa.

[3] Just before the commencement of the hearing, the plaintiff's counsel placed on record admissions made by the defendants. This limited the issues in dispute. The issues to be decided are

- 3.1 whether the arrest of Gombakomba was lawful. If not, quantification of his damages requires determination.
- 3.2 Whether the first and second defendants were negligent when releasing the plaintiff's truck to a third party. If so, quantification of his damages requires determination.

[4] Notwithstanding the defendants bearing the onus on the issue of unlawful arrest, the parties agreed that the plaintiffs have a duty to begin due to the second plaintiff's claim. Both plaintiffs and an expert testified and five witnesses testified for the defence.

Factual Background

[5] Gombakomba testifies that he and his co-employee, one Taruvinga Raradza (Raradza) were tasked to transport certain goods from Zimbabwe to Johannesburg, South Africa. They loaded sealed containers from the container depot, Manica in Bulawayo. The owner of the consignment, one Mr Banda, from ME Motsi (Pvt) told them

that the containers contain Timber Decking that needs to be delivered in Johannesburg, South Africa. They were instructed to travel through Botswana. They were told that clearance at Botswana borders is faster as compared to the one in Musina.

[6] On his arrival at the Plumtree Boarder Gate (Zimbabwe-Botswana border) on the 27 June 2010, the container on his truck was opened. The officers together with the clearing agents, cut open the seal, inspected the load he loaded and resealed the container with a new seal.

[7] They travelled through Botswana. Due to unforeseen and unexpected challenges occasioned by their trucks, they only came to Pioneer – Skilpadhek Border Post (Botswana – South Africa border) on the 29 June 2010. They handed to the Clearing Agent documentation for clearance. They were then cleared on both sides of the border. Due to mechanical faults on Raradza's truck, the border gate had already closed at the time they finished fixing the mechanical problem. They thus could not cross over to South Africa. They were among the first to enter South Africa immediately after the opening of the border gate in the morning of 30 June 2010.

[8] He exited first. Raradza followed. On his way, he tried to call Raradza to enquire about his travelling progress but to no avail. He proceeded with his journey until he reached One Stop filling station on R21 near Tembisa. He again tried to call Raradza to no avail. He then called the number of the consignee provided on his documents. That person was one Mr Noel, an Indian. He was told not to proceed to the designated warehouse. He was directed to a place where the consignment was offloaded from his truck to another truck. The offloading took place during the day on the side of a national road.

[9] He then proceeded to the Reef Truck Stop in Alberton. He was awoken around 23h00 by a knock at the truck door. A gun was pointed at him. He was ordered to open the door. He thought he was being hijacked. He complied. The other person handcuffed him. Both these people were not in uniform and they did not even identify themselves. The other two men joined them. All four men searched the truck (horse) and the container. The container was empty. They enquired from him as to what happened to the goods that were in the container. He told them the owner took them. He provided them with

the cell phone number of the consignee, the documents he had in his possession and his two cell phones.

[10] They took him to Zeerust Police Station on 01 July 2010. The truck was impounded. He then saw Raradza at the Community Service Centre (charge office). Both were put in the police cells. He was kept in custody until released on bail with stringent conditions on 22 July 2010.

[11] He testifies that he was not allowed to go out of South Africa. He then stayed with one of his brothers in Polokwane from 22 July 2010 up to July 2012 when the case against him was withdrawn.

[12] He, under cross-examination stood firm on his version. He was composed and relaxed. He answered all questions without hesitation. He was an impressive and a credible witness.

[13] Manual Mutebura (Mutebura) the director of Transport Logistics Southern Africa (Pvt) (Logistics) testifies that the company is the owner of the trucks impounded. He has been in the transportation industry for some years. He corroborates what Gombakomba said in

relation to where they loaded the consignment to its destination in Johannesburg.

[14] He explains how clearance is effected at the border posts. He indicates that the clearing agents, SARS officials assigned at customs are the people who do the necessary to clear the cargo. Drivers are mere messengers. They at times do not even know what the container holds. All what the driver check is the container number seal number and whether the seal has not been tempered with.

[15] He confirms that his company had only two trucks that were driven by Gombakomba and Raradza. He further confirms that he was contacted just after their arrest in South Africa. The company was out of business because the trucks were impounded. The company was forced to close down eight (8) months thereafter.

[16] At the time of the withdrawal of the case against Gombakomba, he was contacted by the SAPS to come and get his truck. He came to South Africa in possession of all documents he was told to bring along. On arrival at the Alberton Police station where the impounded truck was kept, the truck and trailer were nowhere to be found.

[17] On further enquiry, one police officer thereat told him that the truck he is looking for has been released a year ago. The said police officer advised him to seek legal representation and sue the Minister of Police. He was as well an impressive and credible witness.

[18] David George Lange (Lange), a colonel in the saps testifies for the defence that he received a call from a police officer from Skilpadhek border post around 06h30 about a truck suspected of carrying illicit cigarettes. He proceeded to Zeerust T junction where all motor vehicles from the said border must drive through and waited there for the described truck with specified Zimbabwean registration numbers. He spotted the truck. He stopped it. He directed the truck driver to drive follow him to Zeerust Police Station. On arrival there, the truck driver attempted to escape. He was however apprehended and brought back to the truck. The container was opened. They found boxes containing blue cartons of cigarettes.

[19] Shortly after the court's short adjournment, he testifies that he saw the other truck but he did not stop it. I immediately intervened and enquired from him why is he changing his testimony. I made him aware that the said questions were asked three times where he,

without hesitation, responded not to have seen the other truck. He concedes, that he has been reminded during adjournment to say that he saw the truck. I then ruled, after the plaintiff application to disregard the said evidence, in favour of the plaintiff.

[20] Lebogang Elias Kgonare (Kgonare), a captain in SAPS attached to Consumer Crime Investigation Unit in Mafikeng testifies that he was summoned to Zeerust Police Station in respect of the Zimbabwean truck found with the boxes of illicit cigarettes.

[21] On his arrival, he interviewed Raradza. Raradza told him that there is another truck with similar load that is heading for Johannesburg. Raradza told them where they will find the truck. He then organised a backup to Alberton. On their arrival at the Reef Truck Stop, they found the truck. They approached the truck. They searched the truck and container. They found nothing in the container. They then arrested the driver thereof and impounded the truck.

[22] Adv. Johannes Krause (Krause), a public prosecutor assigned to the case testifies on how he has been at pains to be furnished with

the necessary documentation that will sustain the offence allegedly committed by Gombakomba. He requested from the police officers and investigating officer copies of the contents of the file pertaining to clearance of Gombakomba truck from both the Clearing Agent and SARS Custom officials but to no avail. He concedes that the matter was postponed on several occasions. Other postponements were granted at the instance and application of Gombagomba's legal representative. He lastly concedes that in the absence of any documentation supporting the charges preferred, he was left with no option but to withdraw such charges.

[23] Ntokoza Solomon Mahlangu (Mahlangu), captain in the employ of SAPS was stationed at the police pound in Benoni. He was taken through all the required steps that must be taken and documents required before the release of the impounded motor vehicle. He conceded in examination in chief and under cross-examination that he was negligent by releasing the truck and trailer belonging to Logistics to a third party without the required release letter from the relevant officers.

[24] It is common cause that Gombakomba was arrested without a warrant. It is further common cause that he was only released on bail after 21 days of his incarceration. The defence pleads that they effected the arrest as empowered in terms of section 40(1) (b) of the Criminal Procedure Act, in that they formed a reasonable suspicion that Gombakomba committed Schedule 1 offence, to wit, fraud.

Was the arrest lawful?

[25] Section 40 (1) of the Criminal Procedure Act 51 of 1977 provides for an arrest by a peace officer without a warrant of arrest. Of relevance to this case are the provisions of section 40(1) (b). It stipulates:

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

(a) ...

(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody ...'

[26] The plaintiff's counsel submits that the defence failed to pass the mark of the following jurisdictional factors set out in **Duncan v**

Minister of Law and Order 1986 (2) SA 805 (A) being the *locus classicus*:

- '1. The arrester must be a peace officer
2. He must entertain a suspicion
3. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the act ...
4. The suspicion must rest on reasonable grounds.'

[27] The defence counsel submits that the suspicion entertained by the police rests on reasonable grounds. The said grounds rest on "similar facts" as those of *Raradza*.

[28] The court in **Minister of Safety and security v Sekhoto**¹ reiterated the jurisdictional facts set out in *Duncan* case and made reference to what it calls the fifth jurisdictional fact as set out by Bertelsmann J in **Louw and Another v Minister of Safety and Security and Others 2006 (2) SACR 178 (T)** where the following was stated:

'I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting police officers believe on reasonable

¹ 2011 (1) SACR 3115 (SCA); 2011 (5) 367 (SCA)

grounds that such crime has indeed been committed, this itself does not justify an arrest forthwith.

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights.

[P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasion options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.'

[29] The said jurisdiction facts were emphasised by Boshielo JA in **Minister of Safety and Security v Swart (194/11) [2012] ZA SCA 16 (22 March 2012)**

[30] As a matter of common cause, the first two jurisdictional facts need no evaluation. It is common cause that Kgonare who effected the arrest was and still is a peace officer. He entertained a suspicion

that Raradza must have been traveling together with another truck that Raradza refers to in his statement.

[31] Upon inspection of documentation (which were handed up as exhibit "A"), he noted that there is a possible fraud committed. It is depicted on the documents that the words 'South Africa' as the destination country has been scratched over and the word 'Swaziland' inserted.

[32] Kgonare, as he testified, suspected that the same "amendments" could have been done with the other truck's documentation. He, based on the discretion conferred upon him by section 40 (1) (b) of the Criminal Procedure Act, formed a suspicion that the plaintiff may as well be another who could have committed fraud, being one of the offences referred to in Schedule 1. I have no reason to fault the arresting officer Kgonare on this jurisdictional fact.

Suspicion must be based on reasonable grounds

[33] There is no fixed rule as to what constitutes reasonable grounds for the suspicion. Each case must be decided on its facts

and circumstances surrounding the peace officer forming the suspicion.

[34] In my perusal of all the cases I referred to herein, it is clear in my mind that the formation of suspicion must not only be based on admissible evidence. Suspicion may be formed on hearsay evidence, character of the suspected person, confession of one accused implicating the suspect and similar facts. Of importance is that the factual background must be reasonable to form a suspicion.

[35] The defence rely on similar facts in forming the suspicion. The defence counsel submitted that the similar fact as in Raradza's circumstances, constitute a reasonable ground Kgonare formed in effecting the arrest without the warrant. The similar facts submitted are:

- Raradza informed Kgonare that the other truck looks exactly the same as his i.e. A long nose Frontliner, Left hand drive truck that is white in colour
- Raradza and the other truck have been travelling together from Zimbabwe to South Africa.

- The load he (Raradza) is carrying is likely to be the same as his.
- They are both destined to Natal Box Factory with no physical address.

[35] It is common cause that the police have a duty of care and to make enquiries as intense as is practically possible under circumstances that may lead to formation of the suspicion based on reasonable grounds. The police must be vigilant, observant, and receptive and open minded before acting on grounds deemed to be reasonable in forming the suspicion.

[36] Much as I find that the suspicion may either be formed on hearsay, similar fact or the character of the suspect surrounding the circumstances, the peace officer is obliged to conduct further enquiries, as hearsay evidence, character evidence or similar facts may at times be flimsy or inherently not credible, to confirm or dispel suspicion.

[37] Kgonare testified that existence of the other truck came to his knowledge around 13h00 of 30 June 2010. It was further brought to

his attention that Raradza was arrested at 06h30. The other truck left Skilpadhek Border gate almost the same time as that of Raradza. He then organised a team to follow the tracks of the other truck.

[38] In my evaluation of the circumstances Kgonare found himself, I am of the view that Kgonare had ample time at his disposal to conduct further enquiries pertaining to the other truck. He further had ample time to approach the magistrate to cause issue of both the warrant of search and arrest.

[39] In formation of the suspicion, the time factor is important. If indeed the other truck had passed Zeerust T junction by 06h30, the said truck would have travelled seven (7) hours as at the time of his involvement. It is reasonably expected of the peace officer to act within a short space of time from the time of the offence is or reasonably suspected to have been committed to the time of forming a reasonable suspicion.

[40] I find it strange as to why Kgonare opted to pursue the truck himself without seeking assistance from other branches of SAPS between Zeerust and Johannesburg. It is quite strange why did he

not cause circulation to other SAPS of the truck suspected of carrying illicit cigarettes immediately that information came to his knowledge? He formed the suspicion as early as 13h00. He organised a backup team to pursue the truck. They arrived at Alberton around 23h00. Based on this evidence, I infer that they must have left Zeerust Police Station, at the earliest, around 17h00.

[41] Be that as it may, Kgonare and his team found the truck at 23h00. They searched the truck. The truck was empty. They did not find any shred of evidence pertaining to cigarettes, not even a carton let alone a packet of blue labelled cigarettes in possession of Gombakomba. They further did not find any documentation that would back up the suspicion of the commission of the offence of fraud he reasonably formed based on similar facts as that of Raradza.

[42] Gombakomba testified that he told them the name of the person he contacted as the consignee. He corporate with them and provided them with the required information. He handed to them the document that was in his possession. The document was handed up as exhibit "B". He did not depict any "amendment" to the said document. Notwithstanding all that, Kgonare proceeded to effect the

arrest. In my consideration of the said evidence surrounding the arrest, I am unable to find any reasonableness in arresting Gombakomba. Further investigation conducted after the arrest while Gombakomba was kept in custody did not bear fruit. I in the result find Gombakomba's arrest to have been unlawful.

Gombakomba loss of income

[43] The defence does not dispute that Gombakomba earned USD 150 per month as basic salary. It is further not in dispute that he was paid USD 0.21 per travelled kilometre. Both counsel agreed that the damages should be converted at an average Dollar-Rand exchange rate for that period in the amount of R7.39. The defence conceded to an amount of R377 510.76 as calculated by the plaintiff as Gombakomba loss of income.

Damages in relation to unlawful arrest

[44] It is trite that the award of general damages is in the discretion of the court. The plaintiff's counsel refers me to a number of cases that dealt with similar situation.

[45] In quantifying the claim, personal circumstances and conditions the plaintiff found himself play a role. Gombakomba was employed as a truck driver. He had no other job but for truck driving. He passed Zimbabwean O level, an equivalent of South African Grade 10. He was shocked when pointed with a firearm during the arrest. He was incarcerated for 23 days. He shared a cell with 16 – 20 other inmates.

[46] No evidence has been led of bad conditions in the cell. He was provided with food which his co-inmates bullied him over. He later managed to overcome that. It is not clear for how many days was he bullied over his ration. There is no evidence that the arrest was effected in full view of members of the community or his family. It is not clear as to how big or small the cell he shared with other inmates was.

[47] The awards in cases the plaintiff's counsel relies on are in my view, grossly excessive for circumstances as those of Gombakomba. Most excessive awards made by lower courts were drastically reduced on appeal. In **Minister of Safety and Security v Tyulu 2009 (5) SA (SCA)** the trial court's award to a magistrate who was incarcerated for two hours was reduced to an amount of R15, 000.00

[48] In my evaluation of the circumstances in relation to Gombakomba, I am of the view that an amount of R280 000.00 is a fair compensation for incarceration of 23 days as opposed to R100 000.00 the defence counsel submits to be fair.

The second plaintiff's loss of the truck

[49] Mutebuka's testimony was never challenged. In fact, the defence conceded, as eluded earlier that Mahlangu was negligent in releasing the truck to the third party without proper release letter to that effect. The arithmetical calculations as submitted by the plaintiff with the aid of the expert witness, was accepted by the defence.

The second plaintiff's loss of income.

[50] I earlier on in this judgment gave a synopsis of the second plaintiff's evidence. I, however, find it inevitable to place on record how the second plaintiff pleaded in his particulars of claim. It is stated that:

'15. By releasing the truck and trailer to an unknown person(s), the member(s) of the South African Police acted with negligence alternatively recklessly alternatively malicious and was his/her alternatively their conduct unlawful ...

16. By virtue of the members of the first defendant's conduct as mentioned ... the plaintiff suffered damages ... made up as follows:

16.1 ...

16.2 ...

16.3 Loss of income ...²

[51] It is trite that in delict, the onus of proving wrongful and or negligent conduct on the part of the defendant is clearly on the plaintiff.³

² Plaintiff particulars of claim under case number 66632/2012 Paragraph 15 and 16

³ See Kotze v Johnson 1928 AD 313

[52] Negligence on the part of the first defendant in releasing the truck and trailer to an unknown person without the release letter has been conceded for and on behalf of the first defendant.

[53] Wrongfulness is often determined by asking as to whether the defendant had a legal duty to prevent the loss.⁴

[54] The second plaintiff has thus proved the required negligence on the part of the first defendant in releasing the impounded truck and trailer to an unknown third party without the release letter.

[55] The plaintiff's counsel submitted that the first defendant is thus liable for the loss of income in that the second plaintiff was unable to use the truck and trailer that generated his sole income.

[56] In rebuttal thereto, the defence counsel submitted that the second plaintiff rides on the back of Gombagomba's unlawful arrest in claiming his loss of income. He refers to the **Minister of Safety and Security v Scott**⁵ where the court, he submitted, found 'such imposition

⁴ Neethling, Potgieter Visser: Law of Delict, 6th Edition – page 291 and Jowel v Bramwell-Jones and Others 1998(1) SA 836 (WLD) at page 878 C-D

⁵ Minister of Safety and Security v Scott (969/2013)[2014] ZASCA 84 (30 May 2014)

of liability on the minister is likely to create an unascertainable class of potential claimants – one can imagine the absurdities that would arise if all persons or entities contractually linked to a person wrongfully arrested could sue the Minister for contractual loss suffered by them.⁶ (Emphasis added)

[57] In the **Minister of Safety and Security v Scott**⁷, I gather that Scott had entered into an agreement with Field and Stream to host game hunters, in particular the Americans, to Mopane Ranch for hunting safaris. Just before the American clients could arrive at the Ranch, Scott was arrested. The agreement was then cancelled due to the incident that occurred that led to Scott being arrested. The said arrest was found to be unlawful. Scott then sued the Minister for loss of contractual income.

[58] The court found that both wrongfulness and causation serve as a brake on indeterminate liability. The court quoted Neethling⁸ where it stated that the authors 'rightly state that the courts have held that the wrongfulness of an act causing pure economic loss almost always lies in the breach of a legal duty. The authors note that there is no general duty to prevent pure economic loss. As to whether, in a particular case, there was a legal duty to

⁶ Ibid – paragraph [36] emphasis added

⁷ Opcit – fn 5 supra

⁸ Neethling, Potgieter Visser – Law of Delict - opcit

avoid pure economic loss, the yardstick is the general criterion of reasonableness or *contra boni mores*. This involves the exercise of a value judgment which embraces relevant facts and considerations of policy. In essence, this amounts to judicial control over the scope of delictual liability.'

[59] As already stated that in *casu*, the defence conceded negligence on the part of the first defendant in releasing the truck and trailer to an unknown third party. In essence, wrongfulness has been proven. What needs determination is the legal causation. The question is whether the wrongful act is sufficiently linked to the loss concerned for legal liability to ensue.⁹

[60] Mutebura testified that the second plaintiff had only two trucks which were the only source of generating its income. The second plaintiff had standing contractual and cash clients. The second plaintiff was out of business occasioned by impoundment of the truck and trailer. Tipping the scales of its loss of income is the total loss of the truck occasioned by the wrongful release from impoundment to an unknown third party.

⁹ Minister of Safety and Security v Scott paragraph [37]

[61] In my evaluation of the evidence tendered and submissions made by both counsel, I am of the view that there is causal link between the first defendant's wrongful act to the second plaintiff's loss of income more specifically after the wrongful authorisation to release the truck and trailer. The second plaintiff would have, in my view, been in the position to generate the income had the truck and trailer been released to them.

[62] I enquired from both counsel to address me as to why, if I find in favour of the second plaintiff, I should not apply contingencies. I further enquired as to what percentages one can apply for contingencies. Plaintiff's counsel urged me not to apply contingencies while, on the other hand, the defence counsel submitted that 50% contingencies would be fair.

[63] The second plaintiff's truck was bought as a second hand from America. There is no evidence of its state of repair or the kilometres it already had at the time of impoundment. The truck had already travelled 57 600km just within a period of 6months. In two years, the truck's kilometres would have tripled causing normal wear and tear. Considering all that, I am of the view that 50% contingencies would

be a fair application to the total amount claimed in respect of the loss of income.

[64] The calculation towards computation of the loss was not contested.

[65] It is trite that cost follow the event. The plaintiffs succeeded with their claims and are thus entitled to their costs

In the result, I make the following order:

Order:

The First Defendant is ordered to pay:

- 1. Gombagomba an amount of R657 510.76 within 14days from date hereof.**
- 2 Interest thereon at the rate of 9% if the amount in 1 is not paid within 14 days from date hereof *a tempore morae* to date of payment.**
- 3 Costs of suit in case number 66631/2012**

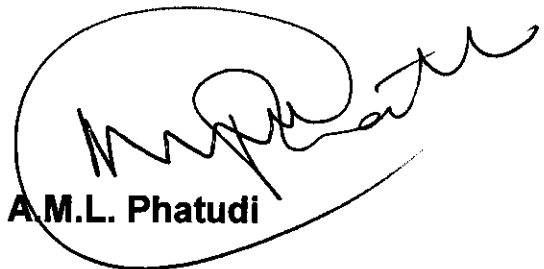
4 Transport Logistics (Pvt) an amount of :

4.1 R260,000 for truck and trailer

4.2 R1,960,759.14 for loss of income

**4.3 Interest thereon at the rate of 9% if the money is not
paid within 14 days from date hereof a *tempore morae*
to date of payment.**

5 Cost of suit in case number 66632/2012

A handwritten signature in black ink, appearing to read 'A.M.L. Phatudi', is written over a large, faint circular stamp or seal.

Judge of the High Court

On behalf of the Plaintiff:

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