

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A 77844/2014

DATE: 2016/09/23.

In the matter between:

THABO THOMAS BALOYI

and

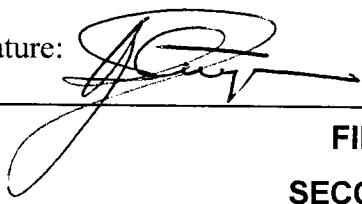
THE MINISTER OF POLICE
KENNETH NGUBANE

(1) Reportable: ~~Yes~~ / No

(2) Of interest of other Judges:
~~Yes~~ / No

(3) Revised _____

Date: 23.09.2016..

Signature: 

PLAINTIFF

FIRST DEFENDANT
SECOND DEFENDANT

HEARD ON:

JUDGMENT: 23.09.2016.

STRIJDOM AJ

INTRODUCTION

1. The Plaintiff's claim is for damages for alleged wrongful and unlawful arrest and detention.
2. Plaintiff claim include *inter alia* unlawful arrest, detention, contumelia and mental anguish.
3. Plaintiff claims a quantum of R830,000.00.

COMMON CAUSE FACTS BETWEEN THE PARTIES

4. The Plaintiff was arrested by members of the First Defendant on 16 May 2014 and released on bail later the same day.
5. The Plaintiff was detained for 14 (fourteen) hours.
6. The Second Defendant did find a firearm in the possession of the Plaintiff.

ISSUES IN DISPUTE

7. The issues that arise for consideration are whether or not, the Second Defendant had formed a reasonable suspicion that the Plaintiff had committed an offence falling under schedule 1 of the Criminal Procedure Act, 51 of 1977.
8. The Defendants raised a defense relying upon section 40(1)(b) of the Criminal Criminal Procedure Act, 51 of 1977. The salient wording of section 40(1)(b) reads:

“(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

PLAINTIFF'S CASE

9. The Plaintiff's evidence can be summarised as follows:

9.1. He went to work on 3 May 2014 at 05h20 in the morning. He was employed at Putco as a bus driver and has been working there for 18 (eighteen) months with the complainant (Johannes Koloï) as his direct supervisor.

9.2. He testified that Dibakwane started working at the company and that he is the driver with the complainant as his direct supervisor. At all material times he was always referred by everyone including the supervisor as Thabo Thomas Baloyi and Gilbert Dibakwane as Gilbert Dibakwane.

9.3. He further testified that on that day he did not have a firearm in his possession and could not have carried a firearm to work as the security officers searches everyone who enters the premises and they would confiscated it.

9.4. He saw the complainant (Johannes Koloï) at the depot and his encounter with him was not hostile. The complainant instructed him to knock off when he parked the bus at around 10h48 in the

morning. He testified that he was at work from 3 May 2014 until the day of his arrest except on Sundays.

9.5. He further testified that the complainant was not at his house at the time of his arrest.

9.6. He testified that he was not aware that the complainant opened a case against him.

9.7. After he was released from detention his employer conducted a disciplinary hearing regarding the alleged pointing of a firearm. He was acquitted on the charge against him. The complainant also testified in the disciplinary hearing.

DEFENDANT'S CASE

10. The evidence of the Second Defendant Kenneth Ngubane can be summarised as follows:

10.1. He has been employed in the SAPS at Orlando Police Station for 10 years. He received a police docket on 12 May 2014 to investigate. He testified that he perused the contents of the docket as well as the statement made by the complainant (Johannes Koloi). It was alleged by Johannes Koloi that the Second Defendant was known to him as Dibakwane and that he pointed him with a firearm.

- 10.2. Kenneth Ngubane further testified that he went to the complainant's place of employment regarding the alleged incident but could not find him. He left a note for him to come to the police station. On the same day the complainant came to his office with the details of the Plaintiff and assured him that he will be able to point him out.
- 10.3. He testified that the complainant narrated what happened to him and explained that he told the Plaintiff to be home on 3 May 2014. The Plaintiff later met and pointed the complainant with a firearm.
- 10.4. He testified that he informed the complainant that the police will be conducting an operation from 15 May 2014 at night to arrest all suspects linked to different crimes and requested the complainant to accompany them to identify the Plaintiff and to point out where the Plaintiff is staying.
- 10.5. He further testified that the complainant went with them to the Plaintiff's residence on 15 May 2014 after midnight. The Plaintiff was sleeping in the bedroom. The complainant was with them at all relevant times. They proceeded to the bedroom and he asked the Plaintiff whether he was Thomas Baloyi. The Plaintiff answered in the affirmative and the complainant pointed the Plaintiff as the person who pointed him with a firearm.

- 10.6. Kenneth Ngubane asked the Plaintiff whether or not he has a firearm and he answered to the affirmative. He asked the Plaintiff where he kept his firearm. The Plaintiff showed him the safe and gave him the keys to the safe. He then opened the safe and took the firearm as an exhibit. He further advised the Plaintiff that he arrest him for pointing the complainant with a firearm. The Plaintiff was taken to the police station and locked up in the holding cells. He was later charged and was released on bail.

THE UNLAWFULNESS OF THE ARREST

11. It is trite law that the onus rested on the Defendants to justify the Plaintiff's arrest. The question is: did Constable Ngubane entertain a reasonable suspicion that the Plaintiff has committed a schedule 1 offence.

12. The Act in schedule 1 states:

"Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine."

13. Section 39(d) of the Firearm Control Amendment Act states:

“It is an offence to point (a) any firearm, a muzzle loading firearm or an airgun, whether or not it is loaded or capable of being discharged, at any person, without good reason to do so or anything which is likely to lead a person to believe that it is a firearm, a muzzle firearm or an airgun at any other person, without good reason to do so.”

14. Schedule 4 of the Firearms Control Amendment Act, 60 of 2000 makes provision of a sentence of two years imprisonment for pointing a firearm without the option of a fine.

15. It was held in **Duncan v Minister of Law and Order**¹ the jurisdictional facts for a section 40(1)(b) defence are that:

“(i) The arrestor must be a peace officer;

(ii) The arrestor must entertain a suspicion;

(iii) The suspicion must be that the suspect committed an offence referred to in schedule 1; and

(iv) The suspicion must rest on reasonable grounds

¹ 1986 (2) SA 805 (A)

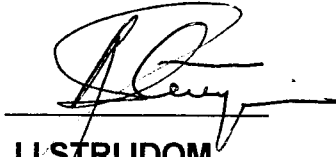
16. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power.
17. Constable Ngubane testified that he suspected the Plaintiff to have committed the offence of pointing a firearm at Johannes Kolozi after he perused the statement of the complainant.
18. What acerbated his suspicion is that the complainant pointed the Plaintiff out as the person who pointed him with a firearm and a firearm was found in the Plaintiff's possession.
19. His evidence was not seriously contested in cross-examination by counsel for the Plaintiff. He did not contradict himself and his evidence was corroborated by the common cause facts in this case. He was consistent about his version of events.
20. Counsel for the Plaintiff submitted that Constable Ngubane was obliged before arresting the Plaintiff to evaluate the objective facts at his disposal and that the suspicion formulated by Ngubane was not founded on a reasonable ground and accordingly the arrest was unlawful.
21. It was further submitted by counsel for the Plaintiff that Constable Ngubane did not exercise his discretion rationally and in good faith.

22. It is trite law that anyone that wants to challenge the discretion of the Defendant must plead it in his papers, The Plaintiff did not plead the issue or raise it during the trial. However, even if it was pleaded, the suspicion which Constable Ngubane entertained was not arbitrary. He perused the statement of the complainant, consult with the complainant at his place of employment and took the complainant to point out the suspect at his residence. He also enquire from the Plaintiff whether he possess a firearm and took possession of the firearm as an exhibit.
23. In my view all the jurisdictional facts were met and the discretion to arrest was properly exercised.
24. The evidence tendered by the Plaintiff did not change the objective facts and common cause facts, In fact, most of the relevant evidence was not disputed by the Plaintiff.
25. In **Johannes Papa Kgapola v Minister of Police**² it was held that:
- “Objectively speaking, a pointing out of a suspect established a prima facie case and affecting arrest cannot be said to have been unreasonable under those circumstances.*
26. Having considered the conspectus of evidence I am persuaded that the Defendant’s discharged the onus rests upon them to prove the jurisdictional facts and that Constable Ngubane exercised his discretion reasonably.

² (74795/2014) 2016 ZAGPPHC 429

27. I am of the view that the Plaintiff failed to made out a case for unlawful arrest and detention.

28. It follows that the Plaintiff's claim is dismissed with costs.



JJ STRIJDOM
ACTING JUDGE OF THE HIGH COURT
PRETORIA

DATE:

APPEARANCES:

Advocate for Plaintiff:	Adv T Morudu
Attorneys for Plaintiff:	Ndiubane Attorneys
Advocate for Defendant:	Adv AN Tshabalala
Attorneys for Defendant:	State Attorney