

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 87269/15

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

15 January 2021  
DATE

SIGNATURE

In the matter between:

**W J VAN DEVENTER**

Plaintiff

and

**THE MINISTER OF POLICE**

Defendant

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**J U D G M E N T**

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*This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on December 2020.*

**TEFFO, J:****Introduction**

[1] This is a claim for damages suffered by the plaintiff as a result of his arrest and detention on 22 December 2014.

[2] It is common cause that the plaintiff was arrested by members of the South African Police Services at his residence at Section 9, Vlakfontein, Bronkhorstspuit, Gauteng on 22 December 2014. He was detained at the Bronkhorstspuit police station and later released on the same day. The charges against him were subsequently withdrawn. The parties prepared a stated case and also submitted the heads of argument. The matter was then decided on the papers.

[3] I was requested to determine the issue of liability only. The issue of quantum was therefore postponed for later determination.

**Pleadings**

[4] In his particulars of claim, the plaintiff alleges that he was arrested on a charge of possession of an unlicensed firearm. His arrest was wrongful and/or malicious and he was detained without any merit and/or a reasonable suspicion for justifying the arrest and/or of committing an offence and/or consideration of his explanation. In the plea the defendant contends that the plaintiff was found in possession of an unlicensed firearm and this was the reason for his arrest.

Common cause or agreed facts

[5] The salient facts which led to the arrest of the plaintiff are essentially common cause.

- 5.1 On or around November 2014, the plaintiff's uncle, Mr Petrus Gerhardus van Deventer, visited the plaintiff at his residence. He had with him a firearm which he requested the plaintiff to keep at his residence since he did not want to leave it in his vehicle for safety reasons.
- 5.2 The plaintiff took the firearm and placed it in a safe at his residence. When his uncle left his residence, he forgot to take the firearm with him.
- 5.3 The plaintiff later informed his uncle that he forgot the firearm. The uncle said he would come and pick it up when he has time. The firearm remained locked at the plaintiff's residence in the safe.
- 5.4 On 21 November 2014 the plaintiff's uncle passed on. At that time, he had not collected the firearm at the plaintiff's residence.
- 5.5 On or about 22 December 2014 at approximately 02h00 and whilst sleeping at his place of residence, the plaintiff and his wife were woken up by some strange noise around the residence which sounded like someone was attempting to break into the house.

- 5.6 Upon further inspection, the plaintiff realised that the noise was from unknown people who were attempting to commit a robbery.
- 5.7 In order to protect himself and his family, he took out the firearm which had been left by his uncle at his residence and fired a shot at the door. This resulted in the fatal shooting of one of the intruders.
- 5.8 He went out of the house and saw a person lying down in a pool of blood. The person was still breathing at the time.
- 5.9 He then realised that his other family members were seriously assaulted by the robbers. The family members informed him that they were under constant assault since 01h00. Subsequent thereto, the robbers drove away in one of the vehicles belonging to his brother.
- 5.10 Police were summoned to the scene and when they arrived, they found the person lying down on the floor. The person was later taken to hospital where he succumbed to the injuries.
- 5.11 The police asked the plaintiff as to what happened. He informed them that he shot the person after he concluded that he had come to rob his family.
- 5.12 The police asked for the firearm that he used to shoot the deceased and he showed them the firearm that belonged to his uncle.

5.13 The police further asked for the licence for the firearm. The plaintiff told them that the said licence was with the executor of his deceased uncle's estate. The police then arrested him for possession of an unlicensed firearm.

5.14 He was subsequently detained at Bronkhorstspuit police station on the same day and later released after appearing in court. The charges against him were withdrawn.

#### The issues for determination

[6] The main issue for consideration in these proceedings is whether or not the arrest and detention of the plaintiff was justified. Aligned to this is the question whether, on the facts of this case, the plaintiff can be said to have committed or attempted to have committed the offence in the presence of the police. This issue revolves around whether or not the firearm that the plaintiff was found in possession of at the time of his arrest, was licensed.

#### The law

[7] It is trite that an arrest without a warrant is *prima facie* unlawful and the defendant bears the *onus* of justifying the lawfulness thereof<sup>1</sup>.

[8] Section 40(1)(a) of Act 51 of 1977 ("the Criminal Procedure Act") provides that a peace officer may without a warrant arrest any person who commits or attempts to commit any offence in his/her presence.

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<sup>1</sup>*Zealand v Minister for Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) par 25; *Minister of Safety and Security v Sekhoto & Another* 2011 (5) SA 367 (SCA) para 7

[9] The jurisdictional factors that must be established for a successful invocation of section 40(1)(a) are –

- (a) the arrestor must be a peace officer;
- (b) an offence must have been committed by the suspect or there must have been an attempt by the suspect to commit an offence; and
- (c) the offence or attempt must occur in the presence of the arrestor<sup>2</sup>.

[10] The expression “*in the presence of*” as contained in section 40(1)(a) has not been interpreted consistently. Ordinarily the expression means “*within the eyeshot of that police official or on her/his immediate vicinity or proximity*”<sup>3</sup>.

[11] In *Gulyas v Minister of Law and Order*<sup>4</sup>, the court held as follows:

*“In my view the intention was to authorise a warrantless arrest also in the case of an offence that has already been committed. To hold that the peace officer can only arrest without a warrant someone who is still committing the offence seems to be absurd and not what the Legislature intended. Parliament intended that if, from the peace officer’s own perception, the offence had just been committed, he should have the power to arrest without a warrant. This involves the*

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<sup>2</sup> *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA) at paras [13]-[14]

<sup>3</sup> In *Levuna v R* 1943 NPD 323 at 325 where Hathorn JP (Selke J concurring) was of the view that a peace officer’s power to arrest without a warrant should not be confined to cases where she/he can actually see the offender committing the offence, whilst in *Fnacult v Kalil* 1933 TPD 348 at 251, it was held (in relation to section 26 of Act 31 of 1917 – predecessor of section 40) that the power to arrest their entirety (compare also *Minister of Justice and Others v Tsose* 1950 (3) SA 88 (T) at 92-3)

<sup>4</sup> 1986 (3) SA 934 (C) 953H-I

*peace officer being on the scene of the offence either at the time of its commission or at the tail end of it, so that he personally (or otherwise perceives) that an offence has just been committed.”*

[12] In *Nel v Minister of Police*<sup>5</sup>, the court said the following:

*“Most importantly, the assessment of the legality of an arrest in terms of section 40(1)(a) requires a determination of whether the facts observed by the arresting officer as a matter of law prima facie establish the commission of the offence in question. The question to be posed and answered is – did the arresting officer have knowledge at the time of the arrest of such facts which would in the absence of any further facts or evidence, constitute proof of the commission by the arrestee of the offence in question? The arresting officer’s honest and reasonable subjective conclusion from the facts observed by her/him is not of any significance to the determination of the lawfulness of her/his conduct.”*

[13] Section 3 of the Act<sup>6</sup> reads:

*“(1) No person may possess a firearm unless he or she holds for that firearm –*

*(a) a licence, permit or authorization issued in terms of this Act;*

*or*

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<sup>5</sup>(CA62/2017) [2018] ZAECHGHC 1 (23 January 2018); see also *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) at [20]- [21]; Du Toit et al, *Commentary on the Criminal Procedure Act* Vol p5-14

<sup>6</sup> The Firearms Control Act, 60 of 2000

*(b) a licence, permit, authorization or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.”*

[14] In terms of the provisions of section 147(1)<sup>7</sup>, in the case of the death of the holder of a firearm licence, the firearm in question must be disposed of as prescribed. The executor of the estate of the deceased person who comes into possession of the firearm licensed to the deceased must store the firearm as prescribed<sup>8</sup>.

Discussion and application of the law to the facts

[15] It is common cause between the parties that the plaintiff was arrested and subsequently detained for being found in possession of an unlicensed firearm. Counsel for the plaintiff correctly submitted in his heads of argument that the defendant can only rely on section 40(1)(a) of the Criminal Procedure Act to justify the arrest and detention of the plaintiff. This therefore renders the provisions of section 40(1)(b)<sup>9</sup> irrelevant in these proceedings.

[16] Counsel for the plaintiff further submitted that because the defendant has conceded that the firearm that the plaintiff was found in possession of at the time of his arrest, was licensed, the arrest and detention of the plaintiff was not justified. The defendant can therefore not persist with its argument that the plaintiff's arrest and detention were lawful.

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<sup>7</sup> The Act

<sup>8</sup> Section 147(2)

<sup>9</sup> The Criminal Procedure Act



[17] In order to deal with these issues, it is prudent to look at the meaning of the word “*unlicensed*”. The Oxford Advanced American Dictionary defines “*unlicensed*” as follows:

(a) “*Not having an official license*”;

(b) “*Unauthorised*”.

[18] Whether or not there was a concession by the defendant that the firearm was licensed at the time of the plaintiff’s arrest, is immaterial. The defendant’s counsel correctly submitted in his heads of argument that as at the time of the plaintiff’s arrest, the plaintiff did not have a licence to possess the firearm that he used to shoot the intruder. He could not produce a licence in his own name which proved that he was authorised or permitted in terms of section 3 of the Act to possess the firearm. The licence that was later produced had been issued to his deceased uncle and not to the plaintiff.

[19] Although the plaintiff shot an intruder who later died, he was not arrested for the assault and/or murder.

[20] The firearm that was found in the possession of the plaintiff at the time of his arrest, belonged to his deceased uncle, Mr P G van Deventer, and it was only his deceased uncle who was licensed to possess that specific firearm. The firearm was not dealt with in terms of section 147 of the Act.

[21] It can therefore not to be correct to argue that when he was arrested, the plaintiff was in possession of a licensed firearm while he did not hold a licence to possess the firearm at the time.

[22] The plaintiff was found in possession of an unlicensed firearm at the time of his arrest. He held the firearm unlawfully as he was not authorised to do so. The facts observed by the arresting officer at the time *prima facie* established the commission of the offence of unlawful possession of a firearm or possession of an unlicensed firearm.

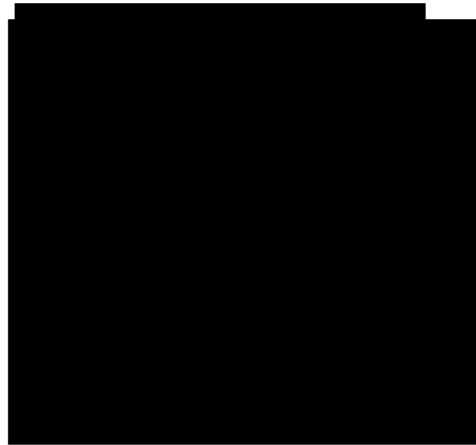
[23] An issue was raised that the defendant cannot contend now that the plaintiff was not licensed to possess the firearm at the time of his arrest and detention as a justification for his arrest and detention. The basis thereof was that it is not the case that the plaintiff has been called upon to meet. In my view this issue has no merit. The defendant has been consistent in his plea that the plaintiff was arrested for being found in possession of an unlicensed firearm.

[24] What has been pleaded by the defendant is consistent with the stated facts.

[25] In my view the jurisdictional factors that apply to an arrest and detention in terms of section 40(1)(a) have been established. I am therefore persuaded that the defendant has discharged the *onus* of proving the lawfulness of the arrest. It follows that the subsequent detention of the plaintiff was also lawful. The action of the plaintiff falls to be dismissed.

[26] In the result I make the following order:

1. The plaintiff's action is dismissed.
2. The plaintiff is ordered to pay the costs of the action.



**M J TEFFO**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

Date of hearing 15 October 2020

Date handed down 15 January 2021

For the plaintiff D D Mosoma and I T Ngwana

Instructed by Gildenhuys Malatji Inc

For the defendant M Ngoetjana

Instructed by State Attorney Pretoria