



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 23993/2018

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



SIGNATURE

06 OCTOBER 2022
DATE

In the matter between:

OOSTHUIZEN, ANDRE

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] The plaintiff is claiming damages for his alleged unlawful arrest arising from his arrest without a warrant and subsequent detention by members of the South African Police Service ('SAPS'), employed by the defendant.

[2.] The plaintiff was arrested for defeating the ends of justice in that it is alleged that he concealed the delivery of 92 crates of copper cable off-cuts. In his particulars of claim, the plaintiff seeks payment in the sum of R450 000.00 computed as follows:

- (a) Legal expenses incurred in respect of the defence of the matter: R10 000.00;
- (b) Future hospital, medical and ancillary costs, treatment of psychiatric and psychological nature, examination, consultations and purchase of medication: R100 000.00;
- (c) Past and future loss of earning capacity: R50 000.00; and
- (d) General damages: R290 000.00.

[3.] The plaintiff's claim is premised on vicarious liability, it being his pleaded case that the police officers who arrested and detained him, were at the time employed by the defendant and were thus acting within the scope of their employment and in execution of their duties. The issue of merits was separated from quantum in terms of Uniform Rule 33(4).

[4.] The action is opposed. The defendant in its plea, pleaded that the plaintiff was defeating the end of justice in the presence of a peace officer, therefore the arrest was justified in terms of s40(1)(a) of Act 51 of 1977.

BACKGROUND

[5] The plaintiff was arrested without a warrant on 11 July 2014 and detained at Lephalale SAPS and released on 14 July 2014.

[6.] According to the defendant's evidence, the arresting officer, Captain Simangaliso Solomon Baloyi, testified that he was investigating an inquiry in terms of Hercules 1/7/2014 relating to scrap metal deliveries by Ellisras Scrap Metal, from Lephalale, Limpopo on Mondays at Toit's Metal in Hercules, Pretoria. The investigation commenced in 2012.

[7.] During the investigation phase in 2014, the driver of the Ellisras Scrap Metal truck while delivering to Toit's Metal in Hercules indicated to Captain Baloyi that the scrap or copper delivered was from Ellisras Scrap Metal who had a contract with Exxaro Grootgeluk Mine in Lephalale to collect scrap copper cables.

[8.] A meeting was held by Captain Baloyi and his team with Exxaro officials from Head Office, to discuss the scrap delivered to Toit's Metal in Hercules, Pretoria from Lephalale, by Ellisras Scrap Metal. The representative of Exxaro security officials from Head Office indicated that they do not have a contract for collection of scrap copper metal with Ellisras Scrap Metal but with Reclamation group. The SAPS team agreed with security officials of Exarro, Head Office to go to Lephalale, Medupe Power station to investigate the matter further.

[9.] The SAPS investigators and Exarro security officials from Head Office visited Lephalale, Medupe Power station to investigate Hercules inquiry 1/7/2014 further.

[10.] On 10 July 2014, Captain Baloyi and his crew, Colonel Liebenberg under the command of Colonel Sibanda, Exarro officials, Exarro management from Lephalale, Wade Walker Pty Ltd, Mr Andre Oosthuizen and Exarro Grootgeluk Mine security official, Mr Manamela met in a boardroom at the mine. The reason for the visit was explained and a question was asked again as to whether Ellisras Scrap Metal have a contract with the mine and asked information about copper cables sold as scrap. It was reported that the mine has a contract with Reclamation Group. It was further indicated that they do sell off cuts cables to Ellisras Scrap Metal for petty cash.

[11.] During the meeting, Captain Baloyi asked Mr Oosthuizen a question about the last load of copper cables taken out of the mine and delivered to Ellisras Scrap Metal. Mr Oosthuizen responded that the last load delivered was 54 crates and was also asked whether he can make a statement in that regard. Mr Oosthuizen agreed to make a statement and ultimately made a statement. The statement formed part of exhibits presented in court. The statement was signed by Mr Oosthuizen and deposed to before Gladys Baleseng Sibanda, a police officer, on 10 July 2014 at 12h20.

[12.] It was further reported that Mr Ettiene Koekemoer of Wade Walker (Pty) Ltd was the person involved in cutting the copper cables off cuts. Mr Ettiene Koekemoer was called into the boardroom and was asked a question about how he cuts off the copper cables as scrap and last load of off cuts taken out of the mine and delivered to Ellisras Scrap Metal. In the presence of Mr Oosthuizen, Mr Ettiene Koekemoer indicated that he made cuts of copper cables as scrap and loaded 92 crates which were taken or driven by Mr Ockerts and Mr Oosthuizen confirmed the quantities. Mr Oosthuizen escorted the vehicle driven by Mr Ockerts from the mine to Ellisras Scrap Metal. Mr Koekemoer was asked as to whether he can make a statement in that regard. He agreed and made a statement on the same day at 15h20 deposed to before Mr Lesiba Stephen Manamela, head of security for Exarro Mine. A copy of the statement formed part of the exhibits presented in court. It was further reported by Mr Ettiene Koekemoer that he was threatened by some people at the mine and the case of intimidation was opened with SAPS with the assistance of Capt Baloyi after the meeting.

[13.] Captain Baloyi and his team asked information about the process and deliveries taken out of the mine and obtained a document from Exarro mine confirming the 54 crates. A copy formed part of the exhibits presented in court. No document could be provided in respect of the 92 crates referred to by Mr Ettiene Koekemoer which allegedly had been confirmed by Mr Oosthuizen.

[14.] I should pause to mention that, despite that no documentation was found in regards to the 92 crates, the arresting officer was in possession of the affidavit Mr Ettiene Koekemoer who confirmed the number of crates that left the mines to be delivered at Ellisras Scrap Metal at the escort of the Plaintiff who nonetheless denied the existence of the 92 crates under oath and in the presence of the arresting officer.

[15] Further, the defendant averred that there were two invoices that were discovered and the statements of the plaintiff and Mr Koekemoer, the arresting officer asked the plaintiff about the 92 crates and the statement that his last load was for 54 crates and based on the two invoices he was informed that he was hiding the 92 crates. The defendant further averred that the plaintiff responded that he was sorry and apologised for not disclosing same and indicated that he was doing that for his family survival.

PLAINTIFF'S CASE

MR CHRISTO LOUWRENS ERASMUS

[16.] The plaintiff called his first witness, Mr. Christo Louwrens Erasmus, owner of Ellisras Scrap Metal. Mr. Erasmus testified that only one load of 54 crates was received from Wade Walker by Ellisras Scrap Metal on 12 June 201.¹

[17.] The plaintiff averred as follows in relation to Mr Erasmus' evidence:

- (a) Mr Erasmus testified that the two invoices M4969 and M4970, respectively were created as a result of the 54 crate load only;
- (b) The two invoices M4969 and M4970, respectively, are in fact the register of Ellisras Scrap Metal relating to the purchase of second-hand goods in the form of non-magnetic/non-ferrous metals;
- (c) No separate register relating to the purchase of second-hand goods in the form of non-ferrous metals exist;
- (d) It was impossible that the mass container/skip containing the crates loaded with stripped copper cable could be packed and accommodated therein;
- (e) Only one transaction was concluded with Wade Walker represented by documentation at hand, the photographs depicting the mass container/skip

¹ Plaintiff's Heads of Argument para 8.1.1.

containing the crates, the respective invoices M4969 and M4970 and the document titled “Ellisras Scrap Metal OB no 1509/06/2015”; and

- (f) He throughout, insisted that the 580kg and 800kg relates to one transaction only.²

[17.] In cross-examination, Mr Erasmus vehemently denied two transactions and confirmed once again, one transaction only;

[18.] On being put to him that the arresting officer testified that Mr Koekemoer stated under oath that there were 92 crates, his response was that he would have asked him if 92 crates can fit into the mass container/skip.

[19.] He further testified that it is impossible for 92 crates to fit into the mass container/skip and that should 92 crates be loaded there into, it would protrude some 2.5 metres above the top level of the mass container/skip and would not be allowed to exit the mine premises.

[20.] He confirmed that he only received one mass container on 12 June 2014, depicted on the photographs which accompanied the mass container/skip which gave rise to the two weigh bridge tickets 701 and 702.

MR JEREMIAH JOSIAH ROESCH

[21.] The plaintiff called his second witness, Mr Jeremiah Josiah Roesch, the safety officer at Wade Walker.

[22.] The plaintiff averred as follows in relation to Mr Roesch’s evidence:

- (a) Mr Roesch testified that only one load of shiny bright copper off-cut cable consisting of 54 crates loaded into a single mass container/skip, left the

² Plaintiff’s Heads of Argument para 8.2 Bullet point 12.

premises of Wade Walker and Exxaro Grootgeluk Mine on 12 June 2014 to Ellisras Scrap Metal;³

- (b) He explained the “gate release form” at capital yard and confirmed that he completed the gate release form relating to the 54 crates load;
- (c) He confirmed that he took the photographs of the copper packed into the plastic crates loaded in the mass container/skip on 12 June 2014 and that it reflects the 54 crates which he entered on the gate release form;
- (d) Once he has checked the load, completed the forms and taken the photographs, it is then counted and checked by management of Wade Walker, one van Rooyen, who signed the gate release form;
- (e) Thereafter, it is checked by a representative of the main contractor on Exxaro Grootgeluk Mine, who checks the load and signs it and that in that specific instance, it was one Johan Peens;
- (f) After the necessary checks was done and the documentation completed, all the documentation is given to the driver who then proceeds to the capital yard of Exxaro Grootgeluk Mine for further verification of the load and capturing of the particulars thereof on their SAP-system; and
- (g) He confirmed the delivery point as being Ellisras Scrap Metal and that only one load of crates went out to that delivery point on 12 June 2014 and no other.

[23.] When confronted with the 92 crate statement by Mr Koekemoer and the possibility that 92 crate were taken out of the property on 12 June 2014, his answer was “no’ and he further stated that it was unlikely that anything would be taken out of the mine premises without the proper procedure being followed.

³ Plaintiff’s Heads of Argument para 9.1.1.

[24.] He also explained the apparent date which differs with the date the crates were taken out as being the revision date of the document, not the date that it was completed.

[25.] I now recount the evidence of Mr Andre Oosthuizen.

MR ANDRE OOSTHUIZEN

[26.] In his testimony, the plaintiff explained the specific procedure followed on that day that only one mass container/skip containing copper was taken from Wade Walker lay down yard, containing 54 crates to Ellisras Scrap Metal and that he received payment in cash, therefore.

[27.] The plaintiff further explained that once the off-cut copper cable is ready to be packed, it is verified by Mr JJ Roesch, thereafter by capital yard, whereupon it proceeds to the Mine gate for release and ultimately to Ellisras Scrap Metal where he will await the arrival of the truck containing the load.

[28.] The plaintiff was tasked with transporting the copper off-cut from Exarro Grootgeluk Mine premises. The plaintiff indicated that he was interviewed and informed that on 12 June 2014, he escorted 54 crates of copper from the mine premises to that of the scrap metal dealer. The plaintiff further indicated on request of the SAPS, he deposed to a statement under oath on 10 July 2014.

[29.] The plaintiff informed that the SAPS investigation team also obtained a statement from a certain Etienne Koekemoor, who declared under oath, on 10 July 2014, that on 12 June 2014, he took out 92 crates of copper and put them in a container which was taken by a certain Ockert of Ellisras (Ellisras Scrap metal) and that he confirmed with the plaintiff that Ockert took 92 crates.⁴

[30.] In seeking to refute the allegations by that arresting officer, the plaintiff averred that the arresting officer conceded that the statement under oath by the plaintiff is objectively seen, 100% correct.

⁴ Plaintiff's Heads of Argument para 7.2 Bullet point 8.

[31.] The plaintiff further averred that the arresting officer relied solely on the affidavit by Mr Etienne Koekemoer relating to the 92 crates, invoices which form part of the register at Ellisras Scrap Metal and the register of Ellisras Scrap Metal in arriving at the conclusion that, over and above the 54 crate load, there was an additional 92 crate load of copper off-cut cable that the plaintiff is concealing.

[32.] The plaintiff contended that the arresting officer did not consider it necessary to obtain a copy of the relevant page(s) of the register of Ellisras Scrap Metal that specifically referred to a 54 crate load, which would be invoice M4969 and the 92 crate load which would be invoice M4970. Further that it was put to the arresting officer that no such separate register exists, however, he insisted.

[33.] The plaintiff contended that the arresting officer conceded that, save for the affidavit of Mr Koekemoer, no other document in Lephalale CAS 130/07/2014 refer to a 92 crate load. The plaintiff further contended that the arresting officer did not deem it necessary, once he had come to the conclusion that the 92 crate load was concealed from him, to do further investigations as to the existence of the 92 crate load.

[34.] The plaintiff also contended that the arresting officer did not deem it necessary to investigate the process of the release of the copper cable from the mine premises, to the scrap metal dealer premises in detail and to confirm whether he understood it correctly as has been disclosed to him. The plaintiff contended that the arresting officer did not deem it necessary to ascertain the weight of a crate of copper cable, for purposes of crosschecking the weight against the averred amount of crates.

[35.] The plaintiff averred that the arresting officer did not deem it necessary to investigate the number of crates that can fit into a mass container referred to as skip. Further that in re-examination, the arresting officer confirmed that he relied on the statement of Mr Koekemoer and receipts which form part of the register and thaverred register at Ellisras Scrap Metal for coming to the conclusion that, over and above the 54 crate load, there was a further 92 crate load, in the day in question.

[36.] The plaintiff contended that the evidence of Captain Simangaliso Solomon Baloyi (the arresting officer) does not show that at the time of the arrest, he had reasonable belief that the plaintiff had committed an offence and that he reasonably suspected the plaintiff of having committed an offence of defeating the ends of justice.

[37.] The plaintiff contended during cross-examination that he specifically denied the following:

- (a) He had allegedly confirmed that a 92 crate load existed;
- (b) Invoice M4969 related to 580kg of copper relating to a 54 crate load;
- (c) Invoice M4970 related to 800kg copper relating to 92 crate load;
- (d) He never admitted that he hid 92 crate load of copper; and
- (e) He never said sorry that he had hid the 92 crate load and that he insisted that there was only one load, consisting of 54 crates.

THE APPLICABLE LAW

[38.] I refer herein to the provisions of sections 40 and 50 of the Criminal Procedure Act 51 Of 1977('CPA") that are implicated in this matter. In terms of section 40(1)(a) a peace officer may without warrant arrest any person who commits or attempts to commit any offence in her/his presence. 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.

[39.] “[I]n the presence of” contained in the section is an expression whose meaning has not been interpreted consistently. Ordinarily, the expression means “*within the eye shot of that police official or on her/his immediate vicinity or proximity*”⁵

[40.] 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.⁶

[41.] On the other hand, section 50 reads as follows:

- “(1) (a) *Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.*
- (b) *A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.*
- (c) *Subject to paragraph (d), if such an arrested person is not released by reason that-*
- (i) *no charge is to be brought against him or her; or*
 - (ii) *bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after arrest...*”

⁵ In *Levuna v R* 1943 NPD 323 at 325 where Hathorn JP (Selke concurring) was of the view that a peace officer’s power to arrest without warrant should not be confined to cases where she/he can actually see the offender committing the offence, whilst in *Fancult v Kalil* 1933 TPP 248 at 251 it was held (in relation to section 26 of Act 31 of 1917- predecessor of section 40) that the power to arrest was limited to offences which could be seen in their entirety (compare also *Minister of Justice and Others v Tsose* 1950 (3) SA 88 (t) at 92 – 3.)

⁶ *Scheepers v Minister of Safety & Security* 2015(1) SACR 284 (ECG) at [20] – [21]

[42.] As held in the case of **Rautenbach v Minister of Safety and Security 2017 (2) SACR 610 (WCC)** par [43]) provides:

“The arrest is not unlawful because the arrestor exercised the discretion in a manner other than that deemed optimal by the court. The standard is not perfection, as long as the choice fell within the range of rationality... There is a measure of flexibility in the exercise of the discretion because the enquiry is fact specific.”

EVALUATION

[43.] The plaintiff testified that he escorted 54 crates of copper from the mine premises to Ellisras Scrap Metal but denied the existence of 92 crates. Mr Koekemoer on the other hand testified that he took out 92 crates of copper and put it in a container which was taken by Mr Ockert of Ellisras Scrap Metal and that he confirmed such with the plaintiff.

[44.] It is noteworthy that the plaintiff when confronted with the evidence of Mr Koekemoer regarding the 92 crates at a meeting with the arresting officer on 10 July 2014, did not deny Mr. Koekemoer's allegation at that time.

[45.] Despite the plaintiff and his witnesses' denial of the 92 crates, the invoices and weighing tickets suggested that there was not only one transaction as alleged by the plaintiff.

[46.] The evidence of the invoices and weighing tickets indicate that there were different payments of R34 000 in respect of 54 crates (580kg) and R58 000 in respect of 92 crates (800kg). The plaintiff's allegation of the splitting of the transaction cannot be sustained.

[47.] The above observation/conclusion is supported by the fact that the invoices and weighing tickets represent different information, amounts, weights and invoice numbers.

[48.] The arresting officer merely needs a *prima facie* case that an offence has been committed and not that he ought to have evidence to prove the case beyond reasonable doubt.

[49.] Based on the evidence that the arresting officer was in possession of the affidavit confirming the 92 crates and the two invoices, it was reasonable for him to effect arrest.

[50.] In the circumstances the balance of probabilities suggest that there was also a load of 92 crates of copper which left the Exxaro Grootgeluk Mine, which the plaintiff concealed from the arresting officer, thereby committing an offence in his presence.

[49.] Having traversed the evidence in this matter, I am of the view that on a balance probabilities the defendant demonstrated that the plaintiff was arrested in terms of section 40(1)(a) of the CPA. The arrest when viewed from the perspective of all the documents scrutinised and oral evidence presented by various witnesses, is in the circumstances justified.

ORDER:

[50.] In the result the following order is made:

- (a) The plaintiff's claim is dismissed with costs.



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 06 October 2022

APPEARANCES

FOR THE PLAINTIFF:	ADV. T DE KLERK
FOR THE DEFENDANT :	ADV. W MOTHIBE
DATE OF HEARING:	14 SEPTEMBER 2022
DATE OF JUDGMENT:	06 OCTOBER 2022