



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Editorial note : Certain information has been redacted from this judgment in compliance with the law.

Case number: 575/2019

In the matter between:

**B[...] G[...] K[...]**

Plaintiff

and

**MINISTER OF HOME AFFAIRS**

Defendant

---

**HEARD ON:** 08 SEPTEMBER 2021

---

**CORAM:** MATHEBULA, J

---

**JUDGMENT BY:** MATHEBULA, J

---

**DELIVERED ON:** The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 08 December 2021. The date and time for hand-down is deemed to be 08 December 2021 at 12H00.

---

## **Introduction**

[1] This is an action for damages allegedly suffered by the plaintiff as a result of unlawful arrest on 12 January 2018 and subsequent detention until 15 January 2018. It is common cause that the plaintiff, a 31-year-old Congolese man, admitted in the Republic as an asylum seeker was arrested by law enforcement authorities at a roadblock on the N3 toll route near Harrismith. The claim is founded on vicarious liability that the employee of the defendant was acting within the cause and scope of his employment executing his duties. The parties agreed that merits and quantum should be adjudicated simultaneously and the plaintiff bears the onus to prove his case.

## **Evidence**

[2] On 12 January 2018 the plaintiff together with two other people were on the N3 toll route driving from Durban to Pretoria when they encountered a roadblock manned *inter alia* members of the South African Police Service, Traffic Department and the employee of the defendant namely Mr [...] Molotsane. It was around 17H00. The police requested each one of them to produce their driver's licence, vehicle registration and identity documents. As foreigners they produced their documents allowing them to be in the Republic. These were taken to Mr Molotsane for verification who concluded that the other two's documents were valid and his was a fake.

[3] The reason conveyed to him by Mr Molotsane was that his asylum seeker temporary permit did not have two (2) barcodes. He was

taken aback because he had presented the document before to numerous law enforcement officers and it was never doubted by any of them. He only had a temporary permit and not in possession of the refugee booklet because he was in the process of applying for it.

- [4] He was arrested there and then and despite his explanation to Mr Molotsane that he was in the Republic legally he was driven to the police station. He was transported to the police station at the back of a motor vehicle marked "Immigration" to all appearances belonging to the defendant. His plea to the police officers at the police station to be released because he had committed no wrong also fell on deaf ears. They did not even afford him an opportunity to contact telephonically his next of kin. He was placed in a filthy and overcrowded cell where he battled to breath and developed a skin disease. He was eventually released on 15 January 2018 without making an appearance in court. His permit was handed back to him by his fiancée who apparently got it from Mr Molotsane.
- [5] His then fiancée M[...] B[...] also testified. She was contacted by her nephew who informed her about the arrest and detention of the plaintiff. She travelled to Harrismith with her cousin Mr A[...] N[...] and arrived there around 23H00. In her possession she had documents showing that the plaintiff's stay in the Republic was valid. She was informed by the police that they were waiting for verification of his status.
- [6] On 12 January 2021 she spoke to Mr Molotsane about the matter over the telephone and the next day they met face to face in an

office at the police station. Mr Molotsane told them that the plaintiff was in detention because he was an illegal immigrant. Despite showing him the plaintiff's documents, Mr Molotsane was not budging to release him or amenable to any form of bail. She was not even allowed to see the plaintiff. On 15 August 2018, Mr Molotsane handed her the plaintiff's permit and he was released.

- [7] The evidence of Mr A[...] N[...] largely corroborated that of Ms B[...] in material respect. He too testified about the meeting with Mr Molotsane and the handing over of the plaintiff's permit to Ms B[...] on the day he (plaintiff) was due to make the first appearance in court. He too, like Ms B [...], vehemently denied the version of Mr Molotsane that he did not meet with them at all.
- [8] The evidence on behalf of the defendant was narrated by the Immigration Officer Mr Molotsane who is based at the Harrismith Medium Office. He testified that he is well conversant with provisions of the Immigration Act, regulations and policies. These include apprehension and detention of illegal foreigners, deportation, prosecution, fraudulent documents, verification of fraudulent documents including permits *et cetera*.
- [9] On 12 January 2018 he was part of the roadblock set up on the N3 toll route near Harrismith led by a member of the South African Police Service named Colonel Mosia. Essentially it was a police operation. It is common cause that the vehicle the plaintiff was in was stopped and proper documents were demanded from them. His version is that the plaintiff was unable to present to him any document but could only provide his permit number. He explained that he left his document(s) in Pretoria. He advised Colonel Mosia

about it and the plaintiff was requested to park his motor vehicle on the side of the road. He advised him to make means to ensure that the permit is brought to him. Regrettably at the time the roadblock was concluded, at around 20H00, the plaintiff was still in the same position.

[10] At the time the plaintiff was arrested, his office was already closed for the day. All those who were arrested were detained at Harrismith Police Station. He explained that he made the statement for the police docket because it is a policy to do so. He flatly denied transporting the plaintiff to the police station from the point where he was arrested. After completing his work for the day, he left for his residence in QwaQwa and did not discuss the matter pertaining to the plaintiff with anyone. He was nowhere near Harrismith over the weekend *id est* 13 and 14 January 2018.

[11] On 15 January 2018 he accessed and checked on his system the validity of the permit number provided by the plaintiff. He confirmed that indeed his permit was valid and his stay in the Republic was legal. He informed the investigating officer about it and the plaintiff was released. It was put to him that he acted unreasonably to verify the permit only after two (2) days. His response was that the office and the system were inaccessible to him over the weekend. To demonstrate his *bona fides*, he went to work earlier than his official hours in order to assist the plaintiff.

### **Submissions**

[12] Counsel for the plaintiff contended that the arrest and detention was unlawful. She pointed out that the unlawful arrest and

detention of an individual constitutes a significant encroachment on the rights enshrined in the Bill of Rights.<sup>1</sup> I understand this submission to be an emphasis that Mr Molotsane's actions breached the law. In that regard the onus to prove the lawfulness of the arrest and detention rests on the defendant as confirmed in numerous decisions in our courts.<sup>2</sup> The alternative agreement seems to be that even if the arrest is lawful, the official executing the arrest must apply his mind to the detention and the surrounding circumstances. On this point she relied on the judgment of Willis J in **Mvu v Minister of Safety and Security and Another**.<sup>3</sup>

[13] The approach of counsel for the defendant sought to counter the submissions above and focussed primarily on the issues as defined by the parties in their pleadings. He relied on the passage in the judgment of **Jowell v Bramwell-Jones and Others** as authority that the court, just like the parties, is bound by the same pleadings that served before it.<sup>4</sup> He submitted that the evidence placed before court was in direct conflict with the pleadings. He pointed out that it was crystal clear that the plaintiff was arrested by members of the South African Police Service not Mr Molotsane as shown by evidence led during the trial. The plaintiff was simply making out a case that was not pleaded. He urged me to accept the evidence that Mr Molotsane did not arrest the plaintiff and follow the judgment of **Ngwenya v Minister of Home Affairs**<sup>5</sup> that the detention of the plaintiff was ordered by the South African Police Service and cannot be held against the defendant.

---

<sup>1</sup> Thandani v Minister of Law and Order 1991 (1) SA 702 (E) at 707B.

<sup>2</sup> Cele v Minister of Safety and Security 2007 (3) All SA 365 (A).

<sup>3</sup> 2009 (6) SA 82 (GSJ) at para 10.

<sup>4</sup> 1998 (1) SA 836 (W) at 898F-J.

<sup>5</sup> (A3014/2017) [2017] ZAGPJHC 222 (15 August 2017).

## **Pleadings**

[14] Prior to dealing with the onus of proof and evaluation of the evidence before me, a brief discussion of the allegations in the pleadings will suffice. The plaintiff pleaded that he produced a valid asylum seeker permit but it was considered to be fraudulent by Mr Molotsane.<sup>6</sup> He was subsequently arrested by members of the South African Police Service and taken to Harrismith Police Station under the orders of Mr Molotsane.<sup>7</sup> Lastly he was detained at the aforementioned police station at the instance of Mr Molotsane.<sup>8</sup> It is alleged that Mr Molotsane failed and/or neglected to inform him of his rights in terms of section 34(c) of Immigration Act 13 of 2002.<sup>9</sup> The arrest and subsequent detention that he was subjected to, was without cause, wrongful and unlawful.<sup>10</sup>

[15] On the other hand, the defendant pleaded that the plaintiff was arrested by members of the South African Police Service. This means those who were under the command of Colonel Mosia at the roadblock. The defendant pleaded specifically that Mr Molotsane did not possess powers to order the police to arrest the plaintiff. The defendant denied that the arrest and detention of the plaintiff was unlawful, wrongful and without cause.

## **Onus**

[16] There is no disagreement between the parties about where the onus of proof must lie. In this matter it has been proved that the plaintiff was arrested and subsequently detained. It is trite law that

---

<sup>6</sup> Paragraph 5.3 of the Particulars of Claim.

<sup>7</sup> Paragraph 5.4 of the Particulars of Claim.

<sup>8</sup> Paragraph 6 of the Particulars of Claim.

<sup>9</sup> Paragraph 7.3 of the Particulars of Claim.

<sup>10</sup> Paragraph 8 of the Particulars of Claim.

the onus of proving that the arrest and detention was lawful lies with whoever is responsible for such detention. It must be justified by such an official deriving such powers from the relevant law and that he was acting within the cause and scope of his employment in executing such duties.

## **Discussion**

- [17] This brings me to the consideration of the body of evidence tendered whether the necessary onus has been discharged in order to grant the appropriate relief. There is no dispute between the parties that the plaintiff was arrested at a roadblock. The undisputed evidence is that this roadblock was controlled and led by members of the South African Police Service. The defendant, as a government department and represented by Mr Molotsane was an invitee specifically to provide specialised services relating to immigration matters.
- [18] The issue is whether the plaintiff presented his temporary asylum seeker permit as he testified or he failed to do so and only provided his permit number as per Mr Molotsane. This goes to the heart of whether the arrest was unlawful, wrongful and without cause. The versions must be weighed against each other.
- [19] The guidelines on how such irreconcilable versions should be approached was set out by the Supreme Court of Appeal in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others** as follows: -

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another.

The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”<sup>11</sup>

[20] There is no evidence that the plaintiff and Mr Molotsane knew each other from the bar of soap. It can be accepted that there is no prior dispute between them. There is no evidence that Mr Molotsane could have picked on him for any particular reason. The other two (2) people who were with the plaintiff produced the proper documents in the form of the booklet and nothing untoward happened to them. They too were foreigners, section 3(1)(e) of the Immigration Act grant powers to duly authorised officers of the defendant to request anyone suspected of being a foreigner to produce a permit. Even on the evidence of the plaintiff, he did not have the booklet. The fact that the document he had with him on the day has never been questioned before that day, does not advance his case.

[21] The version of Mr Molotsane is more probable that the plaintiff was stopped and allowed to park on the side of the road. This was to enable him to ensure that the correct document was brought to him. He was not arrested at once. I find it strange that the plaintiff did not call his companions as witnesses to corroborate him on the events that unfolded at the roadblock. It simply does not add up to me why Mr Molotsane would single him out for no apparent reason if he had a proper asylum seeker permit with him. There is no evidence that he took his matter to the leader of the roadblock or any other high ranking police official that he was being unfairly

---

<sup>11</sup> 2003 (1) SA 11 (SCA) at para 5.

treated by Mr Molotsane. His version is rendered improbable in the circumstances.

[22] On the evidence before me I find that he was not in possession of the asylum seeker permit on the day. Mr Molotsane explained with candour, frankness and detail of how he came into contact with the plaintiff and the essence of their discussions. The plaintiff was afforded an opportunity to produce proper documents but failed to do so. The plaintiff was not a good witness because he could not explain on what grounds he alleges that his document is the correct asylum seeker permit. He spent three (3) hours on the side of the road and despite facing being imprisoned did not even at once contact his fiancé or family. There is no reason known that Mr Molotsane could have queried his asylum seeker permit, assuming he had it, for no apparent reason. On this aspect, he is creating his evidence to sway the verdict in his favour. Failing to produce the correct documents is contravention of the laws of the Republic and the arrest and consequent detention will be deemed lawful.<sup>12</sup>

[23] It was pleaded that the plaintiff was arrested by the members of the police under the orders of Mr Molotsane. There is no evidence that indeed he issued such orders and the details thereof. What is fatal to the case of the plaintiff is that he did not present any evidence that he had such orders. The uncontested evidence is that he

---

<sup>12</sup> Section 34(1) of the Immigration Act 13 of 2002 provides that –

“Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned...”

participated at the roadblock at the invitation of the police and it was sanctioned by his immediate supervisor. At best Mr Molotsane could have caused the arrest as provided for in the Immigration Act and given the prevailing circumstances at the roadblock. The submission that he does not have such powers must be upheld.

[24] The paginated bundle headed “Defendant’s Index to Trial Documents” was handed in per agreement and relied on during the trial by both parties. These are the contents of the docket. Page 1 which is the front cover of the docket clearly mentions the name of the investigating officer and Mr Molotsane is the complainant. I find nothing untoward that he made the statement he had to because he was the complainant.

[25] Turning to that statement, it will be noted that his written version is the same as his *viva voce* evidence before this court. That shows consistency and enhances the probabilities that his version is the correct one.

[26] These documents reveal that the plaintiff was in custody under the South African Police Service not the defendant. My considered opinion is that they should have been litigants in this matter. I pause to add that they are not a party to these proceedings and I will not make any finding against them. Certainly once the matter was saddled with the police, Mr Molotsane had no powers to negotiate or grant bail. It is the Investigating Officer who will primarily deal with such matters. In my view, the meeting that was alleged to have taken place on Saturday, 13 January 2018 did not happen. The details as to where it took place are sketchy. The uncontested evidence is that Mr Molotsane does not have an office

at the police station. It was argued that both Ms B[...] and Mr N[...] were able to identify Mr Molotsane. The identification relied on was similar to dock identification in criminal matters. No evidence pertaining to details was led by the plaintiff in a convincing manner that this is not a case of wrong identity. In any event such meeting would have been pointless for the reasons advanced above, Mr Molotsane was not in Harrismith and he had no access to the verification system. On the probabilities the version of the plaintiff is supported by evidence.

[27] The next point to be considered was not pleaded but raised during cross examination. The allegation is that the time taken by Mr Molotsane to verify the permit was inordinately long and this is an indication that the plaintiff was unreasonably deprived of his liberty. The plaintiff was stopped at a roadblock at about 16H30 and only taken to the police station at around 20H00 on a Friday. At that time the office of the defendant was closed and he had no access to the verification system. I accept that he could do nothing to assist the plaintiff over the weekend. On Monday, 15 January 2018 he reported for duty before time and immediately dealt with the plaintiff's matter. In the circumstances that was the first available opportunity. I do not find merit on the submission that he unreasonably delayed such verification. He was prompt in the execution of his duties and could not have acted in any other manner.

[28] It was pleaded that Mr Molotsane contravened in particular section 34(c) of the Immigration Act 13 of 2002.<sup>13</sup> Reliance on this section

---

<sup>13</sup> This section reads as follows: -

“(1) ... –

is misplaced. Section 34 deals with deportation and detention of illegal foreigners. Specifically, section 34(1)(c) provides that a foreigner shall be informed of his rights set out in paragraphs (a) and (b) upon arrest in a language that he/she understands. These are in cases where a decision for his/her deportation has been taken and that he is afforded the right to appeal. Paragraph (b) presupposes a detention for the purpose of deportation. This is not applicable in the present matter.

[29] There was no decision taken to deport him nor was his detention for the purpose of his deportation. On this ground too, the plaintiff cannot succeed in his claim.

### **Costs**

[30] Both counsel agree that the losing party must pay the costs. There are no reasons to depart from the principle that costs ordinarily follow the result.

### **Order**

[31] For the foregoing reasons, I make the following order: -

31.1. The plaintiff's claim against the defendant is dismissed.

31.2. The plaintiff is to pay the costs of suit.

---

a) ...;

(b) ...;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) ...; and

(e) ..."

M.A. MATHEBULA, J

On behalf of plaintiff:  
Instructed by:

Adv. A. Booyse  
Campbell Attorneys  
C/O Honey Attorneys  
BLOEMFONTEIN

On behalf of defendant:  
Instructed by:

Adv. M.S. Mazibuko  
State Attorney  
BLOEMFONTEIN

/kwapa