THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1017/2020

In the matter between:

SANDILE BIYELA **APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36 (01 April 2022)

Coram: PETSE AP, DLODLO JA, MUSI, MATOJANE and MOLEFE AJJA

Heard: 15 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 01 April 2022.

Summary: Delict – unlawful arrest and detention – inadmissible hearsay evidence can form the basis of a reasonable suspicion by a peace officer.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court Pietermaritzburg (Koen J *et* Bezuidenhout J concurring, with Mngadi J dissenting sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced by the following:
'The appeal is dismissed with costs.'

JUDGMENT

Musi AJA (Petse AP and Dlodlo JA and Matonjane and Molefe AJJA concurring):

[1] This appeal, which is with the special leave of this Court, concerns the arrest and detention of the appellant, Mr Sandile Biyela. The controversy to be determined is whether his arrest and detention by members of the South African Police Service (SAPS) were unlawful.

[2] The appellant successfully instituted action against the respondent, the Minister of Police, in the Durban Magistrate's Court for unlawful arrest and detention. Judgment was granted in his favour in the sum of R160,000 with interest plus costs.

[3] The respondent was aggrieved by the outcome and appealed to the KwaZulu-Natal Division of the High Court, Pietermaritzburg. After the two judges to whom the appeal was initially allocated could not agree, a third judge joined the bench to hear the appeal afresh and resolve the deadlock. The majority (Koen *et* Bezuidenhout JJ) upheld the appeal, however, Mngadi J dissented and concluded that he would have dismissed the appeal.

[4] Before traversing the facts of this matter, I pause to deal with a preliminary issue that was raised by the appellant. In his amended particulars of claim, the appellant alleged that on Friday, 18 May 2012 at Durban Central, he was arrested without a warrant by members of the SAPS for the offence of intimidation. He was, thereafter, detained at the Durban Central Police Station and appeared in court on Monday, 21 May 2012. The case against him was postponed and he was released.

[5] The respondent's plea was a bare denial which had the effect that it was accepted that the appellant had the onus to prove his arrest and detention. That being the case, the appellant assumed the duty to begin. During his cross-examination, counsel for the respondent put to him that he was indeed arrested by members of SAPS. Since that statement conflicted with the plea, counsel for the appellant objected.

[6] The court adjourned for the parties to discuss the issue. They resolved the issue and the respondent applied to amend his plea. In the amendment the respondent admitted that the appellant was arrested without a warrant on 18 May 2012, in the area of Warwick Avenue, by members of the SAPS and that he was detained until Monday, 21 May 2012. The respondent amplified its plea by setting out factual allegations that purportedly led to the arrest and detention of the appellant. The magistrate allowed the amendment.

[7] Although the appellant testified first, the matter was nevertheless conducted with the common understanding that the onus of proving that the arrest and detention were lawful rested on the respondent. The court *a quo* described the bare denial as a 'tactical denial to avoid the defendant (respondent) attracting the onus to begin'. Before us, counsel for the appellant argued that the appellant was prejudiced by this 'tactical plea' because it rendered his trial unfair. He submitted that the trial was unfair because the appellant had to testify first and that the trial was conducted on the understanding that the onus was on the appellant to prove both his arrest and detention.

[8] It is unacceptable for a party to plead a bare denial in the face of straightforward and undeniable allegations against such party. It goes without saying that a trial by ambush is unfair; courts should be very slow to allow a party to mount a case at trial other than the one that the party has pleaded. In *Minister of Safety and Security v Slabbert*[1] it was stated that:

'The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial.'[2] (Footnote omitted.)

[9] In this matter, the respondent pleaded a bare denial and persisted with such denial in circumstances where it obviously knew that the information at its disposal is incongruent with such plea. This must be so because the statements of the respondent's witnesses that were disclosed to the appellant clearly show that the appellant was arrested by members of the SAPS.

[10] The matter was set down, on approximately six occasions, for a pre-trial hearing before a magistrate. The respondent failed to attend all the pre-trial conferences. The respondent's failure to attend the pre-trial conferences compounds its egregious abuse of court process. The issue relating to the bare denial could have been raised and addressed at the pre-trial stage. The respondent's conduct was totally unacceptable and must be deprecated.

[11] However, having regard to the total circumstances of this case, the stage at which the issue was discovered and addressed and the manner in which the trial was subsequently conducted, I am not convinced that the prejudice was of such a nature that it should vitiate the entire proceedings. I now turn to the facts.

[12] Warrant Officer Sithole (Sithole) and Constable Ngcobo (Ngcobo) testified that on 18 May 2012 they were on duty in the Durban Central Business District (CBD). Earlier in the day, taxi drivers had marched to the offices of the eThekwini Metro Police in order to hand over a memorandum protesting the impoundment of their vehicles.

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[1] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; (2010) 2 All SA 474 (SCA).
[2] Ibid para 11.

[13] At approximately 14h20 they received a report from Constable Saunders (Saunders), who was monitoring CCTV cameras, about the occupants of a white minibus taxi who were engaged in unlawful activities at the Warwick Avenue Triangle. They were given the location and registration number of the taxi. They drove to Warwick Avenue where they saw the taxi and activated their police vehicle's siren in order to stop the taxi. It stopped and the occupants were asked to alight from the taxi. Sticks, stones and a rubber hammer were found in the taxi or in the possession of some of the passengers. All 12 males who were in the taxi were arrested and taken to the Durban Central Police Station.

[14] Sithole testified that Saunders had informed them, via their radio, that the occupants of the white taxi 'just smashed a DTM bus' and jumped into the taxi and drove in a northerly direction on Warwick Avenue. They rushed to the scene where they stopped the taxi. He and Ngcobo jumped out of the car in which they were travelling, went to the taxi and instructed the driver to alight. He identified himself, explained the reason for stopping the taxi and requested permission to search the driver. He was granted permission. Nothing illegal was found in the driver's possession.

[15] He then requested the driver to accompany him to the left side of the taxi and opened the sliding door. The occupants were requested to alight from the vehicle and once they were outside, he searched the taxi and found concrete stones and sticks that were abandoned. They arrested all the males for intimidation and public violence and requested their colleagues to come to the scene with a police van. They came and 12 people were transported to the police station while they followed the police van in their own vehicle. Sithole denied that the police van executed zig-zag manoeuvres on the road on the way to the police station, which was one of the allegations levelled against them.

[16] Likewise, Ngcobo testified that Saunders had informed them that a group of 12 males alighted from a taxi, pelted a bus with stones and forced the passengers to alight from the bus after which they climbed back into the taxi and drove off. When he saw the taxi for the first time there were males hanging out of the windows of the taxi

with sticks in their hands. He testified that before they stopped the taxi, they called Saunders in order to verify that it was indeed the taxi that they were supposed to stop. He confirmed.

[17] After stopping the taxi, Sithole searched the occupants of the taxi while Ngcobo was observing. Although he could not recall exactly what was found, he said that Sithole found a rubber hammer, sticks and stones in the taxi. All the males were informed that they were going to be arrested for public violence and malicious injury to property. After their arrest they were transported to the police station in a police van.

[18] Constable Rajen Saunders testified that he is stationed at the Durban Central Police Station, but was stationed at the Metro CCTV room at the time. His duties entailed monitoring CCTV for crime or related incidents. He would then report any crime or incidents to radio control who would then be put into direct contact with the vehicle on the ground and communicate with the police officers in the vehicle. His job also entails downloading any camera footage of an incident. He confirmed that he was on duty on 18 May 2012. However, he could not recall any incident that occurred on that day. During cross- examination, he confirmed that he could not recall the incident referred to by Sithole and Ngcobo. At some stage, he categorically stated that no report was ever given as testified to by both Sithole and Ngcobo.

[19] Detective Constable Zikhalala, who was the investigating officer in respect of the criminal case testified that he took a warning statement from the appellant. The appellant informed him that ‘he will make a statement at court’.

[20] For his part, the appellant testified that he is a tractor operator. On 18 May 2012, he went to work and thereafter went to town to buy groceries. He stays in Kwa-Mashu and commutes by taxi. Between 15:00 and 16:00, he went to the taxi rank and boarded a taxi together with approximately 12 other males. While seated, he saw that the area at the taxi rank was full of police officers. Whilst the taxi was still stationary, the police approached it. They opened the taxi door, grabbed him and pulled him out of the taxi. He fell and the police hit, kicked and swore at him.

[21] They pulled him up and hurled him into a police van. There were other persons in the van. Whilst driving to the police station the police allegedly executed zig-zag manoeuvres which had the effect that they were being hurled from one side of the van to the other and bumping into each other. Once they arrived at the police station, they were told to sit on the floor. When he enquired why he was arrested, the police swore at him and placed him in the police cells until the Monday when he was released. This was his first brush with the law. He was very traumatised by the incident and consulted a doctor after the incident.

[22] In the court of first instance, the magistrate made terse and unsubstantiated credibility findings. She found that because Sithole and Ngcobo based their arrest on the information received from Saunders, no reliance could be placed on their testimonies, especially when 'considering their contradictions as well'. She did not elaborate on these contradictions. Rather, she found that 'on the evaluation of the evidence and the legal position the entire arrest depended solely on the evidence of radio command, which the court found inadmissible … hence I find that the defendant failed to discharge the onus.'

[23] The majority, in the court a quo, found that the magistrate erred in concluding that the information that qualified to be considered whether a reasonable suspicion to arrest existed, had to be evidence which would be admissible in a court of law. They properly characterised the issue and said the following:

'The issue is not whether there is evidence admissible in a court available to the arresting officer, but whether there was information available which would cause him to reasonably suspect the suspect of having committed the relevant offence. The reasonableness requirement therefore extends inter alia to the reliability or accuracy of the information upon which an arrest is founded, including the quality and ambit thereof.'

[24] Having properly characterised the nature of the enquiry, the majority had regard to the credibility of the witnesses. They concluded that they 'had no hesitation in accepting the evidence of Sithole as corroborated in every material respect by Ngcobo as more probable.' They found that there is no reason why the police officers would fabricate their testimonies relating to the taxi being in motion and them stopping it by activating the siren of their vehicle, if that did not occur.

[25] They found that the appellant's version that the police van in which they were being transported drove in a reckless zig-zag manner to the police station can safely be rejected, because it is improbable that the police would do so in a built-up area, in full view of the public and their colleagues who were following them.

[26] The majority concluded that the court of first instance misdirected itself by not having regard to the information available to the arresting officers to establish a reasonable suspicion at the time of the arrest. If it had done so, the majority concluded, it would have found that the arrest of the appellant was lawful.

[27] The minority found that the arresting officer must prove the basis of his or her suspicion. He or she must prove what he or she observed which caused him or her to reasonably suspect, and, if not based on his or her observation, he or she must prove the information he or she had which caused him or her to formulate the suspicion. The learned judge characterised the enquiry as follows:

'In this case the issue is not that the report as contained in an inadmissible evidence (sic). In this case the police failed to produce the report when the matter was tried before the trial court. They did not fail to produce it because it was inadmissible, it did not exist.'

[28] The learned judge reasoned that in his view the issue was not whether the information relayed to the arresting officers afforded sufficient grounds to form a reasonable suspicion. Rather, the issue was whether the arresting officers could prove that they had formed a suspicion and that the suspicion was reasonable without producing the information on which they allegedly formed the suspicion. He concluded that the case was decided on the basis of the respondent's failure to discharge the onus to justify the arrest because there was a failure to produce the report on which the arrest was based.

[29] Counsel for the appellant contended that the testimonies of Sithole and Ngcobo were inadmissible hearsay and that the court of first instance was correct in finding that for that reason the respondent did not discharge the onus of proving that the arrest was lawful. Counsel on behalf of the respondent, on the other hand, argued that the

court a quo was correct in its characterisation of the nature of the enquiry as well as the credibility of the witnesses.

[30] Section 40(1)*(b)* of the Criminal Procedure Act[3] provides:

'A peace officer may without warrant arrest any person –

(a) who commits or attempt to commit any offence in his presence;

(b) whom he reasonably suspects of having committed any offence referred to in schedule 1, other than the offence of escaping from lawful custody; …'

[31] In order to prove that the arrest was lawful, the respondent has to prove that:

(i) the arresting officer was a peace officer;

(ii) the arresting officer entertained a suspicion;

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

(iv) the suspicion rested on reasonable grounds.[4]

[32] It is common cause, in this matter, that the arrest was effected by a peace officer. It is further common cause that the appellant was allegedly suspected of having committed a Schedule 1 offence. The only controversies in this matter are whether the arresting officers could have formed a reasonable suspicion based on hearsay evidence and the credibility of the arresting officers.

[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)*(b)* is objectively justiciable.[5] It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

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[3] Criminal Procedure Act 51 of 1977.

[4] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H.

[5] *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579H.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly.[6] Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.

[37] The mere fact that Saunders could not recall that he made the report is not dispositive of the matter. The absence of his recollection does not signify the absence of a report made by him. If the testimonies of the recipients of the report are credible, and it is clear that they genuinely acted on the information received from Saunders, there would be nothing wrong in concluding that the suspicion was reasonable under the circumstances because they received it from a credible source. That source was one of their own colleagues specifically tasked with monitoring CCTV cameras in order to report to them, in real-time, the scene of the crime, the kind of crime committed and a description of the person or persons who committed the crime.

[38] I, therefore, agree with the majority's characterisation of the issues and its conclusion that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not. Furthermore, I agree with the conclusion that the court of first instance erred in its conclusion that the police officers could not form a reasonable suspicion because such suspicion was based on inadmissible hearsay evidence.

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[6] *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G.

[39] However, the majority did not upset or criticise the magistrate's credibility findings. They did not point out any factual misdirection committed by the magistrate. Neither did they state that the magistrate's credibility findings were wrong or insupportable. They did not comment, at all, on any of the magistrate's credibility findings and they did not state on which ground they were at large to interfere with the magistrate's credibility findings. This was a misdirection because the majority did not have regard to the entrenched principles pertaining to a court of appeal's powers to interfere with the credibility findings of a trial court.[7]

[40] The court a quo downplayed the materiality of the contradictions and omissions in the testimonies of Sithole and Ngcobo. That they contradicted each other as to the exact content of the report that was made by Saunders is beyond question. They both testified that when they followed the taxi, they saw men brandishing or holding sticks but during cross-examination they could not explain whether they saw one or more of the occupants of the taxi brandishing or wielding sticks.

[41] During cross-examination, Sithole testified that he searched the occupants of the taxi and found some carrying sticks and some carrying stones. When he was pressed to indicate how many were carrying sticks and how many were carrying stones, he said that he could not recall. He then conceded that he could not recall whether it was one stick or more than one stick. He also did not make mention of any of the occupants of the taxi carrying a rubber hammer. It was also pointed out to him by counsel for the appellant, that in his statement made immediately after the arrest he stated that all the occupants in the taxi were involved in damaging the bus and that they also damaged police vehicles with the registration numbers and letters BRH567B and BRB112B. He conceded, without satisfactory explanation, that he did not mention this aspect in his evidence-in-chief. It was also put to him that he previously testified in other trials relating to the same incident and that in those trials he did not mention that police vehicles were damaged or a rubber hammer was found in the possession of one of the taxi's occupants.

[7] *Rex v Dhlumayo and Another* 1947 (2) SA 677 (A) at 705.

[42] Ngcobo did not mention that Sithole first spoke to and searched the taxi driver before he (ie Sithole) went to the left side of the vehicle. Ngcobo testified that before they stopped the taxi, they verified with Saunders whether it was indeed the correct vehicle. Yet, this was not mentioned in his statement. Ngcobo conceded during cross-examination that this was a very important aspect which he omitted from his statement. It was then put to him that he embellished his testimony in order to give it an aura of truthfulness. It was also pointed out to him that Sithole did not mention anything about the verification of the identity of the taxi before it was stopped.

[43] In this matter the respondent's case faced insurmountable obstacles. First, Saunders could not recall that he made the report to his colleagues, and at some stage he said that he made no such report. The recorded CCTV footage, if it ever existed at all, is also irretrievably lost. Secondly, Sithole and Ngcobo contradicted each other on material issues. In my view, the majority downplayed the contradictions in the testimonies of the last-mentioned witnesses. Additionally, these material contradictions undermined the credibility of their evidence.

[44] The majority did not criticise the gravamen of the appellant's testimony. Instead, they, for the most part, referred to and over-emphasised peripheral issues. The court of first instance concluded that the appellant's evidence was 'straightforward and clear with little or no contradictions'. This finding cannot be faulted. There was therefore no tenable basis to justify interference with those findings. Indeed, none is discernible from the majority judgment of the court a quo.

[45] In my judgment the court a quo should have concluded that the respondent did not prove that the appellant was arrested lawfully. Therefore, this appeal ought to succeed. And there is no reason why costs should not follow the result.

[46] The quantum determined by the court of first instance was not challenged. Thus, no more need be said about it in this judgment.

[47] I accordingly make the following order:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced by the following:

‘The appeal is dismissed with costs.’

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C MUSI

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	S Khan SC
Instructed by:	Seelan Pillay & Associates, Durban
	Webbers, Bloemfontein.
For first respondent:	N D Myeni
Instructed by:	State Attorney, Durban
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