


REPUBLIC OF SOUTH AFRICA



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

CASE NO:6109/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
SIGNATURE	<u>28 FEBRUARY 2025</u> DATE

In the matter between:

GEORGE LAMBRAKIS

Plaintiff

and

MINISTER OF POLICE

First Defendant

**NATIONAAL COMMISSIONER OF SOUTH AFRICAN
POLICE SERVICES**

Second Defendant

**COMMANDING OFFICER OF THE SOUTH AFRICAN
POLICE STATION SERVICE**

Third Defendant

**MEMBERS OF THE SOUTH AFRICAN POLICE SERVICES
UNKNOWN TO THE PLAINTIFF**

Fourth Defendant

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 28 February 2025.

MALUNGANA AJ

INTRODUCTION

- [1] This is an action for damages instituted against the defendants (collectively referred to as “the defendant.”), arising from unlawful arrest and detention of the plaintiff by members of the South African Police Services (SAPS). The arrest took place during the outbreak of COVID-19 pandemic in April 2020. In order to curb the spread of the virus, our government, as in other countries, declared a state of national disaster. The Minister of Cooperative Governance and Traditional Affairs at the time, published the amended Regulations in terms of section 27(2) of the National Management Act, 57 of 2002 (‘the Act’) under Government Gazette No.43096 on 15 March 2020. The regulations placed certain restrictions on the sale of certain items at supermarkets, visitations, gatherings and movement of people. Regulation 11 of the regulations introduced offences and penalties on people and entities who have failed adhere to the restrictions and measures aimed at curbing the spread of the COVID-19 virus.
- [2] The claim is being defended by the Defendant, who has since filed a plea. According to the defendant, the plaintiff was arrested pursuant to s 40(1)(a) of the Criminal Procedure Act, 51 of 1977 (“the CPA”) for selling hot food in contravention of Regulation 11 of the Act.
- [3] At the commencement of the trial, there was a confusion as to whether the trial would run in respect of both merits and quantum. I was at first, disposed to hear the matter in

respect of both issues. However, due time constraints within which the trial had to be completed, I reserved my order until such time that the merits of the matter have finalized. In the end I ordered that the issues be separated in terms of Rule 33 of the Uniform Rules of Court. Consequently, the trial before me proceeded on merits with the issue of quantum postponed for later determination.

RELEVANT FACTS

- [4] At the outset, I sketch out the events that gave rise to this action, briefly as follows: The plaintiff was who was performing his duties as a manager at Whitfield Super Spar was arrested by members of the SAPS, on 29 April 2020. According to the Plaintiff the police arrested him for allegedly contravening regulation 11B of the Disaster Management Act of 2020, in that he was allegedly selling hot food to the public which offence constituted an offence under the Act.
- [5] In its plea, the Defendant contends that the Plaintiff was lawfully arrested by the peace officer on solid grounds pursuant to the section 40(1)(a) of the Criminal Procedure Act, 51 of 1977('the CPA') read with section 11 (B) (1) and (d) of Disaster Management Act, 2020, for contravening Regulation 11A of the Act. Contrary to what is alleged by the plaintiff, the plaintiff was only detained for 2 and half hour while being processed until he was released on bail of R1500.00. The Defendants further contend that the plaintiff was kept in the holding cell, and not prison.
- [6] It is trite that there are four jurisdictional requirements which authorizes arrests without a warrant: They are: that a person arresting must be a peace officer; who entertained a suspicion, that the suspicion was that the arrestee had committed a Schedule 1 offence and that the suspicion rested on reasonable grounds.¹
- [7] It follows that in the present case, the Court must determine whether the defendant has discharged its evidentiary burden as envisaged in section 40 of the CPA, if not, the arrest is unlawful, so is the subsequent detention.

¹ Duncan v Minister of Law and Order [1986] ZASCA 24 [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H.

EVIDENCE

- [8] The starting point is the evidence by witnesses. As is often the case in these kinds of matters, the Defendant bears the onus to begin and to prove that the arrest was justifiable. The Defendant led the evidence of its first witness, Sergeant David Makung, the arresting officer. He testified that he was stationed at Boksburg Police at the time of the incident. Whilst busy performing his crime prevention duties, he received a complaint via his phone from client service centre (CSC). The complaint was to the effect that the Spar at Whitfield was not complying with the Disaster Management Act, in that they were selling hot cooked food. He responded to the complaint by visiting the concerned store accompanied by Constable Nwepe.
- [9] On his arrival at the Whitfield Super spar, Sergeant Makung observed that there was no security to control people on sight. There were lot of people and, social distancing was not observed. Cooked food was being sold by the Spar employee who stood behind the closed glass window. He questioned the employee about the sale of cooked hot food, who called his superiors to come and deal with the issues raised by the police. The employee further informed him that he was instructed by the employer to sell the food. His superiors, two white males, subsequently emerged and enquired what the problem was. The witness informed them that he intended to arrest them for selling cooked food in contravention of the Disaster Management Act. Their response was that they had a permission to sell the food, and they were in charge. He then placed them under arrest and put them into back of the police van, then drove to the police station. At the police station the duo were handed to the CS. No one complained of the injuries. The docket was then opened and the necessary paperwork done. It took about 30 minutes to open the docket and after paperwork they were taken to the cells. Asked about how the duo were taken to the station, he testified that they were transported in two separate vehicles.
- [10] Under cross examination Sergeant Makung testified that there was a second police vehicle that came to the scene. However, he could not give account of the number of police who were in the vehicle. When it was put to him that the plaintiff would testify that there were about six police at the scene. His response was that police officers were not supposed to exceed 3 in one car. He maintained that he was the officer who arrested the plaintiff. Regarding his knowledge and training in relation to implementation of the

regulations, his testimony was to the effect that they were offered a training course, and they were also given a booklet about the regulations. He understood that selling cooked food was not allowed under the Act.

- [11] Throughout his testimony Sergeant Makung maintained that the Spar employee was busy dishing out food to the customers whilst he stood in front of the counter. The customers were getting food out of the employee's hand, not pre-packaged food as alleged by the plaintiff. Asked if he could distinguish business from individual persons. He responded that if the manager of the business is found to be giving instructions to the employee, he would arrest the manager.
- [12] Sergeant Makung also testified that he could not arrest the employee who was dishing out hot food because he could not access him through the glass counter.
- [13] The Defendant also led the evidence of Constable Kamokgelo Nwepe. He testified that at the time of the incident, he was a Constable stationed at Boksburg Police Station. He accompanied Sergeant Makung as a crew on crime prevention mission. While performing their duties, they received a complaint from CSC to the effect that there were people contravening the National Disaster Management Act at Whitfield Super Spar. They drove to the location and observed that the backup vehicle was already on the scene. The shop was also full of customers, and there was no social distancing. There was a person standing behind the food warmer. He questioned the employee behind the warmer about the sale of hot food who responded that the employer had instructed him to sell the food. Two white men emerged and one of them informed the police that they had permission to sell the food. Constable Makung then arrested the two men and put one of them in the vehicle which he was driving, and the other in the backup vehicle.
- [14] Constable Nwepe further testified that when they arrived at the police station, he took out some stationery, opened the docket. It took about an hour to open the docket. He denied that the Plaintiff was grabbed by the hand, because he the latter was cooperating. Afterwards the pair were released on bail.
- [15] During cross examination Constable Ngwepe testified that he did not know the identity of the person who notified them of the complaint from SCS. He could also not recall the identities of the backup officers. He cannot recall the exact number of people at Spar Whitfield. He saw pap being sold at the store and it was not pre-packaged. He denied

that the customers could grab pre- prepared pap from the counter. He was not present when the plaintiff was placed in the police holding cell.

[16] The Plaintiff testified that he is an operational manager at Whitfield Spar. His responsibility was by and in large the administration of the store. On the day in question, he was in the director's office when he received a phone call informing him that the SAPS have arrested Citradi. As he got down to the floor, he observed that the main door of the store was closed, and there were about 6 police officers. He told the manager that he was the manager. The police took him to the food section and showed him the prepacked food on the bain marie. The police informed him that he was contravening the Disaster Management.

[17] He denied that the store was selling cooked hot food. He testified that during Covid the glass from the counter to display the prepacked food over the foam trays. This was to enable the customers to pick up the food which was already bar coded.

[18] Despite his denial the police arrested him. He described the policeman who arrested him as a tall man in blue overall. As he arrested the Plaintiff, he told him that he was going to spend the night in jail. He pulled the Plaintiff towards the entrance of the store and led him to the police van. He testified that the store manager, Stereid, was already arrested and was inside the police van. During the Plaintiff's arrest, the police forcefully pushed him into the van. This caused a serious discomfort as he was handcuffed. At the police they were taken to the boardroom where the docket was opened. They were then handcuffed together with Stereid. Thereafter, their personal belongings were taken before being led off to the cells. The Plaintiff and Stereid were kept in a cell where there were already 5 to 6 prisoners. The cell was about 6 x 4 metres in size. There was no social distancing in the cell, and he was worried that he would contract the Covid virus. Later, their lawyers came to apply for bail, only to be told that there were no bail forms. As a result, they were again handcuffed and returned to the cells. Due to the lack of bail forms, they could have been taken in and out of their cells three times.

[19] He refuted the Defendant's version that there was no security in the store. He also denied that the store was full of people. He said there were about 25 to 100 people allowed in the store. The store sold prepacked food. He denied ever receiving a call via intercom.

[20] Asked how he felt about the incident, the Plaintiff testified that he felt degraded after the arrest. He is still scared of the police to an extent that he locks himself up when they come to the store. He suffers from withdrawal symptoms. He cannot complete tasks at work like he used to. He develops panic attacks whenever he comes across police roadblocks.

[21] Under cross examination he testified that he did not know the police officers who testified before the Court. He is not sure if they were at the store on the date of the incident. He maintained that he was arrested by a tall police officer wearing a blue overall. He could not answer to the testimony of the two police officers as he did not deal with them. In this regard counsel for the defendants put it to the plaintiff that the police could not fabricate their testimony as they also did the paperwork.

[22] The Plaintiff led the evidence of Miss Sophie Matosdacosta, an HR Manager at Whitfield Super spar. She testified that they had removed the glass from the counter so that customers could pick up the prepared food and leave on their own. The bain maries were not heated to avoid damaging the prepacked food. On the day in question, she came across Citradi Rudolph standing with the police officer. She walked past them to her office. Whilst in the office, she suddenly noticed the plaintiff going down the stairs. After hearing noise, she went down to the store and observed that the plaintiff was surrounded by close to 8 cops. However, Rudolph Citradi, the store manager was no longer in the store. The cops were arguing with the plaintiff near the fruit and veg area. Few minutes later she saw the police pulling the plaintiff. The plaintiff looked terrified. She then went back to her office. She testified that the head office instructed them not to sell cooked meal so the food that was sold in the store was packed food with bar code. The customers were collecting their own food. Head office had given her a list of stuff they were not allowed to sell under Covid and would visit the store to check compliance.

[23] She also testified about the Plaintiff's change of behaviour. He does not greet or laugh like he used to before the incident. He gets easily irritated. Now she gets complaints that plaintiff is not kind anymore.

[24] Under cross examination Sophie testified that she did not see the police officer who arrested the plaintiff, but the one who dragged him was wearing overalls with police

uniform inside. She maintained that they removed the glass from the counter, and it is not possible to work from behind it as alleged by the Defendant's witness. Moreover, they were working with skeleton staff during covid period. On the security, she testified that there were two securities, one for inside the store, and the other for outside the store.

[25] The Plaintiff's last witness was Mr Rudolph Korda, the store manager at Whitfield Spar Supermarket. He testified that when he was paged to come inside the store. On his arrival he noticed a blond policewoman, who informed him that they were not complying with the COVID. Regulations because they were selling hot food to customers. He informed her that they were selling prepacked food including pap and chicken which is put on the display. At that moment he asked the police if he could go and call his superiors, but before he could leave a police man in overall grabbed him. He handcuffed him, took him to the police van and threw him inside. Later the Plaintiff joined him in the van. They were both taken to the police station. Upon arrival at the police station, the police had his one hand handcuffed together with that of the plaintiff. Fingerprints were taken, and later his lawyers were called to apply for bail.

[26] Under cross examination, he maintained that he was paged to come to the customer service. He observed that there was a blond lady and other police officers wearing blue overalls. He contradicted the Plaintiff's testimony that the person who arrested him was tall. The witness, instead, testified that the police officer who arrested the Plaintiff was short and light.

LEGAL PRINCIPLES

[27] In terms of the Disaster Management Act, 2002, no 'cooked hot food' may be sold to the public during the National State of Disaster. Under Alert Level 4 Table 1, Part E read with Part I, of the regulations, the sale of hot food was permitted, but only for home delivery. Counsel for the plaintiff had argued that Whitfield SuperSpar complied with the Regulations and did not sell hot cooked food. He further submitted that the offence with which the plaintiff was charged did not fall within the list of offenses mentioned under regulation 31. According to him, police docket stated that the Plaintiff was arrested for the contravention of regulation 11(1)B(b)-(d). This is clearly at odds with sections 14

and 31 which contains a list of offenses. Moreover, the conduct complained of is not an offense under the regulations.

[28] In terms of section 12 of the Constitution: “ Everyone has the right to freedom and security of the person, which right includes:-

(a) not to be deprived of freedom arbitrarily without just cause;

(b) not to be detained without trial.”

[29] In *Brentley and Another v Mc Person* 1999 (3) SA 854 (EC), the arresting officer lacked knowledge of the essential requirements for kidnapping, which led to an unlawful arrest and detention giving rise to liability for damages. It follows, therefore that good faith or a reasonable mistake will not assist the arrestor. As in *Duncan supra*, the suspicion must rest on reasonable grounds. Once the jurisdictional facts are established in accordance with section 40 of the CPA, a discretion is triggered to arrest or not. The police officer is not obliged to arrest. See *Minister of Safety and Security* 2011(1) SACR 315 (SCA) par [28]. In paragraph [29] the Supreme Court went on to say:

[30] Insofar as the exercise of discretion which the arrestor must entertain before effecting the arrest, the Supreme Court of Appeal went on to state that:

[31] As far as s 40(1) (b) is concerned, H J O van Heerden JA said the following in *Duncan* (at 818H-J): ‘If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holigate-Mohammed v Duke* [1984] 1 All E R 1054 (HL) at 1057). No doubt the discretion must be properly exercised.”

EVALUATION

[32] The question that arises from the above facts and authorities, is whether the discretion to arrest the Plaintiff was properly exercised. This calls for objective enquiry. As pointed out by counsel for the Plaintiff, according to the police docket, the Plaintiff and his colleague were alleged to have contravened section 11(b) –(d) of the Disaster Management Act. In paragraph 6.6 of its plea, the defendant pleaded that the arrest

was justified on the ground that the Plaintiff contravened regulation 11A of the Act. Regulation 11b(iv)(b)- (c) provides: All businesses and other entities shall cease operations during lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service. (c) Retail shops and shopping malls must be closed, except where essential goods are sold and on condition that the person in control of the said store must put in place controls to ensure that customers keep a distance of at least one square meter from each other, and that all directions in respect of hygienic conditions and the exposure of persons to COVID-19 are adhered to.


[33] The evidence by Sophie that there was one security personnel inside the store, and the other outside the store was not challenged by the defendants. According to the Plaintiff, the head office often came to the store to check if they were complying with the COVID-19 regulations. Food packages from the head office were displaced in the trays, and they could not be heated up to avoid damaging the package. I have no reason to doubt her version that they sold prepacked meal with bad coded packets. Sergeant Makung's evidence that they could not arrest the employee who was dishing up hot food because of lack of access via the counter is highly improbable, given the number of police officers who were at the scene. They could not do the bare minimum of calling him to come out from where he was selling. It follows that the decision to arrest the Plaintiff was not taken properly. He is an administrative manager, while Rudolph Stereid is a store manager. If the discretion was exercised rationally, the police would have established that his functions had nothing to do with the sale of food in the store. At best the police had arrested the Plaintiff at his place of employment, where his attendance would have been secured by means of summons. I therefore accept the Plaintiff's version that there was no contravention of the Disaster Management Act.

[34] Although the police arrested the Plaintiff for contravening regulation 11B, large part of the evidence was concentrated on the sale of hot food, which did not fall under the list of offenses prescribed in the relevant regulations. Their evidence was poor, and despite having called for back up, no witnesses other than Sergeant Makung's crew member, Nwepe was called to corroborate their version. The Plaintiff and his witnesses eloquently described the event of what transpired at Whitfield Super Spar and have no reason to doubt their testimony. I agree with the Plaintiff's submission that there is

contradiction between the Defendant's witnesses versions as to why the person who allegedly found selling hot food behind the counter was not arrested. Objectively viewed, the balance of probabilities favours the Plaintiff.

[35] Consequently the following order is made:

- (1) The Defendant is ordered to pay the Plaintiff's proven damages;
- (2) The costs of this action are deferred to the Court hearing the Quantum.



MALUNGANA AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard on: 15 October 2024
Delivered on: 28 February 2025

For the Plaintiff: Adv X.T. Van Niekerk instructed by ML Schoeman Attorneys

For the Defendants: Adv Liphoto instructed by State Attorney, Johannesburg