



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

Case no: **747/2021**

In the matter between:

MORWENYANE JAN MAKAOA

PLAINTIFF

and

MINISTER OF POLICE

1st DEFENDANT

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

2nd DEFENDANT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **4 SEPTEMBER 2023**

DELIVERED ON: **18 DECEMBER 2023**

[1] The Plaintiff instituted a delictual claim against the Defendants for damages for unlawful detention following the successful opposition against his admission on bail by the Defendants. The essence of the Plaintiff's case is that the investigating officer testified that the State had a strong case against the Plaintiff and the necessary eye witnesses who were willing to testify, and

these assertions, which according to the Plaintiff were untrue, led to his refusal for his admission on bail.

[2] The facts of this case are largely common cause as set out in this paragraph. In the early hours of 8 September 2019, the Plaintiff and the complainant were at the stadium where an entertainment event was held. The complainant was under the influence of liquor. The complainant went to the toilet. A scuffle then ensued between the Plaintiff and the Defendant. as to what exactly happened thereafter. The Plaintiff was arrested by the security officer on the scene. Allegations against the Plaintiff were that he raped the complainant. The police were summoned and the Plaintiff was arrested based on allegations of rape. On 26 September 2019 the Plaintiff, duly legally represented applied for bail. The bail application fell under Schedule 5 of the Criminal Procedure Act 51 of 1977 (CPA). It was opposed by the State. The court subsequently refused the bail application. The accused remained in custody until 1 June 2020 when the State withdrew the charges on the basis that there was no prima facie evidence against the Plaintiff.

[3] The Plaintiff testified that the complainant was under the influence of liquor and was causing trouble at the event. He accompanied her to the gate. Near the gate, she pushed him which escalated to a wrestle on the ground as he tried to subdue her. He confirmed that he was duly arrested on the scene. The Plaintiff called no further witnesses and closed his case.

[4] The Defendants called Constable Lenkoane as their first witness. He testified that he was on duty on 8 September 2019. He was summoned to the scene where the Plaintiff was already arrested by the security at the stadium. He testified that one Mr Meje, the security officer, approached him and handed the Plaintiff to him. The Plaintiff had already been assaulted by members of the community. He requested Mr Meje to provide him with his personal particulars but the latter informed him that he stayed at an informal

settlement area in Bloemfontein where there were no addresses. Meje, however, provided him with his contact details in the form of a cell phone number.

[5] Ms Jacobs, the investigating officer also testified in the bail proceedings. She testified that she had tried more than once to trace the eye witness Tshepo Meje. She confirmed her testimony in the bail application that she testified that the State had a strong case as well as a strong eye witness who was available to testify against the Plaintiff. When confronted with the fact that she had had no contact with the witness and had no statement of him, she explained that she was entitled to rely on hearsay evidence during the bail proceedings and that according to her, also had an affidavit of the police officer who made reference to the witness. She conceded that while she testified in the bail proceedings that all the statements were taken and that only the DNA results were outstanding, her testimony was not entirely correct on the aspect.

[6] Ms Andrews, the Public Prosecutor, in the bail proceedings also testified. She testified that she evaluated the docket for the purposes of bail. She testified that according to the investigating officer, there was a strong eye witness who was available to testify. She also testified that the State was entitled to rely on hearsay evidence during the bail application. She conceded that Mr Meje was crucial as an eye witness for the State and that it was important that his statement be obtained. She confirmed that she was aware that at the time of the bail proceedings, his statement had not been obtained.

[7] Mr Machogo, the Regional Court Prosecutor testified that he withdrew the charges against the Plaintiff as the crucial eye witness statement had not been obtained and the DNA results were still outstanding.

[8] The fundamental rule is that the liberty of an individual is inviolable. Our courts hold the view that the deprivation of liberty, through arrest and detention is prima facie unlawful.

[9] Section 60(11) of the CPA provides that:

“ ...where an accused is charged with an offence referred to-

(a) ...

(b) In schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

[10] The duty is on the accused to discharge the onus as set in section 60(11) (a) and (b) of the CPA. The State carries no such burden. Section 60(4)(a)-(e) then spells out the circumstances under which the interests of justice would not permit the release of an accused on bail.

[11] It is conceded on behalf of the Plaintiff that his arrest on the charge of rape was lawful. It is further conceded that his detention from 8 September 2019 until 26 September 2019 when his bail application was launched, was also lawful. The contention arises on the testimony led during the bail application as well as the decision by the Prosecutor for the day, to oppose bail. The main contention is that on the day of the bail application, the affidavit of the crucial witness, Mr Meje had not been obtained. The affidavit of the complainant did not establish the rape offence. The medical report on the investigation did not establish any penetration and lastly, it was wrong for the State, by way of the investigating officer and the Prosecutor to make submissions to the effect that the case against the Plaintiff was strong.

[12] On his own version, during cross-examination, the Plaintiff testified that he was accompanying the complainant to the loo. The complainant was walking in front of her and he grabbed ‘her not in the right way’. He testified that the

complainant asked why he was grabbing her like that and if she wanted to rape her. The complainant grabbed him by the clothes and assaulted him with an open hand.¹

[13] The above version does not resonate with what he said in examination in chief. In this regard, he says he was following the complaint. He then asked the security officer to accompany the complainant to the toilet because “those ladies that she was in the company of said that she was troublesome and that is all (my emphasis)

[14] When one has regard to the above, one wonders why the Plaintiff holds the view that his arrest and detention prior to the bail proceedings was lawful. In my view, this is a classic case where the Magistrate should have been joined as a party in these proceedings to explain the reasons for refusing bail.

[15] The investigating officer was not candid with the court. When she testified that the only outstanding issue with regard to the investigation was the DNA, she knew that the statement was untruthful. She even discussed it with the Public Prosecutor.

[16] It must however be remembered that these were bail proceedings and not the trial proceedings. The state is entitled to rely on hearsay evidence. The Plaintiff was legally represented during the bail proceedings. The defence did not object to the admissibility of the said evidence being led. At that stage, the information in the possession of the state was that Meje was a potential witness. There is no evidence that he was completely untraceable. When the Plaintiff launched these proceedings, the investigation was still under way. The State bore no onus at that stage to prove the case against the accused beyond a reasonable doubt.

¹ See Bail Application Transcription, EXH A- page15, lines 20 et seq.

[17] What the State had at that stage was the fact that Meje informed Constable Lenkoane that the accused was found on top of the complainant. In his statement accepted into evidence, Constable Lenkoane says that the Plaintiff was trying to rape the complainant.² The fact that the medical report or the so called J88 is 'neutral' does not assist the Plaintiff. The doctor pertinently says in that report that the '*absence of physical genital injuries does not exclude sexual penetration*'³

[18] As indicated above, I hold the view that the Magistrate should have been joined in these proceedings. The record is replete with instances where he 'suggested' to the parties not to go into the merits of the case. Even in his ruling on the bail application, he did not refuse bail on the basis that there was a strong case against the Plaintiff. He says the following in his judgment:

"You were assaulted. Your safety. Can we really ignore things like this? Can we? Talking about the strength of the case, yes I leave that one for the trial court but the state keeps on saying you were caught red-handed."⁴(my emphasis)

[19] In my view the fact that the State said that the case against the Plaintiff was strong is neither here nor there as it clearly did not influence the Court. The fact that a crucial witness statement had not being obtained does not necessary mean that bail could not be entrained or opposed at that stage. What is important is that the police had allegations that the Plaintiff was arrested while on top of the Complainant on allegations that he was trying to rape her. A witness was at that state available who gave his contact details to the police. The fact that charges were later withdrawn does not detract from the fact that an offence was apparently committed and there were cogent reasons to oppose bail. The Magistrate held the view that the Plaintiff failed to discharge his onus as stipulated in s (60) (11) (b) and was not at all

² See EXH B page 24 para 4.

³ See EXH B page 21.

⁴ See EXH A page 16 para 10-14.

persuaded by the allegations by the state that there was a strong case against the Plaintiff, hence the view that the Magistrate should have been joint. I am of the view that the claim of the Plaintiff must fail. I accordingly make this order:

ORDER

1. The Plaintiff's claim is dismissed with costs.

P. E MOLITSOANE, J

On behalf of the Plaintiff: Adv. MDJ Steenkamp
Instructed by: Schoeman Steyn Attorneys
BLOEMFONTEIN

On behalf of the Defendant: Ms I Macakati
Instructed by: The State Attorney
BLOEMFONTEIN