REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 37677/2020

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

20 May 2022

In the matter between:

EDWIN VUYANI KAMPI Plaintiff

And

THE MINISTER OF POLICE First Defendant

THE PROVINCIAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICES Second defendant

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JUDGMENT

Mdalana-Mayisela J

Introduction

[1] This is an action against the defendants for delictual damages. The claim arises from the arrest of the plaintiff by members of the first defendant on 19 March 2020, and his detention until he was released from custody after the criminal charges were withdrawn on 17 June 2020. The plaintiff avers that the arrest and detention were unlawful. He is claiming R6 000 000 (six million rand) for compensation for the harm he allegedly suffered. He is also claiming for costs, including costs of two junior counsel.

[2] The defendants are opposing the action and have filed the plea and amended plea. In the amended plea the defendants contend that the arrest and detention were lawful, in that the plaintiff was arrested in terms of section 40(1)(b) and detained in terms of section 50(1) of the Criminal Procedure Act 51 of 1977 ("The Act"). Further, the defendants have raised the special pleas of mis-joinder of the second defendant and the non-compliance with section 5(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 read together with section 33 of Judicial Matters Amendment Act 8 of 2017.

[3] The plaintiff filed a replication, wherein he asserts that he complied with section 2 of the State Liability Act 20 of 1957 and section 5(1) of Act 40 of 2002 by citing the Minister as a nominal defendant. Further, he attached the Notice in terms of section 3 of Act 40 of 2002 and proof of dispatch marked "A1" together with the return of service marked "A2" to prove compliance with Act 40 of 2002 read with section 33 of Act 8 of 2017.

[4] At the commencement of the civil trial, counsel for both parties advised me that the special pleas have been abandoned by the defendants. Therefore, what arises for determination is whether the arrest and detention were unlawful, and if so, whether the plaintiff suffered damages, and the quantum thereof.

The facts

[5] The plaintiff was arrested without a warrant on 19 March 2020 at his place of residence at number 384 Golden street, Simunye township, extension 1, Westonaria by Sergeant Seepolle acting within the course and scope of his employment. At the time of the arrest Seargeant Seepolle was in the company of his colleague, and the complainant, Mapaseka Martha Mawelela who pointed out the plaintiff as a suspect. The plaintiff was charged with rape and kidnapping of the complainant.

[6] Following his arrest, the plaintiff was detained at Bekkersdal Police Station, whereupon further detention occurred at Randfontein Police Station holding cell. He appeared for the first time at Westonaria Magistrate Court on 23 March 2020. Subsequently, he was transferred to a correctional services facility for incarceration whilst awaiting trial, until he was released from custody on 17 June 2020 after the charges were withdrawn by the state.

[7] Prior to the plaintiff's arrest, the complainant had laid charges of rape and kidnapping against him. According to the complainant, she met the plaintiff at an open veld between extension 2 and 4, Simunye on 31 January 2020, while she was in the company of Smangele Tshobeka walking to extension 4. The plaintiff took out a knife and threatened to stab her if she refused to go with him to his shack at extension 1, Simunye. He pointed a knife at her neck and instructed her to go with him to his shack. Smangele ran away. Upon arrival at his shack, she was kept captive and raped repeatedly until 6 February 2020 when she was rescued by a friend. During her 6 days ordeal, she was tied up to a chair with a wire. The plaintiff locked up the shack and tied up the window handles with a wire.

The applicable law

[8] A claim under the *actio iniuriarum* (action for non-patrimonial damages) for unlawful arrest and detention has specific requirements:

(a) the plaintiff must establish that his liberty has been interfered with;
(b) the plaintiff must establish that this interference occurred intentionally.

In a claim for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving his liberty and not that the defendant knew that it was wrongful to do so;

© the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and

(d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.

(see *De Klerk v Minister of Police [2019] ZACC 32*).

[9] The defendants assert that the arrest was effected in terms of section 40(1)(b) of the Act. Section 40(1)(b) provides as follows:

(*1) A peace officer may without warrant arrest any person-*

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from a lawful custody.

[10] In *Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818 G-H*, it was held that the jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. Once the jurisdictional facts for an arrest have been established, a discretion to arrest arises.

[11] It is trite that the onus rests on the defendants to justify an arrest. In *Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F*, it was stated as follows:

'*An arrest constitutes an interference with the liberty of an individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law*.'

[12] With regard to detention prior to the plaintiff's first court appearance, the defendants assert that the detention was made pursuant to the provisions of section 50 of the Act. Section 50(1)(a) provides as follows:

'50 Procedure after arrest
(1)(a) Any person who is arrested with or without a 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.'

[13] Further, the defendants assert that in so far as the post first court appearance or judicial detention is concerned, such detention was at the instance of the court with no role played by the police.

[14] In *Zealand v Minister for Justice and Constitutional Development [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) at para 22*, it was held that:

'*It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In Minister van Wet en Orde v Matshoba, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vendicatio a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that Court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reason applies with equal, if not greater, force under the Constitution.'*

Arrest

[15] It is common cause that the plaintiff was arrested without a warrant on 19 March 2020 for kidnapping and rape charges by members of the defendants acting within the course and scope of their employment. The defendants assert that the arrest was effected in terms of section 40(1)(b) of the Act.

[16] It is common cause that (i) the arresting officer is a peace officer; (ii) the arresting officer entertained a suspicion; and (iii) the suspicion was that the plaintiff committed rape and kidnapping, which are schedule 1 offences.

[17] The issues to be determined are whether the suspicion rested on reasonable grounds; and whether the arresting officer properly exercised his discretion to arrest.

[18] It is trite that the defendants bear the onus of establishing the lawfulness of the plaintiff's arrest on a balance of probabilities.

[19] The defendants led the evidence of Sergeant Chimi Jeremiah Seepolle stationed at Family violence, child protection and sexual offences unit. He testified that he arrested the plaintiff at house number 384 Golden Street, Simunye township. He was in the company of his colleague, and the complainant who pointed out the plaintiff as a suspect during the arrest. The plaintiff was standing outside the house in the yard. Sergeant Seepolle introduced himself to the plaintiff and explained that he was there because of the case of kidnapping and rape opened against the plaintiff. He explained to the plaintiff his constitutional rights and informed him that he was arresting him. The plaintiff cried and informed sergeant Seepolle that he did not rape the complainant, she is his girlfriend and she used to sleep at his place. He then took the plaintiff to Bekkersdal police station.

[20] In the morning before going to the plaintiff's home to arrest him, sergeant Seepolle attended a parade where the dockets, including the current matter

were being discussed. He read the contents of the docket in this matter. The docket contained the complainant and witnesses' statements, and a J88 report. He discussed the matter with the investigating officer, Sergeant Ramabele before the arrest. He also interviewed the complainant before the arrest. The complainant looked traumatised during the said interview. After reading the contents of the docket and interviewing the complainant and the investigating officer, he was satisfied that the plaintiff committed the said offences and that he had to be arrested. The purpose of arresting the plaintiff was to bring him before the court to stand trial on charges of kidnapping and rape. He relied on the provisions of section 40(1)(b) which entitled him to effect the arrest without a warrant where a schedule 1 offence has been committed.

[21] The relevant contents of the docket that made him to suspect that the plaintiff committed rape and kidnapping are the following:

Complainant's statement

'*Nuku took out a knife from his pocket and threatened to stab me if I refused to go to his place at Simunye.'*

'Then Nuku took me by force and even see that force was used whilst seeking the victim'

'While he was pointing a firearm on my neck'

'Where he tied me up with wires both my hands and on my back and pushed me to the bed and closed my mouth with a cloth and undressed me'

'He the undressed himself and penetrated his penis into my vagina and have sex without a condom until he ejaculated. After that he took me and placed me on the chair and tied me with the wires on the chair, both hands, then slept and woke up after an hour.'

'*And went out, locked the door and he left. He came back and raped me again*.'

Smangele Tshobeka statement

'*When Jaman approached us he greeted us'*

'He asked to speak to Mapaseka aside and the witness left a distance from them. I could not hear clearly what was said but Jaman asked Mapaseka who is she dating?'

'Mapaseka said Jaman pointed a knife at the complainant. Then Jaman then asked she still loves her? She said yes still loves and continues speaking Mapaseka. He holds Mapaseka by the hand and went with her. I tried to follow but Jaman said I must continue to go extension for direction.'

'That I must not try anything funny and she has been killing people. I must not think I know him.'

'I ran back to Mapaseka's house, did inform her mother, Nthabeleng, Nthabeleng I mean, about. Her mother said she warned Mapaseka about Jaman but she does not listen. She will not be involved.'

J88 report

'*Normal examination does not exclude the possibility of sexual assault*.'

[22] It is common cause that Nuku and Jaman are the plaintiff's other names. Sergeant Seepolle concluded from the above extracts that the plaintiff is a violent person. He threatened the complainant and forced her to go with him to his place. He raped the complainant more than once. The plaintiff is known to the witnesses. Smangele corroborated the complainant that the plaintiff was at the scene where the kidnapping took place. She also corroborated the complainant that the plaintiff took out a knife and threatened the complainant. The plaintiff also verbally threatened Smangele. The fact that Smangele ran to the house of the complainant's mother to give a report about the incident made Sergeant Seepolle to believe that the version of the witnesses about the threats was true. The plaintiff during his arrest admitted to having sexual intercourse with the complainant but said it was with her consent as she is his

girlfriend and she used to visit him at his place. The J88 report does not exclude the possibility of sexual assault. On these grounds Sergeant Seepolle entertained a suspicion that the plaintiff committed rape and kidnapping. In my view these grounds are reasonable.

[23] Further, he testified that after satisfying himself that the plaintiff has committed these serious offences, he exercised a discretion to arrest the plaintiff. Before exercising the discretion to arrest, he also looked at part B and C of the docket and noticed that the investigating officer made an entry that on the 26th of February 2020 when the police went to the plaintiff's home, he escaped through the window. He also looked at SAP5 where the entry was made that the investigating officer went to look for the plaintiff several times and that he ran away. Further, he consulted with his commander. His commander perused the contents of the docket and recommended the arrest of the plaintiff. He could not apply for a warrant of arrest because he did not have the full personal details of the plaintiff. I find that the arresting officer was justified to have a reasonable apprehension that the plaintiff would abscond or fail to appear in court if a warrant was first obtained for his arrest or if other less invasive options to bring him before court were effected.

[24] The purpose of arresting the plaintiff was to bring him before the court to stand trial on charges of kidnapping and rape. He could not release the plaintiff on bail after his arrest before the first appearance because he was charged with schedule 5 offence.

[25] In *Shidiack v Union Government (Minister of the Interior) 1912 AD 642 at 651-652,* Innes ACJ stated as follows:

'Now it is settled law that where a matter is left to the discretion or a determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would be; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or

to substitute his conclusion for his own… There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the expressed provisions of a statute - in such cases the Court might grant the relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[26] It was submitted on behalf of the plaintiff that the statements of the complainant and Smangele and J88 were insufficient to form the basis of arrest. More evidence had to be collected before the arrest could be effected. I disagree with this submission. In my view the quantity of the evidence is immaterial. What is important and material is the quality of the evidence. In most cases of sexual assault, the complainant is a single witness with regard to the actual penetration. Section 208 of the Act provides that an accused may be convicted of any offence on the single evidence of any competent witness. It is the court that has to make a finding on credibility of the witness/witnesses.

[27] I find that the defendants have established all the listed jurisdictional facts for a defence based on section 40(1)(b). The arresting officer properly exercised his discretion to arrest the plaintiff and this court will not interfere with the result. The plaintiff has failed to prove that the discretion was exercised in an improper manner. Therefore, the arrest was lawful.

Detention

[28] It is common cause that after the plaintiff was arrested, he was detained at Bekkersdal police station and subsequently detained at Randfontein police station until his first appearance in court. Following the lawful arrest of the plaintiff for Schedule 1 offences, the members of the first defendant were legally justified to detain the plaintiff in terms of section 50(1)(a) of the Act until his first court appearance. Because of the nature and seriousness of the offences the plaintiff was charged with, section 60(11)(a) of the Act required

him to be detained in custody until he is dealt with in accordance with the law, unless he, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.

[29] With regard to a further detention post-first court appearance, the defendants deny liability and rely on *The Minister of Safety and Security v Tshei Jonas Sekhoto and Another (131/10) [2010] ZASCA 141 (19 November 2010),* where it was held that, '*Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.'*

[30] Both parties referred me to *De Klerk v Minister of Police*, where the Constitutional Court stated as follows:

'*Second, even if Isaacs says that a remand after an unlawful arrest is always lawful, does that necessarily render the harm arising from the subsequent detention too remote from the wrongful arrest? In other words, for the purposes of determining the liability of the Minister of Police, what is the relationship between the legal causation element in relation to the wrongful arrest and the lawfulness of the detention after the first appearance of an arrested person?*'

[31] In *Mahlangu and Another v Minister of Police 2021 (7) BCLR 698 (CC),* it was held that it is only when a causal link is established between the arresting officer's conduct and the subsequent harm suffered by the plaintiff that the defendant is said to be liable for detention after first appearance.

[32] The present matter is distinguishable from De Klerk and Mahlangu cases because I have found that the arrest was lawful. I have not found any fault on the conduct of the arresting officer.

[33] However, I intend to apply the principle stated in Mahlangu in respect of the conduct of the investigating officer, Sergeant Ramabele, where the Constitutional Court held that '*the unlawful continued concealment by the police of the fact that the confession was obtained illegally therefore provides the applicants with a basis for holding the Minister delictually liable for the full detention period*.'

[34] The plaintiff was arrested on 19 March 2020 and he appeared for the first time in court on 23 March 2020. From 19 March to 17 June 2020 he spent a total of 90 days in custody. From the first court appearance to the day the charges were withdrawn the matter was postponed on ten occasions and the plaintiff was remanded in custody because the investigating officer was not available to testify in bail proceedings. The matter was also postponed on two occasions during the stated period because the plaintiff was not brought to court by the members of the defendants. On 11 occasions the prosecutor made entries in the investigation diary requesting the investigating officer to avail himself for bail proceedings. These requests were duly received by the Captain and the investigating officer. The investigating officer was not attending court for a bail hearing. He testified in court that sometimes his Captain was not returning the docket to him and as a result he was not aware that he had to testify in court. On one occasion he did not attend court because he was on leave. It is clear from the above that the plaintiff was not given the reasonable opportunity as required by section 60(11) of the Act, to adduce evidence which satisfies the court that the interests of justice permitted his release on bail.

[35] The matter was withdrawn on 17 June 2020 and the plaintiff was released from custody. The prosecutor made an entry in the investigation diary to Captain Prinsloo stating the reason why the matter was withdrawn and requesting an investigation in the matter. It states:

"*I need an investigation in this case. This acc stayed IC since Feb. We struggled to get the IO at court*. *Today, Olga the prosecutor called the IO to the bench. This is a Schedule 6, he said under oath that this victim confirmed to him she was never raped!! This was said to him on the day of arrest!! He never mentioned this in his*

docket! This man stayed in custody for nothing! He didn't even bother to write a statement. This is defeating the administration of justice. I withdrew this matter…."

[36] This entry shows that the investigating officer became aware of the crucial information from the complainant on the same day the arrest was effected. He failed to disclose this crucial information to the public prosecutor on or before the first court appearance in order for the prosecutor to decide whether or not to withdraw the charges. He continued to conceal this crucial information until when he testified under oath on the 17th of June 2020. The duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not (*Minister of Safety and Security v Tyokwana [2014] ZASCA 130; 2015 (1) SACR 597 (SCA*). This duty applies to the investigating officer. The investigating officer breached this duty by failing to disclose the said crucial information to the prosecutor which was relevant to the further detention of the plaintiff. In *Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR409 (SCA*) it was held that the Minister was liable for post appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. In *Mahlangu* the Constitutional Court said that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.

[37] In my view the investigating officer's unlawful conduct led to the further detention of the plaintiff post-first appearance. In the premises the first defendant is delictually liable for the further detention of the plaintiff from 23 March 2020 to 17 June 2020.

[38] I now turn to the issue of quantum. In the assessment of damages for unlawful detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate

with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. It is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) (2009) ZASCA 39) paras 26-29).*

[39] In *Mahlangu* case the two plaintiffs were tortured and forced to make confessions by the police. The confessions formed basis for their continued detention. The Constitutional Court after considering the relevant circumstances and previous awards, awarded R550 000 to the first plaintiff and R500 000 to the second plaintiff for eight months and 10 days' detention.

[40] In the present matter the are no allegations of torture or assault made against the police. The plaintiff spent 85 days in custody post-first appearance. He testified that in custody the cell was full with inmates, it was stinking, and he was sleeping next to the toilet. He suffered from sinuses due to the strong urine smell that was blocking his nose. At some stage he was not eating because he had no appetite.

[41] Taking into account the living conditions in custody, the period of 85 days spent in custody post-first court appearance and the relevant previous awards, I am of the view that R350 000 would be a fair and appropriate compensation to the plaintiff.

Costs

[42] The plaintiff seeks costs of the action. He is successful on liability and quantum. I find no reason why the costs should not follow the event. However, the withdrawal by the plaintiff's counsel from the matter on 22 October 2021 was not due to the defendants' fault. Considering the nature of this matter, in my view the costs of the second junior counsel are not justified.

ORDER

[43] Accordingly, I make the following order:

1. The first defendant (the Minister of Police) is liable to the plaintiff for damages he suffered as a result of his unlawful detention from 23 March 2020 to 17 June 2020.

2. The first defendant shall pay the plaintiff an amount of R350 000 (three hundred and fifty thousand rand) for damages suffered as a result of unlawful detention;

3. The first defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include one junior counsel's fees on the applicable High Court Scale.

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MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 20 May 2022

Appearances:

On behalf of the plaintiff:	Adv K Mvubu
	Adv S Mabunda
Instructed by:	Mr Y Bodlani
	Yonela Bodlani Atoorneys
On behalf of the defendants:	Adv M Mthombeni
Instructed by:	Mr C Setlhatlole
	State Attorney, Johannesburg