IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

Case Number: 26082 / 11

9/3/2018

In the matter between:

J T	Plaintiff
and	
MINISTER OF POLICE	First Defendant
CONSTABLE MTHETO	Second Defendant

JUDGMENT

NOWOSENETZ AJ

[1] This is an action by the plaintiff for damages for wrongful arrest and detention. He alleges in his particulars of claim that on 18 February 2010 he was arrested without warrant at his home in Pretoria and was unlawfully detained at Silverton police holding cells for a period of 15 days. He claims the amount of R450 000 as damages for loss of freedom,

contumelia trauma and damage to his dignity and reputation.

[2] It is common cause that on 18 February 2010 a complaint was laid against the plaintiff by T G T of indecent assault at the Silverton Police Station. At the time she was the plaintiff's wife and she their minor daughter T C T and the plaintiff lived together in the common home in Nellmapius Pretoria. She alleged that the plaintiff had sexually molested their minor child who was 4 years of age at the time.

[3] Two witnesses-gave evidence on behalf of the defendants: Firstly Constable (Mr) S E Motsepe who was the arresting officer and secondly Constable (Ms) KM Motheto, the second defendant and the investigating officer. Both were based at Silverton Police Station. Motsepe was that on 18 February 2010 his colleague Sergeant (Ms) Mafora gave him a report of a written complaint by Ms Thoka. The statement alleged that the child complained that her vagina was painful when the mother bathed the child. There were also discharges in the child's panties. The child had told her that the plaintiff had put his finger in the child's vagina.

[4] He also interviewed the complainant who confirmed her statement. She also informed him that the complainant had taken the child to a clinic for a medical examination the same day. She told him that the findings of the doctor were suggestive of sexual assault. She was afraid to go home as she complained that the plaintiff was violent and asked for protection.

[5] He had the docket in his possession when he went with another constable to see the plaintiff at his house. The purpose was to tell the plaintiff about the complaint against him and to see the atmosphere at the home. He already formed the suspicion that the plaintiff was identified as the suspect. The child knew him and he had access to her as they lived together in the same house. The plaintiff was aggressive when he informed the plaintiff of the complaint. He realised that it was appropriate to arrest the plaintiff. He was arrested, handcuffed and brought to the Silverton cells. He did not see the complainant at the plaintiff's house but did not deny she may have been there. It was put to him that the complainant, the child and the plaintiff's sister were at the house and that

his sister and the complainant were fighting and the police separated them. He denied this. It was suggested to him that the primary purpose of the visit to the plaintiff was not to arrest him but to defuse the situation and protect the complainant and child. He rejected this.

[6] The evidence of the investigating officer was that the plaintiff was detained from approximately 20h00 on a Thursday, 18 February 2010. The next day he was fingerprinted processed and charged. The plaintiff appeared before a magistrate on Monday 22 February 2010. He was remanded in custody by the magistrate. On 2 March 2010 he was granted bail and was released from custody. The police docket was admitted into evidence. this included the statement by the complainant which the witness commissioned on 23 February 2010, the medico legal report dated 18 February 2010 at 11h 15, the investigation diary and excerpts from the occurrence book. She presented the medical report in detail. The doctor noted redness and swollenness of the child genital area. There were no visible injuries. The charges were withdrawn in May 2010 because the social worker advised that the child was not a competent witness due to her age.

[7] The plaintiff described himself as self employed. He testified concerning his version of the arrest. He disagreed with the arresting officer's account in the following main respects: The door was open. There was mob outside. He was not aggressive. He called his sister. She fought with the complainant. The police separated them. He was not handcuffed. He admitted that he was detained, remanded and released as stated by the investigating officer. He denied knowledge of the allegations against him in the complaint but did not deny the contents of the medical report. He explained that the allegations against him were false and were caused by the child being influenced by the mother. He and his wife were having marital problems. The child was sometimes left in the care of the maternal grandfather.

[8] In *Mbotya v Minister of Police* (1122 / 10) [20 12] ZAECPEHC 43 (10 July 2012) the requirements for an action of this nature are well set out :

"[24] Section *40(*1)(b) of the Criminal Procedure Act 51 of 19*77* provides that, ' a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1'.

The jurisdictional requirements have come to be stated as fellows, that for a lawful arrest under [the] section:

(i) the arrestor must be a peace officer;

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect committed an offence referred to in schedule I ;

(iv) the suspicion must rest on reasonable grounds.

The test to be applied is an objective test.

- See Duncan v Minister *of* Law and Order 1986 (2)SA 805 (A) at 818 G-H; Nkambule v Minister of Law and Order 1993 (1) SACR 434 (T) at 436 A-B; Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GS.J) para 9; Olivier v Minister of Safety and Security and Another 2009 (3) SA 434 (W) at 440G.

…

[25] The-test whether a suspicion is reasonably entertained within the meaning of s40 (1)(b) is objective S v Nel and Another 1980-(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of

conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to· swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion. - See Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658 E-H. See also S v Purcell-Gilpin1971 (3) SA 548 (RA).

[26] As regards onus of proof in these matters it is settled law that a plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification. It is thus the defendant who bears the onus of proving the lawfulness of the arrest. - See Minister of Law and Order v Hurley .1986 (3) SA 568 E-F; at 589 E-F: Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) per Grosskopf JA."

[9] It is clear that the arresting officer was a peace officer and the complaint on the face of it was a schedule 1 offence. The plaintiff did not argue to the contrary. His submission was that that he was not reasonably linked as a suspect. The plaintiff attempted to assail the credibility of the arresting

officer on collateral issues. This detracts in no manner from the objective enquiry as to the jurisdictional facts available and utilized by the arresting officer before making the arrest.

[10] It is not necessary to be convinced of the guilt of a suspect before an arrest is considered lawful. The reasoning of the arresting officer for suspecting the plaintiff is unassailable. The child knew him. He had access to the child and they lived in the same house. There was no evidence that any other male lived in the house. He had interviewed the complainant and had read her statement in the docket. He was aware of the medical examination. The arresting officer exercised his discretion rationally and in a bona fide manner. The nature of the discretion was fully enunciated in *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA). The defendant has convincingly discharged the onus of proving that the arrest was based on a reasonable suspicion that the plaintiff had committed a Schedule 1 offence and thus the arrest was !awful.

[11] The plaintiff on his own version was not detained for 15 days. He was detained at 20h00 on Thursday night and could not be brought before a magistrate on the Friday as he was being finger printed, profiled and charged. His detention by the police was until Monday 22 February 20 10 the next first available court day after being charged. The magistrate then exercised the discretion to remand him without bail and thereafter the Defendants had no responsibility for his further detention. The plaintiff's claim was groundless. A reasonable explanation has been given as to why the plaintiff was not brought before a magistrate strictly within 48 hours as required in terms of s 50 of the Criminal Procedure Act.

The following order is made:

1 The plaintiff's case is dismissed.

2 The plaintiff shall pay tt1e defendants' costs of suit.

L. NOWOSENETZ

ACTING JUDGE OF THE HIGH COURT

CASE NO: 26082/11

HEARD ON: 6 and 7 March 2018

FOR THE PLAINTIFF: ADV. Z. FENI

INSTRUCTED BY: Makhafola & Verster Incorporated

FOR THE DEFENDANT: ADV. T. LUPUWANA

INSTRUCTED BY: Office of the State Attorney, Pretoria

DATE OF JUDGMENT: 9 March 2018