REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

15853/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.
04/10/2023

…… ……

DATE SIGNATURE

In the matter between:

FORSTER RIKHOTSO Plaintiff

and

MINISTER OF POLICE 1st Defendant

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS 2nd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The plaintiff has instituted a claim against the defendant arising from his alleged unlawful arrest and detention by members of the first defendant, the South African Police Service ("SAPS") and alleged malicious prosecution by officers of the second defendant, National Prosecuting Authority ("NDPP"), allegedly acting within the course and scope of their employment. The plaintiff is also asking for costs.

[2] The first defendant pleaded that the plaintiff was lawfully arrested in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act). The first defendant does not dispute the arrest and detention of the plaintiff. The second defendant also disputes that the prosecution of the plaintiff was malicious.

[3] By agreement, an order in terms of uniform rule 33(4) the issues regarding merits and quantum were separated and quantum related issues were postponed *sine die*. The matter proceeded on merits.

[4] The issues to be determined are whether:

4.1 the arrest and detention of the plaintiff without a warrant was lawful; and

4.2 the prosecution of the plaintiff was malicious.

[5] Section 40(1)(b) of the Act reads as follows:

> "(1) A peace officer may without a warrant arrest any person –
>
> (a) …
>
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act."

[6] In *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) it was held at para [6] that in order for a section 40(1)(b) defence to succeed, the following jurisdictional facts must be present:

6.1 the arrestor must be a peace officer;

6.2 the arrestor must entertain a suspicion;

6.3 the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1; and

6.4 the suspicion must rest on reasonable grounds (See also *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A)).

[7] Wrongful arrest consists in the wrongful deprivation of a person of his liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. *Relyant Trading (Pty) Limited v Shongwe and another* 2007 (1) All SA 375 (SCA) at para.4; *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139D. Once there is an alleged unlawful arrest, the first defendant bears the burden of

proving that the arrest was lawful or justified. *Minister of Law and Order v Hurley* 1986 (3) SA 568(A) at 587 – 589. Furthermore, once it is proven that the arrest is unlawful, the consequent detention of the plaintiff is also wrongful.

[8] In *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) at page 265, the court held that once it is established that a person has been detained, the burden of justifying their detention rests on the detaining authority.

[9] For the plaintiff to succeed with the malicious prosecution claim, he must prove, *inter alia*, that the second defendant, could not have reasonably believed that the plaintiff has possibly committed the offence accused of, secondly that the second defendant in instituting the prosecution was moved by improper motive and had no reasonable cause.

[10] It is common cause that at around midnight on 8 February 2019 the police arrested and detained the plaintiff after he was pointed out by the complainant who alleges that plaintiff raped her. Further that the plaintiff appeared in court on 11 February 2019 where the matter was postponed to 20 February 2019 when the plaintiff was released on bail. It is furthermore common cause that on 11 July 2019 the charge of rape against the plaintiff was withdrawn.

[11] The first witness for the defendant was sergeant Sechaba Baldwin Makhubele ("sergeant Makhubele"). His evidence is as follows. On 9 February 2019, he was stationed at the Family Violence, Child Protection and Sexual Offences Unit. On the day in question he was on standby when he and his colleague, warrant officer Jan Mokori ("warrant officer Mokori") received a call to attend to a case under Pretoria West. At that time he was attending two cases falling under Pretoria Central. They agreed to meet at the entrance of the Pretoria West police station. When he met warrant officer Mokori, he informed him about a case involving a lady who had allegedly been raped at the Tshwane Events Centre ("the Centre"). Warrant officer Mokori further informed him that both the victim and the alleged perpetrator were working as car guards at the Centre. He perused the docket and found the statement of the victim, which he read. The contents of the statement indicated that the victim had been assaulted and raped and that the incident the victim went to the police station to report about the assaults. He was also informed that the victim had gone home after reporting the incident and they were given directions to her home. He together with warrant officer Mokori went to the victim's home and took her back to the Centre where she pointed out the area where the incident happened. Sergeant Makhubele further testified that the complainant also told them that he knows where her assailant lives. He further testified that when they were at the complainant's place, the boyfriend was also there although they did not interview him.

[12] According to sergeant Makhubele, when they reached the complainant's place, her boyfriend was also there. The complainant told them what had happened to her earlier on that day and they went with her to the place where the rape allegedly happened. The complainant also informed the police that her assailant is known to her and she knows the area where he stays. On reaching the area where the plaintiff stays a person gave them directions to the plaintiff's shack. On knocking at the shack the plaintiff opened the door and the complainant pointed at the plaintiff as the person who had raped her. The officers introduced themselves and informed him that they were arresting him on the basis of a complaint of rape laid against him. He further testified that they also read him his constitutional rights. They took the plaintiff to an unmarked police vehicle and took him to the Pretoria West police station.

[13] With regard to the reason for effecting an arrest on the plaintiff, sergeant Makhubele testified that after perusing the complainant's statement and taking into consideration that the allegations of rape are serious; that the complainant was raped by a person known to her; that there was a possibility that she could be raped again by the same person; and that the plaintiff might try to avoid or delay his arrest.

[14] Under cross-examination sergeant Makhubele denied that at the time of the plaintiff's arrest, he and warrant officer Mokori had used two vehicles.

He further testified that the unit was ever used in possession of the type of vehicles described to him by the plaintiff's counsel. Sergeant Makhubele further denied that the plaintiff's alleged friend, he calls Zulu, was present outside the plaintiff's shack when he was arrested. He testified that the plaintiff was found inside his shack after the police had knocked at the door of the shack and the door was opened.

[15] On meeting the plaintiff they did inform him that they were arresting him on the basis of a complaint of rape made against him and that they also read him his constitutional rights. They thereafter escorted him to an unmarked police vehicle and took him to the Pretoria West police station.

[16] The next witness called by the defendants is warrant officer Mokori. In his evidence warrant officer Mokori who corroborated the evidence of sergeant Makhubele in relation to the perusal of the docket; the visit and interview with the complainant; the pointing out of the crime scene by the complainant; the arrest of the plaintiff and the detention of the plaintiff at the Pretoria West police station.

[17] Warrant officer Mokori further testified that after the detention of the plaintiff and at around 03h00 and 04h00, he took the complainant to the Laudium Medical Centre for a medical examination. With regards to the non-availability of the complainant as a witness, warrant officer Mokori testified that despite several

efforts to get hold of the complainant at her last known place of residence, he could not find her. Further, that he had also tried to find a certain Seshoka whom the plaintiff had alleged the complainant had previously falsely accused him of raping her.

[18] Warrant officer Mokori further testified that the criminal case against the plaintiff was provisionally withdrawn mainly because of the non-availability of the complainant and that should the complainant be traced, the plaintiff would be summoned to appear in court.

[19] Furthermore, warrant officer Mokori testified that he was justified in arresting the plaintiff as the allegation against him was serious and based on the information from the complainant he formed a reasonable suspicion that the plaintiff had committed the alleged rape.

[20] With regards to the issue of malicious prosecution, the defendant called Ms Portia Phongola-Nkosi ("Ms Phongola-Nkosi"), a prosecutor within the office of the Director of Public Prosecutions, Pretoria ("DPP"), and her evidence is as follows. At the DPP's office she was responsible for the screening of sexual offence cases. Ms Phongola-Nkosi testified that the reason why she enrolled the criminal case against the plaintiff was that she was of the view that there was a *prima facie* case against the plaintiff which had reasonable prospects of success after taking into consideration the following factors: (i) the case related to the rape of a homeless woman; (ii) the complainant's statement; (iii) the J88

report which set out the injuries the complainant had sustained; (iv) the J88 report setting out the plaintiff's injuries; and (v) the plaintiffs warning statement. Ms Phongola-Nkosi further testified that she also interviewed the complainant who appeared traumatised and cried throughout the interview.

[21] With regard to the withdrawal of the charge against the plaintiff, Ms Pongola-Nkosi testified that she was informed by the investigating officer that the reason for the withdrawal of the charge against the plaintiff was as a result of the non-availability of the complainant. With regard to the initial postponement of the plaintiff's case on 11 February 2019 Ms Phongola-Nkosi testified that the postponement was necessary in order to check the plaintiff's previous convictions and to confirm his residential address.

[22] The plaintiff's evidence is as follows. He testified that at around 15h00 on the relevant day, while he and the complainant were guarding cars parked at the Centre, they had a dispute about money paid by a client. As a result a fight between them ensued leading to the complainant biting him on his finger and him pushing the complainant. He denied raping the complainant. The plaintiff testified that when the police came to arrest him there were three officers travelling in two vehicles, a Nissan Hardbody and a Nissan NP 200. He testified that when the officers arrived at his shack, he was sitting outside with his friend, Zulu, and that at the time, he did not see the complainant. The officers pointed him with firearms at him and informed him that he was under arrest for the rape of the complainant. He was handcuffed and denied that the officers who arrested

him read him his constitutional rights. He testified that he was put at the back of one of the vehicles the police were using. He further testified that the police did not explain his constitutional rights before his detention at the police station.

[23] With regard to his detention at the police station, the plaintiff confirmed that after his detention on 9 February 2019, he made his first appearance in court on 11 February 2019 and that the matter was postponed to 20 February 2019 for a bail application on which date he was released on bail.

[24] With regard to his prosecution, the plaintiff testified that after his release on bail, he appeared in court on several occasions until the charge against him were withdrawn on 19 July 2019, due to the non-availability of the complainant.

[25] Under cross-examination, the plaintiff admitted his statement and its contents but denied that it was read back to him. At this stage the plaintiff was being questioned about the variance between his evidence with regard to the time the alleged incident of rape occurred and what was contained in his statement.

[26] The next witness called by the plaintiff is Mr Lindani Dludlu (aka Zulu). He testified that he also worked as a car guard at the same premises as the plaintiff and the complainant. He testified that he started working at the Centre during March 2019. With regard to the assault on the complainant, Mr Dludlu testified that on the day in question at around 20h00 he was at the Centre when he heard a commotion. On following the direction where the sound came from he saw the

plaintiff who told him that the complainant had bitten his finger. After the incident he and the plaintiff left the Centre, bought meat and went to the plaintiff's shack where they started cooking the meat as they sat outside the plaintiff's shack. As they were busy with the meat, four police officers travelling in two vehicles arrived and the plaintiff was arrested. He further testified that when the police officers arrived the plaintiff was inside the shack and the police officers were accompanied by two females, one of which remained inside one of the vehicles. The female who came out of one of the vehicles pointed out the plaintiff as the person who allegedly raped her. Mr Dludlu alleged that he did not recognise the woman who pointed out the plaintiff.

[27] Mr Dludlu further testified that the day after the plaintiff's arrest, he together with Cyrus, Whisper and the plaintiff's wife went to look for the complainant and took her to the police station for questioning by the investigating officer in the case involving Cyrus. During the interview the complainant had gone to the toilet and thereafter vanished.

[28] The second witness called by the plaintiff is Mr Lawrence Seshoka (aka Cyrus). In the main Mr Seshoka testified that during 2012 he was also the complainant's victim against whom a false claim of rape had been made by the complainant after she took his phone. He further testified that he knew of another gentleman against whom the complainant had preferred false rape charge.

[29] Mr Seshoka testified at the time, he and the complainant were in a relationship during which time the complainant was using drugs. Mr Seshoka further testified

that on the day in question he was at work, working close to where the plaintiff was and he saw the complainant walking towards the plaintiff and they started fighting over money the plaintiff had allegedly received from a client. Mr Seshoka further testified that the incident happened around 15h00. At around 23h00 he and Mr Dludlu proceeded to the police station.

[30] Under cross examination Mr Seshoka testified that the reason for going to the police station was to inform the police that the plaintiff had not raped the complainant. However, the officers at the police station refused to listen to what they had to say. Further Mr Seshoka testified that on the following day (10 February 2019) he and Zulu returned to the police station where the previous allegation of rape made by the complainant against him was found on the station's system. However, Mr Seshoka could not explain why, despite the fact that he continued to work at the Centre with the complainant, the charge of rape was withdrawn on the basis that the complainant was untraceable.

[31] In argument counsel for the plaintiff argued that the arrest was unlawful in that warrant officer Mokori was aware that investigations into the complainant's allegations were not complete and that at the time of the arrest, warrant officer Mokori knew where the plaintiff stayed and it was not necessary to arrest the plaintiff. Counsel for the plaintiff further argued that warrant officer Mokori had not exercised his discretion reasonably in that he did not consider other alternative methods of bringing the plaintiff before the court.

[32] With regard to the claim for malicious prosecution, counsel for the plaintiff argued that the continued prosecution of the plaintiff was unnecessary and the charge could have been withdrawn earlier after the defendants became aware in March 2019 that the complainant could not be reached.

[33] Counsel for the defendants argued that the offence for which the plaintiff was arrested for was serious as it was a schedule 1 offence. Counsel submitted that warrant officer Mokori was, therefore, within his rights to arrest the plaintiff. Counsel further argued that the arrest of the plaintiff was lawful in that warrant officer Mokori, on the basis of the information at his disposal had a reasonable and probable cause suspicion that a schedule 1 offence had been committed and therefore that the arrest of the plaintiff was lawful in terms of section 40(1)(b) of the Act.

[34] Counsel further submitted that warrant officer Mokori had no power to release the plaintiff once arrested either on bail or on his own cognizance as bail in the case of a schedule 1 offence could only be granted by a court. It was further submitted that warrant officer Mokori had exercised his discretion reasonably in deciding to arrest and detain that plaintiff and that the plaintiff had failed to prove that he was acquitted on the rape charge as the case was only provisionally withdrawn in the absence of the complainant.

[35] I found the witnesses for the defendants to be impressive, credible and honest witnesses and that their evidence is reliable. The evidence of the two police

officers as to the events leading to the arrest and detention of the plaintiff was satisfactory. The essence of the defence of the first defendant is that there was a reasonable suspicion to believe that the plaintiff was involved in the commission of the rape of the complainant. Nothing turns on the fact that the police omitted to interview the complainant's boyfriend as he did not witness the incident between the plaintiff and the complainant as alleged by either the complainant or the plaintiff. Ms Phongola-Nkosi's evidence as to her evaluation of the allegations made against the plaintiff and the subsequent enrolment of the criminal case was also impressive and credible.

[36] The plaintiff, Mr Dludlu and Mr Seshoka did not impress as witnesses. They did not corroborate each other's evidence in relation to the time when the alleged fight between the plaintiff, and the complainant happened, their presence at the crime scene and whether or not the plaintiff was inside or outside his shack when the police came to arrest him. The plaintiff's witnesses appeared to be fabricating their evidence in order to suit the evidence of the plaintiff and their evidence ought to be rejected. Their version seems highly improbable.

[37] It is not in dispute that allegations of raping the complainant were made against the plaintiff, an offence which is a schedule 1 offence. Secondly, it is not in dispute that the plaintiff was arrested at around 00h00 as testified to by the police officers and the plaintiff. Further, it is common cause that the plaintiff was brought before court within 48 hours of his arrest. Once warrant officer Mokori

was satisfied that a reasonable suspicion existed that the plaintiff had committed a schedule 1 offence, he had a discretion to arrest the plaintiff. Taking into account the facts at hand: that there was a victim who was possibly raped, Ms Phongola-Nkosi having observed the traumatic state in which the complainant was, and the complainant having disappeared without reason, warrant officer Mokori made a decision to arrest the plaintiff. I am not convinced that warrant officer Mokori had not applied his mind to the facts when he decided to arrest and detain the plaintiff.

[38] In *Sekhoto* (supra), the Supreme Court of Appeal held that:

> "[25] It could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. And an unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified."

[39] I am satisfied that when warrant officer Mokori decided to arrest and detain the plaintiff he did not act out of malice or on the basis of an unjustified reason. He acted on the basis of the facts before him and exercised his discretion reasonably. The argument by the plaintiff's counsel that it was not necessary for warrant officer Mokori to detain the plaintiff as he knew where he lived and could easily find him is misplaced taking into account that the plaintiff lived in an informal settlement. The Supreme Court of appeal in *Sekhoto* (*supra*) has held

that there is no fifth jurisdictional fact in terms of section 40(1)(b) as alluded to in *Louw and another v Minister of Safety and Security and others* 2006 (2) SACR 178 (T) where the court held that:

> "I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such crime has been committed, this in itself does not justify an arrest forthwith."

[40] Taking into account all the evidence before me I am satisfied that the evidence of sergeant Makhubele and warrant officer Mokori is the more probable as regards the events pertaining to the arrest and detention of the plaintiff. In *Mabona v Minister of Law & Order* 1988 (2) SA 654 (SECLD) at 658 E-H the court held that:

> "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, i.e. 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 as 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."

[41] In my view, it was not necessary that the police should have first completed their investigation before effecting the arrest of the plaintiff. When warrant officer Mokori decided to arrest the plaintiff, he had no powers to release the plaintiff since the powers to release or detain the plaintiff rested with the courts. On that basis I am of the view that the detention of the plaintiff was also not unlawful.

[42] The test for absence of reasonable and probable cause contains both a subjective and an objective element which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances. In her evidence, Ms Phongola-Nkosi gave a detailed explanation why she was of the view that the case against the plaintiff was prosecutable on the basis of the information at her disposal and her observation of the complainant during their interview. The evidence of Ms Phongola-Nkosi was not controverted and the plaintiff has not presented evidence showing that the prosecution of the plaintiff was actuated by malice and that there was no reasonable and probable cause for the prosecution of the plaintiff. Further, the plaintiff had to prove that his prosecution had failed and that he was acquitted. As correctly pointed out by counsel for the defendants, the charge against the plaintiff has been provisionally withdrawn. Should the complainant re-appear, nothing stops the prosecution of the plaintiff to resume.

[43] Having regard to the totality of the evidence in this case, the impressions the witnesses have made on me, I am satisfied that the plaintiff has not discharged the *onus* resting on him to prove that the defendants did not have reasonable cause to believe that he committed the rape; and that the arrest and subsequent prosecution the defendants were motivated by malice; and that the defendants acted unreasonably. Further, I am also satisfied that the defendants have discharged on a balance of probability the onus resting on them to show that there was a reasonable suspicion, premised on the material placed before them, that the plaintiff was guilty of the offence of rape and that they reasonably believed the information that was at their disposal showed that the plaintiff raped the complainant.

[44] In the result the following order is made:

1. The plaintiff's claims are dismissed;

2. That the plaintiff is ordered to pay the defendants costs on party and party scale.

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N P MNGQIBISA-THUSI

Judge of the High Court

Date of hearing :10 March 2023

Date of Judgment : 04 October 2023

Appearances

For Plaintiff: Adv N Lekgetho (instructed by Mabasa SK Attorneys Inc)

For Defendants: Adv K Maleka (instructed by State Attorney, Pretoria)