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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 1361/2012

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

8 SEPTEMBER 2017 FHD VAN OOSTEN

In the matter between

JOSEPH KIVIET

PLAINTIFF

and

CONSTANCE M.

FIRST DEFENDANT

MONGEZI M.

SECOND DEFENDANT

MINISTER OF POLICE

THIRD DEFENDANT

NATIONAL PROSECUTING AUTHORITY

FOURTH DEFENDANT

Delict - Claim for damages against the defendants arising from alleged unlawful arrest, detention and malicious prosecution – evidence adduced analysed - plaintiff's

arrest and detention - legal principles applicable restated - reasonable suspicion requirement in s 40(1)(b) of the Criminal Procedure Act 51 of 1977 - Held: the plaintiff's arrest and detention not unlawful - arresting officer exercised his discretion to arrest the plaintiff for a purpose contemplated by law - Malicious prosecution - acquittal of plaintiff – resulting from uncertainties having arisen upon the trial court's evaluation of the complainant's version in court - acquittal did not follow upon a state case that was doomed to failure right from the outset – absence of malice or animus injuriandi - claims dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] In this action the plaintiff claims damages against the defendants arising from alleged unlawful arrest, detention and malicious prosecution.

Background

[2] It is common cause between the parties that the plaintiff was arrested on 18 January 2010 at Klipspruit, Soweto, by Constable Mathebula, who was and still is stationed at the Kliptown police station, without a warrant for his arrest, on an alleged charge of rape. It is not in dispute that Cnst Mathebula was at all relevant times acting within the course and scope of his employment with the third defendant. The plaintiff was detained at Kliptown police station and charged with the rape of a 6 year old girl (the complainant). On 20 January 2010 the plaintiff, under the name Vuyisile Joseph Kiviet, appeared in the Protea Regional Court for the first time. He applied for but was denied bail. The trial after numerous postponements eventually commenced on 25 October 2010. The plaintiff pleaded not guilty to the charge preferred against him which was rape in contravention of sec 3 read with other sections of Act 32 of 2007. The State called the following 4 witnesses to testify, the complainant (who testified through an intermediary), her mother Ms M., Ms Nhlanguwini, a nurse at Baragwanath Hospital, who has since passed away, and Dr Natvarjal, a medical practitioner, who had examined the complainant on 18 January 2010 at 23h00, in

respect of which a J88 medical examination form was completed with the conclusion 'Wide gaping hymen is relevant with sexual penetration'. The plaintiff, who was legally represented, testified in his own defence. On 22 November 2010, the plaintiff was acquitted. By that time he had spent 306 days in prison. The transcript of the proceedings in the criminal trial, including the judgment of the Regional Magistrate, is before me.

The present action

[3] The present action was instituted on 17 January 2012. The third and fourth defendants raised a special plea based on the plaintiff's non-compliance with s 3 of Act 40 of 2002, but the plaintiff sought and was granted condonation by this court for the late filing of a written notice in accordance with s 4(1) of the Act. The defence raised by the third defendant in regard to the alleged unlawful arrest is based on the provisions of s 40(1)(b) of the Criminal Procedure Act 51 of 1955 (the CPA), which requires for an arrest without a warrant to be lawful, that the arresting officer must hold a reasonable suspicion that the plaintiff had committed the crime alleged.

[4] The third defendant correctly assumed the duty to begin with the leading of evidence in regard to the alleged unlawful arrest and I indicated to counsel that, for practical reasons, the duty would encompass also leading evidence in respect of the alleged malicious prosecution.

[5] During the course of the trial counsel for the plaintiff informed me that the plaintiff's case against the second defendant was withdrawn.

[6] The defendants called four witnesses to testify: first, the first defendant who is the mother of the complainant (Ms M.), second, Cnst Mathebula, the arresting police officer, third, Inspector November, the investigating officer in the criminal case and lastly, Mr Martin, who acted as the prosecutor in the criminal trial. In response thereto the plaintiff testified as well as his uncle, Rueben Kiviet.

The evidence on behalf of the defendants

[7] The facts of this matter as related by Ms M., can be summarised as follows. In September 2009 Ms M. became aware of urine incontinence with the complainant

which was confirmed in a report made to her by the teachers of the Don Pre-school which her child attended at the time. She took her child to Dr Mutwadi without any significant result and thereafter, on 18 January 2010, to the Pimville Clinic for a medical examination. At the clinic they were referred to the Baragwanath Hospital. There the complainant was clinically examined and she thereafter received counselling by Anna Nhlanguwini. Sister Anna, as she was referred to in the evidence, informed Ms M. and her husband that the complainant had disclosed to her that she had been raped by one Chimpie, which it is common cause is one of the plaintiff's nicknames. Sister Anna then advised them to open a case of rape against the plaintiff and they proceeded home.

[8] The plaintiff was referred to in the documents before me and in the evidence by the name Vuyisile, as well as his nicknames Chimpi or Chimpanzi. The plaintiff was well-known to the M. family since 2003, after they had moved to Pimville: the plaintiff lived in the same street and indeed became like their own child in the M. household in being cared for and, he, in turn, assisting them with various tasks and household chores.

[9] Having arrived home from the hospital Ms M. still in a state shock finding it hard to come to terms with the news she had received, eventually decided to confront the plaintiff with the facts and forthwith started searching for him. He was not at home but she eventually found him at a nearby house where he was washing a car. She asked him what he had done to her child. The plaintiff responded that he had done nothing to the child. She then proceeded to assault him. She returned home, phoned the police and informed them that the plaintiff had raped her child.

[10] The police arrived shortly thereafter while she was in the street (M. street) and holding the complainant, who was crying, in her arms. Members of the community started gathering around them and they became aggressive. The plaintiff approached them from his house. Ms M. pointed the complainant out to the police and added that the complainant had been raped by the plaintiff. The complainant in turn also pointed to the plaintiff and accused him of having raped her. The plaintiff was arrested and loaded into the back of the police van. Ms M. likewise proceeded to the police vehicle and took up the front passenger seat whereafter they all proceeded to the Kliptown police station where the plaintiff was put into the cells.

[11] Cnst Mathebula confirmed the evidence of Ms M. relating to the arrival, presence and conduct of the police at the scene, on all material aspects. He together with a crew member, whose name he was unable to recall, were on patrol duty in a police vehicle in the Pimville area, when they received a radio report concerning a rape. Having been given the street name and house number in Klipspruit, they proceeded there.

[12] Upon their arrival in Mosolodi street, they encountered a crowd of people and they were directed to where Ms M. was standing, holding the complainant in her arms. Both Ms M., who appeared aggressive, and the complainant pointed the plaintiff out as the person who had raped the complainant. The plaintiff was on the scene and he was 'fully convinced' that the plaintiff was the suspect. The plaintiff confirmed that it was alleged that he had raped the complainant. He explained the plaintiff's Constitutional rights to him and arrested him. Because they feared for his safety the plaintiff was locked into the back of the police van and they, together with Ms M., who was sitting in the left front passenger seat, proceeded to the Kliptown police station.

[13] Inspector November testified concerning the investigation diary forming part of the documents in the criminal case docket and the steps taken by him in complying with the instructions given to him as the investigating officer, from the date the docket was allocated to him, on 19 January 2010, onwards. Lastly, Mr Martin related the events from the time of having received the case docket on the morning of the trial. He studied the docket and consulted with the state witnesses. He firmly held and throughout maintained the view that the State had a 'solid' case and proceeded with the prosecution of the plaintiff, who, much to his dismay, was eventually acquitted.

The plaintiff's version

[14] The plaintiff confirmed that on the day of his arrest Ms M. confronted him in the yard at the house where he was washing a car. She was together with the second defendant, her son, who dragged him out of the yard to the side of the street and started beating him. He continuously asked why he was beaten to which Ms M. eventually responded in accusing him of having raped her daughter. The plaintiff was

lying on the ground, jumped up and ran to the house of his uncle, Rueben Kiviet. The front door was opened and he went inside. Two members of the SAPS arrived and they spoke to Rueben. Rueben called the plaintiff to point out the house of Ms M. to the police. He did so and asked to sit in the back of the police van as he was afraid of Ms M. assaulting him. The police spoke to people outside the police van and Ms M. arrived and sat in the front of the van. They then departed to the police station where he was put in the cells.

[15] The last witness to testify was Rueben Mongezi Kiviet. He confirmed the version of the plaintiff in regard to the plaintiff's arrival at his house and the plaintiff hiding in his house until the police arrived. He observed blood on the plaintiff's face. The police took the plaintiff away to point out the house of Ms M. and advised the plaintiff that he was entitled to open a case of assault. He added that the allegation of the plaintiff having raped was made by members of the crowd who had gathered outside his house in the yard.

The plaintiff's arrest and detention

The legal principles applicable

[16] It is trite that the deprivation of a person's liberty, such as arrest and detention at the hands of the police, is *prima facie* unlawful. In *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993(3) SA 131(A) 153D-E, the then Appellate Division (per Hoexter JA) held:

'The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal.'

[17] In an action for wrongful arrest and detention, a plaintiff only bears the onus of proving the arrest and detention. Recently, in *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) the Supreme Court of Appeal (per Malan AJA) reiterated this position as follows (par 6):

'To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.'

[18] In *Minister of Justice v Hofmeyr (supra)* the court further held 'Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.' This pronouncement was in approval of the earlier decision in *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) where the Court (*per* Rabie CJ) stated as follows (589D-E):

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.'

[19] In *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H, Van Heerden JA explained that once the jurisdictional requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.

[20] The reasonable suspicion requirement in s 40(1)(b) was dealt with by Jones J in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) 685E-G where the learned judge stated that the test as to whether an arresting officer held a reasonable suspicion is an objective enquiry involving the question whether a reasonable person in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the Schedule 1 offence alleged. He also stressed that, in this enquiry, it must be borne in mind that what is required is suspicion, not certainty, albeit that the suspicion must be based on solid grounds (see also *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24 para [40] – [44]).

[21] While dealing with the legal principles I consider it convenient at this stage, to refer to three judgments heavily relied upon by counsel for the plaintiff, who submitted that they are on all fours with the present matter in support of the argument that the plaintiff was unlawfully arrested. The facts those cases dealt with are clearly distinguishable from the facts of the present matter. I shall briefly refer to

each judgment. First, in *Stemar v Minister of Police and Another* (4789/2012) [2014] ZAGPPHC 295 (16 May 2014) Matojane J, in regard to a claim based on unlawful arrest without a warrant, found for the plaintiff, as the facts of the matter *and* the evidence adduced before him, in particular in regard to the identity of the perpetrator, ‘do not constitute very strong circumstantial evidence, which would found a reasonable suspicion that plaintiff raped the complainant’. The learned judge did not set out the reasons for the finding which in my view, in any event, appears to me to be open to some doubt. The second judgment relied on is by Tuchten J, in *Matshego v Minister of Police and Another* (Case no 68353/2013) (Gauteng, Pretoria, 19 October 2015) which clearly deals with an entirely different factual *matrix*. There the arresting officer in his evidence made no mention that he held a suspicion at all but merely adopted the approach that he was under an obligation to arrest merely on the basis of having been in possession of a written statement directly implicating the plaintiff in the crime of rape. The learned judge held that absent a suspicion, the arrest cannot be justified under s 40(1)(b) of the CPA. Thirdly, and lastly, I was referred to the judgment of Pakati J, in *Booi v Minister of Safety and Security* (1402/08) [2014] ZANHC 1 (28 February 2014). In that case the arrest on charges of murder and rape was effected solely on the strength of the information obtained from an informer which the learned judge held was insufficient to found a reasonable suspicion (see also my judgment on similar facts, in *Ndevu v Minister of Police* (GLD case no 34444/2011, delivered on 15 August 2016).

The law applied to the facts

[22] The plaintiff pleads that the arrest was unlawful and that he was wrongfully and unlawfully detained, in regard to which the following allegations are pleaded:

‘11. The detention of the plaintiff from 18 January 2010 to 22 November 2010 was wrongful and unlawful in that:

11.1 Inspector November and/or other unknown policemen involved in the purported investigation of the matter against the plaintiff:

11.1.1 knew, alternatively, ought to have known that no reasonable or objective grounds or justification existed for either the arrest of the plaintiff or his subsequent and continued detention;

11.1.2 could have ascertained, by the taking of simple investigative steps, that no such grounds or justification existed, but failed to take any such steps;

11.1.3 failed in his/her/their duty to inform the relevant public prosecutor/s dealing with the matter that there were no such grounds or justification and indeed no objective facts reasonably linking the plaintiff to the alleged crime of rape;

11.1.4 failed to take any steps whatsoever to ensure the plaintiff was released from detention as soon as possible.'

[23] The facts of this matter are dispositive of the pleaded allegations. It is undisputed that Ms M. summoned the police and reported to them the rape of which she had been informed that very morning. I accept the evidence of Ms M. that, as materially corroborated by Cnst Mathebula, the plaintiff, who was known to them and lived in the same street, was pointed out at the scene as the perpetrator, by both the complainant and Ms M..

[24] The plaintiff's denial that he had raped the complainant is of no moment. The plaintiff, in my view, was an unsatisfactory witness who clearly attempted in his evidence to steer clear from any facts which may remotely implicate him in the commission of the crime. Counsel for the plaintiff contended that the arresting officers were in duty bound to there and then conduct a further investigation before arresting the plaintiff. As referred to above, all that was required is a reasonable suspicion based on solid grounds, not certainty. It cannot be expected of the arresting officer, as counsel for the plaintiff would have it, to investigate each and every possible aspect relating to the crime before an arrest is made. On a conspectus of all the prevailing circumstances at the scene, the arresting officer, I find was entitled to and did form a reasonable suspicion sufficient to justify the arrest of the plaintiff.

[25] As regards the continued detention of the plaintiff, this was a matter for the court to decide. Insofar as this may be of any relevance, I am satisfied that Inspector November, upon being appointed the investigating officer, was in possession of sufficient information, consisting of the statements of the complainant, Ms M., as well as the J88 medical report, warranting the detention of the plaintiff and further investigation with a view of pursuing the prosecution of the plaintiff. It is now settled

that the purpose of the arrest is to bring the arrestee before the court, for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial (see *Minister of Safety and Security v Sekhotho & Another* [2010] ZASCA 141; 2011 (5) SA 367 paras 30-31; *Minister of Safety and Security and Another* 2011 (5) SA 367 (SCA) para 42). The plaintiff's arrest and detention accordingly was not unlawful and the arresting officer, I hold, exercised his discretion to arrest the plaintiff for a purpose contemplated by law.

Malicious prosecution

[26] The plaintiff's case regarding this claim is pleaded as follows:

'12. The prosecutor or prosecutors, whose identities are unknown to the plaintiff, who had control over the relevant police docket and who dealt with the plaintiff from time to time during his several court appearances until he was released after his acquittal on 22 November 2010:

12.1 Failed in his/her/their duty to acquaint himself/herself/themselves with the contents of the relevant police investigation docket from which it would have been obvious that there were no reasonable grounds or justification for the continued detention of the plaintiff;

12.2 failed in his/her/their duty to timeously withdraw the charge against the plaintiff;

12.3 failed in her/her/their duty to inform any of the presiding magistrates expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged crime of rape;

12.4 failed in his/her/their duty to ascertain independently that no reasonable grounds or justification existed for the continued detention of the plaintiff;

12.5 failed to establish from the investigating officer of the case, all facts which would justify further detention of the plaintiff;

12.6 failed to take any steps to ensure that the plaintiff was released from detention as soon as possible.'

[27] The sole issue in regard to the plaintiff's claim based on malicious prosecution is whether the requirement of malice has been proved. What has to be proved is this regard is *animus injuriandi* (see *Rudolph and Others v Minister of Safety and Security and Others* 2009 (5) SA 94 (SCA) para 18). In *Relyant Trading (Pty) Ltd v*

Shongwe [2007] 1 ALL SA 375 (SCA) para 14, the Supreme Court of Appeal in regard to the requirement of absence of reasonable and probable cause, held:

‘[14] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in *Beckenstrater v Rottcher and Theunissen* [1955 (1) SA 129 (A) 136A-B] as follows: ‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.’ It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff’s guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: ‘For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.’ [Footnotes omitted]

[28] In this case Mr Martin received and studied the case docket and consulted with the state witnesses on the morning of the trial commencing. All the information in the case docket is before this court. Upon this court’s consideration thereof Mr Martin’s view that the State indeed had a ‘solid’ case against the plaintiff, cannot in any way be faulted. It is not a requirement that the State should have a perfect or irrefutable case as was in effect contended for by counsel for the plaintiff. Nor is the prosecutor required to usurp the role of the Magistrate or Judge in deciding whether reasonable and probable cause for continuing with the prosecution exists. Solid as a case may appear to be on paper and even so after consultation with witnesses, it does not guarantee a conviction, as this case clearly shows. Aspects such as cross-examination of witnesses are amongst the numerous unforeseen variables that determine the outcome of a case. The acquittal of the plaintiff followed upon uncertainties having arisen upon the trial court’s evaluation of the complainant’s

version in court. The acquittal did not as counsel for the plaintiff sought to suggest, follow upon a state case that was doomed to failure right from the outset.

[29] Nothing has been put before this court to show or even suggest malice or *animus injuriandi* (*Minister for Justice and Constitutional Development and Others v Moleko* (131/07) [2008] ZASCA 43 (31 March 2008); [2008] 3 All SA 47 (SCA) para 61-64).

[30] For these reasons I conclude that the plaintiff's claims must fail.

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

1. The plaintiff's claims are dismissed.
2. The plaintiff shall pay the costs of the action.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF

ADV JMV MALEMA

PLAINTIFF'S ATTORNEYS

PADI INCORPORATED

COUNSEL FOR 3RD & 4TH DEFENDANTS

ADV M GUMBI

3rd & 4th DEFENDANTS ATTORNEYS

THE STATE ATTORNEY

DATES OF HEARING

**4, 5, 6 & 7 SEPTEMBER
2017**

DATE OF JUDGMENT

8 SEPTEMBER 2017