



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

CASE NO:24050/2020

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: No
27 July 2023	

In the matter between:

SOLOMON OLEHILE MOJAH

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

YACOOB J:

1. The plaintiff, Mr Mojahi, was arrested without a warrant at his family home, at which he resides, for allegedly assaulting his sister, Maria Kubeka. He was detained overnight, and taken to court in the morning, when he obtained bail. He was charged, prosecuted, and found not guilty.

2. Mr Mojahi now claims damages from the defendants, jointly and severally, for wrongful arrest and detention, wrongful prosecution, and loss of income, in the amount of R1,1 million.
3. By agreement between the parties, the plaintiff led evidence first. Mr Mojahi testified on his own behalf and was the only witness. The defendants called two witnesses, Sergeant Oagile Moreki, the arresting officer, and Mr Xolani Dube, the prosecutor who placed the matter on the roll.

THE PLAINTIFF'S CASE

4. Mr Mojahi testified that he lives in his parental home with three of his siblings. His parents are deceased. His sister, Ms Kubeka, does not live there but visits regularly. She visits other family members and she also visits because it is "home".
5. On Saturday 10 March 2018, Ms Kubeka was at the parental home when Mr Mojahi returned from the spaza shop. He saw his sister in the yard with his brother Michael and a tenant, Geddi or Ketu. As he passed them by, Maria said something about the yard being full of dogs. He stopped and asked her why she always causes trouble and why she called him and his family names.
6. Maria told him she was not talking to him, and he responded that she only said what she said because he had entered the yard. She then told him that she would "show me who she is" and that something was going to happen to him. His brother Michael asked him why he speaks to Maria like that and he told Michael that he can hear her "swearing" at him and does not stop her. Mr Mojahi then decided to leave, he went to tell his brother's child what had happened.

7. According to Mr Mojahi this was the sum of the encounter between himself and Maria on that day. He contends that he knew that Maria would get him arrested, she had done that before. He did not give further details of previous arrests.
8. While Mr Mojahi was with his nephew, he received a call from his wife informing him that the police were at his home looking for him. He went home and the police had already left.
9. Late on the night of Thursday 15 March, while he was asleep, two police officers came to his home and arrested him. According to Mr Mojahi he was arrested for “assault GBH”. He told the police officers he would present himself at court without the need for an arrest. One of the police officers said he should be left but the other said he should be taken away. However, under cross-examination Mr Mojahi said that he told them he had not done anything and that is why they should let him sleep at his own house. They allowed him to relieve himself and then took him in the police van to the Jabulani police station.
10. Mr Mojahi refused to give the police a statement because he did not know what to say as he had not done anything wrong. They removed his shoelaces, belt and phone and gave him a receipt, and he slept in the cell on a sponge without a blanket. There were about 15 or 20 other men in the cell. There was a toilet with no door, and sponge mattresses on the floor. He was cold. In the morning they were given bread and cold tea which he declined to eat. He was then taken to court where he was granted bail of R500. He complained that the police refused to tell him how much his bail would be, he had to wait until he got to court.

11. According to Mr Mojahi he and his sister had protection orders against one another.

He first opened a case against Maria and she retaliated by opening a case against him. Maria had taken more than ten protection orders against him and they were all dismissed. Again, no documentary evidence was tendered of these orders, or of any proceedings by either Mr Mojahi or Maria against the other.

12. Mr Mojahi conceded that the prosecutors did not know him and had no reason to harm him, but stated that you can harm a person you don't know but not following the rules.

13. In cross examination Mr Mojahi conceded that he heard in court that both Michael and Maria made statements to the effect that he had assaulted Maria with an open hand and a jacket. He denied that Maria was present at the arrest. It was put to Mr Mojahi that the arrest occurred early in the morning of 16 March, at 00h15, rather than on the night of 15 March. Rather surprisingly, considering that he does not know at what time the arrest took place, Mr Mojahi insisted that it was on 15 March.

14. Mr Mojahi was unemployed when he was arrested and was still unemployed at the time of the hearing.

The defendants' case

15. Sergeant Moreki was the arresting officer and also the investigating officer involved in Mr Mojahi's arrest. He testified that they went to arrest Mr Mojahi shortly after midnight on Friday 16 March, and that the complainant came with them to point out the suspect.

16. The complainant pointed Mr Mojahi out after he opened the door, and then Sgt Moreki informed Mr Mojahi he was being arrested for domestic violence. The statements of the complainant and a witness contained the information that the complainant and the “offender” were siblings, that is why he classified it as a domestic violence case. The complainant and the witness told him that the suspect had slapped the complainant with open hands and hit her with a jacket, on her face and upper body. There was no J88 form.
17. Sgt Moreki denied that Mr Mojahi said he would take himself to court and that there was no need to arrest him. He recalled that Mr Mojahi asked why he was arrested, and he told Mr Mojahi it was “assault DV”. Sgt Moreki also testified that the police are not allowed to deal with bail, that is something that the magistrate has the discretion to do. On being asked if he had previously arrested Mr Mojahi, he said that he had not, he saw him for the first time that night.
18. Sgt Moreki was cross-examined on the contents of section 40(1)(q) of the Criminal Procedure Act, 51 of 1977 (“the CPA”), section 18(3) of the Domestic Violence Act, 116 of 1998, (the Domestic Violence Act) and Instructions issued in terms of that section by the National Commissioner of the South African Police Services. He did not attempt to pretend that he knew the provisions without having sight of them. He simply reiterated that he knew that if he had statements to support the allegations he could arrest without a warrant. He was satisfied that he had statements from a complainant and a witness, alleging assault in a domestic violence matter, and that this allowed him to arrest the suspect.

19. There was a statement from a person called Geddi Mthimkulu, who was apparently the tenant at the property, who was an eyewitness. However the statement was dated 16 March 2018 at fifteen minutes past midnight, which is the time at which Mr Mojahi was being arrested. Sgt Moreki said that that was correct, he did in fact interview a witness that night before arresting Mr Mojahi. He needed to get that witness statement before he arrested Mr Mojahi because simply the complainant's statement would not be enough. According to Sgt Moreki it was the complainant who told him when the witness was available, and he told them to come at that late hour because that is when his team was carrying out a "raid" – an operation of arresting suspects.
20. He also conceded that he did not apply for a warrant because before he obtained the second statement, at the same time as the raid, he did not have enough evidence for a warrant, and he knew that once he had the second statement he would be able to effect the arrest without a warrant. Later he denied that he had testified that he would not be able to get a statement, but that he would not need a statement. On being asked by the court at the end of his testimony when he would consider it necessary to apply for a warrant, his response was that he would apply for a warrant of arrest "in a case where one has to arrest a suspect, like someone suspected of selling drugs and a search is necessary".
21. Sgt Moreki testified that he saw that the complainant was injured and told her to go to a doctor but she did not. He could not force a complainant to go to a doctor if she did not want to.

22. On being asked why the arresting statement was dated two days before the arrest, Sgt Moreki stated that he had written the statement on the day of the arrest but that maybe the person commissioning it made a mistake. He did not explain why he did not notice the apparent error. He was adamant that he arrest Mr Mojahi for common assault, DV (domestic violence) and had no explanation to offer for Mr Mojahi's impression that he was arrested for GBH, or for the charge in court being GBH.
23. It was put to Sgt Moreki that because there was no protection order he could not obtain a warrant in terms of the Domestic Violence Act. It must be noted that this was problematic for two reasons, one is that the obtaining of a warrant when a protection order is violated is a way of enforcing the order, rather than the order being a requirement for a warrant, and two, that this contradicts Mr Mojahi's evidence that there were multiple orders.
24. Sgt Moreki did not investigate the matter other than taking the statements, and did not go to the premises to speak to people there. He only went to the premises for that midnight raid at which he says he also took the eyewitness statement. In his own words "I avoided going there until I had the statements then I went to arrest." The inherent contradiction in his version is obvious. Sgt Moreki obtained the third statement only after the court appearance.
25. It was put to Sgt Moreki that Mr Mojahi was charged with "GBH", however the docket states that the charge was "assault, common".

26. According to Sgt Moreki, he classified the matter as “assault, DV” because the parties are family. He denied that Mr Mojahi had offered to come to the police station himself without being arrested.
27. Mr Xolani Dube is a regional court prosecutor. He testified that he was the prosecutor who placed the matter on the roll. On reading the statements he was satisfied that there was a *prima facie* case, and that the matter can therefore be placed on the roll. He issued a case number and that would then be taken by the Investigating Officer to place on the roll. The prosecutor in the court would then complete the docket, together with the relevant police officer. Mr Dube however recalls that he preferred a case of assault against the accused.
28. The cross-examination was somewhat mystifying, as Mr Dube was asked about various chief prosecutors and Directors of Public Prosecutions. Mr Dube was also asked when a prosecution starts, and he stated that according to his knowledge it is when a case number is issued and the accused’s name is placed on the register of cases, rather than when the charge sheet is formulated. Mr Dube did not formulate the charge sheet.
29. It was put to Mr Dube that a subpoena issued to a witness stated that the case was assault GBH. Mr Dube indicated that he did not know why, as far as he was aware the matter was one simply of assault.
30. The docket and the notice of rights indicate that the charge was assault, it is only a subpoena to Ms Mthimkulu, the eyewitness, that indicates it was “assault GBH”.

UNLAWFUL ARREST AND DETENTION

31. It is trite that the deprivation of liberty is something that should only happen in exceptional circumstances. Once the plaintiff has established that he was deprived of freedom, the *onus* falls on the defendant to demonstrate that the deprivation, or arrest, was lawful.
32. The defendants rely on section 40(1)(b) read with 40(1)(q), alternatively 40(2) of the CPA to support their version that the arrest was lawful.
33. It is unclear why the defendants rely on section 40(1)(b). Section 40(1) (b) provides for the arrest without a warrant of a person whom a peace officer reasonably suspects of having committed a Schedule 1 offence. According to the defendants Mr Mojahi was arrested for, and charged with, common assault, which is not a Schedule 1 offence.
34. Section 40(1)(q) permits the arrest without a warrant of a person whom a peace officer reasonably suspects of having committed an offence as contemplated in section 1 of the Domestic Violence Act, of which violence is an element.
35. It is clear that assault is an offence of which violence is an element. Section 1 of the Domestic Violence Act identifies “physical abuse” as an act of domestic violence, and defines it as an act or threatened act of physical violence towards a complainant, where that conduct harms or may cause imminent harm to the complainant. Although the Domestic Violence Act deals with “incidents of domestic violence” rather than offences, it is clear that it is these acts of domestic violence

that are meant in section 40(1)(q) of the CPA. The drafting is unfortunate, but there is no other offence that could be meant, in terms of section 1 of the Domestic Violence Act.

36. It was suggested by Mr Mvubu that no arrest for a domestic violence incident is possible unless there has first been a protection order and then a breach of that protection order.

37. This is clearly incorrect, for two reasons. The first is that the Domestic Violence Act is intended to extend the powers of the police and the courts to protect victims of domestic violence, and this is not done by limiting the existing powers of the police to arrest someone for assault just because that assault was in a domestic context. The second is that the Domestic Violence Act itself makes provision in section 3 for the arrest of a suspect at the scene of an incident of domestic violence “whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant”.

38. The defendants also relied on section 40(2) of the CPA which allows the arrest of a person without a warrant if it is provided for in any other law. This of course is a reliance on section 3 of the Domestic Violence Act. However, it is clear from the context of the Act that “at the scene” means not just at the place, but also at the time at which the incident of domestic violence is occurring, or shortly thereafter.

39. This much is clear from section 2 of the Domestic Violence Act, which places a duty on a member of the South African Police Services to assist the complainant “at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible”.

40. Taking into account that the arrest in this case took place approximately five days after the alleged incident of domestic violence, section 3 of the Domestic Violence Act does not assist the defendants, nor does section 40(2).¹
41. Sgt Moreki was the only witness who testified in support of the arrest. His evidence was replete with inaccuracies and contained certain inconsistencies that it is difficult to reconcile with a conclusion that he held a reasonable suspicion.
42. He clearly had an odd idea of when it is necessary to apply for an arrest warrant, associating it with a search warrant. This is troubling in a member of the South African Police Services of over ten years' standing.
43. He contradicted himself regarding why no warrant was obtained, on the one hand saying he would not have been able to get one as he had insufficient evidence, and on the other that it was not necessary as he had sufficient evidence to justify arrest without a warrant.
44. On his own version, though, it does not appear to be the case that he did have sufficient evidence to have reached a reasonable suspicion against Mr Mojahi. He did not do any investigations, and at the time when he embarked on the midnight raid to effect the arrest, he had only the statement of the complainant. He did not have a report from a doctor, because she apparently did not want to go to a doctor.
45. The statement of the eyewitness was, quite coincidentally, obtained at the very moment when Mr Mojahi was arrested. The coincidence is quite fantastic and I

¹ The Domestic Violence Act also allows for arrest when a protection order is not complied with, but there is no contention that that is the case here, nor was there an attempt to rely on those provisions.

have difficulty believing it. It explains why the respondents found it so important to insist that Mr Mojahi was arrested in the early hours of 16 March rather than on the night of 15 March, when for all other intents and purposes the difference is irrelevant.

46. Even if I accept that Ms Mthimkulu's statement was in fact obtained at the same moment Mr Mojahi was being arrested, this means that, before the arrest, there was insufficient evidence on which to effect the arrest.

47. It must be borne in mind that the arrest did not take place while an incident was occurring, in the heat of the moment, with statements being taken contemporaneously, and a complainant likely in danger. This arrest was planned, five days after the incident, when no-one was in danger, and the statement was taken at a time when most people would have been asleep. There was no proper explanation given for this extraordinary occurrence, apart from that the complainant said the witness would be available.

48. Sgt Moreki certainly did not have the time to consider the evidence, even if it is assumed in his favour that that was sufficient investigation, which it clearly was not. The unavoidable inference is that the arrest was planned, and was going to happen, and the eyewitness statement was obtained at the same time or after the fact in order to justify it.

49. This is before one takes into account the inexplicable fact that Sgt Moreki's arresting statement is commissioned and dated two days before he claims he wrote it. His explanation was that it must have been a mistake. If it was a mistake, it calls into question the extent to which any documents produced by the South African

Police Services. Sgt Moreki himself did not even appear to notice this mistake when he signed his statement, which was presumably commissioned in his presence.

50. As far as Mr Mojahi's offer to come to the police station without being arrested is concerned, I do not rely on it. This is because Mr Mojahi also stated that he asked them not to arrest him because he did not do anything. If this was the case, it is difficult to see why he would then present himself at the police station.

51. I am satisfied therefore that the first defendant has failed to discharge the *onus* of showing that the arrest was lawful.

52. There being no intervening factors between the arrest and the detention, I am satisfied that the resulting detention was also unlawful. The only redeeming factor was that the detention was shorter than that suffered by many arrested persons.

MALICIOUS PROSECUTION

53. The plaintiff bears the *onus* of proving on a balance of probabilities that the prosecution was malicious.

54. In my view there was no evidence at all from which to make an inference that the prosecution was malicious. By the time the matter was prosecuted there were statements from the complainant and two eyewitnesses. Certainly a *prima facie* case appears to have been presented to the prosecution.

55. There is no merit in Mr Mvubu's submission that Mr Dube appeared simply to blindly defend his employer's case. Mr Dube impressed the court as a good

witness. He simply told what he knew and did not attempt to make anything up or justify anything.

56. I am satisfied that the malicious prosecution case must be dismissed.

QUANTUM

57. No evidence was presented for the loss of earnings claim, which must therefore also be dismissed.

58. The only quantum to be considered is for general damages for the arrest. It is clear that the arrest was traumatic for Mr Mojahi, it was done in the middle of the night for no obvious reason, and that conditions in the cells were extremely unpleasant.

59. An award of damages has to be fair to both the claimant and the defendant. It is not punitive, indeed the person who carried out the arrest does not bear the financial consequences of his actions, rather the award is compensatory in nature. But it is not intended to give a plaintiff a windfall. The award is also not to be a mathematical calculation.

60. The trend recently, at least at the level of the Supreme Court of Appeal, is to award smaller, almost nominal amounts. See for example *Minister of Police and Another v Erasmus* 2022 JDR 0979 (SCA), in which the SCA reduced to R25 000 an award of R50 000 granted to a plaintiff arrested on suspicion of housebreaking and theft, and detained for 20 hours.

61. I am satisfied that the conduct of the SAPS members in this case was sufficient, in particular, rudely awakening Mr Mojahi from his sleep, and obtaining a witness

statement almost in order to justify the arrest, rather than as part of their investigations in order to consider whether they could form a reasonable suspicion, to award a slightly higher award than that in *Erasmus*. I therefore consider the appropriate award to be R30 000.

COSTS

62. The plaintiff is entitled to his costs for the claims of unlawful arrest and detention.

However, he was unsuccessful in his claim of unlawful prosecution, against the second defendant. The ordinary rule is that costs follow the result, but in this case it is clear that any order that the plaintiff pay the second defendant's costs would be bootless, as he is not a man of means.

63. I therefore make the following order:

1. The plaintiff succeeds in his claims of unlawful arrest and detention.
2. The first defendant is to pay to the plaintiff R30 000, plus interest at the current rate of *mora* interest, to be calculated from 30 days after the date of judgment until the date of payment.
3. The first defendant is to pay the plaintiff's costs, save for those costs associated with Claim C.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Plaintiff: K Mvubu
Instructed by: Yonela Bodlani Attorneys

Counsel for the Defendants: L Qwabe
Instructed by: The State Attorney (Johannesburg)

Date of hearing: 14, 15 and 17 November 2022
Date of judgment: 27 July 2023

