

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

20/05/2011
CASE NO 33324/2007

11	REPORTABLE: YES NO
21	OF INTEREST TO OTHER JUDGES: YES NO
31	REVISED.
20/05/2011	
DATE	SIGNATURE

LINDA ISRAEL BEKA

PLAINTIFF

AND

THE MINISTER OF SAFETY AND SECURITY

FIRST DEFENDANT

INSPECTOR TINYIKO CHAUKE

SECOND DEFENDANT

JUDGMENT

PHATUDI J

[1] The plaintiff instituted this action against the defendant for damages he sustained as a result of the defendants arrest and detention without a warrant. The plaintiff further claim damages occasioned by second defendant and other Police Officers who assaulted him.

[2] At the commencement of the trial, the defendants abandoned their special plea. The defendants concede that the onus is on them to prove that arrest was lawful. They further concede that they have a duty to begin.

[3] Tinyiko Rekson Chauke (Chauke) testifies in Tsonga. Ms July Sithole, duly sworn-in interpreter, interpreted to English. He is a warrant officer and investigating officer attached to Saselamani Police Station. He is assigned to investigate an offence of murder, attempted murder and rape under case number CAS 29/08/2004. He hands in the entire police docket as exhibit. I marked it "A".

[4] He testifies that on 11 August 2004, he received a call to attend to the case of murder committed near Shikundaville next to Punda Maria Road. On his arrival at the scene, he found the body of a person lying near a Toyota Hi-Lux (LDV) with registration number DKG 414 N. He noted gun shot wounds on the body of this person. He found that the person had already passed on.

[5] He later learned that the deceased was one Paul Ramudhuli. He arranged for a photographer and for the body to be taken to the mortuary. The photos compiled are not clearly visible. He further learned that another victim has been taken to the hospital. He proceeded to the hospital where he consulted with the victim by the name of Josephine Mabaso (Josephine). Josephine made a statement¹ which he reduced to writing. He, subsequent thereto, went to the following people and obtained statements by:

¹ Statement at page 4 to 6 of Exhibit A. it is a handwritten statement with no typed version.

- (i) Vaidah Mabaso – marked **A4**²
- (ii) Jack Mafumo – marked **A5**³
- (iii) Constance Mabaso – marked **A6**⁴

[6] On the 16 August 2004, he went with Captain VF Ngobeni to Mankweng Hospital to obtain another statement from Josephine. The statement is Marked **A7**⁵. He, based on the contents of the statements, formulated a prima facie case that justified plaintiff's arrest. He further formulated a suspicion that the plaintiff is the one who committed the said offences⁶.

[7] He testifies under cross-examination that on the 11 August 2004, Josephine did not mention the name of the perpetrator. She only mentioned the name of the perpetrator on the 16 August 2004 during consultation with Captain Ngobeni. Josephine indicated that the plaintiff warned her that he (Plaintiff) would kill her should she disclose his name. He found the explanation to have been acceptable and reasonable. It is on that basis he effected plaintiff's arrest on the 19 August 2004. He was assisted by other Police officers.⁷ They went once to the plaintiff's house at about 10h50. They there and then searched the house for a firearm but to no avail. He denies having assaulted the Plaintiff on the day in question.

² Page 9 of exhibit A

³ Page 12 of exhibit A

⁴ Page 14 of exhibit A

⁵ Page 16 of exhibit A. I required second Defendant to read the entire statement of Josephine on record as there is no typed version.

⁶ Murder, attempted murder and rape.

⁷ Warrant officer Khoza, wife of Ngobeni, wife of MT Micheal and Maluleke.

[8] He concedes that the plaintiff was arrested in the morning of Thursday 19 August and only brought him to court on Monday 22 August 2004. He opposed the plaintiff's application to be released on bail.

[9] The plaintiff, well known in his community as Beka Mhlanga "the carpenter". He testifies that the second defendant together with four (4) other officers arrested him at his house. He co-operated and complied with their orders in all respect. He responded humbly to their questions. He was taken to the police station. On their arrival, one warrant officer Khoza told other officers to release him on warning. The second defendant refused to release him and told w/o Khoza that "broerskap" is not permissible.

[10] The second defendant enquired from him as to the whereabouts of the firearm. He was then assaulted at the Police station. Later during the day, he was again assaulted at his house in demand of the firearm. He was again taken to the Police station where he was "suffocated" with a sack at room 6. They kept on saying "bloody F*** terrorist, take out the firearm".

[11] He concedes that he was in a love relationship with Josephine but denies being involved in the commission of the offences. He further concedes that he underwent military training at Mkhonto we Sizwe (MK) outside South Africa. He finds no justification for his arrest. He testifies that he lost income from a subcontract he signed with Erick Matchebela.

[12] He testifies under cross-examination that he was assaulted at the Police station and at his house when taken there in search for a firearm. His face was swollen with no bruises. He further testifies that the Police

refused to take him to a doctor. He was kept in custody until taken to court on Monday 22 August 2004.

[13] When confronted with his statement, he denies knowing what was written in the statement. He was only told to sign an uncompleted document. The contents of the statement were not read to him. No rights were explained to him.

[14] With regard to the sub-contract, he testifies that he would have been paid R40, 000.00 on completion. The main contractor would provide the materials. All he had to do was to provide labour and skill.

[15] Matena Erick Matchebela (Matchebela) testifies that he had been awarded a tender to build RDP houses. He concluded a sub-contract with the plaintiff. The plaintiff had to erect roofs of the said RDP houses. He would provide material. Material was not delivered on time. By the time the material was delivered, he learned that the plaintiff was arrested. He would have paid the plaintiff R40, 000.00 per month. The total value of the sub-contract was approximately R1 000 000.00 (one million rand). The total value of the tender he received is approximately R5 000 000.00 (five million rand) He would have paid the plaintiff the said R40, 000.00 per month with ease. He handed in a document to prove the value of the tender. The document was handed in as exhibit **B5**.

[16] The second defendant is recalled on allegations of assault. He denies having assaulted the plaintiff at all. The defence team objects that the plaintiff testified on his assault at his house. We played the record back to ascertain if indeed the plaintiff did testify of the assault at his

house. I recorded that he was assaulted both at Police Station and his house during arrest.

[17] In my evaluation of the evidence, it is clear that the following is not in dispute.

17.1 Warrant officer Chauke is a peace officer who effected the plaintiff's arrest and detention.

17.2 The arrest was effected on 19 August 2004

17.3 The second defendant was acting in the course and scope of his employment with the first defendant.

[18] The following issues are in dispute.

18.1 Notwithstanding the defendant's admission of the arrest, they contend that the arrest and detention was lawful and justified in terms of section 40 (1) (b) of Criminal Procedure Act 51 of 1977 on the basis of second defendant's reasonable suspicion that the plaintiff had committed the offence.

18.2 The plaintiff had been assaulted by the second defendant.

[19] No evidence was led by the plaintiff in support of his claim for legal fees and malicious prosecution. In fact, the director of public prosecution (DPP) declined to prosecute. There was no prosecution conducted against plaintiff. The malicious prosecution and the claim for legal fees stand to be dismissed.

[20] Section 40 (1) (b) of Criminal Procedure Act provides that a peace officer may without a warrant, arrest any person whom he reasonably suspect of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. In order to find that arrest was effected lawfully in terms of section 40 (1) (b), the court must consider the following jurisdictional facts. (i) The arrestor must be a peace officer ;(ii) the arrestor must entertain the suspicion ;(iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1 of Criminal Procedure Act and (iv) the suspicion must rest on reasonable grounds.

[21] It is without doubt that the arrestor (W/O Chauke) of the Plaintiff was (and still is) a peace officer. It is further not disputed that the arrestor entertained a suspicion based on Josephine's statement. The question to be determined is whether the suspicion rest on reasonable grounds considering the evidence tendered.

[22] Josephine's statements are not in dispute. It is further common cause that the Plaintiff and Josephine had intimate relationship. Josephine is one of the victims. She was with the deceased on the day and time when the offences were committed. Josephine states that the perpetrator raped her before fleeing.

[23] The second defendant obtained the statement from her on the 11 August with no names of the perpetrator. Another statement obtained on the 16 August, with which the plaintiff's name is mentioned as the perpetrator. The second defendant testified that Josephine indicated to him that she withheld the name of the perpetrator in fear of her life. It is not clear from Josephine's statements and the second defendant's

evidence as to when were such threats advanced. It must be remembered that Josephine knew the Plaintiff. She alleges to have been raped at the scene by the plaintiff. One can easily infer, as I do, that the plaintiff may have uttered the said threatening words during the commission of the offence, (most probably during rape).

[24] The second defendant alleges to have established the suspicion that the plaintiff did commit the offences. In **Louw v the Minister of Safety and Security 2006 (2) SACR 178 (T)**, Bertelsmann J is '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 CPA 51 of 1977 has allegedly been committed, and even if the arresting peace officers believes on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith'. He further held that 'if there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his or her arrest,... then its constitutionally untenable to exercise the power to arrest'. Harms DP in **Minister of Safety and Security v Sekhoto 2011(1) SACR 315 SCA** refers this as "the fifth jurisdiction fact" which would be a valid requirement for arrest under all paragraphs of section 40(1) of Criminal Procedure Act.

[25] Harms DP further set out that "this requires that the facts on which the defence is based must be set out." He further thereto states that "it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant as not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations..."

[26] The question to be considered here is whether the second defendant considered and applied his discretion in establishing a reasonable suspicion. The second defendant testified that he formulated a suspicion that the plaintiff is the suspect because Josephine and the plaintiff knew each other from their intimate relationship. He thought that Josephine would not be telling a lie.

[27] The other question to consider is whether the second defendant considered other means of bringing the suspect before court. The Plaintiff testified that one W/O Khoza was inclined to release him on “warning” [or summons] to appear to court on specific day. The second defendant refused to adhere to such opinion from his colleague by uttering the words ‘no broerskap allowed’. It is clear that second defendant had already taken a decision to keep the plaintiff in custody without considering other means of bringing suspect to court.

[28] Did the second defendant investigate explanation offered by the suspect? Both the plaintiff and second defendant testified that the plaintiff corporated with the Police. He responded humbly to all questions posed to him. The second defendant conceded thereto. He even testified that the words written in the “bail form” that Plaintiff did not corporate were misplaced.

[29] He, however, failed to accept the plaintiff’s explanation. He failed to investigate the explanation the plaintiff offered. This is clear that the plaintiff did not present a danger to the society. I find the second defendant’s explanation that the plaintiff, as an MK veteran, presented a danger to the society as being misplaced. I find no evidence that the plaintiff would have absconded or harmed himself or was not able and

keen to disprove the allegations. The suspicion was not sufficiently reasonable at the time of arrest.

[30] The Plaintiff testified that he was assaulted at room 6 (six) of Sesalemani Police Station. He was further assaulted at his house. Considering that he was arrested on Thursday morning of 19 August 2004 and only brought to court on Monday 22 August, I infer that the Plaintiff was indeed assaulted. He was kept in custody for the weekend to conceal his swollen face to the public and in particular, the presiding officer. I find no reason why the plaintiff was not brought to court on Friday 20 of August other than to conceal the swollen body and face of the plaintiff. In support thereto, he reported the matter which was not investigated to date.

[31] The Plaintiff had a standing contract to erect roofs of RDP houses as corroborated by Mr. Matchebela. It is clear that Mr. Matchebela had a contract (tender) to build the RDP houses. It is undisputed by the defence that such a contract existed. The defence attempted to dispute the amount to be paid to the Plaintiff. The document **B5** blew on the face of the defence. In fact, they shot themselves in the foot by calling for such a document. Had it not be for the detention of plaintiff, he would have earned R40 000.00 per month as placed on record by Mr. Matchebela. I find the difference in their testimony on when would the amount have been paid (monthly or on completion), as immaterial.

[32] I find the Plaintiff to have suffered general damages in respect of loss of freedom and discomfort. The quantum is not disputed. I am, though, of the view that an amount of R150, 000.00 is commensurate to his claim.

[33] It is trite law that costs follow the event. The plaintiff's successes dictate his entitlement to costs. I thus make the following order.

THE FIRST AND SECOND DEFENDANTS ARE JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED:

CLAIM A:

1. ORDERED TO PAY THE PLAINTIFF THE SUM OF R1,110,000.00
2. INTEREST ON THE SAID SUM OF R1110000.00 AT THE RATE OF 15, 5 % PER ANNUM FROM THE 14TH DAY OF THIS DATE TO DATE OF PAYMENT

CLAIM B

3. ORDERED TO PAY THE PLAINTIFF THE SUM OF R30,000.00
4. INTEREST ON THE SAID SUM OF R30,000.00 AT A RATE OF 15.5% PER ANNUM FROM THE 14TH DAY OF THIS DATE TO DATE OF PAYMENT
5. ORDERED TO PAY THE PLAINTIFF'S COSTS OF SUIT


AML PHATUDI
JUDGE OF THE HIGH COURT

Heard on: 08 March 2011
For the Plaintiff: Adv MA CHAUKE
For the Defendants: Adv AT NCONGWANE
Date of Judgment: 20 May 2011