

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No. 2629/2013

Dates Heard: 28 -29July 2016,

and 1 August 2016

Date Delivered: 4 October 2016

In the matter between:

Sipho Zweni

Plaintiff

and

The Minister of Police

First Defendant

The National Director of Public Prosecutions

Second Defendant

JUDGMENT

MALUSI AJ:

[1] This is an action for damages for alleged unlawful arrest, unlawful detention and malicious prosecution. The claim is defended by both defendants.

[2] The plaintiff claims damages in the sum of R250,000.00 for unlawful arrest on 23 September 2010 and initial detention until his first appearance in the Port Elizabeth Magistrates Court on 27 September 2010. He further claims damages in the sum of R200,000.00 for unlawful detention for the period commencing when he appeared in the lower court to 14 February 2012 when he was acquitted. The third claim for damages is for the sum of R250,000.00 which is based on malicious prosecution.

[3] The defendants admitted in their plea that the plaintiff was arrested without a warrant. They denied that the arrest and detention were unlawful. They asserted that the arrest and initial detention were justified by the provisions of section 40(1)(b) read with section 50 of the Criminal Procedure Act 51 of 1977. They asserted that the detention for the extended period was due to plaintiff being denied bail and postponements of the case in the course of the administration of justice. The defendants admitted the arrest and prosecution of the plaintiff but denied that they acted without reasonable cause.

- [4] Most of the evidence is either common cause or is not disputed. The plaintiff testified that on Monday, 20 September 2010 at about 14h00 he was off-loading tools from his van to storage at his home. Whilst busy with this chore he called the complainant, T.. He sent her to buy paraffin for him at the local shop. Upon return he instructed her to place the paraffin container on a table in his kitchen. He gave the child a R5 tip and as she walked out of the gate she was joined by another child, N..
- [5] The plaintiff gave evidence that at about 17h00 on the same day he met the two children on the way as he was driving to the local Spar supermarket. He gave them a lift and dropped them in a street in his neighbourhood upon return.
- [6] The plaintiff testified that on Thursday, 23 September 2010 he was arrested at his home. The arresting officer told him the reason for the arrest was the alleged rape of the complainant the previous Monday. Nothing further was explained. His evidence was that he told the police of an altercation he had with a young man from his neighbourhood. He was later detained until the following Monday.

[7] Under cross examination the plaintiff conceded the police were simply performing their duty and had no ulterior motive. He denied that he was pointed out by the complainant at the time of arrest. He conceded the complaint was serious and it was not unreasonable to arrest him. He gave convoluted evidence about the complainant being part of a conspiracy against him.

[8] Constable Gregory Harry is the detective who arrested the plaintiff. He testified that he interviewed the complainant's mother, N. J. and her neighbour N. N.. The complainant was interviewed by another female officer. After written statements were obtained from all three witnesses, he accompanied the complainant and her mother to the plaintiff's house.

[9] Harry gave evidence that plaintiff's wife opened the door. The plaintiff was called to the door and he informed him about the charge. An argument ensued between the plaintiff and his wife. He went outside with the plaintiff. The complainant pointed out the plaintiff as the person who raped her. The plaintiff was arrested and detained at Motherwell police station.

[10] Harry said the reasons he arrested the plaintiff were that the charge involved a schedule 6 offence; he had no authority to issue a warning to

appear at court to plaintiff; the latter was positively identified by the complainant; the residences of the plaintiff and complainant were in close proximity on the same street.

[11] Under cross examination Harry testified that though he had decided to arrest the plaintiff by the time he left the police station this was subject to the complainant identifying the plaintiff. His view was that it was not prudent to delay the identification of the plaintiff by the complainant. He had compared and weighed up the written statements and found no discrepancy with oral statements given to him. He did not get a warrant of arrest as the matter involved a schedule 6 offence. He also needed to act urgently.

[12] Harry testified he had arrested the plaintiff so that he may be taken to court. Another factor he had considered was is that due to the close proximity of the residences the community may exact mob justice against the plaintiff.

[13] Renerte Grobelaar is 24-year veteran senior public prosecutor. She read the docket on the morning of the plaintiff's first appearance in the lower court. At that time there were ten statements in the docket. She was

convinced there was a strong prima facie case against the plaintiff based on the statements.

[14] Under cross examination she testified that she did not only consider the complainant's statement and the J88 medical legal report. She also considered the important statement of N. who saw the complainant with the plaintiff and the statement of the complainant identifying the plaintiff. She was of the view that apparent contradictions on some aspects between the statements were not material as police statements are generally of poor quality. Her view was that the alleged rape was not a once off incident as the J88 and the statements indicated grooming of the complainant by the plaintiff. She stated that a prosecutor could not authorize the release of an accused on bail in a schedule 6 offence as the court is required to authorize such. On completion of the investigation she was convinced the evidence proved the plaintiff's guilt beyond a reasonable doubt.

Unlawful arrest and detention

[15] The right to freedom and security is enshrined in section 12(1) of the Constitution and any arrest and detention of a person amounts to prima facie infringement of these rights. When challenged, the

police bear onus of proving that the arrest and detention are not wrongful¹.

[16] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ('the Act') provides for an arrest by a peace officer without a warrant of any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act. In *Duncan v Minister of Law and Order*² it was held that there are four jurisdictional pre-requisites to be established before an arrest is determined to be in accordance with the section. These are the following:

- (i) The arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- (iv) The suspicion must rest on reasonable grounds. The introduction of a fifth jurisdictional element has been rejected by the Supreme Court of Appeal³. The test whether the police officer has a reasonable suspicion is an objective one⁴.

¹ *Zealand v Minister of Justice and Constitutional Development and Another* 2008(2) SACR 1 (CC) at para 24; *Minister of Safety and Security v Slabbert* [2010]2 All SA 474 (SCA) at para 20

² 1986(2) SA 805(A) at 818 9-H

³ *Minister of Safety and Security v Sekhoto and Another* [2011]2 All SA 157 (SCA) at para 22

⁴ *Woji Minister of Police* [2015]1 All SA 68 (SCA) at para 8

- [17] The discretion whether to arrest or not arises once the required jurisdictional facts are present. The exercise of the discretion by the police officer must be rational when viewed objectively⁵.
- [18] Section 35(1) (d) of the Constitution provides that a person under arrest has the right to be brought before a court as soon as reasonably possible but not later than 48 hours after arrest. Section 50(1) of the Act is the legislative enactment of this Constitutional right.
- [19] Unlawful detention does not necessarily depend upon whether the original arrest was unlawful or not. Justification for the detention that follows on arrest until a detainee's first appearance in court continues to rest on the police⁶. The unlawfulness of a detention does not cease when the detainee is brought before a reception court, as remand orders by a Magistrate do not validate an unlawful detention ⁷.
- [20] In the particulars of claim the principal attack on the lawfulness of the arrest is predicated on the assertion that Harry's suspicion was

⁵ Sekhoto supra at para 36

⁶ Minister of Police v Du Plessis 2014(1) SACR 217 (SCA) at para 17

⁷ Minister of Safety and Security v N Ndlovui 2013(1) SACR 339 (SCA)

not based on reasonable grounds. The following facts are the basis for the assertion:

“10.1. In formulating the alleged suspicion rape murder (sic) the members of the SAPS and prosecutors failed to take into account contradictions between the various state witnesses;

10.2. That there was no conclusive medical evidence confirming the charge of rape;

10.3. That the complainant was not a competent witness.

10.4. In the circumstances, the said members of the SAPS and prosecutors at all times failed to pay due regard to the logical conclusion that followed from the available evidence, namely that the complainant was not raped by the Plaintiff.”

[21] In the alternative, it is asserted that Harry failed to exercise his discretion properly as on the available facts *"there was no rational need to deprive the plaintiff of his liberty pending his first appearance in court."*

[22] Thus, it is clear that only the fourth jurisdictional pre-requisite for unlawful arrest at issue. There is no dispute that Harry is a peace officer; he entertained a suspicion; the suspicion was that the plaintiff had committed rape which is in offence listed in Schedule 1. The issue for decision is whether Harry's suspicion rests on reasonable grounds.

[23] The first assertion by plaintiff is that there were contradictions in the statements of the three state witnesses available at the time of arrest. Mr Dyer, who appeared for the plaintiff, concentrated on the discrepancy in the sequence of events and failure to conduct further investigations.

[24] In my view there is no merit in the assertion. There are no material contradictions on the first three statements except for dates. The contention of discrepancy is based on a misunderstanding. It takes into account statements that were not available to Harry at the time he took the decision to arrest the plaintiff. The statement of N. was taken the day after the plaintiff was arrested.

[25] Whether further investigation is warranted before an arrest is effected must surely depend on the facts of each case. An objective assessment of the three statements available indicates there were reasonable grounds to arrest without the need for further investigation. N. saw the complainant

in objectively “suspicious” circumstances with the plaintiff. When the complainant was confronted by N. she alleged being raped by the plaintiff on multiple occasions. Harry took the precaution of checking the aspect of identity by having the child point-out the plaintiff. The statement of Jack is just a preamble on a standard form without making material allegations.

[26] The requirement is that the arresting officer only has to form a suspicion. I agree with Jones J when he said , *“This is not to say that the information at his disposal must be of sufficient high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty.”*⁸

[27] The rest of the other basis relied upon by the plaintiff tabulated in paragraph 20 above have no merit. They are that the facts were known after the arrest was effected. An objective assessment of Harry’s state of mind and the facts he considered at the time of arrest ineluctably lead to the conclusion that at the time of arrest the suspicion was reasonable.

⁸Mabona v Minister of Law and Order and Others 1988(2) SA654(SE) at 658 E-H

[28] The plaintiff asserted in his first alternative cause of action in the particulars of claim that the arrest was malicious. No proper basis was alleged. Mr Dyer listed a number facts as the basis of contending the arrest was malicious. I need not list nor deal with them in any detail as none of these facts raised constitute a basis for malicious arrest. Harry stated that the sole object for the arrest was to bring the plaintiff to court. This justified the arrest as not malicious. Only the object and not the motive for the arrest is relevant in determining malicious arrest. The claim for malicious arrest must therefore fail.

[29] The exercise of discretion by Harry was challenged by the plaintiff in his particulars of claim. It has been held that once the jurisdictional facts are established, it is for the plaintiff to prove that the discretion was exercised in an improper manner⁹. Under cross examination by Mr Beyleveld, who appeared for the defendants, the plaintiff conceded that it was a correct decision to arrest him. Nowhere in his evidence did he say the discretion should have been exercised in his favour. By that I do not mean I expected him to know of the concept of discretion but at least I expected him to provide reasons and to allege that regardless of the suspicion he should not have been arrested.

⁹ Sekhoto ibid at para 46

[30] Under cross-examination Harry stated that discretion was "not available" in this case because of the seriousness of the offence. It appears he felt compelled to arrest. But vigilant analysis of the evidence indicates that he in fact exercised a discretion. His evidence indicates that he had decided to arrest the plaintiff when he left the police station. But this decision was to be reconsidered by him depending on whether the plaintiff was identified by the complainant. He clearly applied his mind to the facts before him. He also considered the proximity of the residences of the plaintiff and complainant. All these facts made him arrest the plaintiff.

[31] Harry may not have been aware of discretion as a concept. He struck me as not being a knowledgeable or sophisticated police officer. An example is that in his 11 years experience he had never applied for a warrant of arrest. In my view the court needs to look at whether he applied his mind to the relevant facts. One needs to look beyond mere concepts but at the substance. He clearly applied his mind before arresting the plaintiff. His decision hinged on the identification of the plaintiff.

[32] I am of the view that Harry was an honest and truthful witness. He answered the questions satisfactorily. His evidence was clear and cogent despite his limitations outlined above. I accept his evidence especially where contradicted by that of the plaintiff who was not a good witness.

[33] I am obliged to distinguish the present matter from *Domingo v Minister of Safety and Security*¹⁰ and *Qunta v Minister of Police*¹¹. Both these cases are judgments of Chetty J in which I concurred. The *Domingo* and *Qunta* are distinguishable from the present case on the facts. In both of those matters it was clear no thought was given to the arrest by the arresting officer. The facts in this matter are quite different as outlined above. As such I may depart from the precedent in these two cases.

[34] I am satisfied that viewed objectively the decision to arrest was rational. The reasons given by Harry for arresting plaintiff cannot be faulted. This was a serious case with a discretionary minimum sentence of life imprisonment. The lawfulness of an arrest, it has been held, is closely connected to the facts of each situation¹². The evidence indicates that the arrest was justified and thus lawful.

[35] The initial detention of the plaintiff is on an entirely different footing. It was foreshadowed in the particulars of claim that the plaintiff asserted his initial detention to be unlawful. Despite this the defendant led no evidence whatsoever to justify the plaintiff's initial detention. The

¹⁰ CA 429/2012)[2013] ZAECGHC 54 (5 June 2013)

¹¹ CA 114/2012) [2013] ZAECGHC 53 (5 June 2013)

¹² Minister of Safety and Security v Van Niekerk 2008(1) SACR 56 (CC) at para 20

justification for detention after an arrest until the first appearance in court continues to rest on the police ¹³.

[36] In *Burford v The Minister of Police*¹⁴ it was held that having regard to the incidence of onus it was incumbent on the respondent to have adduced evidence to justify the detention. Failure to lead evidence can only result in the defendant being liable. The same finding was reached in *Minister of Safety and Security v Jaftha*¹⁵ in similar circumstances. Consequently, the first defendant is liable for the unlawful detention of the plaintiff during the initial period before his appearance in the lower court.

[37] The plaintiff asserts further in the particulars of claim that his extended detention from 27 September 2010 when he first appeared in the Magistrates Court to 14 February 2012 when he was acquitted was unlawful. The basis are that employees of the defendants allegedly failed to properly investigate the charges against him; failed to inform the presiding Magistrate that the complainant was not a competent witness; represented that there were sufficient and compelling reasons not to release the plaintiff on bail; and failed to ensure all relevant issues were considered by the Magistrate.

¹³ Du Plessis *ibid* at para 17

¹⁴ CA 128/2015 [2015] ZAECGHC 126(10 November 2015) at para 24

¹⁵ CA 310/2014) [2016] ZAECGHC6 (1 March 2016

[38] The detention of the plaintiff when he first appeared in the Magistrate Court was governed by section 60(11)(a) of the Act. It provides:

“(11) Notwithstanding any provision of this Act, where accused is charged with an offense referred to–

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release;” (own emphasis).

Clearly section 60(11)(a) authorized the detention of the plaintiff unless he discharged an onus. It was held that this section limits the right of the accused to be released from detention in section 35(1)(f) of the Constitution ¹⁶ .

[39] The plaintiff instituted two applications for bail. He abandoned his first bail application midway in the hearing. The second bail application was

¹⁶ S v Dlamini et al 1999(2) SACR 51 CC at para 77

refused by the Magistrate. The applicant contends there was no proper investigation by the police. He does not state in what respect. It cannot be expected of the defendant to lead evidence about every conceivable aspect of the investigation to rebut this allegation. There is simply no merit in the allegation when the factual basis has not been disclosed.

[40] The plaintiff asserts that the defendants' employees failed to inform the Magistrate that the complainant was not a competent witness. This overlooks the fact that the psychological report was received by the defendants on 10 March 2011. The second bail application had been concluded on 2 March 2011. The copy of the docket was provided to the plaintiff's legal representatives on 15 April 2011. It was incumbent on the plaintiff to bring a third bail application not the defendants. Furthermore, The report does not say the complainant is incompetent only that she is mildly mentally retarded. It is the Regional Magistrate who made a ruling that she is incompetent. I find no merit in this assertion.

[41] The plaintiff asserts that defendants' employees represented there were reasons not to release him on bail. He does not allege in what respect this was wrong or unlawful. The employees could not just be supine in the

bail application. They had a legal obligation to place evidence before court ¹⁷. I find no merit in this assertion.

[42] The plaintiff asserts the defendants' employees failed to ensure the Magistrate considered all relevant issues. None of the "issues" are specified nor in what respect the defendants' employees failed. There simply is no merit whatsoever in this assertion.

[43] Grobelaar testified that she alone took the decision to oppose bail. The reasons to oppose were that it is was a serious case , a Schedule 6 offence and the State had a strong case. She was of the view that during bail application the complainant strengthened the State case by placing himself on the scene. After the second hearing the Magistrate refused bail.

[44] I am of the view that, taking into account the evidence of Grobelaar and the evidence in the form of the transcripts of the bail applications , the defendants discharged the onus on them to justify the lawfulness of the entire period of detention. The fact that there was a statutory provision stipulating plaintiff must be detained weighs in the favour of the defendants.

¹⁷ S v Branco 2002(1) SACR 531(W) at 533 F

malicious prosecution

[45] The plaintiff must allege and prove following requirements in order to succeed on a claim for malicious prosecution:

- (a) That the defendants set the law in motion (investigated or instituted the proceedings);
- (b) That the defendants acted without reasonable and probable cause;
- (c) That the defendants acted animus injuriandi; and
- (d) That the prosecution has failed¹⁸.

The four requirements will be considered in turn.

[46] It appears from the evidence that the employees of the first defendant did no more than one would expect from them. Harry and his colleagues received the complaint and registered it. He arrested the plaintiff and detained him. The investigating officer submitted the docket to the prosecution. There is no evidence that any of the employees of the first defendant were involved in the decision to prosecute. Thus, the first defendant cannot be held liable for the prosecution.

¹⁸ Prinsloo and Another v Newman 1975(1) SA 481(A) at 492 C-F; Minister of Justice and Constitutional Dev. V Modeko 2009(2) SACR 585 (SCA) at para 8

- [47] Grobelaar testified that she alone took the decision to prosecute the plaintiff. Clearly she set the law in motion.
- [48] Reasonable and probable cause means in this context an honest belief founded on reasonable grounds that the institution of the proceedings is justified. It has to be determined by adopting both an objective and subjective approach¹⁹. It is not expected of the defendant to test the truth of every possible relevant factor before initiating the prosecution. It must be decided on the facts of the particular case.
- [49] Grobelaar testified that she genuinely believed that the accused was guilty of rape. She considered 10 statements in the docket , namely A1-A10, when taking the decision to prosecute. She considered N. 's statement important as she saw the complainant with the plaintiff. The plaintiff was pointed out by complainant. The fact that the plaintiff was with the complainant in his home at the time of the incident. She considered all of these facts crucial.
- [50] Grobelaar struck me as genuinely believing the plaintiff was guilty. When discrepancy regarding sequence of events was pointed she firmly stated it was not a material factor. This was because the quality of the statement

¹⁹ Moleko at para17

was not good. She displayed a confident and calm demeanour throughout her evidence. She was an impressive witness.

[51] I objectively considered whether Grobellar's belief and conduct was reasonable. I am satisfied that there was a prima facie case established in those statements. The complainant stated that she had been raped inside the plaintiff's house. N. corroborated that the complainant was inside the plaintiff's house at the time. The complainant was in the complainant's motor vehicle according to N. . The report the complainant made to N. about repeated rape incidents, the medico legal report indicated rape could not be excluded. All this evidence when considered holistically establishes a prima facie case.

[52] The plaintiff appeared to me to be untruthful. He could not answer simple questions. He was visibly uncomfortable when pointedly asked about the charge of rape. His memory was selective in its recollection. Where his version is in conflict with that of the defendants' witnesses I accept the latter's.

[53] I am of the view that the claim of malicious prosecution has not been proven by the plaintiff.

[54] A number of factors need to be considered when assessing the appropriate quantum of damages for unlawful detention. At the time of arrest the plaintiff was 47 years old. He was married. He was self-employed as a builder. He testified that the police treated him civilly at the time of arrest. He was in a cell with many detainees. He described the condition of the cell as fair except for a bad smell from the toilet. The blankets given to him also had a bad smell. I accept that police cells are notoriously unsavoury in this province

[55] The plaintiff's evidence is what hurt him the most in this arrest detention is that that he was innocent. As apparent from this judgement I have serious reservations about his innocence. His claim for unlawful detention was successful due to the defendants not tendering evidence.

[56] I have considered a number of other cases of unlawful arrest and detention as a guideline. The cases I have considered have a marked difference regarding the amount of damages awarded. It is trite that this case must be decided on its own merits. In my view an appropriate award is R100 000,00.

[57] In the premises the first defendant is ordered to pay the plaintiff :

(a) R100 000,00 as damages in respect of his unlawful detention;

**(b) Interest on the aforesaid amount at the prescribed legal rate
from the date of this order to date of final payment;**

(c) Costs of suit, as taxed or agreed, on the party and party scale;

[58] The plaintiff is ordered to pay the second defendant's costs of suit, as
taxed or agreed, on party and party scale.

T. MALUSI

ACTING JUDGE OF THE HIGH COURT

On behalf of the plaintiff:	Adv E Dyer
Instructed by:	O, Brien Inc Port Elizabeth

On behalf of the first and defendant:	Adv A Beyleveld SC with Adv B Naran
Instructed by:	State Attorney Port Elizabeth

