

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 2589/2012

In the matter between:

MLINDELI DAVID SEPTEMBER

Plaintiff

And

MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Defendant

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Third Defendant

JUDGMENT

BESHE J:

[1] The plaintiff in this matter was arrested by employees of the first defendant on the 24 August 2009 on suspicion that he had committed rape.

[2] Plaintiff's claims, as would appear from his amended particulars of

claim are premised on *inter alia* the following allegations:

Claim A.

“6. On the 24th of August 2009, the Plaintiff was unlawfully arrested without a warrant at Provincial Hospital, Port Elizabeth by members of the South African Police Force, whose names and ranks are unknown to the Plaintiff.

7. The Plaintiff was detained initially at Kwa-Zakhele Police Station for a period of three days, and thereafter at St Albans until his release on the 11th November 2009.

8. On the 27th of May 2010 the Plaintiff appeared in Court and charges against him were withdrawn.

9. In the event of being found that the members of the South African Police complied with the jurisdictional facts to justify the unlawful arrest, in terms of Section 40(1)(b) of the Criminal Procedure Act, 1997, (Act No 51 of 1997) “the Act”. The Plaintiff pleads that the discretion to arrest and detain unlawfully was arbitrarily unreasonable, unjustified and improperly by the members of the South African Police Force, in that:

9.1 the members of the South African Police Force did not verify the information that they were initially given;

9.2 the members of the South African Police Force failed to ascertain the identity of the Plaintiff, with certainty or at all, as a result they arrested the Plaintiff who was not at the scene when the crime complained of was committed;

9.3 the Investigation Officer/or other unknown Police Officers involved in the investigation of the matter against the Plaintiff:

9.3.1 knew or ought to have known that no reasonable objective grounds or justification existed for the Plaintiffs’ further and subsequent continued detention;

9.3.2 could have easily ascertained by taking simple investigation steps that no such grounds or justification but failed to take and such step;

9.3.3 failed in their duty to inform the relevant Public Prosecutors dealing with the matter that there were no such grounds or justification or indeed no objective facts

reasonably linking the Plaintiff to the alleged crime of rape

9.3.4 failed to take steps whatsoever to ensure that the Plaintiff was released from detention as soon as possible.”

Claim B.

“17. On the 24th of August 2009, the members of the South African Police Force set the law into motion by laying a charge of rape against the Plaintiff.

18. On the 27th of May 2010, the Plaintiff appeared in Court and charges against him were withdrawn.

19. The actions of the members of the South African Police Force were unlawful and were made with the intention to injure the reputation of the Plaintiff in that the members of the South African Police Force did not believe the truth of the information given.

20. Plaintiff also suffered contumelia. His personal integrity, name, reputation and dignity were impaired, as a result of the public nature of the court proceedings, to which he was subjected to amounting to R150 000.00.”

[3] Responding to the claims, in their plea the defendants admit that plaintiff was arrested by functionaries of the first defendant on the 24 August 2009. Defendants denied that plaintiff’s arrest was unlawful. Pleading that he was arrested lawfully in terms of *Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977* on a reasonable suspicion that he had committed the offence of rape. It was further denied that functionaries of first defendant exercised their discretion to arrest and detain the plaintiff in an arbitrary unjustified, unreasonable and improper manner. First defendant pleaded that the decision to arrest the plaintiff was based on the intention to bring him to justice. Second defendant denied that the public prosecutor performed his or her duties negligently or breached any of his or her duties.

[4] It is trite that the onus rests on the defendant to justify an arrest.¹

[5] However, because plaintiff's suit is not confined to unlawful arrest, he is also suing the defendants for damages for malicious prosecution and bore the onus in respect of the latter claim, plaintiff testified first.

[6] The plaintiff was the only witness who testified in support of his claims. His evidence, briefly stated was as follows:

He is a sixty five (65) year old self employed upholster. On the 24 August 2009 he was discharged from Provincial Hospital where he had been admitted for a stomach ailment. Whilst still waiting for medication he was to take home following his discharge, two police officers arrived and informed him that he was under arrest in connection with the rape of a child he did not know. He did however know the child's mother with whom he was in a relationship. He was taken to KwaZakhele police station where he was locked up with five other inmates. He was taken to court on a Wednesday having been arrested on Monday. The matter was postponed, he was thereafter held at St Albans Prison.

[7] It is common cause that he was released on bail on the 11 November 2009. It is also common cause that the plaintiff was re-arrested on the 9 February 2010 it being alleged that he failed to appear in court subsequent to being admitted to bail resulting in a warrant for his arrest being issued. He was held at St Albans until his release once again on bail on the 16 February 2010. The charge against him was withdrawn on 27 May 2010.

¹ Minister of Law and Order v Hurley 1986 (3) SA 568 A at 589 E – F.

[8] During cross examination, counsel for the defendants, *Mr Dala* put to him that the charge was provisionally withdrawn to which he answered: all he knows is that the charge against him was withdrawn. He also persisted in his denial that he raped his lover's child. It transpired that on the date the rape is alleged to have taken place he had spent the night at the complainant's home and that he left the house after the children left for school. When it was put to him that the police, armed with the rape complaint, conducted investigations, he responded by saying he can see that.

[9] After the conclusion of the plaintiff's case, *Mr Dala* moved an application for absolution from the instance in respect of second and third defendants in so far as Claim A is concerned and in respect of all three defendants in respect of Claim B. Arguing that in respect of Claim B there is no evidence that any of the defendants set the law in motion against the plaintiff.

[10] The application was opposed by *Mr Nobatana* who was acting for the plaintiff.

[11] Mindful of the requirements that should be met in order for a claim for malicious prosecution to succeed, I was of the view that at least one such requirement had not been met by the plaintiff. The requirements were restated in ***Rudolf v Minister of Safety and Security***² to be the following:

- (a) That defendants set the law in motion. (instigated or instituted the proceedings).
- (b) The defendants acted without reasonable and probable cause.

² 2009 (5) SA 94 at 100 [16].

- (c) The defendants acted with *malice*.
- (d) That the prosecution failed.

[12] Not only must these requirements be alleged they must also be proved.

[13] There was no allegation that second and third defendants set the law in motion against the plaintiff. In the particulars of claim, plaintiff alleges that “members of the South African Police Force set the law in motion by laying a charge of rape against the plaintiff”. It was further alleged that they did not believe the truth of they said. Firstly we know that the mother of the complainant laid a charge against the plaintiff and not the members of the first defendant. There was no evidence led to bolster the allegation that the defendants did not believe in the truth of the information given. Having been of the view that in the circumstances, there was no evidence upon which I could find in favour of the plaintiff - I had no difficulty granting the defendants absolution from the instance in so far as Claim B is concerned.

[14] One witness testified on behalf of the defendants or in rebuttal of plaintiff’s claim. **Sergeant Abegail Tantaswa Teyise** testified that on or about the 18 July 2009 the docket in respect of this matter was allocated to her to conduct investigations. She proceeded to obtain statements from the alleged victim, her teacher and her aunt. She testified that when she inherited the docket, it only had the statement of the complainant’s / victim’s mother according to which the victim was said to be mentally disabled. It transpired that **Sergeant Teyise** interviewed the minor child being the victim of the alleged rape **N.**, a neighbour and complainant’s

teacher because the complainant had indicated that she made a report to her teacher as well about the rape.

[15] **Sergeant Teyise** was questioned at length about what was said to be contradictory versions about rape from the statements at her disposal. This proposition was based on the fact that the teacher to whom the report about the alleged rape was first made did not mention the actual rape in her statement. The relevant part of teacher **N. M.** reads as follows:

“I do not remember the day and the date but I only know that it was the previous quarter, I was at school and it was in the morning session when N. came to me in class. She told me that at her home there is a male whom they go to church together and this man was touching her on her body. She then told me that she refused and asked the man to leave her alone.”

She told **N.** to bring her mother to school which she never did. It emerged from plaintiff’s evidence that he attended the same church with **N.’s** mother and would collect the church keys from her place (**N.’s** mother’s house). It was also put to **Teyise** that **M.’s** statement was also in conflict with that of **Ms D.** who also deposed to a statement wherein she stated **N.** told her that plaintiff “had touched her on her body dragging her to sleep with him”. **Teyise** retorted that whilst she would not ignore these two statements and considered them together with complainant’s and her mother’s, she formed an opinion that there was a reasonable suspicion that the plaintiff raped the complainant. **Teyise’s** attention was also drawn to the fact that the medical report on the examination of the complainant was inconclusive as well as her mental state. She maintained that she was of the view that there was a reasonable suspicion that plaintiff had committed the offence.

[16] To this end she traced the whereabouts of the plaintiff. Established that he was admitted at Provincial Hospital. She made arrangements with the nursing staff at the hospital that she be advised when plaintiff was to be discharged. She accordingly arrested the plaintiff upon his discharge from hospital.

[17] *Section 40 (1) (b) of the Criminal Procedure Act* provides that:

A peace officer may without warrant arrest any person whom he reasonable suspects of having committed an offence referred to in Schedule1, other than the offence of escaping from lawful arrest.

Rape and sexual offence against a child or a person who is mentally disabled are offences that are listed in *Schedule 1 of the Criminal Procedure Act*. These are no doubt serious offences.

[18] It would appear that after the re-arrest of the plaintiff, the Sexual Offences Prosecutor referred the complainant to a Clinical Psychologist for an assessment to determine the following:

Her level of intelligence (IQ assessment) and category in which she fell, and whether she could distinguish between right and wrong.

Having assessed the complainant **Dr Mabusela** concluded as follows:

“On the basis of N.’s developmental history as well as her performance on the assessment, it can be concluded that N.’s intelligence falls within the moderately mentally retarded range. Overall her mental age is therefore estimated at just over nine (9) years. N. seems able to distinguish between truth and lies as long as she can comprehend the information. There are however indications that she may not always feel comfortable enough to express what she knows to be the truth (or not) if confronted aggressively.”

It would seem however, that the charge against the plaintiff was provisionally withdrawn after an application for a postponement was refused and before the evaluation report could be filed. This was on the 27 May 2010.

[19] There seems to be no issue with the other requisite jurisdictional facts for a *Section 40 (1) (b)* defence except for the question whether **Sergeant Teyise** (the arresting officer) had reasonable grounds for the arrest. In particular whether the discretion to arrest and detain was exercised justifiably.

[20] *Mr Nobatana* argued that the arresting officer failed to exercise her discretion properly. This in view of the fact that she decided to arrest the plaintiff even though she had contradictory statements, the J88 was inconclusive and complainant was mentally retarded.

[21] **Teyise** told court that she considered all the statements at her disposal, did not exclude any of them, and that based on all the information at her disposal, she formed the opinion that there was a reasonable suspicion that the plaintiff raped the complainant. She testified that she did not have any problems when interviewing the complainant. They understood each other well. This seems to be in keeping with **Dr Mabusela's** observation / finding that she is moderately retarded. She can distinguish between truth and lies as long as she comprehends the information.

[22] The test whether a suspicion was reasonable entertained within the meaning of *Section 40 (1) (b)* was enunciated by *Jones J* in ***Mabona and Another v Minister of Law and Order and Others***³ as follows:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA28 (E) at 33H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? 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, ie 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 a 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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[23] When **Teyise** inherited the docket, there was only one statement filed, that of complainant’s mother which seems to have been taken on the 3 July 2009, the incident having taken place on the 15 May 2009. She proceeded to obtain statements from the complainant, her teacher and a neighbour. The teacher confirmed that complainant made a report to her about what had befallen her in the hands of the plaintiff. Just as complainant had suggested, that immediately after she arrived at school she made the report to her teacher, she said the report was made in the

³ 1988 (2) SA 654 at 658 D – H.

“morning session”. Complainant had been consistent in her reporting about the identity of the person who she alleged molested her. **Sergeant Teyise** cannot be faulted for not placing much reliance on the J88. The complainant was examined on the 3 July 2009 – more than a month after the incident had taken place. The doctor’s conclusion was “Alleged rape”. I am not sure what this means. Only the first page of the J88 was attached. We are in the dark as to what was contained in the rest of the report.

[24] I am unable to find that **Teyise’s** suspicion was not based on solid ground. I am of the view her suspicion was reasonable and the arrest of the plaintiff was not unlawful. It stands to reason that the initial detention was not unlawful.

[25] Apart from a bald allegation in the particulars of claim, regarding the detention after the first appearance that “By requesting that plaintiff be remanded in custody on or about 26th August 2009 – 11 November 2010 the said prosecutor/s acted maliciously and *amino injriandi* and without due regard for plaintiff’s constitutional rights to be released on bail”. No evidence was led as to how the prosecutor acted with *amino injuriandi*. All we know is that on his first appearance in court plaintiff expressed the wish to be represented by his private attorney. The matter was postponed but it transpired the said attorney was on maternity leave. What emerged from plaintiff’s cross examination is that the matter was also postponed for a bail application. **Teyise** deposed to an affidavit for purposes of bail application. In which she expressed the view that the state had a strong case against the plaintiff “as he is known to the victim”. That in my view was still in keeping with what she maintained during this trial – that she

formed an opinion that there was a reasonable suspicion that the plaintiff committed the offence. *Mr Nobatana* suggested that by submitting that the state had a strong case against the plaintiff she misled the court. I do not agree. In her view the state had a strong case against the plaintiff. I am not persuaded that she acted maliciously.

[26] In my view the plaintiff has not made out a case for damages for the detention following his first appearance in court in respect of the defendants.

[27] In the result plaintiff's action is dismissed with costs in respect of both claim A and B.

NG BESHE
JUDGE OF THE HIGH COURT

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