

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 34336/16

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

DATE: 10/08/2023

SIGNATURE

In the matter between:

BONGANE MLOTSHWA

Plaintiff

And

THE MINISTER OF POLICE

1st Defendant

MONTU NICHOLAS SIPHIWE TWALA

2nd Defendant

JUDGMENT

Mogotsi DD

[1] The Plaintiff has instituted action proceedings against the first and second Defendants for delictual damages arising from his arrest and detention.

[2] Condonation of late filing of a notice of intention to institution Legal Proceedings against certain organs of the State in terms of Act 40 of 2002 was granted by the court on the 26th January 2022.

Background

- [3] The investigating and arresting officers testified. A case docket having *inter alia* a statement of Ms N[...] (the complainant) was handed as exhibit by agreement between the parties. She made a statement to the police at Besters wherein she alleged that she got raped at about 22h30pm on the 30th December 2014. She got sexually violated while walking to see her boyfriend. She briefly stated that she came across the Plaintiff whom she referred to as 'Chako'. The Plaintiff grabbed her put a knife on her neck and pulled her from the street to where it was dark. He robbed her a cell phone. Thereafter he lifted her skirt, shifted her panty to the side and penetrated her private part with his penis while the two were standing against the electric pole. The plaintiff made up and down movements. Thereafter, he withdrew his penis from her private part, "urinated" on the ground and walked away.
- [4] She thereafter went to her boyfriend's place. The boyfriend told her to wash her private part before they had sexual intercourse.
- [5] The victim's boyfriend made a statement in which he stated that she was crying while reporting rape to him. She was not certain about the perpetrator's name but she reported that she saw him at the time he was removing a sim card from her phone. She further informed him that the perpetrator was known to her by sight, and she will be able to point him out if she can see him. The complainant also told the doctor who completed a J88 form that she knows the perpetrator.
- [7] The arresting officer is Sergeant Twala, a member of the South Africa Police services who was attached to the visible policing unit at that time of this incident. His evidence is that on the day in question he was doing patrol and crime prevention duties. After receiving a complaint, he interviewed the Complainant on 31st December 2014, at 12h00. As he was interviewing her, she realised that she knew the suspect and further that the two were not staying far apart in Watersmith. Pursuant to the interview, the victim took sergeant Twala together with other police officers to a tuckshop which was

next to a tavern. They found the Plaintiff sitting in between his two companions and the victim pointed him out as a suspect.

- [8] Sergeant Twala immediately arrested the Plaintiff. He says the arrest was effected in terms of section 40 (1) (a) - (q) Act 51 of 1977¹(as amended) (CPA) as he deemed the nature of the offenses committed serious. He felt that there was no need for the identification parade to be held under the given circumstances. He went on to say that in those kind of circumstances should the police have delayed to arrest the Plaintiff, the community would have resorted to mob justice. They did that before.
- [10] The Plaintiff was kept at Ladysmith police station as there were no detention facilities at Berstas. The arresting officer only effected the arrest. He does not know for how long was the Plaintiff detained.
- [11] Constable Mazibuko was allocated a case docket shortly thereafter as she was on standby. She felt that the Plaintiff should not be released because he was known to the complainant *albeit* by a nickname. Identity was not an issue. Secondly, he was charged with a schedule 5(CPA) offence.
- [12] The Plaintiff was arrested on the 31stDecember 2014, the 1st December2014 was a public holiday and he got released on the 2ndJanuary 2015 in court on his first appearance.
- [13] Only the Plaintiff testified. His version is that the complainant pointed him out - while he was sited with others at a tuck shop. He confirmed the date and the place of his arrest. He further stated that it was his first time to see the victim. He got arrested and assaulted on his back while boarding a police van.
- [14] He got locked up with about ten detainees in a filthy cell at Ladysmith police station. They were not provided with amenities of life like a bathing cloth and soap. He was given a soiled blanket.

¹ Criminal Procedure Act 51 of 1977(as amended).

[15] He denied the allegations against him and elected to remain silent in his warning statement dated the 30th December 2014. He got released from custody on the 5th January 2015. The Plaintiff maintains that he was detained for a period of five (5) days.

[16] Buccal swabs were obtained from the Plaintiff on the 21st January 2015 and sealed in the exhibit bag 13DBAF9115. The forensic science laboratory report dated 14th August 2015 excluded the Plaintiff as the donor of the DNA on the exhibits (PAD000262281Q).

[17] It is the contention of the Plaintiff that the Defendant failed to read the case docket before he could effect the arrest. He therefore could not have had a reasonable suspicion when he arrested the Plaintiff. The arresting officer also did not exercise his discretion properly.

Common cause

[18] It is common cause that a member of the SAPS arrested the Plaintiff without a warrant of arrest. It is further admitted that the Plaintiff was kept in the police holding cells at Ladysmith police station for some days.

Issue

[19] The issue is whether or not the arrest of the Plaintiff by a member of the South African Police Services and the subsequent detention thereafter was unlawful or not. Also, whether the Plaintiff was as a result of that arrest kept in the holding cells for a period of five (5) days as he alleges or less.

Separation of Issues.

[20] The parties agreed during a pre-trial conference that the merits will be separated from the quantum and as a result, the matter proceeded on the merits only. The defendant further accepted that he had a duty to begin.

The Law

[21] Section 40 of the CPA provides for the arrest by a peace officer without warrant and it provides as follows;

(1) A peace officer may without warrant arrest any person-

(b) Whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escape from lawful custody.

The legal position regarding justification of a warrantless arrest in terms of section 40(1) (b) of the CPA was dealt with in the case of Duncan v Minister of Law and Order².

“The so-called jurisdictional fact which must exist before the power conferred by section 40 (b) are as follows;

(1) The arrester must be a peace officer.

(2) He must entertain a suspicion.

(3) It must be a suspicion that the arrestee committed a offence referred to in schedule 1 of the Act (other than one particular offence)

(4) That [the] suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection i.e he may arrest the suspect.

[22] The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective, see *S v Nel and Another*³ and that is, Would a reasonable man in the position of the defendant possessing the same information considered that there were good and sufficient grounds for suspecting that the Plaintiff is guilty of the offences of rape and robbery.

² *Duncan v Minister of Law and Order* 1988 (2) SA 805 (A) at 818 G-H.

³ *S v Nel and Another* 1980 (4) SA 28(E) at 33 H.

[23] A person's freedom and security are sacrosanct and are protected by our Constitution. Tshiqi J in the matter of *Mahlangu and Another v Minister of Police*⁴ said that

"It is now that public policy is informed by the Constitution. Our Constitution values freedom, understandably so when regard is had as to how, before the dawn of democracy, freedom for the majority was close to non-existence. The primacy of human dignity, the achievement of equality and the advancement of human rights and freedoms "is recognised in the founding values contained in section 1 of the Constitution...These constitutional provisions and the protection in section 12 of the right of freedom and security of the person are at the heart of public policy consideration."

[24] It is trite that the *onus* rests on the arresting officer to prove the lawfulness of the arrest and detention. In *Barnard v Minister of Police and Another*⁵, the court said a police officer should investigate an exculpatory statement offered by a suspect before they can have reasonable suspicion for the purpose of a lawful arrest. The court in *Sandle Biyela v Minister of Police*⁶ held at para [36] that the arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly after taking all the prevailing circumstances into consideration.

In the matter *Kubeka v The Minister of Police and Another*⁷

"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

⁴ *Mahlangu and Another v Minister of Police* 2021 (2) SAC 595 (CC) at para. [43].

⁵ *Barnard v Minister of Police and Another* 2019 (2) SACR (ECG). At para. [25].

⁶ *Sandle Biyela v Minister of Police* [2022] ZASCA 36 (1 April 2022)

⁷ *Kubeka v The Minister of Police and Another* the court said (63675/2016)[2022]ZAGPPHC 298 (4 May 2022).

warrant, i.e. something which otherwise would be an invasive 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.... This is not to say 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."

Application

- [25] The Plaintiff is claiming damages in an amount of R425000-00, being a global amount for the unlawful arrest, detention, deprivation of freedom and liberty, damage to dignity and reputation. "It is the contention of the Plaintiff that the Defendant were acting within the course and scope of their employment with the first Defendant.
- [26] The complainant in the sexual assault case laid a charge almost immediately. She knew the Plaintiff as 'Chako'. From the time of the arrest till the date of the court there were no other statements from the Plaintiff's side for the defendant and or this court's consideration. It has only been the defendant's allegation and the Plaintiffs' bare denial of the allegations. The Plaintiff did not distance himself from that name Chako.
- [27] When the Plaintiff testified he came with new evidence. He for the first time informed the court that the complainant suspected other people. The Plaintiff's counsel added that there was another dark coloured suspect with red eyes. That assertion cannot be credible. It is intended to mislead the court. Firstly, it is not contained in the Plaintiff's pleadings. Secondly the defence counsel adds 'red eyes' to the given description. Something not in the evidence. Thirdly, this is allegedly what was said by members of the community, which makes it hearsay and the counsel does not say why should the court accept hearsay evidence. The allegation is not in the case docket. Furthermore, it was never taken up with the arresting officer.

- [28] The day following the incident, the Plaintiff took the police to where the Plaintiff was and pointed him out to the arresting officer. The Plaintiff was charged within three and half hours of being arrested. There is no evidence to suggest that there were other suspects who were looked for or she was not sure about the identity of the suspect. There is also no *alibi* raised by the Plaintiff.
- [29] There could be a reason or reasons why the forensic report excluded the Plaintiff as the donor in the samples submitted. One such reason could be what the complainant said in her statement that during the alleged sexual violation, the plaintiff who was not using a condom, withdrew and “urinated” on the ground. The results may be influenced by a number of factors. For example, the type and the locality of the samples taken from the complainant. Also, the fact that her boyfriend told her to bath her private part before having sexual intercourse with her. Her body, which could be referred to as part of the scene of crime was interfered with before the samples could be taken for analysis.
- [30] All that happened immediately after she was sexually violated cannot be interpreted to have nullified the alleged sexual assault and robbery with aggravating circumstances. These allegations had to be investigated.
- [31] A withdrawal of the case, was because the complainant felt that she did not want to be subjected to a secondary trauma. She lost interest as the matter was dragging and she had other problems. Not that she was not sexually violated and robbed of her cell phone by the Plaintiff. The case was not withdrawn by the State because of the merits.
- [32] Coming to the alleged five days period of detention, a case docket was handed in as an exhibit by consent between the parties. When the Defendants counsel referred to the dates therein, the Plaintiff’s counsel requested the court to ignore the evidence of a cell register and a J7 form, as it was not discovered in terms of the court rules.

[33] There is an entry in the investigation diary dated 2d January 2015 which states as follows;

“1, Herewith, docket for court first appearance.

2. Accused is in custody-Bail is opposed.

3. Please remand this case for further investigations “

The entry is signed E.M Buthelezi, the investigating officer. The date of the Plaintiff's first appearance in court is clear.

[34] Except what the plaintiff as a single witness is alleging, there is no other form of evidence that he was in custody for the alleged period of five days. A copy of a cell register, charge sheet, J7 or court book were not discovered or exhibited. The evidence before the court shows that the Plaintiff was basically in custody for two nights before his release by the court. He could not have appeared on any other day before the 2nd because of the public holidays.

[35] The Plaintiff chose not to admit or deny that he is known as Chako. He also chose to remain silent on whether they stay far apart or not.

[36] Under cross examination the Plaintiff's lawyer put it to sergeant Twala that the Plaintiff was arrested because he was known by the victim. The counsel felt that it is the Police who somehow, failed the victim. There is no suggestion that complainant in the case of rape may have not been honest about the offence. Meaning the offence may have taken place but the police did not perform their duties well. Also, after the defence counsel's admission that the Plaintiff was known to the complainant in the rape matter, there was not much left on the question of Identity. Consequently, if there is an allegation of rape committed by a person known to the complainant, there would be nothing wrong with the arrest and detention *per se*.

Conclusion

[37] The plaintiff was arrested by a peace officer, Sergeant Twala who after interviewing the victim had a reasonable suspicion that the offence of sexual violation was committed by the plaintiff as identified by the complainant. He objectively assessed the facts. See *Mabona and another v Minister of Law Order and Others*⁸. The arresting officer had reasonable grounds to effect the warrantless arrest. It is my well-considered view that the jurisdictional factors have been met.

Judgment

The Plaintiff's action is dismissed with costs.

MOGOTSI D.D
Acting Judge of the High
Court, Pretoria

Date of Hearing: 14 March 2023

Date of Judgment: 10 August 2023

APPEARANCES

Counsel for the Plaintiff:	Adv. T.C. Kwindu
Instructing Attorneys:	Mr Sello Makhafola
Counsel for the Defendant:	Adv. T. Chavalala
Instructing Attorneys:	Mr S Zulu

⁸Mabona ad Another v Minister of Law Order and Others 1988 (2) SA at 654 (SE) at 258 E-H).