

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2617/2021

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

IN THE MATTER BETWEEN:

TSHIDISO JACOB MAKHELE

Plaintiff

and

MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT BY: MPAMA, AJ

DATE HEARD: 25, 26 & 28 OCTOBER 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 13 February 2023. The date and time for hand-down is deemed to be 13 February at 15h00.

[1] The plaintiff instituted action against both defendants. As set out in the particulars of claim (POC), the plaintiff claimed damages arising out of unlawful arrest, detention and malicious prosecution.

[2] At the commencement of trial the plaintiff withdrew the claim of malicious prosecution against the 2nd defendant and the parties requested the court to stand down the issue of costs for a later determination. I acceded to the request. The main issue remaining for adjudication is whether or not the arrest of the plaintiff by the members of South African Police Services and subsequent detention was unlawful and if so the quantification of damages as a consequence thereof.

[3] The following issues are common cause: The plaintiff was arrested by Constable Kantoro Simon Mapokoane, without a warrant in the early hours of 2 December 2020. Constable Mapokoane was a peace officer acting within the scope of his employment. The plaintiff was arrested for, a Schedule 1 offence in terms of the Criminal Procedure Act 51 of 1977 as amended (CPA). Subsequent to his arrest he was detained until his first appearance in court on 4 December 2020 when he was released on bail.

[4] In **MINISTER OF LAW AND ORDER and Others v HURLEY and Another 1986 (3) SA 568 (A) at 589 E-F** it was said:

“... An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

It follows that the defendant has an onus to show on a balance of probabilities that the arrest was lawful and justified.

[5] The evidence of the defendant is as follows: Constable Mapokoane testified that he was with his two colleagues, Constable Mavis Motloun and Constable Phadi in a marked police vehicle patrolling at Thabanotsoane Village, Tseseng in the early hours of 2 December 2020. At approximately 00:30am a young woman (the

complainant) appeared being followed by a male person. It is not in dispute that the male person was the plaintiff and I shall refer to him herein as such. The complainant rushed towards the police vehicle. He then stopped the vehicle and noticed that the complainant was crying. The complainant reported that she was raped by the plaintiff. When the complainant reported the plaintiff was at a distance of about 2-3 meters (m) away from the police vehicle and he heard what the complainant was saying.

[6] Constable Mapokoane testified further that Constable Phadi opened the vehicle's door and before he could say anything the plaintiff ran away. Together with Constable Phadi they chased the plaintiff leaving the complainant with Constable Motloun. The plaintiff ran down the hill until they apprehended him next to certain dongas. The distance between the dongas and where the plaintiff was arrested was about 3 kilometers (km). Together with Constable Phadi they walked back to the vehicle. As they were walking back to the vehicle they received a call from Constable Motloun asking them about their whereabouts and advising that another vehicle was on its way from the police station to look for them. They requested Constable Motloun to drive the vehicle towards the dongas.

[7] Whilst still walking towards their vehicle another police vehicle appeared. It was Sergeant Zengele and Constable Mohapi's vehicle sent from the police station. He informed the plaintiff about the reasons for his arrest and explained his constitutional rights. The plaintiff was transported in Sergeant Zengele's vehicle. On arrival at the police station he opened a docket and charged the plaintiff. He then completed a SAP 14. Constable Mohapi obtained the complainant's written statement. He took the plaintiff to the police cells. He denied that the plaintiff was arrested in the presence of his family.

[8] During cross examination Constable Mapokoane testified that the plaintiff was not informed of the reason for his arrest at the dongas. He further testified that due to the magnitude of the offence he was unable to release the plaintiff as he needed to go to court for his release to be considered. Further cross examination bore no fruit as Constable Mapokoane stuck to his version.

[9] Constable Motloung testified and in essence repeated what was testified to by Constable Mapokoane regards how they were approached by the complainant. Further, she testified that that she remained behind in the police vehicle with the complainant. The complainant was still crying. After they had disappeared she called their cellphones and there was no response. Not knowing what had become of her colleagues she contacted the police station and reported that her colleagues were missing.

[10] A police van was dispatched from the police station to search for them. Once again she tried to call her colleagues on their cellphones and this time she received a response. Constable Mapokoane informed her that they were coming from the dongas and were on their way to the vehicle with the plaintiff. Sergeant Zengele and Constable Mohapi arrived. Constable Mapokoane and Phadi appeared with the plaintiff. The plaintiff was transported in the vehicle driven by Sergeant Zengele and the complainant in their vehicle. At the police station the complainant was attended by Constable Mohapi and the plaintiff by Constable Mapokoane.

[11] The last witness for the defendant was Warrant Officer Matataisi Albert Molefe, a retired police officer and an investigating officer of the rape charges against the plaintiff. At the time of the arrest of the plaintiff he was attached to Family Violence, Child Protection and Sexual Offences Unit within South African Police Services. His unit investigated all rape cases hence the docket was referred to his unit. He received the docket on 3 December 2020, at about 16h00 from Tseseng Police Station. The docket had been opened on 2 December 2020. He testified that the normal procedure was for the docket to be referred immediately to their unit after it has been allocated a case number and that he does not know why it took some time for this one to be referred to their unit.

[12] Warrant Officer Molefe testified further that when he received the docket the complainant's statement was already filed. As a norm he needed to visit complainant in order to continue with the investigations. He found the complainant's address in the docket and proceeded to this address to see the complainant. At this address the complainant was unknown. He asked around and even went to a nearby police station in search of the complainant, but all in vain. About to give up he received

some information that the complainant's mother was residing at Haresethunya Village and he proceeded to this address.

[13] On arrival he met with the complainant's mother who informed him that the complainant was a sex worker, using drugs and was no longer staying at home. He obtained a written statement from the complainant's mother and filed it in the docket. Later on he proceeded to the police station and obtained the plaintiff's warning statement. He knew that because the plaintiff was facing an offence falling within the ambit of Schedule 6 his release from police custody was to be decided only by the court. He took the docket to the Senior Public Prosecutor (the SPP) and informed the SPP that he is unable to get hold of the complainant and proposed that the plaintiff should be released on warning whilst he is still searching for the complainant.

[14] The plaintiff testified and called one witness, Mr P [....] M [....] M [....] 1. The evidence of the plaintiff is that on 2 December 2019, he was a passenger in his friend's vehicle, Mr M [....] 1. The plaintiff is an educator by profession. At about 15h00 they met the complainant who was hitchhiking. Mr M [....] 1 stopped and offered the complainant a lift. They conversed with the complainant and since they were drinking some liquor they offered some liquor to her. The complainant informed them that she was not drinking liquor, but there is something she was smoking. The complainant further informed them that she was a sex worker and offered her services to him. He paid her R200.00 for her services. They travelled with the complainant, and along the way the complainant requested that they should go to a certain house. They proceeded to this house, the complainant got in and returned back with a substance and she started sniffing it in the car.

[15] The plaintiff testified further that they proceeded to his place with the complainant still being driven by his friend. When they were nearing his residence his friend dropped them off. He proceeded with the complainant and next to a certain corner had consensual sex with the complainant. When they were finished they proceeded to his place. The complainant started walking fast and took a direction of a vehicle that was approaching. He proceeded to his place and when about 500m away he was approached by two males who arrested him. He was not told why he was being arrested. He was taken to the police station and no rights were explained

to him. At the police station a form with his rights was completed. Later on he was taken to the cells and detained. On the following day he was transferred to Phuthadithjaba police cells where he was kept until the following day. He was taken to court on 4 December 2020. He appeared in court and he was remanded in police custody until 10 December 2020, for a bail application.

[16] Whilst at the holding cells in court he approached Mr Chabangu, an attorney who facilitated that he be taken back to court. When he reappeared in court he was released on warning. He testified further that he was unlawfully detained as the complainant was a prostitute and he had paid her for her services. The plaintiff in addition testified on how the arrest and rape allegations affected him as a school teacher. His dignity had been adversely affected and his colleagues had lost some respect for him. He had suffered damages to the tune of R400 000.00 for the unlawful arrest and further detention.

[17] Mr M [...] 1 corroborated the plaintiff's version from the time he offered a lift to the complainant to when he dropped-off the plaintiff and the complainant on the street leading to plaintiff's place. He testified that he does not know what happened afterwards. He learnt about the plaintiff's arrest later on.

[18] The defendant contended that the arrest without a warrant was justifiable and the police acted reasonable and the plaintiff contended that it was the opposite.

[19] The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. See **MAHLANGU and ANOTHER v MINISTER OF POLICE 2021 (2) SACR 595 (CC) at para 25.**

[20] Section 40(1) (b) of the CPA provides:

“A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

[21] In **DUNCAN v MINISTER OF LAW AND ORDER 1986 (2) SA 805 (A) at 818G-H** it was held that the jurisdictional facts for a section (40) (1) (b) defence are that:

- (i) The arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect committed an offence referred to in Schedule 1;
- (iv) The suspicion must rest on reasonable grounds.

[22] The test whether a peace officer ‘reasonably suspects’ a person of having committed an offence within the ambit of s 40(1) (b) is an objective one. The test is not whether a police believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. See **MINISTER OF SAFETY and SECURITY v SEKHOTO and ANOTHER 2011 (1) SACR 315 (SCA) para 6.**

[23] Once the arresting officer has established the required suspicion he will then be vested with a discretion to arrest and such discretion must be exercised rationally.

[24] The question is whether the defendant discharged the onus of proving on a balance of probabilities that the arrest of plaintiff was lawful. The test is whether the arrestor on the facts presented had formed a reasonable suspicion that the plaintiff had committed an offence falling within Schedule 1 of the CPA and whether he exercised his discretion properly when arresting the plaintiff. It was submitted on behalf of the defendant that the arrest of the plaintiff was justified and the arresting officer correctly exercised his discretion. In addition, it was contended that the arrest of the plaintiff in the middle of the night after the complainant had made the accusation justified the arrest.

[25] It is not in dispute that: the complainant disappeared without a trace after she laid charges rape against the plaintiff. The complainant's mother in her statement to the police reported that the complainant was a sex worker and that she provided a false address to the police. However, the court does not look at the now position in determining whether the arrestor was justified. It must look at the circumstances that prevailed at the time of the arrest. The complainant in the middle of the night made rape allegations against the plaintiff. When she approached the police the complainant was crying and without any hesitation pointed out the plaintiff as her assailant. It did not end there, she made a written statement to the police and reported in detail how she was raped by the plaintiff.

[26] The plaintiff denied that he ran away from the police, however the evidence of Constable Motlounq flies against his face. She testified that because she was worried when her colleagues disappeared she sought reinforcement at the police station and a vehicle was dispatched. The presence of a second vehicle was never disputed by the plaintiff. This shows without a hint of doubt that Constable Motlounq got worried and decided to act when her colleagues went missing running after the plaintiff hence assistance from the police station was requested. The plaintiff by running away from the police, in the absence of any explanation strengthened the suspicion on the part of police.

[27] The evidence of Constable Motlounq is that when the plaintiff was asked to identify himself he refused to have any conversation with Constable Mapokoane. This evidence also stands unrebutted. The plaintiff thwarted any attempts by the police to have a discussion with him regards the allegations at the time of arrest.

[28] It would be incongruous to expect the police not to act in the manner they did in the circumstances of this case in order to bring the plaintiff to justice. The police cannot be faulted as they exercised their discretion reasonably. Failure to act in the manner they did would be an abdication of their responsibilities.

[29] I am satisfied that the defendant was able to discharge the onus on a balance of probabilities that the arrest of the plaintiff was not unlawful.

[30] The last issue to be decided is costs (including the costs of the second claim withdrawn by the plaintiff). The award of costs is always at the discretion of the court. The general rule in litigation is that costs 'follow the event. A successful party must be awarded costs unless the court considers it appropriate to make a different order. I find no reasons to deviate from the general rule.

[31] In the result the following order is made:

31.1 The plaintiff's claim is dismissed with costs.

31.2 The plaintiff is ordered to pay the defendant's costs in respect of second Claim which was withdrawn at the commencement of proceedings.

L. MPAMA, AJ

On behalf of the plaintiff: Adv. C. Zietsman

Instructed by: Loubser Van Wyk Inc

Pretoria

c/o Jacob's Fourie Inc

Bloemfontein

On behalf of the defendant: Adv. K. Motshabi

Instructed by: Office of the State Attorney

Bloemfontein