

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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3700/2018

In the matter between:

J[...] V[...]

Plaintiff

and

MINISTER OF POLICE

First Defendant

**THE NATIONAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICES**

Second Defendant

**THE PROVINCIAL COMMISSIONER OF
POLICE FREE STATE**

Third Defendant

THE STATE ATTORNEY

Fourth Defendant

HEARD ON:

18 & 19 JULY 2023

HEADS OF ARGUMENT FILED ON

20 & 21 JULY 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

06 NOVEMBER 2023

- [1] On 27 March 2016, the plaintiff was arrested without a warrant by members of the South African Police Services (“the police”) for assaulting his then wife, Mrs. E[...] V[...] (“the complainant”). He was subsequently detained and

released on bail after appearing in court on 29 March 2016. The charge was ultimately withdrawn on 27 July 2016 pursuant to mediation proceedings.

- [2] According to the plaintiff, the arrest was unlawful including the subsequent detention as it was effected without a warrant and it was also not based on a just or reasonable cause. Furthermore, he was also refused access to a lawyer. It is for that reason that he has instituted this claim against the defendants for damages in the amount of R440 000.00 (FOUR HUNDRED AND FORTY THOUSAND RAND) for unlawful arrest and detention and an amount of R10 000.00 (TEN THOUSAND RAND) for legal fees.
- [3] The arrest and subsequent detention is not disputed. The claims are resisted on the grounds that the arrest was justified as the plaintiff was reasonably suspected of having committed the offence of assault as predicated in sections 40(1)(b) and 40(1)(q) of the Criminal Procedure Act ("the CPA").¹
- [4] An arrest is *prima facie* wrongful, the onus is therefore on the defendant to allege and prove justification for the arrest on a balance of probabilities.² The defendant elected to begin with leading evidence and proceeded to call three witness the complainant, the arresting officer Sergeant Xolani Madalane and his colleague Sergeant Thabo Isaac Moletsane. the plaintiff was the only witness who testified in support of his case. Hereunder follows the summary of their testimony.
- [5] The complainant was married to the plaintiff, he is also the father of her two minor sons aged nine (9) and seven (7) years old. Their marriage was dissolved on 6 January 2016, she thereafter moved out of the marital home. At the time of the incident she and the minor children lived with her mother.
- [6] She testified that the plaintiff was arrested after she had lodged a complainant of assault against him. He had assaulted her when she went to his residence to collect their baby's nappy bag by chocking and head butting her on the

¹ Act 51 of 1977.

² *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 (SCA).

nose causing her to bleed and also set his dogs on her. She told the Court that the argument ensued after the plaintiff demanded to see their youngest son and she refused telling him that she will not allow him to see the children because he was not paying child maintenance. Exhibit "A1" is the statement that she made at the police station in that regard.

- [7] It was the complainant's testimony that she also told the police that she was afraid of going home because the plaintiff had threatened to go to her mother's house and kill her and her mother, and since they lived alone, there was no one else who could protect them in the event that he carried out his threats. When she arrived at the police station she was still bleeding from the nose. She was present when the plaintiff was arrested at his home because she had gone there with the police to point him out. At first it was difficult for the police to arrest the plaintiff because he was aggressive and rude towards the police. They only managed after their colleague, Sergeant Gerda arrived and spoke to the plaintiff that's when he calmed down. He was arrested and taken to the police station where he was read his rights while begging the complainant to withdraw the case. He said a criminal record will cause him to lose his job and without a job he will not be able to maintain their children. The case was finalized on 27 July 2016, when she withdrew the charge after they entered into a mediation agreement, Exhibit "A45-50."
- [8] The complainant also mentioned that it was not the first time that the plaintiff had subjected her to physical abuse. During their marriage she had to obtain a protection order after he had assaulted her. (Exhibit "A41-47")
- [9] Under cross-examination it was put to her that the plaintiff was actually arrested at the police station after being lured to the police station under false pretenses that they wanted to ask him some questions and that the complainant had actually begged the police not arrest him. The complainant disagreed. She was adamant that the plaintiff was arrested at his home and that it was the plaintiff who pleaded with her to withdraw the charge as he feared losing his job.

- [10] Sergeants Madalane and Moletsane were at all material times hereto stationed at the Hennenman police station. On the day of the incident they were both on duty when the complainant arrived at the charge office to lay a charge against the plaintiff.
- [11] Sergeant Madalane testified that he was the arresting officer in this matter. Immediately before he arrested the plaintiff he observed the complainant bleeding and crying at the charge office. After establishing that the complainant had opened a case, he approached her to ask her about the details of her complaint and upon hearing those details he was satisfied that the complainant was abused by the plaintiff. He then asked the complainant to go with him and his colleague Sergeant Moletsane to point out the plaintiff's residence. On arrival at his residence, the plaintiff locked himself inside the house. He refused to let the police inside his home or to come out even after the police had introduced themselves to him. He became aggressive and arrogant they had to call their detective colleague on standby Sergeant Gerda Coetzee (who has since passed away) who managed to speak to the plaintiff and calmed him down with the result that the police were able to arrest him. His rights were explained and he was also informed about the reason for the arrest. He responded by denying that he had assaulted the complainant. He told the police that the complainant was lying and that she just wanted him to lose his job.
- [12] Sergeant Moletsane confirmed Sergeant's Madalane's version. He testified that the complainant came to police station to open a case of assault against the plaintiff. He also saw that she was crying and emotional and after she was done opening the case, he accompanied Sergeant Madalane to arrest the plaintiff at his home. They were accompanied by the complainant to point out the address.
- [13] The plaintiff was uncooperative. He was rude and aggressive, he only cooperated after Sergeant Coetzee arrived and spoke to him. Sergeant Moletsane further confirmed that it was Sergeant Madalane who

explained to the plaintiff his rights, the reason for arresting him and also arrested him.

- [14] Under cross-examination, the explained that the complainant had stated in her statement that she feared for her life and that of her mother as the plaintiff had threatened to kill them. The state in which the complainant was, it was also clear to them that the plaintiff had physically violated her. Sergeant Madalane also saw that she was bleeding therefore, they had to arrest him to protect the complainant and for the plaintiff to appear in court to answer to the charge. The plaintiff only appeared in court on 29 March 2016 because he was arrested on Easter Sunday and the Monday after was a holiday. The denied that assertion that the complainant has begged them not to arrest the plaintiff, it was the complainant who pointed out his whereabouts to the police.
- [15] On the other side, the testified on the day of the incident the complainant arrived at his home at about 10h30 and started to fight with him because she did not want him to see his son. When he went inside the house she pushed him and that is when his dog jumped over her to defend him. They accidentally head butted each other, the plaintiff then went out to her motor vehicle and drove off.
- [16] Around 14h00, the police arrived and requested him to go with them to the police station to answer some questions and he obliged. He left with them in their vehicle and on arrival at the police station he found the complainant outside the police station. He wanted to go over to her to greet his child, but the police grabbed him telling him that he was under arrest without telling him why. He was taken inside the police station and detained and this is despite the fact that the complainant begged the police three times not to arrest him telling them that he had children to maintain.
- [17] It was his evidence that he was subsequently placed in an overcrowded filthy cell with no running water and the toilet was also out of order. On Tuesday morning, detective Gerda Coetzee took him to her office where she informed him that the investigations were complete and that she was going to “lock him up”. He was taken to court where his rights to legal representation were

explained and he elected to appoint his own attorney. He was released from custody and told to bring his attorney on the next appearance.

[18] During cross-examination, the plaintiff denied having assaulted the complainant. When it was put to him that the complainant had made a statement to the police in which she detailed how he had assaulted her and that it was on the basis of that statement that the police arrested him, he responded by saying that he was not aware that she had made such a statement. He never saw it and no one told him about that statement let alone about the allegations contained therein. When he was taken to the police station, he was merely told that there were questions the police needed to ask him.

[19] The plaintiff further insisted that the conditions at the police cells were terrible. He was made to share a cell with other nine-teen (19) arrestees. If the purpose of the arrest was for him to answer to a charge in Court the police should have used other means of bringing him to Court instead of arresting him. When it was put to him that he was provided with a phone to make calls he said, he never asked to make a call. He admitted that he was not paying child maintenance and that he had informed the complainant that he will not pay maintenance until she allows him contact with the children.

[20] The plaintiff confirms that the complainant withdrew the charge after mediation proceedings. He does not recall if he said anything to the complainant during mediation, but would not dispute that he did say "I'm very sorry" as indicated in paragraph 3 of the mediation agreement. According to the plaintiff he only said that so that everything can just pass.

Unlawful arrest and detention

[21] Section 40(1)(q) of the CPA permits a peace officer to arrest without a warrant a suspect whom he reasonably suspects of having committed an offence as listed in s 1 of the Domestic Violence Act ("the DVA").³ In this matter, it is not

³ Act 116 of 1998; in terms of s1: domestic violence means physical abuse.

in dispute that the arresting officer, Sergeant Madalane is a police officer and it follows too that he is a “peace officer” as defined in Section 1 of the CPA. The issues in dispute between the parties remained to be the following:

- 21.1 whether the offence which the plaintiff was suspected of having committed was one of the offences which justified an arrest without a warrant;
- 21.2 and if the Court finds in the affirmative, the reasonableness of the suspicion of the arresting officer; and
- 21.3. if the suspicion was reasonable, then the question that arises is whether the arresting officer applied his discretion correctly when he did not consider other means of bringing the plaintiff before Court rather than placing him under arrest.

[22] It is the plaintiff’s case that the alleged assault he was charged with does not fall under schedule 1 as it was not one involving the infliction of a dangerous wound as contemplated in section 40(1)(b) of the CPA for that reason, the arrest without a warrant was not justified.

[23] I do not agree with the plaintiff’s contention. The examination of the docket clearly reveals that the plaintiff was charged with “*assault common (D/V)*”⁴ and on the available facts, the assault was alleged to have been committed within the domestic sphere. Assault involves physical violence which in terms of s1 of the DVA constitutes an act of domestic violence justifying an arrest without a warrant. In *Minister of Police v Gqamane*⁵ it was held that:

“[19] ...An arrest made in terms of s 40(1)(q) explicitly refers to ‘an offence in respect of which violence is an element’ while an arrest made pursuant to s 40(1)(b) requires that there be allegations of a commission of a schedule 1 offence. (Emphasis added.) The jurisdictional requirements for arrest are the same. A crucial difference is that, unlike an arrest under s 40(1)(b), the degree or extent of the violence referred to

⁴ Exhibit “A5”.

⁵ 2023 JDR (SCA) at para 19.

in s 40(1)(q) is not bounded, justifiably so, to afford the maximum protection intended by DVA...”

[24] With regard to the reasonableness of the suspicion, it is trite that reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion and there must be evidence upon which the arresting officer formed this suspicion, in other words, the arresting officer must also carry out some investigations⁶ into the essential elements of the offence complained about in order to qualify the suspicion as reasonable.

[25] The defendant’s evidence was undisputed that:

25.1. the plaintiff was arrested following a complaint laid by the complainant;

25.2 the arresting officer investigated the basis of the complaint by interviewing the complainant and during that interview he observed that she was crying and bleeding from the injury that she alleged to have received from the plaintiff;

25.3. based on the information he received from the complainant, the arresting officer also established that the plaintiff had allegedly threatened to kill the complainant and her mother, as a result she feared for their lives.

[26] It was only then that the arresting officer formulated a conclusion that the plaintiff had committed the offence of assault. The plaintiff was thereafter pointed out by the complainant to the police as the perpetrator therefore, it cannot be said that the arresting officer’s suspicion that the plaintiff assaulted the complainant as alleged was unreasonable.

⁶ Hiemstra’s Criminal Procedure, LexisNexis 2023 edition, Chapter 5 at page 8.

[27] The contention that arrest was unlawful as it was effected despite the fact that the plaintiff had begged the police not to arrest him because he had children to maintain is preposterous and disingenuous. On his own version, at the time of the arrest he was not maintaining his children. He admitted that he had refused to maintain the children because the complainant had been restricting his contact rights and on the available facts, this was the cause of the discord which led to the physical confrontation between the parties which in turn led to the plaintiff's arrest. That aside, there are only four express jurisdictional facts for a defence based on s 40(1)(b).⁷ There is no fifth requirement which requires the arresting officer to consider whether the complainant wishes to withdraw the charge. Police are statutorily obligated to advise complainants of their rights under the DVA including to lodge a criminal complaint and to also render the necessary protection from offenders.⁸

[28] It is trite law that once all the jurisdictional prerequisites have been met, the discretion arises whether to arrest or not. This discretion is arrived at by taking into consideration the relevant facts of the case and the intention or purpose of the arrest. In this matter, there is no evidence to gainsay the defendant's version that the intention of the arresting officer was to protect the complainant from the plaintiff and to bring him before Court to answer to the charge. It is common cause that the plaintiff had his day in Court until the matter was finalized.⁹

[29] Taking into consideration the facts of this case and the case law to be applied, the defendant has succeeded in proving on a balance of probabilities that the arrest and the subsequent detention of the plaintiff was lawful.

Legal fees

⁷*Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at paras 22-23.

⁸*Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Venter and Others* 2011 (2) SACR 67 (SCA).

⁹ See s50 (1)(a) of the CPA.

[30] Except to fleetingly aver in his particulars of claim at para 7 that: “As a result of the aforementioned actions of the Defendants the Plaintiff was *forced to appoint legal representation in the amount of R10 000.00 (Ten Thousand Rand)*.” There was not even an attempt by the plaintiff to adduce evidence to prove this claim nevertheless, in the mediation agreement it is recorded that the plaintiff was represented by Legal Aid.” See Exhibit “A48”.

[31] Based on all the reasons that I have set out above, I find that the plaintiff is not entitled to the damages he seeks, both claims must accordingly fail. The costs shall follow the result.

[32] I make the following order:

ORDER

(1) The plaintiff's claims are dismissed with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff:

Instructed by:

Adv. N van der Sandt

SLDP Attorneys

C/O ROSENDORFF REITZ BARRY

BLOEMFONTEIN

Counsel on behalf of the defendants:

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