

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/33807

(1)	REPORTABLE: <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>NO</u>
(3)	REVISED, YES
	
..... SIGNATURE	
DATE <u>11 April</u> 2024	

In the matter between:

OMPIE BEN SELUME

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL PUBLIC PROSECUTIONS AUTHORITY

Second Defendant

JUDGMENT

LOUW AJ:

INTRODUCTION

- [1] The plaintiff instituted three damages claims against the defendants:
- 1) Claim A: wrongful and unlawful arrest and detention;
 - 2) Claim B: wrongful, false and malicious prosecution; and
 - 3) Claim C: loss of business profit.
- [2] It is common cause that the plaintiff, after his arrest on 23 February 2018, was detained for a period of 494 days when he was discharged in terms of Section 174 of the Criminal Procedure Act.
- [3] The plaintiff cumulatively claims an amount of R15 560 000 from the defendants. In respect of claim A, he claims R14 820 000 (Fourteen Million Eight Hundred and Twenty Thousand Rand). In respect of claim B he claims R500 000 (Five Hundred Thousand Rand). In respect of claim C he claims R240 000 (Two Hundred and Forty Thousand Rand).

THE EVIDENCE

- [4] The plaintiff testified in respect of claims A to C and Mr Sibiya was called on the plaintiff's behalf to testify in respect of claim C.
- [5] For the defendant the following witnesses testified:
- [5.1] Detective Constable Mhlanga (nee Lubisi), the arresting officer;
 - [5.2] Mr Daniel Petrus Oberholzer, the control prosecutor; and
 - [5.3] Mrs Gladys Sibongile Nxumalo, the Regional court prosecutor.
- [6] The parties agreed that the contents of the docket is what it purports to be and will serve as evidence without having to lead evidence thereon.

APPLICABLE LEGAL PRINCIPLES

[6] In order to conceptualise and properly evaluate the evidence, the following legal principles are to be considered.

[7] Section 40(1)(b) of the Criminal Procedure Act¹ ("the Act") reads as follows:-

"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 custody."

[8] The jurisdictional facts in terms of 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; and
- (iv) The suspicion must rest on reasonable grounds.²

[9] In Hiemstra's *Criminal Procedure*,³ the learned author, with reference to the *Sekhoto* case (*supra*) summarises the law pertaining to arrest without a warrant as follows:-

- (i) The jurisdictional prerequisites for subsection 40(1)(b) must be present;
- (ii) The arrestor must be aware that he or she has a discretion to arrest;
- (iii) The arrestor must exercise that discretion with reference to the facts;
- (iv) There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[10] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.⁴ It is also a well-established legal principle that the arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests. *Nkambule v Minister of Law and Order*.⁵

[11] In the matter of *Olivier v Minister of Safety and Security and Another*,⁶ the court held as follows:

"When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts."

[12] The court stated⁷ the following, namely:-

"This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question- was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employment, and residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation. The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court's view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort."

[13] The discretion to arrest must be properly exercised, therefore, the test for the legality of the exercise of discretion to arrest should be an objective one. In order to avoid abuse, the exercise of public power by the executive and other

functionaries should not be arbitrary. Such decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.⁸

[14] In order to objectively determine whether an arrestor has acted arbitrarily the court is obliged to consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) disregarded the express provisions of the statute. The authority for this has long been held.⁹ The onus rests upon the arrestor to prove that the arrest was objectively lawful.¹⁰

[15] A number of decided cases support the proposition that if the arrest is unlawful, it follows that the subsequent detention must also be unlawful.¹¹ The principles applicable to the delictual liability of the Minister of Police for detention were laid out in the recent Constitutional Court decision of *Mahlangu and Another v Minister of Police*.¹²

[16] The Court cited, with approval, the matter of *Relyant Trading (Pty) Ltd v Shongwe*¹³ where the Supreme Court of Appeal held, *inter alia*, the following:-

"....to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty".

[17] In *Mahlangu (supra)*, Tshiqi J¹⁴ was compelled to include in the judgment an excerpt from the decision of *Botha v Minister of Safety and Security, January v Minister of Safety and Security*.¹⁵:-

"It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s 12(1) of the Constitution ...

These provisions, therefore, place an obligation on police officials, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish, before detaining the person, the justification and lawfulness of such arrest and detention.

*This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so. In *Mvu v Minister of Safety and Security and Another* Willis J held as follows:-*

"It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all."

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person. [Footnotes omitted.]"

- [18] In the case of *Raduvha v Minister of Safety and Security and Another*,¹⁶ the Constitutional Court held as follows, as to how the discretion ought to be exercised:

"[42]. Section 40(1) of the CPA states that a police officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is

reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry."

"[44]. In other words the courts should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in Duncan [29] or as per Sekhoto where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised "in light of the Bill of Rights".

[19] In *Minister of Safety and Security v Tyokwana*:¹⁷

"(T)he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not."

[20] In relation to the standard of a reasonable suspicion to be applied the SCA in *Biyela v Minister of Police*¹⁸ held that:

"The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively."

THE EVIDENCE IN RESPECT OF THE ALLEGED UNLAWFUL ARREST

- [21] Detective Sergeant Mhlanga (née Lubisi) ("Lubisi") was the arresting officer who arrested the plaintiff on 23 February 2018. She testified that on 23 February 2018, she received a complaint from the Bertha Gxowa Hospital about a sexual assault on a minor child. She met with the complainant, who is the minor child's mother and took down her statement. The essence of the statement was that her 10-year old daughter described a perceived sexual act performed on her by the plaintiff.
- [22] It is common cause that the minor child had undergone a medical examination at the Bertha Gxowa Hospital on 23 February 2018. The examination was performed by Dr Ncha. Dr Ncha's conclusion in the J88 was that the child was sexually assaulted. The doctor concluded that: *"She was sexually assaulted. There was no hymen and the vaginal opening could admit 1 finger. There was inflammation above the posterior fourchette. There was also fluid above the perineum as well as between the thighs. Evidence was collected from the labia, perineum and vagina. Evidence points towards interference with the genital area, i.e. sexual assault"*.
- [23] Armed with the statement by the complainant and the J88 completed by Dr Ncha, Lubisi arrested the plaintiff after he was pointed out to her by the complainant. It is common cause that he was a willing participant to the arrest.
- [24] Under cross-examination the plaintiff testified that he did not have any problem with Lubisi effecting the arrest. He conceded that Lubisi had a reasonable suspicion with the available evidence at her disposal. He testified that he was not against what Lubisi was doing and conceded that the *"police would have been in dereliction of their duties if they did not act"*.
- [25] The only disputed issue surrounding the factors after the arrest is whether the plaintiff requested Lubisi to show him the J88. Lubisi denied that this request was made by the plaintiff and that, in any event, she would not have shown him the J88 as she was not allowed to.

- [26] The plaintiff testified that he became concerned when Lubisi did not give him the J88 when he asked Lubisi for it. He testified that Lubisi told him that she has not read the J88 and that she then became threatening towards him when he asked her on what basis is she charging him if she has not read the report.
- [27] The evidence by Lubisi contradicts the plaintiff's version. In any event, when it was put to the plaintiff that if Lubisi had showed him the J88, "*you say she did her job properly*". The plaintiff testified that although he did not commit the offence, he would have believed the doctor's report and he would have been satisfied when she showed him the J88.
- [28] It was suggested to Lubisi in cross-examination that she did not consider the plaintiff's version that the complaint was as a result of an argument that the plaintiff had with the complainant and, had she considered that, she would not have arrested him. Lubisi refuted this allegation. In light of the unequivocal evidence in the J88 and the complainant's statement, she "*had to do her job*". She expressed that it was essential that the minor child be protected, and that she could not be seen to neglect the minor child and that her safety was paramount.
- [29] It is common cause that the plaintiff, the complainant and the minor child lived together in a 1-roomed outbuilding. The best description of the living environment was when the plaintiff testified that when he was in the mood for sexual relations with the complainant, he would merely pull her from the bed where she and the minor child was sleeping to join him on the mattress directly next to the bed.
- [30] Lubisi testified that she understands how to consider and interpret the content of a J88. At that time she was part of the sexual offences unit for a period of 6 years and had no difficulty in accepting the doctor's conclusion. The conclusion in the J88 was perfectly clear. She accordingly arrested the plaintiff on the information in the complainant's affidavit and the conclusive finding on the J88.

- [31] It was put to Lubisi that when the plaintiff made his statement, she had already made up her mind. Her answer thereto was instructive and, in my mind, carries substantial weight: *"If the J88 was negative, I would not have arrested the plaintiff"*.
- [32] She denied that the plaintiff was unlawfully arrested and detained. She testified that the plaintiff was arrested for a reason and that she had applied her mind thereto.
- [33] She handed the docket over to the control prosecutor in Germiston and the plaintiff appeared in the Germiston Magistrates Court on 26 February 2018.

THE EVIDENCE IN RESPECT OF THE ALLEDGED MALICIOUS PROSECUTION

- [34] Daniel Oberholzer ("Oberholzer") was, at the time of the plaintiff's first appearance on 26 February 2018, the control prosecutor at Germiston.
- [35] He testified that one of his functions at the time was to screen and consider new dockets to determine placement on the court roll. According to the guideline manual of the Prosecuting Authority, he would have to, at the time, look for admissible evidence that a crime was committed. He would then look for admissible evidence to link the person arrested to the crime.
- [36] On 26 February 2018, he received what purportedly was a rape docket which contained evidence, i.e. witness statements, correspondence and the investigation diary up to that stage, including the accused's statement.
- [37] Based on the statements and the J88, he believed that a crime was committed and he had sufficient reasons to believe that an accused was identified. He accordingly placed the matter on the roll and instructed the court prosecutor with a written summary to oppose bail because of the nature of the offence – being Schedule 6.
- [38] Not from memory, but having considered the record, he testified that the matter was postponed several times. Legal aid was appointed for the plaintiff and a

bail application had been abandoned. A private attorney was subsequently appointed to represent the plaintiff. A formal application for bail was heard and bail was refused on 07 May 2018. The matter was then postponed for a transfer certificate to the Regional court. Oberholzer personally issued the transfer certificate on or about 12 May 2018.

- [39] A delay in the proceedings was caused in obtaining an assessment report of the minor child by a registered social worker. Oberholzer issued the instruction during February 2018. The complainant did not co-operate and did not comply with requests to have the minor child attend an assessment.
- [40] The matter proceeded to trial without an assessment report. At the end of the prosecution's case, the plaintiff was discharged as the minor child's testimony was found to be of poor quality.
- [41] Oberholzer testified that there was no maliciousness in the prosecution of the plaintiff. The evidence indicated that the minor child was a victim of a serious crime and that any prosecutor, on the available facts, would have done the same.
- [42] It was suggested to Oberholzer in cross-examination that he should have taken the plaintiff's version into account. Oberholzer answered that he did consider the plaintiff's version which, at the time, he had to weigh up against the content of the docket. He does not have the "tools" to evaluate evidence as that remains the purpose and function of the court. He testified that with the available evidence "*no prosecutor would have refused*" to place the matter on the roll.
- [43] Oberholzer refuted the statement that he did not properly apply his mind. He repeated his evidence that "we" look for a crime committed and admissible evidence. A *prima facie* case is considered and the rest is done in court. He did consider the plaintiff's statement, but weighed up against the content of the docket, it was not remotely enough to not prosecute.

- [44] He concluded his testimony by saying that he would have done nothing differently, and that he cannot establish that anything was done incorrectly.
- [45] Sibongile Gladys Nxumalo ("Nxumalo"), the Regional court prosecutor in Germiston at the time of the trial, testified that no prosecutor would have declined to prosecute the plaintiff considering the available evidence.
- [46] She did concede that she experienced some difficulty in securing the assistance of the complainant to ensure that the minor child be evaluated. At some time she decided to in fact remove the minor child from the custody of the complainant.
- [47] It is common cause that an assessment of the minor child was not done when the trial commenced. Nxumalo testified that she was comfortable to proceed without an assessment as she prepared the minor child for court. In any event, she testified further that an assessment is not always handed up and it would not have made a difference except if the minor child had mental problems. The absence of DNA results was not critical. She would have prosecuted whether the results were available or not. If the identification of an alleged rapist is unknown, she will not proceed without DNA results
- [48] Under cross-examination she was referred to the complainant's statement and confronted by plaintiff's counsel with aspects he deemed to be inconsistent and incomplete. She testified that she considers all the evidence and that she looks at the case in totality. She as a prosecutor does not "nitpick" at the available evidence and on the evidence presented to her "*I certainly will not draw a negative inference*".
- [49] She concluded that there was always a *prima facie* case to be prosecuted.

EVALUATION OF THE EVIDENCE

- [50] The evidence of the plaintiff is that of a single witness; accordingly, the plaintiff's evidence must be approached with caution.

[51] The plaintiff did not make a favourable impression on the court during his evidence. His evidence was improbable and unreliable. On the one hand he accepted that Lubisi acted prudently and correctly and that he would have been satisfied had he been shown the J88. Conversely, he was unhappy because a full investigation was not launched to investigate, what he perceived to be, bias against him by the complainant. Nothing was said about the conclusive findings in the J88.

[52] I found the evidence of the state's witnesses to be credible and reliable. The arresting officer, the control prosecutor and the Regional court prosecutor all testified candidly and honestly. I have no hesitation in accepting their evidence in totality.

[53] It is clear that Lubisi's grounds for arresting the plaintiff were reasonable from an objective point of view. The decision to prosecute was reasonable and clearly based on specific and articulable facts and information.

[54] Counsel for the plaintiff seemed to suggest that it was a function of the defendant's witnesses in this case – starting with the arrest up to the decision to prosecute - to conduct a *sui generis* preliminary trial in order to ensure the veracity, or not, of the evidence presented. This is not the legal test.

[55] I accordingly find that the arrest of the plaintiff was lawful and that the prosecution of the plaintiff was not malicious.

[56] In light of my findings the plaintiff's claim for loss of profit need not be considered.

[57] For all these reasons, the plaintiff's claims fall to be dismissed.

COSTS

[58] There is no cogent reason to depart from the general rule that the successful party is entitled to the costs.

ORDER

[59] Accordingly, I make the following order:

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


 A LOUW
 Acting Judge of the High Court
 Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 11 04 2024.

APPEARANCES:

For the Plaintiff: Adv Madau
 For the Defendants: Adv Mkhathshwa
 Date of hearings: 15, 16, 17 and 26 May 2023
 Date of judgment: 11 April 2024

¹ Act 51 of 1977.

² *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 467 (SCA).

³ Page 5-8.

⁴ *R v Van Heerden* 1958 (3) SA 150 (TPD); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814D.

⁵ 1993 (1) SACR 434 (TPD); *Helmstra (supra)* at 5-8.

⁶ 2009 (3) SA 434 (WLD).

⁷ At 445D to F.

⁸ *Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 678 (CC) paragraphs 85-86, page 708D-F.

⁹ *Shidiack v Union Government (Minister of the Interior)* 1912 (AD) 642 at 651-652.

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- ¹⁰ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (AD) at 589E-F; *Mabasa v Felix* 1981 (3) SA 865 (AD) and *Minister of Law and Order v Matshoba* 1990 (1) SA 281 (AD) at 284.
- ¹¹ *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at 600G.
- ¹² *Supra* [2021] ZACC 10.
- ¹³ [2007] 1 All SA 375 (SCA) at para 6; at para [29] of *Mahlangu (supra)*.
- ¹⁴ At para [40].
- ¹⁵ 2012 (1) SACR 305 (ECP).
- ¹⁶ 2016 ZACC 24.
- ¹⁷ [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) at para 40.
- ¹⁸ (1017/2020) [2022] (1 April 2022) ZASCA 36.