



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 34099/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

SIGNATURE

DATE

2022-05-30

In the matter between:

BENJAMIN SEHLEKO MAGANYELE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

- [1] The plaintiff is suing the defendant for the amount of R600 000 (Six Hundred Thousand) for damages suffered following his arrest on 7 April 2018. The plaintiff was detained in the police holding cells until 9 April 2018.
- [2] The following are either common cause or not in dispute:
- 2.1 The plaintiff was arrested by members of the South African Police Services (hereinafter referred to as SAPS) on 7 April 2018 and was detained at Soshanguve Police Station until he was released from custody on 9 April 2018. The plaintiff was therefore detained for a period of three days.
 - 2.2 The plaintiff was arrested and subsequently charged with contravening an interim protection order.
 - 2.3 At all material times the said members of the SAPS were acting in the course and scope of their employment with the defendant.
 - 2.4 The plaintiff was arrested following a criminal complaint laid by Seipati Maganyela, who was at the time married to the plaintiff.
- [3] This court is therefore called upon to determine whether the arrest and subsequent detention of the plaintiff by members of the SAPS was unlawful or not. I am also called upon to determine the quantum of damages in the event I find that the arrest and detention were unlawful.

APPLICABLE LAW

- [4] Section 8 of the Domestic Violence Act 116 of 1998 provides as follows:

“(1) whenever a court issues a protection order, the court must make an order-

- (a) Authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and*
- (b) Suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.*

(4) (a) A complainant may hand a warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition condition or order contained in a protection order, to any member of the South African Police Service.

(b) If it appears to the member concerned that subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).

(c) if the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a notice to the respondent which-

- (i) Specifies the name, the residential address and the occupation or status of the respondent;
- (ii) Calls upon the respondent to appear before a court, and on the date and the time, specified in the notice, on a charge of committing the offence referred to in section 17(a); and
- (iii) Contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent...."

Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 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 escaping from lawful custody..."

THE EVIDENCE

- [5] The plaintiff testified under oath and he called no witnesses to testify on his behalf. The defendant called two witnesses, namely members of the South African Police Services.
- [6] The defendant argued that the arrest and subsequent detention of the plaintiff were not unlawful in that there was a genuine complaint of contravening an interim protection order. Hence the parties agreed that the defendant had a duty to begin in order to prove that the arrest was not unlawful. In that regard the following witnesses testified on behalf of the defendant.
- [7] Sipho Sikosana testified that he was a member of the SAPS holding the rank of a Sergeant. On 7 April 2018 he received a call through radio transmission that there is a complaint at Rietgat SAPS and he needed to effect an arrest. He was told that there was a protection order against the suspect and that the suspect could be found at his home. At the police station he was not furnished with the docket. He only checked the attachment in the docket and saw a protection order. He never read the statement of the complainant. However, he went to the address of the plaintiff to effect an arrest. He told the court he arrested the plaintiff for a contravention of a protection order. During the arrest he says that he explained the constitutional rights to the plaintiff. He further testified that he knew the plaintiff prior to the arrest because he had attended a complaint of Domestic violence between the plaintiff and his ex-wife. On why he arrested the plaintiff without a warrant of arrest he said it was not necessary to obtain a warrant because when the plaintiff was served with the Interim Protection order the repercussions of contravening it were explained to him. Under cross examination he was asked if he had no interest in checking the complaint as per A' statement to which he answered by saying, "*no – I checked the charges. They said contravention of a Protection order*".
- [8] The following questions and answers are important to consider in the evidence of this witness during cross-examination:

Q. *You did not check what is the complaint about?*

A. It was explained to CSC assistant.

Q. you did not confirm what are the allegations as per A' statement.

A. When interviewing the complainant, she did not go into detail. I interviewed her. I asked her what is it that he did. She said he threatened me. He took my clothes. For me that was contravention.

Q. Do you know what the Act say on how to effect an arrest in terms of the Act?

A. No.

Q. When was the interim order served?

A. I don't know.

Q. You cannot confirm if it was served or not?

A. Yes.

Q. On that day you did not confirm if the interim order was served or not?

A. Yes.

Q. Do you know the effect of having an interim protection order that has not been served?

A. It does not hold value. It may lead to an unlawful arrest.

- [9] From the above passage it is clear that sergeant Skosana did not have the contents of the Protection order that was allegedly contravened. He did not know the conditions that were set to plaintiff. He did not have a warrant of arrest. He did not even know the law that authorised him to effect that arrest. And therefore he only arrested the plaintiff on the basis of the complaint through the radio transmission and by interviewing the complainant. The prior knowledge of the plaintiff could have overshadowed the sergeant's judgement.

- [10] Mapula Bella Maswanganyi's testimony does not take the case any further. She only received the docket after the plaintiff had been arrested and she was not involved in the arrest of the plaintiff.
- [11] The defence closed its case after calling the two witnesses and the plaintiff testified that on 7 April 2016 he was walking home when a police car approached him. Members of the SAPS got out of the car and asked where Benjamin is. He said it's him. They instructed him to get into the car. He asked where were they taking him to. They said they did not want to wrestle with him. He must get into the car. He got into the car and they drove off to the Police Station.
- [12] The essence of his testimony is that when he was arrested, the police did not inform him why they were arresting him. He said he was not aware of any protection order against him. He was only informed after he was locked into the police cell why he was arrested. The members of SAPS could not produce any warrant upon which the plaintiff was arrested.

EVALUATION

- [13] In order for the plaintiff to succeed, the plaintiff must prove that he was arrested unlawfully by the members of the SAPS who were acting within the course and scope of their duties with the defendant. On the other hand because the defendant has admitted the arrest, the defendant must therefore prove that the arrest was not unlawful.
- [14] It is common cause that the plaintiff was arrested without a warrant to do so by the members of the SAPS. It is not unlawful *per se* for the members of the South African Police Service to arrest any person without a warrant. However, this must be done within the confines of the law.
- [15] The right to personal liberty is so fundamental that the lawfulness of a person's detention must be objectively justifiable, regardless whether he was aware of the unlawfulness of the detention.

- [16] The defendant contends that the members of the SAPS were within their powers to arrest the plaintiff without a warrant because the plaintiff was issued with an interim protection order and he was aware of the terms thereof.
- [17] The problem with the defendant's case is that when he effected the arrest sergeant Skosana had not satisfied himself that indeed the plaintiff had contravened the conditions of the interim protection order. The defendant could not even present evidence that the interim order was served on the plaintiff and that the plaintiff was aware of its existence.
- [18] Sergeant Skosana admitted that he has very little knowledge in respect of the provisions of the Domestic Violence Act¹ and the importance of a warrant of arrest authorized in terms of Section 8 of the Act². Section 8 of the Domestic Violence Act was promulgated for a reason. The police therefore, have a duty once confronted with a situation where there is a complaint of contravention, to ascertain first the existence of a protection order and the terms thereof. The police have a further duty to ascertain if the complaint by the complainant in a Domestic violence matter is a contravention of the terms of the Protection order. This can only be done if the police has regard to both the complaint, the statement of complaint and the Protection order itself.
- [19] In this case the police officer, especially sergeant Skosana did not bother to ascertain the provisions of the protection order, nor did he read the statement of the complaint to ascertain if indeed what she complained about were a contravention of the terms of the Interim protection order.
- [20] Worse, sergeant Skosana was not even aware that he had to have a warrant in order to arrest the plaintiff for contravening the conditions of a protection order. I am therefore satisfied that the plaintiff has discharged its onus of proving that he was arrested unlawfully. The defendant failed to discharge its onus that the arrest was not unlawful.

¹ 116 of 1998

² 116 Of 1998

QUANTUM

[21] In **April v Minister of Safety and Security**³ Jones J said the following:

“It is necessary to emphasize that an award for *contumelia* involving the invasion of bodily integrity is of a different kind from general damages ordinarily awarded in cases of bodily injury. To my mind, police officers are entrusted with the power to arrest a person without having obtained a warrant of arrest.”

[22] It is, therefore, settled law that any deprivation of freedom is regarded as *prima facie* unlawful. The arrestor in this regard bears the onus proving that the arrest was not unlawful. See **Louw v Minister of Safety and Security 2006 (2) SACR 178 T**.

[23] There is therefore no formula or mathematical calculations for the quantum of damages to be awarded to a plaintiff whose liberty had been deprived. Previously decided cases, therefore, would serve as a guide for the court.

[24] The plaintiff testified that he was locked in a cell with other inmates. He was given a blanket that looked like a carpet. He asked the police officers to bring him his medication but they refused. He was in pain and he could sleep the first night. He was a church leader and the arrest affected his position in church.

[25] Counsel for the plaintiff argued that an amount of R400 000.00 fair and reasonable as compensation for the plaintiff's damages. Counsel for the defendant argued that if I find that the arrest was unlawful I should award an amount of R 60 000.00 as compensation to the plaintiff.

[26] I was referred to a number of previously decided cases by the plaintiff's counsel in trying to justify the quantum of damages that she submitted I should award, and they are, *inter alia*, the following:

³ [2008] 3 ALLSA 27(SE) AT 281-2

(1) In **Mathe v Minister of Police [2017] 4 All SA 130** an amount of R120 000 was awarded for an overnight detention of the plaintiff in a single cell with a single non-functioning toilet and no privacy.

(2) In **Minister of Safety and Security v Tyulu 2009 (5) SA 85 SCA** the court gave direction regarding the correct approach to the assessment of damages for unlawful arrest and detention as follows: *"The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."*

(3) In **Madyibi v Minister of Police 2020 (2) SACR 243 (ECM)** the court awarded R4000.00 for the unlawful arrest and detention for 24 hours, the decision having been influenced by among others, the plaintiff is standing in the community, the manner of the arrest and of course the duration of the detention.

[27] Counsel for the defendant referred me to **Rahim & 14 others v Minister of Home Affairs & Others 2015(4) SA 433(SCA)**, **Tyulu⁴** as well as **Seymour v Minister of Safety and Security⁵**, among others, in trying to advance his argument that an appropriate award of damages should be an amount of R60 000.00. In Seymour the plaintiff who was arrested on the 29th of December and released on the 3rd of January was awarded an amount of R 500 000.00 because he suffered extreme stress during his unlawful arrest and detention as well as afterwards as a result thereof.

CONCLUSION

[28] In this case the plaintiff was detained for 3 days. He was a pastor of a church and he was arrested in full view of members of the public. He requested police officers to bring him his medication but they refused. However, there was no medical evidence presented in respect of the plaintiff's state of health as a result of the

⁴ supra

⁵ 926508/01) [2005] ZAGPHC 18

arrest and detention. I therefore consider an amount of R250 000.000 to be fair and reasonable as compensation for the damages suffered.

ORDER

[29] Consequently I make the following order.

- (a) The defendant is liable for 100% of the plaintiff's proven damages.
- (b) The defendant shall pay the plaintiff an amount of **R250 000.00**(Two hundred and fifty thousand rand) as compensation for damages suffered as a result of the arrest and detention of the plaintiff by members of the South African Police Services.
- (c) Costs of suit.

**KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Case lines. The date for handing down is deemed to be 30 May 2022.

FOR THE PLAINTIFF	: Ms EZ MAKULA
FOR THE DEFENDANT	: Adv. N MOHLALA
DATE OF JUDGMENT	: 30 May 2022