



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 83749/15

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	NO.
(2) OF INTEREST TO OTHER JUDGES:	NO
(3) REVISED.	
DATE	21 January 2019
SIGNATURE	<i>[Signature]</i>

In the matter between:

OSCAR MOLOI

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

Coram: Munzhelele AJ

Heard: 24 October 2018

Delivered: 21 January 2019

JUDGEMENT

MUNZHELELE AJ

[1] The plaintiff, Oscar Moloi instituted an action against the defendant, Minister of Police claiming payment of damages on the basis that he had been unlawfully assaulted, arrested and detained. The damages claimed by the plaintiff are for an amount of R600 000(six hundred thousand rand) made up as follows:

Past medical expenses	: R50 000.00
Future medical expenses	: R50 000.00
Loss of earnings past and future	: R100 000.00
General damages	: R400 000.00

Background facts

[2] In his particulars of claim the plaintiff alleges that on 13 February 2013 at Hammanskraal, South African Police Detective Warrant Officer Rachele Emmanuel "Detective Rachele", stationed at Bela-Bela assaulted, arrested and detained him unlawfully for seven days. It is common cause that Detective Rachele was acting within the course and scope of his employment when he arrested and detained the plaintiff.

[3] The defendant's defence in the plea is that the plaintiff was lawfully arrested and detained by Detective Rachele. The defendant further denies the assault on the plaintiff by the police. Detective Rachele avers that the plaintiff was arrested without a warrant as defined in terms of section 40 of the Criminal Procedure Act 51 of 1977 on reasonable suspicion that the plaintiff has committed schedule 1 offence. Defendant further denies that he is liable to the plaintiff as claimed. He submits that the plaintiff's claim should be dismissed.

Evidence

[4] Drivers along N1 and R101 were getting hijacked and robbed every time during the night. Several dockets were opened for investigations including CR 157/2/2013 where a motor vehicle Mercedes Benz was hijacked, cell phone and cds were robbed. Information was received on the 12 February 2013 by Detective Rachele about the people who might be involved in the R101 robberies. They went to Themba and interviewed Mohalene Nico and Christopher Mudau. The two led the police to Fanie Snyman Lebelo who stays at Brazaville Attridgeville. Fanie Snyman informed the police that Oscar was involved in the car hijack. Oscar was followed at Hammanskraal Thamboville where he was with his girlfriend.

[5] Plaintiff was found in a room together with his girlfriend. In this room a cell phone, cds and a bag were on the table. The police took the items to the police station. These recovered items were later identified by the complainant in the case of robbery. Detective Rachele then arrested the plaintiff and detained him at Bela-Bela police holding cells. Detective Rachele denied assaulting the plaintiff and his girlfriend on that day. During cross examination of Detective Rachele a J88 document was produced as evidence to prove that plaintiff was examined by the doctor and that he was injured. The Detective Rachele denied that he assaulted the plaintiff.

[6] Shumani Mackson Galane is the police officer who charged the plaintiff on the 14 February 2013. He alleged that he did not see any injuries on the body of the plaintiff. He testified that plaintiff did not make any complaint to him regarding the assault by the police.

[7] Richard Karabo Manamela was the investigating officer of this case. He testified that the docket did not contain any complaint by the plaintiff of the assault by the police. The plaintiff was released because the fingerprints uplifted by the police did not match the plaintiff's fingerprints.

[8] The Plaintiff, Oscar Mooketsi Moloi confirmed that he was arrested on the 13 February 2013 without a warrant while he was at Hammanskraal, Thamboville with his girlfriend. The arrest of the plaintiff occurred during the night. The plaintiff testified that when the police arrived, they informed him of the reasons why they were looking for him. Plaintiff denied that he committed the robberies and the hijack of the cars on the N1 and R101. Plaintiff testified that the police started to assault him with firearms and fist blows on the shoulder and also on the stomach because he denied having committed the offences alleged. He was injured as a result of the assault. They took him together with his girlfriend to the police station at Bela-Bela. The plaintiff testified that they assaulted him again at the police station. He was taken to the hospital after a lapse of three to four days while detained at the police holding cells. Plaintiff denied that there were any items which were found at the room. He alleges that at the police station the police forced him to sign for those items and he refused.

[9] During cross examination of the plaintiff it came to light that there were some admissions which he made to the police captain which were reduced into writing. On the statement he admitted having committed the robbery and narrated the modus operandi which they were using in order to hijack and rob these people.

[10] Kedibone Anna Dijana confirmed that plaintiff was her boyfriend and they had a child together. On the night of the arrest she confirmed that she was in the company of the plaintiff. She corroborated the evidence of the plaintiff regarding the assault. She also said that the police also assaulted her with an open hand. However, there were some contradictions regarding the assault as to how many police assaulted him. And where was the plaintiff assaulted. During cross examination she was confronted with her admission of the offence which was occurring along the R101. She alleged that she made the admissions because she was forced by the police.

Arguments by both parties

[11] Advocate F.P.W. Modjadji, argued on behalf of the defendant that the police and in particular Detective Rachele arrest plaintiff based on a reasonable suspicion when he found stolen items at the room where plaintiff was. Counsel further argued that because of such reasonable suspicion then the arrest became lawful in the circumstance. Counsel argued further that the plaintiff failed to prove assault on him by the police because his evidence and the evidence of his witness contradicted each other. Further that the J88 was a fabrication. Counsel argued that the plaintiff and his witness were not credible witnesses as such their evidence is unreliable.

[12] On the other hand advocate M.M.C De Klerk argued on behalf of the plaintiff that the defendants did not cross examine plaintiff on the issue of the cell phone and cds and the bag which was found with him. Counsel further argued that the defendant did not form the required suspicion before arrest. Further the defendant arrested the plaintiff based on the stolen goods. The counsel argued that plaintiff has proved through

evidence of the J88 that the plaintiff was assaulted. The plaintiff and his witness testified that they were assaulted by the police. Counsel further argued that the defendant should be held liable for damages occasioned by the assault on the plaintiff by the police and the resultant arrest and detention.

Issue

[13] The issue to be decided is whether or not Detective Rachele had a reasonable suspicion that the plaintiff had committed the offence of armed robbery and also whether he was justified to arrest the plaintiff without a warrant of arrest. Third issue is whether the plaintiff was assaulted during the arrest and detention by the police.

Unlawful arrest and the required suspicion

[14] In this case, it was common cause that the arresting officer was Detective Rachele together with his Task team. It was also common cause that he arrested the plaintiff without warrant. If Detective Rachele held a suspicion when arresting plaintiff then the arrest would be lawful by reason of the provisions of section 40(1) (b) of the Criminal Procedure Act 51 of 1977. In *Shabaan Bin Hussein and Others v Chong Fook Kam & another* [1969] 3 All ER 1627 it was held that a suspicion 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end'. (See also *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA)).

[15] It is not clear when did the suspicion by Detective Rachele arose, because his testimony is that, he saw the cell phone on the table as well as the bag containing the cds which were stolen items and then arrested plaintiff. Detective Rachele should have ascertained through questions to the plaintiff in order to find if plaintiff could give account of such possession of the cell phone, bag and cds. If he fails to give an account of such possession then he will be suspected of having stolen the said items and therefore lawfully arrested.

[16] The onus to proof the lawfulness of the arrest, rest on the defendant. The defendant should also prove that arrest was based on reasonable grounds. Suspicion is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion (see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814.) The defendant failed to show the reasonableness of their suspicion if they indeed had any suspicion at all. Because of their failure to prove the suspicion which is a requirement in terms of section 40 of the Criminal Procedure Act 51 of 1977 therefore their arrest became unlawful.

[17] Having failed to establish the jurisdictional facts justifying the arrest the resultant detention became unlawful in this circumstance. I am persuaded that the plaintiff has made out a case on merits regarding unlawful arrest and detention and the defendant is liable to pay proved damages suffered by the plaintiff consequent to unlawful arrest and detention.

Assault of the plaintiff.

[18] Detective Rachele denied the assault on the plaintiff. Captain Galane denied seeing any injuries on the plaintiff. Captain Galane further denied that plaintiff never complained to him of any assault or injuries. Investigating officer Manamela testified that he read the docket before he could proceed to take any further step on it but could not see any recording of the plaintiff's complaint nor any instructions from the prosecution or magistrate regarding plaintiff's assault or injuries. He also did not know about the J88. The defendant argued that the J88 was a fabrication. Plaintiff alleged that he was assaulted by the police in the presents of Kedibone.

[19] There are indeed contradictions regarding the assault. Kedibone testified that plaintiff was assaulted by two police while another police was holding his neck. Plaintiff testified that four police assaulted him interchangeably. The plaintiff had a duty to prove the assault by the police. Given the fact that there are irreconcilable versions between the plaintiff and defence the following principles laid down in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA) Nienaber JA should be followed were it was stated that:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities'.

[20] It is already clear that the credibility of the plaintiff and his witness regarding the assault is tainted because of their contradictions. If the assault was perpetrated by four police officers in each other's presents, Kedibone would have seen four police assaulting plaintiff. Nature of this contradiction affects the credibility of the plaintiff and his witness. This

sort of contradiction is not expected from the witnesses as they had ample time with the police before they were taken to the police station. The plaintiff and his witness are found to be unreliable on this material issue. The plaintiff failed on this aspect to prove on a balance of probabilities that indeed he was assaulted by police with certainty. The plaintiff's evidence of assault by the police is rejected. Court accepts the version of the police that they did not assault the plaintiff.

[21] I accordingly make the following order:

1. Judgement is granted in favour of the plaintiff for unlawful arrest and detention only.
2. Plaintiff's claim based on assault is dismissed.
3. The defendant is ordered to pay costs on party and party scale.



M.M.Munzhelele

Acting Judge of The High Court

PRETORIA

Appearances:

For the plaintiff

Advocate M.M.C de Klerk

Instructed by: V Rea and Associates.

For the defendant:

Advocate F.P.W Modjadji

Instructed by: State Attorney

PRETORIA