

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

CASE NO: 1072/2016

In the matter between:

IVY NANA BAM

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MBABANE AJ

Introduction

[1] On 07 March 2016, the plaintiff was arrested by members of the South African Police Services without a warrant of arrest and was detained for one night at Central Police Station, Mthatha. On the following day, she was taken to the court's holding cells but was later released without appearing before the magistrate. She was advised that charges were withdrawn because the public prosecutor declined to prosecute.

[2] The plaintiff instituted action against the defendant claiming payment of damages on the basis that she was unlawfully arrested and unlawfully detained.

[3] The parties agreed to separate the issue of liability and quantum and I made an order in terms of rule 33(4) of the Uniform Rules for the separation of the issue of liability and quantum, with liability falling to be dealt with first and the issue of quantum standing over for determination at a later stage.

[4] It is common cause that, in the circumstances of this case, the defendant bears the onus to prove that the arrest and detention were lawful. This is so because, as Rabie CJ, stated in *Minister of Law and Order and Others v Hurly and another*,¹ that:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.”

Pleadings

[5] Relevant to the issue of liability, the plaintiff in the particulars of claim alleges the following:

“3.1

On or about 07th March 2016 at or near Mthatha dam the plaintiff, whilst driving her motor vehicle, was followed by a police motor vehicle which demanded plaintiff to stop. The occupants of the motor vehicle were two (2) males and one civilian female. Upon having approached the plaintiff the police officer, Ngqokoma, informed the plaintiff that she is under arrest and demanded that she alights from her motor vehicle and board on a police motor vehicle.

3.2

After some protestations from the plaintiff, she was allowed to follow the police to central police station.

4.

¹ 1986 (3) SA 568 (A) at 598 E-F.

The plaintiff was taken to court on 08th March 2016 and she was kept on the holding cells until 14h30 and was advised by the member of the South African Police Service that the prosecutor has declined to prosecute the case and was consequently withdrawn. The plaintiff was released from police custody by the members of the South African Police Service. She was advised that she was arrested for the assault of Petela's child.

5.

The arrest and detention were malicious for the following reasons: On 01st March 2016 the plaintiff was severely assaulted by Nondwe Petela, Nontando Petela, Lusanda Petela, and Asithandile Petela and she opened a criminal case against them under CAS No. 4-3-2016. Plaintiff's motor vehicle was destroyed by the aforesaid persons. They were never arrested and there is not even a court date until the institution of this case."

[6] In denying the allegation the defendant pleaded that:

"Ad paragraph 3.1

The content of this paragraph is admitted.

Ad paragraph 3.2 thereof

Save to admit that the plaintiff resisted arrest to such an extent and the rest of the content of this paragraph is vehemently denied.

Ad paragraph 4 thereof

The contents of this paragraph are admitted.

Ad paragraph 5 thereof

The contents of this paragraph are denied. In amplification thereof the defendant avers that both arrest and detention were lawful in the circumstances as the plaintiff was charged of Assault [with intent to do] Grievous Bodily Harm ["assault GBH"] that was laid against her by the complainant Asithandile Petela. The plaintiff is put to proof of her allegations thereof."

Issues for determination

[7] The issues are the following:

- (a) whether or not the reliance by the defendant on the provisions of section 40(1)(b) of the Criminal Procedure Act in arresting the plaintiff without a warrant is sustainable; and if so,

- (b) whether the arrest and detention of the plaintiff was unlawful.

The Defendant's case through the evidence

[8] The defendant called the evidence of two witnesses. The first witness to testify was the investigating officer, Warrant Officer Ngqokoma ("Ngqokoma"). Ngqokoma testified that on 07 March 2016 he was on duty at Mthatha Central Crime Office performing his normal duties as a detective. He was dealing with new cases and this case was one of the cases allocated to him for investigation. He came across the docket in this matter and read all the statements contained in the docket. Upon reading the docket he established that it was a case of assault GBH which occurred at Link location and the suspect was the plaintiff. He stated further that the victim was an 8-year old and the statement was written by the victim's parent. Ngqokoma further testified that he and Colonel Mali proceeded to Link location to discuss the case with the victim's mother. They interviewed her and she confirmed that the person who assaulted her child is the plaintiff. She accompanied them to look for the plaintiff towards the side of Mthatha dam. When they were about to enter at Mthatha dam, the victim's mother saw the vehicle approaching and informed them. They stopped the said vehicle and went to the plaintiff and informed her that she was under arrest for assaulting a minor child. She requested that she be allowed to drive her own motor vehicle to the police station. At the time she was with a young man in her motor vehicle. She was allowed to follow with her motor vehicle to the police station. Upon arrival at the crime office, she was informed again that she was being arrested for assault GBH and she was detained in the police cell. She asked to call her attorney, and she was permitted to do so. Ngqokoma testified that he did not require a warrant of arrest because he is empowered by the provisions of section 40(1)(b) of the Criminal Procedure Act² to arrest a person without a warrant if that person has committed a schedule 1 offence, and the offence of assault GBH is a schedule 1 offence. He concluded by stating that, at the police station, the plaintiff signed a warning statement.

² Act 51 of 1977.

[9] Under cross examination, Ngqokoma conceded that if the offence of assault GBH was not listed in schedule 1, he would not have arrested the plaintiff without a warrant. It was put to him that the offence of assault GBH is not listed under schedule 1, and for that reason the arrest was unlawful. Ngqokoma disputed that and insisted that assault GBH is a schedule 1 offence.

[10] Ngqokoma was further probed about an entry in the investigation diary on 08 May 2016 reflecting that the J88 affidavit was only filed on that date. He disagreed and stated that the J88 and the J88 affidavit were filed on 04 March 2016. He stated that they were not filed on different dates and, from his observation, there could have been an error that was made by a person who was making an entry in the diary to separate the J88 from J88 affidavit. He disagreed with the proposition that there was no J88 in the docket when he received it. Ngqokoma was also asked about why he did not mention in his evidence in chief that at the time he received the docket, the J88 was already in the docket. He stated that there was no need to mention it.

[11] Ngqokoma was also asked about the fact that, according to the investigation diary, the victim's statement was only filed in the docket on 08 March 2016. He stated that he is not the one who made the entry but persisted that the victim's statement was already in the docket when he received it on 07 March 2016.

[12] Lastly, Ngqokoma was also asked about the reason for arresting the plaintiff instead of summoning her to appear in court. In response, Ngqokoma stated that the reason why the plaintiff was not summonsed is that she was arrested for having committed a schedule 1 offence.

[13] The second witness that was called to testify was Colonel Ndumiso Mali (Mali). In essence, his evidence corroborated the evidence of Ngqokoma about the manner in which the plaintiff was arrested.

[14] Under cross examination, Mali was asked about the reason for not issuing a warrant of arrest before arresting the plaintiff. He stated that the issuing of a warrant of arrest depends on the seriousness of the offence and the discretion of the investigating officer.

[15] Mali was further asked whether he knew the date in which the victim's statement was filed in the docket. He stated that he does not know, but what he knows is that when they went to look for the plaintiff, the statements were already in the docket. When probed about the entry in the investigation diary that shows that the victim's statement was only filed on 08 March 2017, Mali advised the date reflected in the diary does not necessarily mean that the activity occurred on the same date. He stated that the J88 affidavit and the statement of the victim were already in the docket when they received it, and he did not check the diary.

[16] Lastly, Mali was asked whether he heard the plaintiff explaining to Ngqokoma that she was falsely accused by the complainant because the complainant was earlier arrested for assaulting the plaintiff. Mali stated that he did not hear what Ngqokoma and the plaintiff were talking about because he was not paying attention to what was said.

[17] At this stage the defendant's case was closed.

The plaintiff's case through the evidence

[18] After the defendant's case was closed, the plaintiff testified. She stated that on 07 March 2016, she was stopped by the police at Lutshaba nature reserve whilst she was coming from Mthatha dam. She saw Asithandile (the complainant) and the two unknown gentlemen. The gentlemen alighted the police vehicle and approached her. One of them was carrying a police docket. They informed her that they are the police and the one who was carrying the docket was Ngqokoma. They told her that they were arresting her. She had two passengers at the time who hitchhiked, and she requested to first drop them to their destinations and to follow the police to the police station with her

own car. They agreed and followed her until they reached central police station. At the police station Ngqokoma asked her whether she knew Vathiswa. He told her that Vathiswa and him were born in the same year (1975) and they attended the same school. He asked Ngqokoma as to who Vathiswa was and whether he was referring to Asithandile and he confirmed. She stated that there were other police officers, and Mathanda was one of them. Mathanda mocked her by stating that even if you are rich, you will be in the police cells like the poor. She then asked to call her lawyer, and Ngqokoma refused and advised her that he had no time for that as he was attending classes at 'UNITRA'. Subsequently she was given the phone to call her attorney, and thereafter she was taken to the police cells.

[19] Under cross examination she confirmed that her lawyer arrived, but at the time Ngqokoma had already left. She was also probed about the inconsistencies between the date that she gave in her warning statement and the statement she made earlier when she was laying a charge of assault against the complainant. In her warning statement, she said she was assaulted on 01 March 2016, and her earlier statement she said she was assaulted on 29 February 2016. In reply, she stated that she was attacked on 29 February 2016 and that she does not know anything about assaulting a child.

[20] The case for the plaintiff was then closed.

Analysis of the evidence

[21] The main issue is whether Ngqokoma was correct in relying on the provisions of section 40(1)(b) in justifying the arrest of the plaintiff without a warrant.

[22] It is common cause that the plaintiff was arrested without a warrant, and Ngqokoma relied on the provisions of section 40(1)(b) in justifying the arrest of the plaintiff without a warrant. Section 40(1)(b) provides that 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 an offence of escape from lawful custody. In schedule 1, various offences are listed and of relevance to this case is the mention of “assault when a dangerous wound is inflicted.” There is no mention in schedule 1 of an assault with intent to do grievous bodily harm.

[23] The injuries sustained by the victim as per the J88 are ‘soft tissue injuries.’ Was the soft tissue injury suffered by the victim in this case a dangerous wound? It is trite that in civil proceedings the party that bears the onus must, in order to succeed, prove its case on a balance of probabilities. The defendant therefore bears the onus to prove that the wound that was allegedly inflicted by the plaintiff on the victim was a dangerous one. In *R v Jones*³ the court described a dangerous wound as one which itself is likely to endanger life or the use of a limb or organ. There is no evidence presented on behalf of the defendant that suggests that the plaintiff inflicted a *dangerous wound* on the victim. In *De Klerk v Minister of Police*⁴ Shongwe ADP made the following remarks:

“What is clear is that the arresting officer relied on the statement by the complainant and the J88 only, when she made the decision to arrest. Clearly, seen objectively, that was insufficient. The arresting officer failed to investigate further the circumstances of the assault itself, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and the seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible. In my view the respondent failed to establish the jurisdictional facts, in particular that the appellant committed an offence referred to in Schedule 1. I find that the appellant succeeded to prove that the discretion was exercised in an improper manner.”

[24] From his evidence, it is clear that Ngqokoma wrongly assumed that the offence of assault GBH falls into the category of schedule 1. He did not testify that he held the suspicion that the plaintiff had inflicted a dangerous wound on the victim. Therefore, the

³ 1952 (1) SA 327 E at 332 D-F.

⁴ [2018] 2 All SA 597 (SCA). See also *Qwaba v Minister of Safety and Security* (CA&R58/2017) [2018] ZAECHMHC 32 (12 June 2018).

defendant has failed to discharge the onus of proving that the arrest and detention of the plaintiff without warrant was lawful.

Costs

[25] The plaintiff has been victorious against defendant and in the circumstances of this case it is reasonable that the defendant should bear the costs of the action.

[26] In the result I make the following order.

- (a) The plaintiff's claim for unlawful arrest and detention succeeds;
- (b) The defendant is held liable to the plaintiff for proven or agreed damages consequent upon the plaintiff's arrest by members of the defendant on 07 March 2016 and the plaintiff's resultant detention from 07 March 2016 to 08 March 2016;
- (c) The quantum of damages to which the plaintiff is entitled shall be determined on a date to be arranged with the Registrar of this Court;
- (d) The defendant shall pay the costs of the action incurred thus far.

S M MBABANE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the plaintiff: Mr A. Zono

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MTHATHA

For the defendant: Ms S. Mncedane

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MTHATHA

Date heard: 21,22, & 27 February 2019

Date of Judgment: 21 May 2019