

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

[Not Reportable]

CASE NO: 4646/17

Heard on: 07/08/19

Delivered on: 20/08/19

In the matter between:

MTHOBELI MTSHEMLA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

[1] The plaintiff claims against the defendant payment of a total sum of R600 000,00 as damages for unlawful arrest; unlawful detention and *contumelia*. It is averred in the plaintiff's particulars of claim that the damages aforementioned arose from an incident of 18 January 2016, at Tsolo where the plaintiff was arrested by certain members of the police without a warrant, and

over whom the defendant has control and is vicariously liable to pay for delicts committed by them.

[2] Pursuant to the arrest, the plaintiff was detained in a police cell whilst awaiting finalization of a trial until released after a period of six months due to withdrawal of criminal charges by the magistrate. It is pleaded further that a court of law had not ordered that the plaintiff be detained; the arresting officer did not have a reasonable suspicion that an offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977 (the CPA) had been committed; and that the police had failed to conduct investigation that was necessary for them to formulate a lawful suspicion.

[3] A plea proffered on behalf of the defendant is that the arrest and detention are admitted, but a justification therefor is premised on the provisions of s 40 (1) (b) of the CPA, which read:

“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.”

[4] The legal position regarding justification of a warrantless arrest in terms of s 40 (1)(b) of the CPA is stated as follows in the case of *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H:

“The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That [the] suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie he may arrest the suspect. (My added emphasis.)

5] Mr Ntsikelelo Jowel Gadezwi, a Warrant Officer in the SAPS, testified on behalf of the defendant. He has been in the service of the SAPS for 31

years. He told the court that on 18 January 2016 he was on duty and stationed at the charge office of Maclear Police Station. At about 2:30 pm of that day he received a telephone call from the sub-headman of Ngcele Administrative Area, Tsolo, who reported that the local people had converged in his homestead and keeping the plaintiff in their custody for a reason that the plaintiff had raped an elderly lady. Both the plaintiff and the victim were residents in the locality as neighbours. The witness duly accompanied by Mr Mbulali, a Constable in the SAPS drove to the homestead of the sub-headman where they indeed found the plaintiff sitting on the ground and surrounded by a hostile crowd of local people. When asked by the sub-headman to interrogate the plaintiff in the presence of the local people, he refused. The witness decided to take the plaintiff with him to the place of residence of the victim to verify if rape had occurred. Upon meeting and interrogating the victim she pointed out the plaintiff as being the person who had raped her, whereupon the witness handcuffed the plaintiff and drove him to the police station where the victim laid a charge of rape against the plaintiff. Thereafter, the police obtained a written statement from the plaintiff and locked him up in a police cell with a view of causing him to appear before court to face a trial.

[6] The version of Mr Gadezwi was to a large extent common cause. The plaintiff also testified. He denied that he had raped the victim, contending that the victim was mistaking him for one of his brothers. But he could not gainsay the fact that they were neighbours who knew each other very well. The plaintiff also challenged the evidence of Mr Gadezwi saying that he was handcuffed before the victim pointed him out. But the plaintiff raised those disputes for the first time when he testified rather than doing so during cross-examination. For that reason he left the probabilities of Mr Gadezwi's evidence intact. The plaintiff's version is incredible. It falls to be rejected. I have no hesitation in accepting the version Mr Gadezwi.

[7] It is common cause that the untimely death of the victim led to the withdrawal of the charge of rape against the plaintiff at the time when he had already spent approximately six months in a police cell. But that

notwithstanding, it was contended on behalf of the plaintiff that in the absence of a conviction for rape, the detention was unlawful

[8] On the accepted version of the defendant there is ample proof that when Mr Gadezwi arrested the plaintiff he was a peace officer who entertained a suspicion that the plaintiff had committed an offence of rape that is referred to in Schedule 1 to the CPA; and that he, objectively assessed (see: *Mabona and Another v Minister of Law and Order And Others* 1988 (2) SA 654 (SE) at 658E-H) had reasonable grounds to effect the warrantless arrest as envisaged in s 40 (1)(b) of the CPA. To that extent the jurisdictional factors as set out in the case of *Duncan, supra*, have been met.

[9] Further, I find that the detention of the plaintiff following upon his arrest until he appeared in court for the first time, in compliance with s 50 (1) (a) of the CPA, was justified by Mr Gadezwi as is envisaged in the case of the *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 20, which reads:

“The right to dignity and freedom and security of the person are core values of the Constitution and any arrest and detention of a person amounts to a *prima facie* infringement of these rights. Our common law adopted the same approach and it is for this reason that the police, if challenged, have to justify an arrest and detention. This means that the police bear the onus of proving that the arrest and detention are not wrongful.”

[10] A claim for damages relating to detention subsequent to the plaintiff's first appearance in court is not pleaded in the plaintiff's particulars of claim. All that is mentioned is that the plaintiff was detained in a police cell for a period of six months until released when “charges against him were all” withdrawn. There was not sought an amendment of the pleadings following upon the hearing of plaintiff's oral evidence that he had remained in police custody for such a long period of time. Consequently, there was no obligation on the part of the defendant to justify the detention of the plaintiff after his first appearance in court. Neither does this Court have an obligation to adjudicate upon that part of detention period. It may as well be important to state that the court in *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA)

significantly flagged and corrected the mis-statement of the law in the case of *Mthimkhulu and Another v Minister of Law and Order* 1993 (3) SA 432 (E) (at 438C-F) that detention that has been ordered upon first appearance of a suspect in court cannot be lawful if arrest which resulted in such detention being ordered was unlawful. With reference to the case of *Isaacs, supra*, it was held in *Tyokwana* that *Mthimkhulu* was wrongly decided.

[11] Consequently, the defendant cannot be held liable for unlawful arrest and detention. The head of damages under the caption: "Tortured" for which the plaintiff seeks compensation is not supported by evidence that was led in this case. Such a claim must also fail.

[12] On costs, I am of the view that the costs should follow the result. I have not been persuaded otherwise.

[13] In the result the following order shall issue:

The plaintiff's claim for unlawful arrest, unlawful detention and torture be and are hereby dismissed with costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the plaintiff : Adv. Mhambi
 Instructed by : Messrs N Mketsi Attorneys
 MTHATHA.

Counsel for the defendant : Adv. N.D. Ngadlela
 Instructed by : Office of the State Attorney
 MTHATHA.