



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 4491/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **YES** / NO.

(2) OF INTEREST TO OTHER JUDGES: **YES** / NO.

(3) REVISED. ✓

DATE 2/3/2018

SIGNATURE 

2/3/18

In the matter between:

BERNARD CHIKURUNHE

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

DAVIS, J

[1] This is an action in which the Plaintiff claims damages for alleged unlawful arrest and detention by members of the South African Police Services.

[2] The following are common cause:

- 2.1 The Plaintiff was arrested on the N12 highway near the Springs offramp by members of the South African Police Service Flying Squad;
- 2.2 The admitted facts on the pleadings are that the arrest took place on 28 July 2014 but on the evidence of the parties this must have been on the 29th of July 2014. The summary of the facts set out hereunder will explain where the confusion came in.
- 2.3 A certain Constable Mokobane was the arresting officer;
- 2.4 The Plaintiff was taken to Delmas SAPS and thereafter to Witbank SAPS where he was incarcerated;
- 2.5 The case (and the Plaintiff) was subsequently transferred to the Springs SAPS whereafter the control prosecutor decided on 31 July 2014 not to proceed with a case against the Plaintiff and he was released;

The Plaintiff's evidence

[3] The Plaintiff testified that he is a truck driver and he was during the incident in question driving a truck for his employer from Kimberley to Witbank and back. On his way from Kimberley he came across two ladies who were looking for a lift. As it turns out, they were not hitchhikers but engaged in one of the oldest professions known to mankind. He negotiated a price for a "*short time*" with the one lady and took the telephone number of the other. He

and the one lady who accompanied him shared a night of passion, (albeit at an agreed price) at his overnight stop near Witbank where he offloaded the truck's load and loaded another freight for the return trip to Kimberley.

[4] On this return trip and on the N12 highway and near the Springs offramp the truck lost a wheel. He pulled off near the offramp and contacted his employer who sent a back-up vehicle with a spare tyre. Whilst waiting for them, three members of the South African Police Service Flying Squad pulled up in a vehicle and started questioning him. They also investigated the cab of the truck where they found the young lady playing loud music.

[5] The Plaintiff's version is that, after having explained to the Police that his truck had lost a wheel, they indicated that they had seen a brick delivery truck of a different company uploading a wheel just a distance back.

[6] According to the Plaintiff, this truck must have come from the opposite direction and noticed his truck's wheel next to the side of the road. After this other truck had dropped off its load or otherwise turned around, be it on the highway or otherwise, they must have stopped and then salvaged his truck's wheel next to the highway.

[7] Due to the Plaintiff's conversation with the Police, they pulled over this brick-carrying truck and recovered the Plaintiff's truck's wheel for him. For having done him this "*favour*", so the Plaintiff says, the spokesperson of the three Flying Squad members demanded compensation of R100.00 per Police officer.

[8] Upon the Plaintiff's refusal to do so, he and the young lady were taken into custody by the Police and taken by them to the Springs Police Station. There they explained to the senior officer on duty that they wanted to arrest the

Plaintiff for having committed “*statutory rape*” on an underaged female person, being the young lady in question. The senior officer, so the Plaintiff says, refused to have this take place and sent the Police on their way whereafter they took the Plaintiff and the young lady to the Delmas Police Station where exactly the same occurred and the senior Police officer again refused to have such an arrest take place.

[9] Thereafter the Police took the Plaintiff and the young lady to the Witbank Police Station. On the way there, so the Plaintiff says, the senior of the three Policemen threatened the young lady with arrest herself if she did not agree to laying a charge against the Plaintiff which she, tearfully, consented to do. It was pursuant to this that the Plaintiff was arrested and subsequently transferred together with the case to the Springs Police Station and Magistrate’s Court and, according to his particulars of claim “*On 31 July 2014 the control prosecutor at Springs Magistrate’s Court declined to prosecute the Plaintiff and struck the matter off the roll*”.

[10] The Plaintiff further testified that he was aggrieved by this arrest and detention, that he was insulted thereby and injured in his reputation and dignity and that he subsequently lost his job resulting in a year’s unemployment.

[11] The evidence of the Plaintiff as a single witness concluded the Plaintiff’s case.

The Defendant’s case

[12] The Defendant also only called a single witness, namely the arresting officer, Constable Mokobane.

[13] His version more or less coincides with that of the Plaintiff but for the following important distinctions:

- 13.1 There was no brick-carrying truck who had picked up the Plaintiff's truck's tyre and which had to be stopped by the Flying Squad in order to retrieve the tyre.
- 13.2 Upon inspection of the Plaintiff's truck's cab, there was no loud music playing and the constable found a dishevelled young lady. He labelled her apparently destitute and dirty and in cheap clothes. She looked to the constable as young as his own daughter which is approximately 12 years old.
- 13.3 Upon enquiry as to her presence in the truck, she burst into tears and said that the Plaintiff had taken her with him on his way from Kimberley and had slept with her the previous night.
- 13.4 Apart from the fact that she was underage and could not consent to sexual intercourse, she appeared to the constable to be in need of care and protection.
- 13.5 Before arresting the Plaintiff, the constable confronted him and asked how he could have sex with an underaged female. There is some dispute as to whether the young lady would have told the constable that she was the Plaintiff's girlfriend and which he vehemently denied and the constable's version that there was no such talk of boyfriend and girlfriend.

13.6 Be that as it may, the constable wanted to take the young lady to the closest Police station where there was a specialist "*FCS Unit*". That is a unit dealing with family violence and sexual offenses. The closest such unit was at Delmas but upon arrival there he could not find the designated female officer which prompted him to proceed with the Plaintiff and the young lady to Witbank SAPS where there was such a specialist unit.

13.7 Here the Plaintiff was warned of his constitutional rights, incarcerated and the docket handed over to other police members and investigators. The constable testified that he played no further part other than being the arresting officer.

13.8 At all relevant times he was under the genuine belief that the young lady was far under age and he held a reasonable suspicion that a crime as contemplated in schedule 1 of the Criminal Procedure Act No 51 of 1977 had been committed.

13.9 Hereafter the Defendant closed its case.

Documentary evidence

[14] Exhibit A:

14.1 During cross-examination of the Plaintiff an extract of a SAPS 3M Form was presented and the Plaintiff was confronted with the contents thereof as well as an alleged statement by him as a suspect.

14.2 The Plaintiff denied having made this statement and denied his signature on the document. His handwriting also does not appear on it. The document was dated 31 July 2017 and apart from the fact that it is strange that a suspect's statement is only taken on the day that he has to appear in Court and not the day of his arrest, the author of the document was not called and no other evidence was called to properly introduce this document as evidence.

14.3 No regard can therefore be had to this document or its contents.

[15] Exhibit B:

15.1 The Plaintiff was similarly confronted by this document in cross-examination. It is a printed notice of rights in terms of the Constitution to be signed by an arrested person. It contains the Plaintiff's particulars of claims and various case numbers and a serial number.

15.2 In it the arrested person is informed that he is being detained for the reason of "*statutory rape*". The Plaintiff denied having signed this document although it is dated 19h00 on 29 July 2014, being the date and time all the evidence point towards to as being the correct date and time of arrest. It was purportedly signed at Witbank.

15.3 Again, the author of the document and the Police officer who signed it and who informed the arrested person of his rights was not called. On all probabilities, however, this appear to have been a document signed by the Plaintiff although he denied having signed anything on that or any other day.

[16] Exhibit C:

- 16.1 This document was a colour copy of the front page of the docket. The original docket was in Court and counsel for both parties confirmed that this was a correct copy thereof.
- 16.2 It indicates a Witbank case number CAS 965/07/2014 which was deleted and replaced by the word "*Springs*". It also bears a Middelburg case number CAS 604/7/2014. It has the name of various investigating officers who were apparently from time to time replaced and the previous officer's name then deleted. (I again reiterate that none of these officers were called to testify and their evidence would surely have shed light on a lot of aspects).
- 16.3 The date and time of the offence is indicated at between 00h00 on 28 July 2014 and 05h00, again on 28 July 2014 (although this should have read 29 July 2014 and which would have tied in with the evidence of the date of arrest after the overnight "*sleeping together*" of the Plaintiff and the young lady.
- 16.4 As a "*method used*", the word "*penetration*" has been inserted and as type of instrument the word "*penis*" has been inserted. The "*address of offence*", is indicated as N12 highway, Witbank. The name of the complainant and her cell phone number is also indicated therein and the description of the offence is "*statutory rape*" (the particulars of which would have appeared on item A1 in the docket) and the complainant's age is indicated as 14 years.
- 16.5 Regarding the conclusion of the trial the docket contains an initial inscription "*not placed on roll*", with a signature and thereafter

“nolle prosequi” with the reference to item A12 in the docket. This certificate of non-proceeding with the prosecution bears the Regional Court Prosecutor Middelburg’s stamp of 23 December 2014 together with another signature.

- 16.6 This concludes exhibit C and I reiterate that many of queries or loose ends elucidated by this exhibit would have but was not cleared up by evidence of other witnesses. Neither items A1 nor A12 in the docket were introduced into evidence.

[17] Exhibit D:

- 17.1 This is a hand-written document labelled A2 in the Police docket with the heading *“Arrest Statement”*. This statement was signed by the Defendant’s witness and confirmed by him in court and he was extensively cross-examined on it.
- 17.2 As a result hereof and as a result of its importance in the evaluation of whether a defence of justification has been established, I quote it here in full. After identifying himself by his rank and number and stating that he is at Middelburg Flying Squad the witness deposed as follows:

“On the 29-07-2014-12:30 while on duty in full uniform on N12 (freeway) with Constable ...doing patrol spotted a broken-down truck registration number ... driven by an African male by the name of Bernard Chikurunhe.

We approached it and introduced ourselves and asked why is it that he stopped on the freeway. As we were busy looking

inside the truck we found a young African female very young and not in good condition physically. I asked her to jump off from the truck then she started crying. I asked her to stop crying so that I can get her name and tell me what's wrong.

I then asked her how old she is, she said 14 years. I asked her who is the driver, she said she doesn't know his name. I asked the driver who is this girl and why is he travelling with her, where is she from? He replied by saying it's his girlfriend, when I asked him how old is she he said she is 19 years old.

When she stopped crying after she calmed down she told me that she was born in 2000-03-28 and her name is ...and she is from Kimberley and that the truck driver slept with her (had sex).

When I asked the driver how can he have sex with a minor a 14-year old he kept saying its his girlfriend. I then explained to him that it is a criminal offense to have sex with a minor. I therein read him his rights and arrested him free from injuries and took him to Witbank SAPS ..."

Defendant's defence:

[18] The Defendant did not proceed with its special plea relating to alleged non-compliance of the provisions of the Institution of Legal Proceedings Against Organs of State Act, No. 40 of 2002 and pleaded as follows on the merits:

“5.1.1 The Defendant pleads that the Plaintiff was lawfully arrested in terms of Section 40(1)(b) of the Criminal Procedure Act, which provides as follows:

(1) A peace officer may without a warrant arrest any person –

(b) whom he reasonably suspects of having committed an offense referred to in schedule (1) other than the offense of escaping from lawful custody.

5.1.2 The Plaintiff was arrested by a member of the SAPS who at all relevant times hereto a peace officer as defined in Section 1 of the Criminal Procedure Act as amended.

5.1.3 The said member reasonably suspected the Plaintiff of having committed an offense referred to in schedule 1 of the Criminal Procedure Act to wit rape ...”

Evaluation

[19] There is no evidence as to what the complainant would have told the Plaintiff, particularly regarding her age or not and her statement was never placed before Court.

[20] Constable Mokobane testified that he was aware that the docket contained extracts from her school record indicating that she was under age but none of this was formally proven in Court.

[21] It appears that the Plaintiff genuinely believed that the young lady in question was over 18 years old and that he was genuinely surprised at his arrest and the allegations of committing the crime of having sex with an underaged

female. He so openly confessed in his evidence in chief to having had intercourse with the young lady that it cannot be accepted that he would voluntarily have admitted to such a heinous crime or that his counsel would have allowed him to do so and present that evidence to Court if he did not still believe the lady to be over 18.

[22] The fact that the Plaintiff may have believed the young lady to be over the age of consent is, however, not the question. The question is whether facts have been established which could objectively justify the arresting officer's belief that a crime had been committed i.e. can he validly, on the facts, have formed a reasonable suspicion that a schedule 1 crime had been committed.

[23] The arresting officer testified in a calm and controlled manner and although soft spoken, answered questions put to him in a forthright and logical manner, including those put in cross-examination. There are no inherent improbabilities in his version and his version accords with all the common cause facts.

[24] On the other hand, the version of the Plaintiff, if not impossible then is certainly extraordinary. This includes the improbable scenario of a passing truck turning around at a point unknown to the Plaintiff, picking up his tyre, also unbeknown to him and that the same truck, before even passing him was being able of being stopped by the Police and his tyre thereby recovered. No evidence was also presented as to the replacement of the tyre once recovered and the sending back of the Plaintiff's employer's back-up vehicle or any of these circumstances. Whether the Police, after having arrested the Plaintiff went to one or two other Police stations does not appear to be that material and at least the stop at one Police station, being Delmas, has been fully explained. The version of how one Policeman, being the arresting officer, was determined to

perform the arrest and go through with it despite being advised against it by his co-flying squad members, the other members and senior officer at the Springs Police Station, the members and the senior officer at the Delmas Police Station and all this only for the non-payment of an alleged bribe of a R100.00 is equally extraordinary.

[25] In my view of the facts, I need not make an express finding rejecting the Plaintiff's version in this regard but what I do reject is his version that he was simply and only arrested as a result of this ulterior motive and after the young lady had been threatened by the Police. I do accept the evidence of the arresting officer of having formed a clear and reasonable suspicion that an offence had been committed and his version of how and in what state he had found the young lady.

[26] Even in so far as I have rejected portions of the Plaintiff's evidence, I still formed the impression that he genuinely believed that he had not committed a crime and that he had been hard done in by the arrest. I take this fact into consideration in exercising my discretion in respect of the issue of costs and weigh it against the lack of proper presentation of the Defendant's case and the failure to not call any number of corroborating witnesses who were all involved in the incident. This included the other members of the Flying Squad who had accompanied the arresting officer, the various investigating officers and the state prosecutor or, if then not the prosecutor himself, the lack of proper introduction into evidence of the other affidavits contained in the docket, which would have included the complainant's statement and the explanatory statement for not proceeding with the prosecution. I interpose to state that the arresting officer had explained that it was beyond his comprehension why the prosecution had not gone ahead and according to him *"Someone had not done their job"*. Counsel for the Defendant had valiantly argued that I should not draw negative

inferences from the absence of this evidence but the lack of presentation thereof made the Court's job more difficult and falls short of the standard to be expected from an organ of state who had been called upon to justify its actions.

Conclusion

[27] An arrest or detention is *prima facie* wrongful and unlawful and the onus is on the arresting party to prove that an arrest without a warrant was justified and lawful in terms of Section 40(1) of the Criminal Procedure Act, No. 51 of 1977 as pleaded by the Defendant.

[28] Upon a conspectus of the facts and the evidence and the summaries thereof set out above, I am of the view that the Plaintiff had not proven its case on a balance of probabilities and that the Defendant had satisfied the onus of proving the justification of the arrest on a balance of probabilities and that there has been sufficient "reasonable grounds" present as elucidated in Manqalaga v MEC for Safety and Security Eastern Cape [2001] 3 All SA 255 (TK) and the cases discussed therein.

Order

[29] In the result I make the following order:

1. The Plaintiff's claim is dismissed.
2. Each party shall pay his own costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 – 23 February 2018

Judgment delivered: 5 March 2018

APPEARANCES:

For the Plaintiff:

Adv. Maluleka

Instructed by:

MH Malepe Attorneys

For the Defendant:

Adv. Moja

Instructed by:

The State Attorney, Pretoria