

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

CASE NO: 1452/2015

In the matter between:-

INGIPHILE PHAKAMISA TATE

Plaintiff

and

**MINISTER OF POLICE
CONTSBALE MANCO**

First Defendant
Second Defendant

JUDGMENT

MATEBESE AJ

- [1] In this matter the plaintiff is suing the defendants for damages for unlawful arrest and detention.
- [2] The parties agreed to proceed on both liability and quantum. At the beginning of the trial I requested counsel appearing for the parties to engage their respective clients on the quantum to be awarded in the event I find against the defendant on liability. Counsel indeed reached an agreement in this regard and I am grateful to both of them for their assistance.

- [3] It is common cause that the plaintiff, Ingiphile Phakamisa Tate, was arrested without a warrant by the second defendant, a member of the South African Police Services and the first defendant's employee. The arrest, it is common cause, took place in the morning of the 27 March 2015 Ngqeleni Magistrates' court, Ngqeleni.
- [4] The plaintiff alleges that his arrest aforesaid was wrongful and unlawful and claims damages in the total sum of R750 000.00 (Seven Hundred and Fifty Thousand Rand only).
- [5] It is also common cause that the plaintiff was detained by the members of the South African Police Services on 27 March 2015 and was released on 30 March 2015 without appearing in court.
- [6] The plaintiff contends that his detention was also unlawful and for this claims damages as well.

Unlawful arrest and detention:

- [7] I have already stated herein above that it is common cause that the plaintiff was arrested without a warrant.
- [8] Section 12 of the Constitution guarantees everyone a right to freedom and security which right includes a right not to be deprived of freedom arbitrarily or without just cause.
- [9] Section 35 of the Constitution guarantees everyone who is arrested a right, inter alia, to be brought before court as soon as reasonably possible, but not later

than 48 hours after the arrest or the end of the first court day after the expiry of the 48 hours, if the 48 hours expires outside ordinary court hours or on a day which is not an ordinary court day.

[10] Section 40(1) of the Criminal Procedure Act 51 of 1977 authorises a peace officer to arrest a person without a warrant under certain circumstances.

[11] In this case, though not clearly and pertinently pleaded, I understood that the first defendant seeks to justify the arrest of the plaintiff by reliance on the provisions of section 40(1)(b) which provides that a peace officer may arrest without a warrant any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Criminal Procedure Act, other than the offence of escaping from lawful custody. The plaintiff also understood the defendants' case to be based on the provisions of section 40(1)(b) of the Criminal Procedure Act.

[12] It is trite that the jurisdictional facts for a section 40(1)(b) defence are that the arrestor must be a peace officer, the arrestor must entertain a suspicion, the suspicion must be that the person arrested has committed an offence referred to in Schedule 1 and the suspicion must rest on reasonable grounds.¹

[13] That the arrestor of the plaintiff on 27 March 2015 was a peace officer is not in dispute, so is the fact that the arrestor suspected the plaintiff of having committed Malicious Injury to Property which is an offence referred to in Schedule 1 to the Criminal Procedure Act.

¹ Duncan v Minister of Law and Order 1986 (2) SA 805 at 818G-H; Minister of Safety and Security v Sekhoto and another 2011 (1) SACR 315 para.[6] and [28]

- [14] The only issue is whether the suspicion rested on reasonable grounds. This is an issue that must be determined objectively. In other words, the test is not whether the police officer believes he has reason to suspect, but whether, on an objective approach, he in fact had reasonable grounds for his suspicion.²
- [15] It is trite that the onus to justify both the arrest and the detention rests on the defendants.
- [16] In an attempt to discharge the onus the defendants relied on the evidence of Sergeant Manco, the second defendant. He testified that he is a detective on the South African Police Services and stationed at Madeira Police station in Mthatha. That he was the Investigating Officer of CAS 349/07/14 involving allegations of assault, malicious injury to property and pointing of a firearm. That the complainant in the case is Xola Bili and that the plaintiff was the suspect. He further testified that the incident allegedly took place in Mthatha next to Circus Triangle on 31 July 2014.
- [17] He further testified that he had been looking for the plaintiff since July 2014 but was advised, when he went to the plaintiff's home at Corana to look for that he was not well and was in Johannesburg, that he only went to look for him once and only kept telephone contact with the plaintiff's brother and he never applied for a warrant for the entire period of 7 months that he had been waiting for the plaintiff. There is also no evidence that he ever asked for the plaintiff's telephone numbers and attempted contact the plaintiff.

² Mawu v Minister of Police 2015(2) SACR 14 para.[22]

- [18] He testified that on 27 March 2015 he received a telephone call from Xola Bili who advised him that the plaintiff was due to appear at Ngqeleni Magistrates' court in the same case that the said Xola Bili was to appear. At the time he received the telephone call he was at Madeira Police station in Mthatha. He proceeded to Ngqeleni where he found the plaintiff and Xola Bili. He then arrested the plaintiff for allegedly having committed malicious injury to property. He testified that the plaintiff did explain to him that the case at Ngqeleni arose out of the same incident as the one he was being arrested for and in a way asked him to look at the Ngqeleni case but he refused to do so. He said he did not care about it as it did not concern him.
- [19] He testified that from Ngqeleni to Mthatha plaintiff drove behind them. Plaintiff was, at the time, in the company of his legal representative. At Madeira Police station, he again advised plaintiff of his rights and thereafter took him to Central police station to detain him. He did not give any reasons why he saw it necessary to detain the plaintiff. On Monday the 30th March 2015 he only delivered the docket in court and did not attend court. No reasons were advanced why he did not attend at court. He only heard after three days that the plaintiff was released and that plaintiff never appeared in court.
- [20] Under cross examination he was asked why he did not apply for a warrant he only stated that the offence that the plaintiff was alleged to have committed is a serious offence and there was no reason to apply for a warrant because he is able to arrest for such cases.

- [21] The plaintiff's evidence was in essence common cause with that of the defendants, at least on the material issues. The arrest and the reasons therefore are common cause. Plaintiff further testified that he advised the second defendant that the allegations against him were fabricated and even urged him to look at the docket in the Ngqeleni case which the second defendant refused to do. This was not meaningfully disputed by the second defendant. In fact, he confirmed having been referred to the Ngqeleni case something which he ignored.
- [22] Whilst I accept that the second defendant is not obliged to scrutinise or analyse the cogency of the explanation given to him by an arrestee, it cannot be reasonable for him to simply ignore and/or refuse to consider same.
- [23] In **Raduvha v Minister of Safety and Security 2016(10) BCLR 1326 at 1342 para.56 BOSIELO AJ**, as he then was, stated:
- “Our people deserve a police service which is steeped in a culture of respect for human rights. This requires them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom”*
- [24] In my view, the second defendant's actions towards the plaintiff are inconsistent with this culture.
- [25] In my view, the suspicion that the plaintiff had committed malicious injury to property, in the circumstances of this case, was not based on reasonable grounds.

[26] In the circumstances I find that the arrest of the plaintiff on 27 March 2015 was unlawful. It must therefore follow that his detention on 27 March 2015 to 30 March 2015 was also unlawful.

[27] In fact even if I am wrong in finding the arrest to be unlawful, the defendant has failed to justify the detention of the plaintiff. Consequently, the defendant cannot escape liability for such detention.

Quantum:

[28] I have already stated herein above that the parties, at the beginning of the trial, engaged each other and agreed on an amount that would be reasonable compensation in the event I find in favour of the defendants.

[29] I was advised during argument that the parties agreed that compensation in the sum of R25 000.00 for each day of detention was reasonable in the circumstances of this case. They also agreed that the period of detention was three days.

[30] I find no reason to differ with the parties in this regard.

Costs:

[31] Regarding costs I see no reason why the general rule that costs must follow the result should not apply in this case.

[32] I engaged counsel for the plaintiff during argument on why costs should not be awarded in the Magistrates' court scale. He was constrained to concede that such an award of costs is reasonable in the circumstances.

[33] In the circumstances I make the following order:

33.1 The plaintiff's claim for unlawful arrest and detention succeeds;

33.2 The defendants are ordered to pay the plaintiff a sum of R75000.00 (Seventy Five Thousand Rand Only) in respect of his unlawful arrest and detention from 27 March 2015 to 30 March 2015, jointly and severally the one paying the other to be absolved.

33.3 The defendants shall pay the costs of the action such costs to be taxed on a Magistrates' court scale.

Z.Z. MATEBESE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the plaintiff: Mr Krewu

Instructed by Bulela Krewu Attorneys, Mthatha

For the defendant: Adv. Nabela

Instructed by State Attorney, Mthatha

Matter heard on: 26 June 2018

Judgment delivered on: 27 June 2018

