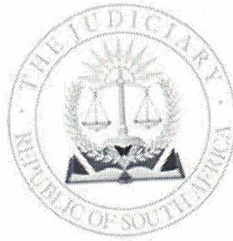


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 2423/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
DATE: 6/09/18	SIGNATURE: [Signature]

In the matter between:

EBEN SMIT

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

KGANYAGO J

- [1] The plaintiff Eben Smit was arrested on the 30th November 2016 on a charge of assault common. The plaintiff and the arresting officer agreed that the he will appear in court on the 25th January 2017. He was released on warning. The Deputy Director of Public Prosecutions declined to prosecute him and he was also not required to appear in court on the 25 January 2017. The plaintiff has issued summons against the Minister of Police claiming damages for alleged unlawful arrest and detention in the sum of R450 000.00
- [2] The defendant denies that the plaintiff was arrested and detained. The plaintiff testified that he is a practicing attorney in Polokwane since 1986. He is now 62 years of age. He was arrested without a warrant.
- [3] He stated that on the 30th November 2016 he was called by warrant officer Buys to come to Polokwane SAPS. He went to the SAPS, and on arrival warrant officer Buys informed him that a charge of assault common has been opened against him and he wanted to take a statement from him. He told warrant officer Buys that he will make a statement in court.

- [4] According to the plaintiff, warrant officer Buys took his fingerprints and took him to the holding cells where the main cell door was locked. After the main cell door was locked, he remained standing next to the counter in the reception area. After a while he was given a notice of rights in terms of the Constitution to show that indeed he has been arrested.
- [5] He further stated that he was released after an hour. He was never taken to the holding cells, but he was at all times at the reception area. The door leading to the reception area was locked and he could not move out. He was told that he was placed under arrest.
- [6] He stated that he is a senior attorney and was seen by people who were coming in and out of the cells. After he was released he felt worthless, humiliated and being a criminal. His sugar level went higher than normal. At the police cells there were lot of people who knew him and have seen him in the cells.
- [7] The plaintiff under cross examination stated that he was at the police station for about an hour and was detained for about 30 minutes. He conceded that none of his personal belongings were taken from him and further that he was not taken to the holding cells. He further conceded

that his candidate attorney has laid a charge of assault common against him with the SAPS, and that warrant officer Buys called him to the police station. He however stated that the complaint by his candidate attorney was false.

- [8] Warrant officer Buys testified on behalf of the defendant. He testified that on the 30th November 2016 an assault common case was opened against the plaintiff. He phoned the plaintiff and explained the charges to him, and told him to come to the police station.
- [9] He stated that the applicant came to his office at the police station. On arrival he told the plaintiff that one of his employees has laid a charge of assault against him. He explained to the plaintiff the procedure that he was going to follow. He also told the plaintiff that he was not going to physically detain him but to write him in the cell books in order to enable him to charge him as he will need a cell number when charging him.
- [10] He further stated that he took the plaintiff's finger prints and charged him whilst in his office. After that he went to the cells with the plaintiff and issued him with a written warning to attend court. The cell book is been kept at the reception area. Whilst he was busy writing in the cell register,

the plaintiff was consulting with his clients in the holding cells. After that he told the plaintiff that he was released. The whole process took about an hour. Before he charged the plaintiff, he explained to him that he was placed under arrest. However, the plaintiff was never detained. He released him on warning and they also agreed on the date of his first appearance in court. Since it was during December, the plaintiff told him that he had already arranged to go on holidays with his family and they agreed that he will appear in court during January 2017.

[11] The witness was cross examined and he conceded that he had placed the plaintiff under arrest. He conceded that the denial of the arrest in the defendant's plea is misleading and wrong. He conceded that when he told the plaintiff that "you are released", by implication it meant that he could not have left before he was told to do so. He conceded further that the plaintiff was deprived his freedom of movement and further stated that anyone who enters the cell with an officer, is not permitted to leave on his own.

[12] As per the defendant's amended plea, the arrest and detention of the plaintiff has been placed in dispute. Therefore the onus was the plaintiff to establish the existence of the arrest and detention. The plaintiff during

his testimony submitted a notice of rights in terms of the constitution which is usually issued to a person who has been arrested and about to be detained. The plaintiff has duly signed that document, and warrant officer Buys has countersigned the certificate as the person who informed the detainee of his rights and that he understood its contents.

[13] Warrant officer Buys when testifying, conceded that he had arrested the plaintiff but dispute having detained him. He further stated that he had charged the plaintiff and released him on warning. Therefore, in my view there are overwhelming evidence that the plaintiff was arrested without a warrant. Even on the defendant's own version the plaintiff was arrested without a warrant.

[14] In terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 ("the CPA") 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 the offence of escaping from lawful custody.

[15] It is trite that jurisdictional facts must exist before section 40 (1) (b) of the CPA can be invoked. Those jurisdictional facts are that the arrestor must be a peace officer, he must entail a suspicion, it must be a suspicion that

the arrestee committed an offence referred to in Schedule 1 of the Act, and 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. (See **Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818 G-I**).

[16] It is common cause that Schedule 1 does not include assault common, but list assault when a dangerous wound is inflicted. In its plea the defendant did not rely on section 40 (1) (b). A defendant who wishes to rely on the section 40 (1) (b) defence, traditionally has to plead the four jurisdictional facts in order to present a plea that is not excipiable. If the fifth fact is necessary for a defence, it has to be pleaded. This requires that the facts on which the defence is based must be set out. (See **Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 at para 52**).

[17] Warrant officer Buys relied on the statement of the complainant to arrest the plaintiff. He did not carry out the investigation to determine the veracity of the allegations contained in the complainant statement before he effected arrest. Assault common is also not listed as a Schedule 1 offence. Arrest without a warrant in these circumstances was not lawfully

permissible. I find that the plaintiff has succeed in proving that the discretion which was exercised by warrant officer Buys was improper and therefore his arrest was wrongful and unlawful.

[18] I turn to the alleged unlawful detention of the plaintiff. The plaintiff claims that he was unlawfully detained for 30 minutes. Warrant officer Buys testified that he was with the plaintiff for about an hour. The plaintiff was called telephonically to report at the police station. On his arrival at the police station, the allegations against him were explained and, upon being asked if he wished to make a statement, he declined and elected to make one in court. He had been at the police station for about an hour. Warrant officer Buys conceded that before he told the plaintiff that he was released, he could not have left on his own. The plaintiff was issued with document containing his constitutional rights, and those rights were even explained to him. That document is reserved for suspects who have been arrested and about to be detained. I am therefore satisfied that the plaintiff has discharged his onus of prove and have shown that he was detained. In my view, he was detained for an hour, even though he was never locked up in a holding cell. (See **De Klerk v Minister of Police [2018] ZASCA 45 (20 March 2018)** at para 16).

[19] Turning to quantum, in **De Klerk v Minister of Police** *supra*, the appellant was detained for two hours and not taken to the holding cells before he appeared in court and was awarded R30 000.00 for unlawful arrest and detention.

[20] In **Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)** the respondent who was a magistrate was wrongfully arrested for being drunk in public. He was detained for a few hours. The trial court took into consideration his age, the circumstances of his arrest, the nature and short duration of his detention, his social and professional standing and awarded him R15 000.00.

[21] In this matter I will take into consideration that the plaintiff was unlawfully arrested without a warrant and detained for an hour, his age, the fact that he was not detained in the holding cells and his professional standing. I am of the view that an appropriate award is the total sum of R20 000.00 for his unlawful arrest and detention.

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

- 22.1. The defendant is ordered to pay the plaintiff the sum of R20 000.00 in general damages in respect of the unlawful arrest and detention.
- 22.2 The defendant to pay the plaintiff's costs on magistrate court scale as between party and party.



KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

For Plaintiff

: Adv van den Eende

Instructed by : Smit & Maree Attorneys

For Defendant : ADV CHIKORORO

Instructed by : State Attorney Polokwane

Date of Hearing : 13th August 2018

Date of Judgment : 6th September 2018