

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

Case No. 2074/11

Date heard: 25/2/15

Date delivered: 27/2/15

Not reportable

In the matter between:

VUYISA SOFIKA

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

Plasket J:

[1] It is common cause that, on 16 November 2008, the plaintiff (who I shall refer to as Sofika) was arrested by Inspector Phakamisa Timakwe (who I shall refer to as Timakwe) acting within the course and scope of his employment as a member of the South African Police Service. Sofika was taken to the Central Police Station in Mthatha where he was detained overnight before being detained further at the Wellington Prison. He appeared in court on 17 November 2008 and again on 25 November 2008 when he was released on bail.

[2] Arising from this, Sofika instituted an action for damages against the defendant, the Minister of Safety and Security, arising from what he alleges was an unlawful arrest followed by an unlawful detention.

[3] The arrest and duration of the detention are both common cause. So are the facts that Sofika was arrested without a warrant of arrest and was arrested on a charge of rape. His evidence concerning the conditions of his detention at both the police station and the prison were not disputed.

[4] I am called upon to decide two principal issues as far as liability is concerned. They are: first, whether Sofika's arrest is unlawful simply because it was effected without a warrant; and secondly, if not, whether Timakwe formed a reasonable suspicion that Sofika had committed the Schedule 1 offence of rape, it not being in dispute that Timakwe was a peace officer for purposes of s 40(1) of the Criminal Procedure Act 51 of 1977 (the CPA).¹ A third issue relating to the manner in which the discretion to arrest was exercised will also be dealt with.

[5] Section 38 of the CPA provides for various methods of securing the attendance of suspects in court. These methods include arrest. Section 39, dealing specifically with arrest, provides that '[a]n arrest shall be effected with or without a warrant'. Section 40(1) sets out the circumstances in which a peace officer may arrest without a warrant. They include the situation where he or she reasonably suspects the arrestee of having committed an offence referred to in Schedule 1 of the CPA.² Section 43 sets out the procedure for applying for a warrant of arrest and s 44 provides for their execution.

[6] The CPA contemplates two methods of arrest – with and without a warrant – and defines the circumstances in which arrests can be made without a warrant. I am not aware of any authority for the proposition that a warrant of arrest has to be used as the preferred means of arresting a person and the failure to use this means, when

¹ The jurisdictional requirements that activate the discretion to arrest in terms of s 40(1)(b) of the CPA are: (a) the person effecting the arrest must be a peace officer; (b) he or she must entertain a suspicion; (c) that suspicion must be that the arrestee committed a Schedule 1 offence; and (d) the suspicion must rest on reasonable grounds. See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto & another* 2011 (5) SA 367 (SCA) para 6.

² Section 40(1)(b) of the CPA provides:

'A peace officer may without warrant arrest any person –

(a) . . .

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

it is possible to do so, vitiates an arrest made without a warrant even if s 40(1) empowers it. No such authority was cited to me.

[7] The legislature has dealt differently with the power to arrest, on the one hand, and the power to enter premises and search property, on the other. In the latter instance, it has made it clear that searching with a warrant is the default position: all searches must be authorised by a warrant unless special circumstances, defined in the CPA, are present that would justify a search without a warrant. Section 21 states that subject to ss 22, 24 and 25, 'an article referred to in section 20 shall be seized only by virtue of a search warrant'. Sections 22, 24 and 25 are exceptions to this rule. Section 22, for instance, allows for a search without warrant in two circumstances, namely if the person concerned consents to the search or if the police official, on reasonable grounds believes that a search warrant would be issued to him or her if he or she applied for one but that the delay in obtaining the warrant would defeat the object of the search.

[8] This postulates a very different position to that of arrest. There is, by contrast, no obligation placed on a police official to apply for a warrant of arrest as a means of first resort and only if he or she cannot for some or other acceptable reason obtain one, fall back on s 40(1). A police official who considers the need to arrest a person has a choice: he or she may either apply for a warrant or, if all of the jurisdictional requirements of one or other of the subsections of s 40(1) are present, he or she will be empowered to arrest without a warrant. These two modes of securing the attendance of a person in court function in parallel, and not in hierarchical order as in the case of searches with and without warrant.

[9] I accordingly find that it is not a requirement for the validity of an arrest that it must of necessity be authorised by a warrant. The absence of a warrant for the arrest of Sofika does not therefore render the arrest unlawful. In the light of this finding, it is not necessary to consider why Timakwe did not apply for a warrant. Instead I turn to whether the defendant has discharged the onus of establishing that Timakwe held the required reasonable suspicion that Sofika had committed the offence of rape.

[10] Timakwe testified that he was the investigating officer in the complaint of rape laid by the complainant against Sofika. Although he did not take a statement from the complainant, he read the docket which contained a statement taken from the complainant when she laid the charge, and which alleged that she had been raped by Sofika. It also contained a medical report that indicated that the complainant had been sexually assaulted. On 16 November 2008, he took a statement from a person to whom the complainant had reported that she had been raped. On that day, he also interviewed the complainant who told him what had happened to her, namely that she had been imprisoned in Sofika's house and raped a number of times by him.

[11] The complainant was only able to identify Sofika by his first name. She undertook to lead him to where Sofika was and to point him out. She duly did so and Sofika was arrested.

[12] In *Mabona & another v Minister of Law and Order & others*,³ Jones J stated that the test as to whether an arresting officer held a reasonable suspicion is an objective enquiry involving the question whether a reasonable person in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the Schedule 1 offence alleged. He also stressed that, in this enquiry, it must be borne in mind that what is required is suspicion, not certainty, albeit that the suspicion must be based on solid grounds.⁴

[13] Timakwe had before him a statement from the complainant as well as medical evidence that was corroborative of her allegation that she had been raped. He also interviewed a witness who confirmed that the complainant had reported that she had been raped. More than that, he interviewed the complainant and obtained her version from her. On the basis of the totality of the information that he had before him, I am satisfied that his suspicion that Sofika was guilty of rape was reasonable. The jurisdictional facts for him to arrest Sofika were therefore present.

³ *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 658E.

⁴ At 658H.

[14] Timakwe was challenged in cross-examination as to why he had not used less restrictive means than arrest of securing Sofika's attendance in court. This goes to whether he exercised his discretion to arrest properly, once the jurisdictional requirements were present. This was not an issue raised in the pleadings but no objection was made to the line of cross-examination. For what it is worth, and for the sake of completeness, I shall deal with it.

[15] Timakwe's answer was that rape is a very serious offence that justified arrest and made the issuing of a summons, for instance, inappropriate. On this account, he cannot be faulted. In *Minister of Safety and Security v Sekhoto & another*,⁵ Harms DP held:

'While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime — and those listed in Schedule 1 are serious, not only because the legislature thought so — a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand, there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case — which ordinarily attract sentences of imprisonment, and are capable of attracting sentences of imprisonment for 15 years — clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released, and, if so, on what conditions, pending their trial.'

In *Sekhoto* the respondents had been arrested on suspicion of stock theft. Rape is, I am sure, a far more serious offence than stock theft. Like stock theft, sentences for rape are invariably sentences of imprisonment.

⁵ Note 1, para 44.

[16] In addition, arrest would have been justified because of the scanty information available to Timakwe about Sofika. He did not know Sofika; the complainant did not even know his surname; he did not know where Sofika lived and had to be led there by the complainant. In these circumstances, Timakwe could not reasonably be expected to use any of the less restrictive means of securing Sofika's attendance in court. Put differently, his decision to arrest was not unreasonable.

[17] In summary then, I have found that Sofika's arrest was not unlawful on account of it not having been effected on the authority of a warrant; that the jurisdictional requirements of an arrest without warrant in terms of s 40(1)(b) of the CPA have been established by the defendant, particularly that Timakwe formed a reasonable suspicion that Sofika was guilty of rape; and that, in the circumstances, it was not unreasonable for Timakwe to arrest Sofika, rather than secure his attendance in court by a less restrictive means such as a summons. As a result, Sofika's claim cannot succeed.

[18] The action is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: Mr S Mfeya, instructed by DN Nolangeni and Associates

For the defendant: Mr V Msiwa, instructed by the State Attorney.