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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 9230/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

DATE: 24-07-2024

SIGNATURE:

In the matter between:

THATO CLEARENCE SHILABYE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

MASHAMBA AJ

Introduction

[1] In this matter one Thato Clearance Shilabye (*“the plaintiff”*), an adult male, instituted an action in this Court against The Minister of Police (*“the first defendant”*); and the National Prosecution Authority (*“the second defendant”*). As set out in his Combined Summons the Plaintiff, at the commencement of his action, claimed delictual damages from both Defendants based on the same cause of action, namely, unlawful arrest and detention, together with malicious prosecution.

[2] When the trial came before this court on the 23rd of May 2023 the defendants abandoned their special plea against the plaintiff. The plaintiff withdrew the entire action of malicious prosecution against the second defendant and tendered to pay the wasted cost.

[3] In light thereof the only issues remain for the adjudication of this court were whether or not the arrest of the Plaintiff by a member of the South African Police Services and the subsequent detention thereafter was unlawful and, if so, the determination of the plaintiff's damages as a result thereof. Only one defendant remained potentially liable for those damages, namely the first defendant as cited in the Plaintiff's action. For simplicity the first Defendant shall be referred to as *“the defendant”* for the remainder of this judgment.

The common facts

[4] It was common cause or not disputed in this matter that: -

4.1 the plaintiff was arrested on the 20th of September 2020, after he handed himself to the police Sergeant Teffo (hereinafter referred as “Sgt Teffo”), a member of the South African Police Services stationed at Seshego Police Station;

4.2 when Sgt Teffo effected the said arrest, he did so without a warrant;

4.3 at all material times Sgt Teffo was employed as a member of the South African Police Services and acted within the course and scope of his employment with the Defendant;

4.4 Sgt Teffo is a peace officer as defined in the Criminal Procedure Act 51 of 1977 (*“the Act”*);

4.5 the plaintiff was charged with rape and robbery which is a Schedule 1 Offence in terms of the Act;

4.6 pursuant to his arrest on the 20th of September 2020 the plaintiff was detained in custody until his release on the 09th of March 2022 after being discharged;

4.7 the defendant bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of section 40(1)(b) of the Act.

The Defendant’s case

[5] The defendant elected to rely on the oral evidence of a single witness Sgt Teffo, the arresting officer. This witness is stationed at Seshego Police Station and has been a policeman for the past 16 years. Sgt Teffo has been a Sergeant for 5 years. As at 20

September 2020 he was stationed at the same Police Station carrying out an investigation into various crimes under the Family Violence and Sexual Offence Unit.

[6] Sgt Teffo testified that he was assigned to investigate the matter with Cas no: 147/08/2020. On 11 August 2020, at 6:30 morning, L[...] L[...] (hereinafter referred as “the complainant”) aged 24 was raped by an unknown suspect. Sgt Teffo confirms the evidence as appears in his statement¹. Sgt Teffo said that on the 20th September 2020 he went to Moletji Mabokelele to do investigations. Sgt Teffo testified that the complainant informed him that she now knows the names of the suspect who raped her as Thato Shilabye (the plaintiff) as she saw him inside the motor vehicle (BMW). The complainant further indicated that she identified the plaintiff and that one of her friends who was with her when she saw the plaintiff knows where the plaintiff resides and she also established his names. The defendant referred to complainant’s friend as Lucrecia Ledwaba who also gave statement to Sgt Teffo².

[7] Sgt Teffo further testified that together with the complainant, they went to the plaintiff’s home address. The plaintiff was not found at his residential place but his mother was found, she informed Sgt Teffo that the plaintiff left home in the early morning. She indicated that she did not know the whereabouts of the plaintiff. Sgt Teffo began to use the plaintiff’s cell number and names to search for his profile. He found that the plaintiff was previously convicted of the similar offence of rape. Sgt Teffo indicated that the plaintiff profile made him to reasonable suspect that there is a likelihood that the plaintiff committed an offence of rape and robbery.

[8] The plaintiff called and informed Mr Teffo that he got his number from his mother who said the police were looking for him. The plaintiff further informed Sgt Teffo that he was heading to Seshego Police Station. The plaintiff arrived at the Police Station with together with his friend. The plaintiff with his friend, met Sgt Teffo at Seshego Police Station. Sgt Teffo informed the plaintiff that he was under arrest as a suspect under Cas

¹ Bundle C, page 26

² Bundle C, page 27

147/08/2020. Sgt Teffo informed the plaintiff of his constitutional rights and thereafter the plaintiff was detained in the police cells.

[9] The plaintiff appeared at Seshego Magistrate Court on 21 September 2020, the case was postponed to 29 September 2020 for bail application. On 29 September 2020 the case was further postponed to 06 October 2020 for bail application. The plaintiff applied for his bail on 06 October 2020 and his bail was denied by the learned magistrate.

[10] In cross examination the plaintiff put to Sgt Teffo that he supposed to have applied for a warrant before effecting the arrest. Sgt Teffo replied by indicating that based on the information in his possession, he had a reasonable suspicion that the plaintiff committed the crime of rape. Sgt Teffo did not interview the complainant's friend but used her statement. He took note that rape is a Schedule 1 offence and that there was a likelihood that if the plaintiff might not be arrested, he may commit a similar offence.

[11] The plaintiff put to Sgt Teffo that the reason the prosecutor opposed bail it was because of his evidence. Sgt Teffo denied and indicated that the Prosecutor and the court had other information such as the plaintiff's adduced evidence and his previous conviction. Sgt Teffo denied having slapped the plaintiff with an open hand and denied breaking his eyes glasses.

Plaintiff's case

[12] The plaintiff testified that on the 20th September 2020, when he arrived at home, he was informed by his mother that Sgt Teffo was looking for him. The plaintiff's mother gave him the letter with contact details from Sgt Teffo. Later on, the same day the plaintiff contacted Sgt Teffo and informed him of his names and that he got the numbers from his mother. The plaintiff wanted to know why the police officers were looking for him. Sgt Teffo confirmed that he was looking for him and the plaintiff informed him that

he was on his way heading to Seshego Police Station. The Plaintiff together with one of his friends went to the Police Station. They found that Sgt Teffo was not there, they waited for approximately 30 minutes before he arrived.

[13] Sgt Teffo arrived and requested the plaintiff should come to the charge office, which he did however, his friend was told to excuse himself. Sgt Teffo started to assault him by slapping him twice with an open hand to his face. He had a swollen eye and his eyes glasses were broken. The plaintiff indicated that the assault did not sit well with him because he thought he will be treated with respect since he has handed himself to the Police Station. The plaintiff testified that Sgt Teffo was so nice over the phone so he was shocked when he was assaulted out of nothing. The plaintiff's face was swollen after the assault. The plaintiff laid a complained of assault but he was informed by Sgt Teffo's colleagues that Sgt Teffo instructed them not to assist him. The plaintiff testified that on 11th August 2020 he was at his grandmother's place and he did not know the complainant. The plaintiff denied the allegation of rape and robbery against him.

[14] The plaintiff was put in the cell which was overcrowded, the place which supposed to hold 4 (four) inmates had an approximately 30 (thirty) inmates. The cell was dirty, toilets were not in good working condition and the diet was not good. He stayed at Seshego holding cells for a period of about 3 (three) months before being transferred to Polokwane prison while waiting for trial. The plaintiff indicated that after his transfer to Polokwane prison things were better than Seshego holding cells, because in Polokwane prison he could watch tv, good diet and hygiene was better. The plaintiff indicated that he spent a year and three months in Polokwane prison.

[15] On the 7th March 2022 his case was transferred to Seshego Magistrate Court for trial. On 09 March 2022 the plaintiff was not found guilty and discharged.

[16] In cross examination the defendant put to the plaintiff that during the bail application he conceded that on 11 August 2020 in the morning, he was exercising behind Moletjie clinic which is the place close to the scene of crime and that he was not

at his grandmother's place as he alluded in examination in chief. The plaintiff did not deny that he was exercising behind the clinic on the 11th August 2020 in the morning but denied being at the mountain or bushes where the rape took place.

The Law

[17] Subsection 40(1)(b) of the Act reads as follows: -

“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 custody.”

[18] The jurisdictional facts for a subsection 40(1)(b) defence are that: -

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- (d) the suspicion must rest on reasonable grounds³.

[19] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.⁴

[20] The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests.

³ *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 467 (SCA)

⁴ *R v Van Heerden* 1958 (3) SA 150 (TPD). *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814D.

Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.⁵

[21] In the matter of *Olivier v Minister of Safety and Security and Another*,⁶ the court held that:

“When deciding if an arrestor’s decision to arrest was reasonable, each case must be decided on its own facts.”

[22] Further, the court stated,⁷ the following, namely: -

“This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation. The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court’s view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort.”

[23] The discretion to arrest must be properly exercised and authority for this proposition is once again found in the matter of *Duncan v Minister of Law and Order*⁸ (*supra*). The test for the legality of the exercise of discretion to arrest is objective. The exercise of public power by the executive and other functionaries should not be

⁵ 1993 (1) SACR 434 (TPD); *Heimstra (supra)* at 5-8.

⁶ 2009 (3) SA 434 (WLD).

⁷ at 445D to F.

⁸ at 818H-I.

arbitrary. Decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.⁹

[24] In objectively determining when an arrestor has acted arbitrarily the court should consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) disregarded the express provisions of the statute. The authority for this has long been held.¹⁰

[25] The onus rests upon the arrestor to prove that the arrest was objectively lawful.¹¹

[26] If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.¹²

[27] The recent decision of the Supreme Court of Appeal in the matter of *Minister of Police and Another v Erasmus*¹³ is illustrative of the more recent developments in our law pertaining to unlawful arrest and detention. the court held:-

*“When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in *Minister of Safety and Security v Tyokwana**

⁹ *Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the republic of South Africa and Others* 2000 (2) SA 678 (CC) para 85-86, at page 708D-F.

¹⁰ *Shidiack v Union Government (Minister of the Interior)* 1912 (AD) 642 at 651-652.

¹¹ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (AD) at 589 E-F, *Mabasa v Felix* 1981 (3) SA 865 (AD) and *Minister of Law and Order v Matshoba* 1990 (1) SA 280 (AD) at 284.

¹² *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at 600G.

¹³ (366/2021) [2022] ZASCA 57 (22 April 2022). Para 12

[2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime. In De Klerk v Minister of Police [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76, the decisive consideration in both the judgments that held in favour of the appellant was that the investigating officer knew that the appellant would appear in a 'reception court' where the matter would be remanded without the consideration of bail. Finally, in Mahlangu and Another v Minister of Police [2021] ZACC 10; 2021 (2) SACR 595 (CC), the investigating officer deliberately suppressed the fact that a confession which constituted the only evidence against the appellants, had been extracted by torture and thus caused their continued detention."

[28] Of course the *locus classicus* in respect of the principles applicable to the delictual liability of the Minister of Police for detention is the Constitutional Court decision in the matter of *Mahlangu and Another v Minister of Police*.¹⁴

[29] Firstly, the Court cited, with approval, the matter of *Relyant Trading (Pty) LTD v Shongwe*¹⁵ where the Supreme Court of Appeal held, *inter alia*, the following: -

"...to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty".

[30] Importantly, the Constitutional Court also cited with approval the matters of *Woji* (*supra*) and *Zealand v Minister of Justice and Constitutional Development and Another*¹⁶ noting that *Woji* had followed *Zealand* in holding that the Minister of Police was liable for post-appearance detention where the wrongful and culpable conduct of the police had

¹⁴ *Supra* [2021] ZACC 10.

¹⁵ [2007] 1 All SA 375 (SCA) at paragraph 6; at paragraph [29] of *Mahlangu* (*supra*).

¹⁶ 2008 (2) SACR 1 (CC).

materially influenced the decision of the court to remand the person in question in custody. Following thereon, the Constitutional Court noted that this reasoning “... *effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor*”.¹⁷

[31] Finally, the Constitutional Court cited,¹⁸ once again with approval, the matter of *Tyokwana (supra)*¹⁹ where it was held: -

“(T)he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.”

Plaintiff’s Submissions

[32] The plaintiff submitted that on totality of the evidence tendered, the defendant failed to discharge onus on balance of probabilities that the arrest and detention of the plaintiff was lawful in terms of subsection 40 (1)(b) and therefore, the arrest and detention is unlawful.

[33] The plaintiff submitted that a reasonable police officer having discovered that the identity of the plaintiff was unreliable, would have sanctioned an identity parade. The plaintiff submitted that a reasonable police officer should have analysed and assessed the quality of the information at his disposal, critically and ascertain the identity of the plaintiff. The plaintiff submitted that it is would only after an examination of this kind that the police officer will allow himself to entertain a suspicion which will justify an arrest.

[34] The plaintiff referred the court to case of *Mabona and another v minister of law and Order and Others*²⁰.

¹⁷ At para [33].

¹⁸ At para 41.

¹⁹ At para 40.

²⁰ 1988(2) SA 654 SE at 686 E-H

“The Court reiterated that the rationality test is required the arresting officer to enquire whether a reasonable man 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 Plaintiff was guilty of committing a crime”.

[35] The plaintiff submitted that he has a constitutional right not to be deprived of his liberty, even when he has a previous conviction. The plaintiff submitted that he was arbitrarily deprived of his freedom and the defendant has failed to prove that there was justification for the interference.

[36] The plaintiff submitted that if the court finds that the arrest was unlawful the defendant should also be liable for the unlawful detention as a result of the evidence adduced by Sgt Teffo during the plaintiff's bail application. The plaintiff contends that if it was not Sgt Teffo the bail application would have been granted.

Defendant's submissions

[37] The defendant submitted that Sgt Teffo had on the basis of the information in his possession, exercised his discretion to arrest the plaintiff without a warrant. The defendant further submitted that further detention from the 21st September 2020 was on the instance of the magistrate court.

[38] The defendant submitted that the arrest was lawful, furthermore the detention was also lawful as the plaintiff was made aware of his constitutional rights and brought to court within 48 hrs as required in terms of the Act.

Court's Findings

[39] In assessing whether the plaintiff arrest without a warrant was justified. The Court noted the jurisdictional facts of section 40 (1)(b) of the Act. The arrestor Sgt Teffo is a

peace officer, he entertained a suspicion. The suspicion was that the plaintiff committed rape which is an offence referred to in Schedule 1 of the Act. The most essential requirement for this court is to assess whether the suspicion rest on reasonable grounds. On the 11th August 2020 the complainant reported a case of rape and robbery which took place next to Moletjie Clinic, Limpopo Province, at around 06h30am. The complainant reported to Seshego Police Station that she was raped and robbed for her phone by an unknown man, while she was going to school.

[40] On 16 September 2020, the complainant called Sgt Teffo and informed him that she saw the suspect inside the car (BMW) and her friend Lucrecia Ledwaba knew the plaintiff's address. The complainant established the names of the plaintiff as Thato Shilabye. Sgt Teffo used the information that was given to him to further investigate the matter including examining the profile of the plaintiff.

[41] During the examination in chief the plaintiff testified that in the morning of 11 August 2020, he was at his grandmother's place. In the cross examination the plaintiff conceded that during his bail application his evidence was that in the morning of 11 August 2020, he was exercising behind Moletjie Clinic, the place close to where the offence of rape and robbery occurred. The Court highlight this to indicated that indeed there was evidence the plaintiff provided to the magistrate during the bail application which may have led to the court not to grant bail.

[42] The plaintiff suggests that Sgt Teffo should have not entertained suspicion until the identification parade is done. The complainant is the one who called the police and gave the police the details of the plaintiff and as a result, the police believed the evidence from the complainant. The police further made some investigation and found that the names given to them are for the plaintiff who have a previous conviction of similar offences. The police reasonable suspected that the plaintiff might have committed the offence of rape and robbery. In my view, any reasonable person in position of the police who has received the identification of the plaintiff from the

complainant, would have a reasonable suspicion that the identified person, in this case the plaintiff, has possibly committed the said offence of rape and robbery.

[43] This Court, on the balance of probabilities, finds that the defendant had complied with subsection 40(9)(b) of the Act in arresting the plaintiff without a warrant of arrest. In my view, any reasonable person in possession of the information which the police had at the time of the arrest would have reasonably believed that the plaintiff committed the offence in Schedule 1 of the Act.

[44] The plaintiff applied bail on 06 October 2020, and the defendant opposed bail based on the information in their possession. The learned magistrate did not grant bail to the plaintiff after the considerations of several factors, among others, the evidence adduced by the plaintiff, Sgt Teffo and consideration of the plaintiff's previous conviction. The plaintiff did not adduce evidence of what transpired in court during the plaintiff's bail application proceedings, therefore, this Court is not in position to find any wrong conduct against the defendant which may have led to the plaintiff further detention. The plaintiff did not adduce any evidence to prove that Sgt Teffo gave any wrong information to the court during his bail application. The Court noted that Sgt Teffo opposed plaintiff's bail application but no evidence which demonstrate that Sgt Teffo deliberately adduced wrong evidence in order to mislead the learned magistrate during the plaintiff bail application.

[45] The Court finds that on the balance of probabilities further detention was not as a result of any misconduct, misleading information or wrong act committed by the defendant. The court on the balance of probabilities finds that further detention was not done by any act or omission by the defendant but it was a decision of the learned magistrate after consideration of different factors.

[46] The plaintiff alleged that Sgt Teffo assaulted him in his office on the 20th September 2020. The plaintiff alleged that as a result of the assault he had a swollen eye and his eyes glasses were broken. The plaintiff further alleged that he lodged a

complaint to Sgt Teffo's colleagues but they denied to take him to hospital as they indicated that Sgt Teffo instructed them not to do so. The plaintiff further alleged that he was not informed of his constitutional rights.

[47] Sgt Teffo denied all the allegations of assault. The defendant also produced the notice in terms of section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996, with the plaintiff's signature as a proof that the plaintiff was informed of his constitutional rights²¹. The plaintiff has onus to proof his claim of assault but he failed to call other witnesses to corroborate his evidence and no medical report was provided. The swollen eye was not documented anywhere in the docket. The plaintiff did not succeed to proof that Sgt Teff assaulted him in his office. The Court finds that on the balance of probabilities the plaintiff was not assaulted by Sgt Teffo and if that was so, the plaintiff would have brought more evidence to proof it.

[48] In deciding the issue of costs, I will not deviate from the general rule that the cost follow the event. The court has noted that this case was not complex so party and party cost will be reasonable to compensate the successful party.

[49] In the result, I make the following order;

[1] The claim for unlaw arrest and detention is dismissed.

[2] The plaintiff is ordered to pay cost on party and party scale.

E. MASHAMBA
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION
POLOKWANE

²¹ Bundle C, page 9

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