

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case Number.: 3478/2015

In the matter between:

SITHEMBELE MONI

Plaintiff

and

MINISTER OF POLICE

First Defendant

REUBEN VAN SCHALKWYK

Second Defendant

JUDGMENT

Beshe J

Introduction

[1] Section 12(1) of the Constitution guarantees everyone the right to freedom and security of the person which *inter alia* includes:

the right not to be deprived of freedom, arbitrarily or without just cause.

[2] The plaintiff in this matter instituted an action against the defendants in which he claims recompense for damages he alleges he suffered as a result of unlawful arrest and detention.

[3] First defendant is sued in his capacity as Minister of Police who is vicariously liable for wrongful acts by his employees committed during the course and scope of their employment with him. Second defendant is cited on the basis that he was the investigating officer of the criminal case in respect of which the plaintiff was arrested as well as on the basis that he was the arresting officer.

[4] Plaintiff's claims are as follows:

Claim 1:

Unlawful arrest in respect of which he claims R500 000.00.

Claim 2:

Detention from 18 August 2014 to 25 October 2014 in respect of which he claims R3 000 000.00.

Claim 3:

Loss of income, in this regard his claim is for R15 937.20.

Pleadings.

[5] Plaintiff pleaded that the arrest was effected without a warrant of arrest on 18 August 2014 in circumstances where members of the first defendant did not harbour a reasonable suspicion that he had committed the offence of rape. That first defendant's employees failed to do a thorough investigation before arresting him. He was only released from detention on 25 October 2014. As a result of the arrest and detention, he suffered damages including loss of income in the amount claimed.

[6] Defendants pleaded that the plaintiff was lawfully arrested and detained on being reasonably suspected of having raped a minor child, an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the Act). That therefore the

arresting officer was entitled to arrest the plaintiff without a warrant in terms of Section 40(1)(b) of the Act.

[7] Plaintiff was the only witness to testify in support of his claims. So was the arresting officer Captain Reuben van Schalkwyk in respect of defendants' case.

[8] Plaintiff's evidence was short, to the point and to the following effect:

He is a 40-year-old male person from Queenstown. On the 18 August 2014 the police arrived at his workplace, being Total garage service station and arrested him for rape of person he did not know. The arrest took place in full glare of his colleagues. He was taken to the police station where he was locked up until his first court appearance. The conditions where he was locked up were despicable in that there was no roof and that one could see the sky. Sometimes they got only one meal a day. He was provided with one blanket. The matter was postponed approximately five times. He was admitted to bail and released towards the end of October. He could not go to work as a result of the detention and lost earnings during that period. He earned R3 700.00 a month. He therefore lost R3 700.00 x 5 not having worked for five months. Even though he was released from custody after two months, he was not allowed back at work for another three months. The rape charge against him was ultimately withdrawn.

[9] Cross examination elicited the following factors from the plaintiff:

He did not work every day at the Total garage. He owned a motor vehicle which he used as a taxi when off duty as a e-hailing service. The description of the motor vehicle is Opel Cadett Cub hatch back, white in colour with blue stripes on the sides and tinted windows. He also has a contract to transport school children. The day preceding his arrest someone stopped his car and remarked that "this is the car". This was a lady who was in the company of a young child. He did not recall whether he alighted from his vehicle and being asked to take off his cap and whether the young girl confirmed he was the person who raped her. He stated that he heard about rape of a young girl who

was abducted from Van Collar school on 31 July 2014 only in court. The reason plaintiff contends second defendant did not have probable cause or suspicion that he committed rape is because there are many vehicles that are similar to his in Queenstown. The reason his bail application could not be heard timeously is because second defendant did not attend court which resulted in his bail application being postponed.

[10] Captain van Schalkwyk testified that he was allocated the docket to investigate a case of a rape in early August 2014. At the time he held the rank of a Warrant Officer. The docket contained A33 complainant's mother's statement, A36 which is complainant's statement as well as that of Ms Dywili who is a teacher at V[...] C[...] primary school. Also filed in the docket at that stage was a medico-legal examination report (J88) in respect of the rape victim. Therein, details of injuries suffered by the victim, which were said to be consistent with sexual assault, were recorded.

[11] As would appear from the abovementioned statements, the incident was brought to the attention of complainant's mother by her class teacher Ms Dywili. Ms Dywili in turn was alerted to complainant having been placed inside the boot of a car, by one of the pupils at the school on the 31 July 2014. It was on the following day when she saw the complainant that she enquired about that incident from her. She then reported the matter to the school principal and the matter was ultimately reported to complainant's mother.

[12] The young boy who reported the matter to Ms Dywili described the motor vehicle in question as being a white sedan with black stripes. He could only make out 759 EC on the car's registration number from where he was.

[13] In her statement, complainant recounted how the abduction and rape occurred.

[14] According to complainant's mother, the latter described the motor vehicle in question as being white with blue and black stripes.

[15] Captain van Schalkwyk proceeded to obtain statements from *inter alia* the seven-year-old boy who witnessed the complainant being placed inside the boot of a car. He described the motor vehicle as being white with dark windows and that the only characters he noticed from its registration are 759 EC from a distance. That it was driven by a black male person.

[16] Captain van Schalkwyk testified that as he carried on with the investigations he kept in touch with the complainant's mother. It is during one of the communications with complainant's mother that the latter informed him that the complainant pointed out to her the motor vehicle into which she was taken/abducted and thereafter raped. She took the registration number of the motor vehicle which she used to make further enquiries about the said motor vehicle from the local taxi rank.

[17] Captain van Schalkwyk only reduced that into writing in the form of statement from complainant's mother a day after plaintiff's arrest. The statement was also filed in the docket. As a result of the information that was received from complainant's mother, he together with plaintiff's mother proceeded to Total garage where plaintiff was employed. He conducted some investigations there. Armed with all the information at his disposal, he formulated a reasonable suspicion that the plaintiff committed rape of the minor child. He then arrested the plaintiff on the 18 August 2014. It was only on the following day however that he obtained a written statement from the complainant's mother concerning what happened when the complainant pointed the plaintiff to her in the township. He however could not confirm whether he recorded what complainant's mother told him before he reduced it to a statement the day following plaintiff's arrest anywhere else.

[18] It is common cause that the charge against the plaintiff was withdrawn due to the fact that not enough male DNA was obtained from the swab (vulva) collected from the complainant. During cross-examination by plaintiff's counsel, Captain van Schalkwyk confirmed that as at the time of the arrest of the plaintiff he was not identified in any of the statement filed in the docket at that stage.

Parties' submissions.

[19] It was argued on plaintiff's behalf that an adverse inference should be drawn from defendant's failure to call the officer who obtained the complainant's statement to explain why it does not state that she pointed out plaintiff's motor vehicle. This based on the fact that, so it was argued, the statement was obtained on 3 August 2014. And yet according to complainant's mother, she pointed the motor vehicle to her on the 2 August 2014 as would appear from the statement obtained from complainant's mother on the 19 August 2014. Further that the information allegedly recorded by the arresting officer in this regard was not recorded anywhere prior to it being recorded in complainant's mother's statement. It being argued that the statement of the 19 August 2014 by complainant's mother was designed to justify the warrantless arrest of the plaintiff. Mr Somandi made an in-depth analysis of the legal principles as they relate to *onus* resting on the defendant to prove the lawfulness of the arrest; what constitutes a reasonable suspicion; reasonable grounds to suspect that a Schedule 1 offence has been committed. The court was referred to a number of decided cases in this regard which I have had regard to. It was argued that at the time of plaintiff's arrest the second defendant did not have a reasonable suspicion upon which plaintiff's arrest was based.

[20] It was conceded on behalf of the defendants that the *onus* to prove the lawfulness of the warrantless arrest and subsequent detention rested on the defendants. It was pointed out as far as the loss of income claim, the *onus* rested on the plaintiff. It was further pointed out on behalf of the defendants, correctly so, that the issue in this matter is whether based on the evidence that was at second defendant's disposal, he properly exercised his discretion to effect the arrest of the plaintiff without a warrant. I however do not agree with the submission that there is no dispute as to what information was available to the second defendant in the exercise of that discretion. In other words, the discretion to invoke Section 40(1)(b) of the Criminal Procedure Act.

Discussion.

[21] Plaintiff contends that at the time of the arrest the statements that second defendant had at his disposal did not point to the identity of the plaintiff, did not

identify the culprit. They did not contain the correct registration of plaintiff's motor vehicle. The motor vehicle in question was described as a sedan as opposed to being a hatch back. It is contended on behalf of the defendants on the other hand that second defendant had further information that did not form part of the police docket at the time emanating from what complainant's mother told him regarding the complainant's pointing out of the suspect to her. As well as the enquiries she made following that pointing out by the complainant. This was also coupled with enquiries van Schalkwyk made at Total garage before arresting the plaintiff.

[22] It appears to be common cause between the parties however that:

The complainant, a minor child sustained injuries that were consistent with sexual assault. It also appears to be common cause or not in dispute that the complainant was abducted from outside the premises of her school in a white motor vehicle. It is further common cause that on a certain Saturday plaintiff's motor vehicle was stopped by complainant's mother who was with the complainant.

[23] The issues regarding this aspect, the stopping of plaintiff's motor vehicle by complainant's mother is the date on which this occurred and the absence of evidence of the recordal of this event by the investigating officer anywhere before the plaintiff's arrest. What is clear and not in dispute is that this happened on a date prior to plaintiff's arrest. This in my view corroborates defendants' case that the second defendant had this information at his disposal at the time of plaintiff's arrest and that this information led to the arrest of the plaintiff. That is after second defendant had followed up on the information by visiting the garage where plaintiff was employed. It seems highly improbable that the complainant's mother would keep the information to herself regarding the identity of the person who is alleged to have raped her seven-year-old daughter and not pass it on to the police. This after all the trouble it is alleged she took to trace the person suspected of having raped her daughter. This also begs the question; why did Captain van Schalkwyk arrest the plaintiff if he did not have this information? Why did he go to his place of work to make certain enquiries?

[24] Second defendant's reliance or association of plaintiff with the motor vehicle described in one of the statements by complainant's schoolmate is impugned on the following basis:

The young boy stated that the characters of the registration plate he could make out from where he was are 759 EC. He described the motor vehicle as sedan and yet plaintiff's motor vehicle is a hatch back. Plaintiff's motor vehicle's registration number is B[...].

There is not merit in this argument. The young boy was witnessing what must have been an unexpected stressful if not traumatic occurrence of his friend being placed inside the boot of a car. He was standing a distance away from the motor vehicle. Even his presence of mind to try and note the registration of the motor vehicle in question is commendable in the circumstances. As to the motor vehicle being described as a sedan as opposed to it being a hatch back. This in my view is of no moment. Even the certificate of registration of the said motor vehicle describes it as a "sedan".

[25] It is common cause as indicated earlier in this judgment that the prosecution was not proceeded with, the charge against the plaintiff having been withdrawn due to the fact that not enough DNA could be obtained from vulva swab that was collected from the complainant.

[26] The information that the second defendant had at the time of plaintiff's arrest was the following:

Evidence that the complainant was abducted and placed inside the boot of a white vehicle. Some of the characters of the car's registration. Evidence of complainant having been sexually assaulted. Information that the mother of the complainant, after the latter had pointed out the plaintiff and his car to her and after the mother had made certain investigations, she was able to say that the person pointed out to her worked at the Total garage. That the person also moonlighted a taxi driver. Having himself made enquiries at the said garage and establishing that on the day of the alleged rape the plaintiff was

off duty. It turned out when found that the plaintiff's motor vehicle bore a striking resemblance to the one described by complainant's school friend.

[27] In the circumstances, can it be said that the second defendant was justified in arresting the plaintiff without a warrant on the ground that he reasonably suspected him of having committed rape, an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977 as envisaged in Section 40(1)(b) of the Act?

[28] It is trite that the jurisdictional factors for a Section 40(1)(b) defence to succeed are:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion that;
- (iii) the suspect committed an offence referred to in Schedule 1; and
- (iv) the suspicion must rest on reasonable grounds.¹

[29] The central issue in this matter is whether second defendant's suspicion in this regard rested on reasonable grounds. Did Captain van Schalkwyk have reasonable grounds for suspecting the listed offence was committed by the person he arrested? The plaintiff in this matter. The meaning of suspicion in this context as was formulated by Lord Devlin has widely been accepted by our courts to be that "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking". "I suspect but I cannot prove". "Suspicion arises at or near the starting point of an investigating of which the obtaining of *prima facie* proof is the end".² It is also trite that the test for reasonableness in this regard is an objective one.³ Namely whether a reasonable man in the circumstances would have held such a suspicion. Expanding on application of this test the following was stated in *Mabona supra*:⁴

¹ Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 at 320 paragraph [6].

² Shabaan Bin Hussein and Others v Chong Fook Kam and Another [1969] All ER 1627 (PC) at 1630.

³ Mabona and Another v Minister of Law and Order and Others 1988 (2) SA at 654 SECLD 658 (E).

⁴ Page 658 E-H.

‘Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[30] I am of the view that armed with the information he had at his disposal, Captain van Schalkwyk’s suspicion that the plaintiff raped the complainant was based on solid grounds. That his suspicion in this regard, based on the information he had at his disposal was reasonable. He had good and sufficient grounds for suspecting that the plaintiff was complicit in complainant’s rape. In the result I therefore find that plaintiff’s arrest without a warrant was justified by Section 40(1)(b) of the Criminal Procedure Act.

[31] There is one more aspect I need to address. After hearing the evidence of both parties, it was agreed that the matter should be postponed *sine die* for the parties to file their heads of argument after which I will determine whether I would like for the parties to present argument in open court. Due to some confusion, the fact that heads of argument had been filed by the parties was not brought to my attention. It was only when the parties enquired about the judgment that it transpired that they had filed their heads of argument. I apologise unreservedly for the delay in rendering the judgment.

[32] Accordingly, the following order will issue:

Plaintiff's claims against both defendants are dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

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