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

Reportable

Case no.: 2579/2020

Matter heard on: 28, 29 and 30 October 2024

Judgment delivered on: 17 December 2024

In the matter between:

T[...] N[...]

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

ZONO AJ

Introduction

- [1] This is a claim for damages arising from plaintiff's arrest and detention which allegedly took place on 7 June 2019 and on 2 August 2019. The plaintiff instituted his claim against the defendant, Minister of Police on 12 August 2019. The defendant defended the matter by filing his notice to defend and the plea.
- [2] On the date of trial the parties jointly made an application for the separation of issues, with the issue liability to be dealt with first and quantum to stand over for later determination. I duly granted such an order. Then, what served before me was whether the plaintiff's arrest by members of the defendant on two different occasions, to wit 7 June 2019 and 2 August 2019 respectively was wrongful and unlawful.
- [3] The parties appositely dealt with their respective cases in their respective pleadings, and later on in evidence. It is fitting to reflect on their respective cases as foreshadowed in their respective pleadings.

The Pleadings

Plaintiff's Case

- [4] The plaintiff avers in this particular of claim that he was wrongfully and unlawfully arrested by Constable Ginya without a warrant of arrest on 7 June 2019 for having allegedly committed an offence of rape. The plaintiff was humiliatingly arrested in full view of members of community whilst in a traditional ceremony at his village. The plaintiff was thereafter taken in a police van to Xhora Police Station for detention where he allegedly spent hours without being charged or locked in the police cells due to the fact that police cells were full. He was thereafter transported back to his home where he was informed by Constable Ginya that he was still under arrest and imposed conditions of his release.

- [5] The plaintiff further avers that on 2 August 2019 he was wrongfully and unlawfully arrested by three police officers whose particulars were to the plaintiff unknown for the same alleged offence of rape. The arrester too, was without a warrant, the plaintiff was taken also in this instance in a police van to Xhora Police Station where he was detained. His first appearance in court was on 5 August 2019 where his case was postponed for bail application and the bail was opposed on instruction of Constable Ginya. The plaintiff was released on 2 October 2019 at the happenstance of Constable Giya informing the court that the state's case is very weak against the plaintiff. This was said in the context of bail application in terms of which the plaintiff was released by the court on warning. His bail was in unnecessarily opposed.
- [6] The plaintiff avers that in both instances the members of defendant had no reasonable suspicion that plaintiff had committed the alleged offence. He was arrested when the police officers had no evidence that he had committed the crime of rape. The second incident of his arrest occurred when he had not breached or violated any of the conditions imposed by Constable Ginya. The police officers failed to inform the Public Prosecutor and the court that the case against the plaintiff was very weak, when the matter was postponed on two previous occasions.

Defendants Case

- [7] The defendant in his amended plea denies that the plaintiff's arrest was wrongful and unlawful and avers that the plaintiff was arrested as he was reasonably suspected to have committed a Schedule 1 (one) offence. Constable Ginya, when arresting the plaintiff invoked the provisions of Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 as amended. Ginya reasonably believed that the plaintiff had committed a sexual assault against a victim who was of unsound mind. He relied on affidavits deposed to by witnesses and the plaintiff failed to proffer exculpatory facts or evidence to Ginya.

[8] The defendant avers that plaintiff's criminal case was opened and he was caused to appear in Mqanduli Magistrate's Court on 5 August 2019 where the plaintiff was legally represented by Ms Jolobe, an attorney from Legal Aid Board. On 5 August 2019 the matter was remanded for formal bail application by consent with plaintiff legal representative. The state and the plaintiff's legal representatives found each other about the fact that the plaintiff was facing a schedule 5 offence which necessitated a formal bail application which was postponed on several occasions by consent.

[9] On 12 August 2019 Constable Ginya deposed to an affidavit consenting to the plaintiff being released, on bail, thereby not opposing plaintiff's release on bail. The defendant disputes that he is liable for plaintiff's continued detention and avers that he was not responsible for further postponements as those postponements were authorized by court. The defendant concludes that plaintiff's further detention was lawful.

In Court

[10] Having dealt with the separation of issues, the court had to grapple with the issues of onus and duty to begin. Determination on those issues must justifiably be guided by legal principles.

[11] In Hurley¹ Rabie CJ held:

"An arrest constitutes an interference with the liberty of the Individual concerned and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus

¹ Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589 E-F

of proving that his action was justified in Law.” This principle was followed in a number of decisions².

[12] It has long been firmly established in our common law that any interference with physical liberty is prime facie unlawful. Once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. Accordingly, it was sufficient in this case for the plaintiff simply to plead that he was unlawfully arrested and detained. The defendant then bore the burden to justify the deprivation of liberty, whatever form it may have taken³. The Constitution enshrines the right to freedom and security of the person including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom⁴. The state must respect, protect, promote and fulfil the rights in the Bill of Rights⁵, including the right to Human Dignity⁶. He who interferes with these rights must accordingly justify his actions. In line with this established jurisprudence the parties agreed that the defendant bore the onus of proof and had a duty to begin.

Defendant’s Evidence

[13] The defendant called the evidence of a single witness, Sergeant Xolisa Ginya, who was regarded as an arresting officer. He testified that he received the docket in February 2019 in terms of which the plaintiff was a suspect in a charge of rape of a mentally handicap person, N[...] R[...]. M[...] R[...] was a complainant in the case on behalf of N[...] R[...]. In the course of his investigations, he sought explanation and statements from the victim and witnesses in relation to the criminal complaint laid against the plaintiff.

² Minister of Safety and Security v Sekhoto 2011 (5) SA 367 SCA Para 8

³ Zealand v Minister for Justice and Constitutional Development and Another 2008 (2) SACR (1)(CC) Paras 24 – 25.

⁴Section 12 (1) of the Constitution

⁵ Section 7 (2) of the Constitution

⁶ Section 1 (a) and 10 of the Constitution.

- [14] It became apparent that Ginya would not obtain a satisfactory explanation from the victim, N[...] R[...] for she was incoherent in her narration of the incidents. What she would constantly say is that *"I do not like what my grandfather did to me."* Ginya testified that they referred the victim to a psychologist. No report was ever received from the psychologist. Ginya testified further that he interviewed one M[...]2 R[...] and M [...] R [...] (mother).
- [15] Ginya was informed that M[...]2 was sent with N[...] (victim) by M[...] (mother) to the plaintiff to fetch potatoes and some money. The plaintiff, waking up from sleep, sent M[...]2 to the local shop and N[...] was left only with the plaintiff. When M[...]2 came back from the shop, he and N[...] went back to their home, although N[...] was walking slowly behind. On their arrival at home N[...] stated that she does not like what the grandfather did to her. She complained of waste pains. It is on that information that M[...] went to open a case against the plaintiff.
- [16] According to Ginya, N[...] was taken to Thuthuzela Care Centre for examination where J88 report form was completed and affidavit in support thereof was deposed to by Dr Ntloko as a doctor who examined her. Armed with the statement obtained from victim, witness and J88, he proceeded to look for the plaintiff in vain as he wanted to interview him and get his side of the story. He ultimately found him on 7th June 2019. Ginya told the plaintiff that he is implicated in a rape case. He requested a statement from the plaintiff and upon agreement, he took the plaintiff to Elliotdale (Xhora) Police Station to take his statement. Ginya emphasized that he was not satisfied with N[...]’s explanation or statement as it was incoherent and dubious. Ginya took the plaintiff and dropped him off on a tarred road not far from his home. He insisted that he took the plaintiff for an interview and he was not arresting him on 7 June 2019.
- [17] Ginya testified that, long after 7 June 2019 he did not receive the psychologist report because of non-payment, but curiously he kept on waiting and checking

for it. Ginya was verbally advised by the psychologist that N[...]’s cognitive capacity is equal to that of a person who is 12 years old, although she was 31 years of age. The basis for sharing that information is not apparent, especially that the report was withheld for non-payment. He testified that he received complaints from the complainant that the plaintiff passes some threats that if they do not withdraw the case, he would not give them food. It is not clear where he got that complaint.

[18] On 2 August 2019 Mqanduli Police Officers were assisted by other police officers from other stations as they lacked resources. The work for that day was divided between different groups and a police officer by the name of Mqomboti and his team was allocating N[...]’s case docket. Ginya testified that Mqomboti, Rapubeng and another police officer went to visit N[...]’s home where they were advised of the threats the plaintiff was making to N[...]’s family. Mqomboti is called Ginya. After narrating the story of the alleged threats by the plaintiff, Mqomboti sought confirmation if he may arrest the plaintiff. Ginya did not object to the arrest of the plaintiff. Mqomboti proceeded to arrest the plaintiff on the same day and was caused to appear in court on the 5th of August 2019.

[19] On the 5 August 2019 Ginya advised the public prosecutor, Mr Mampangashe that he does not oppose bail. Mr Mampangashe instructed him to make a sworn statement to that effect. The matter was thereafter postponed to 14 August 2019 by agreement with plaintiff’s legal representative. The affidavit was only made on 12 August 2019. The matter was ultimately struck off the roll on 18 December 2019.

Plaintiff’s Evidence

[20] Plaintiff’s narrative starts on 7 June 2019 when he was visited by Ginya at a traditional ceremony at his locality in another homestead. One Bhimbi, a local man, advised plaintiff that he was being asked to attend to the vehicle that was

not far. He indeed attended to the vehicle and found Ginya in the vehicle whom he did not know before. After confirmation of plaintiff's name, Ginya informed the plaintiff that he was arresting him in connection with the rape case in which the plaintiff was a suspect. He, at the happenstance of informing the plaintiff of the arrest, ordered the plaintiff to board the vehicle. The plaintiff, after entering the vehicle did not know where they were going. They passed Mqanduli and stopped at Xhora Police Station.

- [21] On their arrival at Xhora Police Station, Ginya ordered the plaintiff to go and stop behind the police counter where other police officers were. Ginya further instructed the plaintiff to take off his belt, shoelaces and that he must switch off his cellphone and the plaintiff obliged. He was next ordered to remain in a squat position for a while and he complied. Ginya instructed other police officers to detain the plaintiff but was advised that the cells were full.
- [22] Ginya then requested an office in which to consult with the plaintiff. He asked the plaintiff if he knew N[...], to which question the answer was in the affirmative. He further asked if the plaintiff raped N[...] and the plaintiff denied that. The plaintiff was requested to make a statement which Ginya was recording down. After finishing recording the statement, the plaintiff was asked to sign the same. Plaintiffs' fingerprints were taken and thereafter the plaintiff was taken back and dropped off on the road as Ginya advised plaintiff that he was rushing to arrest someone. When they were parting ways Ginya took the plaintiff's number and imposed conditions of plaintiff's release.
- [23] The plaintiff was arrested again on 2 August 2019 by three unknown police officers: Two males and one female, after having been called by a female police officer asking plaintiff's whereabouts. He was arrested in a humiliating manner and detained in Xhora police cells. He appeared on 5 August 2019.

[24] Wherein Mqanduli Magistrate's Court holding cells the plaintiff was visited by Ginya who enquired about the details of his arrest and the names of the police officers who arrested him as Ginya stated that he did not send them. The matter was postponed until 2 October 2019 when he was released on warning. The case was withdrawn on 18 December 2019.

Analysis and Discussion

[25] The liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement⁷. Unlawful arrest and detention is a delict comprises wrongful culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of personality interest caused by intentional conduct, then the person who suffered the harm must institute the action based on "*action iniuriarum*" for non-patrimonial damages to claim compensation for the non-patrimonial harm suffered⁸. The harm that the plaintiff complains of in respect of his arrest is the deprivation of his liberty – a significant personality interest.

[26] It is well established that the purpose of arrest is to bring the suspect to court for trial⁹. In dealing with this rudimental purpose of arrest I need to focus my attention on the first alleged arrest and deprivation of liberty that took place on 7 June 2019. I am mindful of the fact that the defendant in his amended pleas offers only a bare denial and put plaintiff to proof of the following averments contained in the particulars of claim:

⁷ Thandeni v Minister of Law and Order 1991 (1) SA 702E at 707B.

⁸ De Klerk v Minister of Police 2021 (4) SA 585 (CC) Para 13

⁹ Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 SCA Para 42 and 44; De Klerk v Minister of Police 2018 (2) SACR 28 SCA Para 14

“4. On or about the 7th of June 2019 at about 11h00 and at Ceza Administrative Area, the plaintiff was wrongfully and unlawfully arrested by Constable Ginya for an alleged offence of rape without a warrant.”

[27] In evidence Ginya was undeterred to lead the evidence that on 7 June 2019 he did not arrest the plaintiff but took him for the interview. This issue was fully canvassed by both parties in evidence even though it was not sufficiently covered by the pleadings. In Slabbert¹⁰ the Supreme Court of Appeal held that a court is not bound by pleadings if a particular issue was fully canvassed during the trial. For this proposition the SCA relied on the following dictum made in South British Insurance Co. Ltd¹¹. *“However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means, fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.”* The plaintiff went at great lengths to cross examine Ginya about the incident of 7 June 2019 and plaintiff testified at length to show that he was arrested on 7 June 2019. I accordingly am at liberty to pronounce on the issue of the incident that took place on 7 June 2019.

Alleged Arrest of 7 June 2019

[28] The plaintiff pertinently averred and testified that on 7 June 2019 he was called by one Bhimbi to attend to the motor vehicle as the occupant of the vehicle wanted him. On his arrival at the vehicle, he was advised by the occupant in the motor vehicle, who happened to be Ginya. Of importance Ginya advised the plaintiff that he was arresting him for an alleged offence of rape. Having been directed to board into a motor vehicle, the motor vehicle drove off and he was not aware where they were going.

¹⁰ Minister of Safety and Security v Slabbert 2010 (2) All SA 474 (SCA) Para 12 and 22

¹¹ South British Insurance Co. Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A at 714 G.

- [29] It was never gainsaid for or on behalf of the defendant that the plaintiff was never advised of where they were going after having boarded into a vehicle and advised that he was being arrested. The plaintiff noticed that they arrived in Mqanduli but did not go to Mqanduli Police Station, but instead passed the town of Mqanduli and their alternate destination was Xhora Police Station. Even at the stage when they arrived at Mqanduli, no indication was given to the plaintiff as to where they were going.
- [30] Ginya, however sought to paint a picture that he and the plaintiff had a rapport, on 7 June 2019. Ginya testified that he took the plaintiff for questioning and was not arresting him. The defendant took stalk of the fact that the plaintiff was not handcuffed and was sitting with Ginya in the front seat of the vehicle.
- [31] Lack of communication of the place where they were going, when the plaintiff was taken by Ginya from the traditional ceremony in his village and when they passed the town of Mqanduli is in direct contrast with the picture of rapport that sought to be painted by the defendants' witness. There is no suggestion at all that the two occupants in the vehicle were talking. That is inconsistent with the fact that the two vehicle occupants had a rapport. I am therefore not inclined to accept the defendants' version in this regard.
- [32] One other aspect is that of the plaintiff who was not given any opportunity to go to the people with whom he was before Ginya's arrival, to tell them that he was being cordially taken by Ginya for questioning. The plaintiff testified that Ginya used his authority to order him to board into the vehicle. This is consistent with the probability that a person cannot first allocate himself a seat in somebody's vehicle; he would probably be told to board and be advised where to sit. I therefore accept that Ginya used his authority in dealing with the plaintiff and the plaintiff had no much of a choice under the circumstances. That is why the plaintiff left the people in the ceremony without saying goodbye. That general atmosphere is indicative of a plaintiff who was submitting to the authority of

Ginya; and that the atmosphere is consistent with the plaintiff who regarded himself to be under arrest. He understood himself to be under the authority of Ginya. He surrendered himself to the control of Ginya. From the point where he was arrested, the plaintiff exercised no freedom and liberty. Plaintiff's freedom and security¹² was severely violated at the hands of Ginya.

[33] Defendant's denial that plaintiff was not arrested on this day is preposterous. Plaintiff was advised by Ginya that he was under arrest when he was taken from the traditional ceremony. Even the manner in which the plaintiff was dealt with in the police station demonstrates that he was dealt with as an accused as well as an arrested person, as I set out to demonstrate hereunder.

[34] A warning statement in terms of Section 35 of Act No. 108 of 1996 was completed and signed at the instance of the police officer, Ginya. Ginya signed at all designated spaces in the form written as follow:

Signed

[No. Rank and signature of the member administered arrest]

Ginya's force or employee number, signature, rank and his surname appear in the designated spaces. Ginya signed the warning form as a member of SAPS Administering the arrest. He understood his conduct to be that of arresting the plaintiff. He considered himself to be the person who was administering the arrest. The plaintiff, under the authority of Ginya signed the same documents as an accused as well as an arrested person in the designated spaces.

[35] The following question in the warning form appear to have been dealt with by both Ginya and the plaintiff:

¹² Section 12 (1) (a) of the Constitution

“Did the person who effected the arrest inform you in a language which you understand that:

- | | |
|--|---------------|
| <i>(a) He/she is a police officer?</i> | <i>Yes/No</i> |
| <i>(b) He/she is arresting you?</i> | <i>Yes/No</i> |
| <i>(c) He/she has told you the reason for your arrest?</i> | <i>Yes/No</i> |
| <i>(d)</i> | |
| <i>(e) You are entitled to legal assistance?</i> | <i>Yes/No</i> |

All of the aforesaid question were ticked yes, meaning that they were answered in the affirmative. The questions relate to the arrest of the plaintiff.

[36] Section 35 of the Constitution, in terms of which the form aforesaid was formulated and prepared deals with the rights of the arrested, detained and accused persons. I reject defendants’ version that the warning form was used instead of an interview form regarding the interview with suspect. Fortunately, both forms a before court. They are completely different, with a different purpose and questions. They could not have been used inter changeably. I therefore come to a conclusion that the plaintiff was arrested by Constable Ginya on 7 June 2019.

[37] The question of lawfulness or otherwise of the arrest was never an issue as the defendant’s position was clear that there was no arrest on 07th June 2019. No case was made out by the defendant in the light of this stance, that the arrest was lawful. Having stated that *“every interference with physical liberty is prima facie unlawful¹³”*, the defendant, as a party who bears the onus, failed to justify the deprivation of liberty whatever form it may have taken. Plaintiff’s freedom and liberty was ostensibly interfered with when he was taken from the traditional ceremony in his village. I have no evidence upon which I can base a finding that

¹³*Zealand v Minister for Justice and Constitutional Development* 2008 (2) SACR (1) (CC) Para 25,

the plaintiff's arrest of 7 June 2019 was lawful. I accordingly find that plaintiff was unlawfully arrested by Constable Ginya on 7 June 2019.

[38] I have not closed my eyes and ears to defendant's evidence that Constable Ginya received the docket in February 2019 and he did not effect the arrest until the 2 August 2019 because he did not have enough information in the docket upon which he would reasonably suspect that plaintiff committed the offence of rape. All what that means is that on 7 June 2019, Constable Ginya did not have the necessary and sufficient information to find a reasonable suspicion that a crime of rape was committed. It is for that reason Constable Ginya sought to deny that on 7 June 2019 he arrested the plaintiff. Unfortunately, the plaintiff was arrested without any reasonable suspicion that a case of rape was committed. No ground of arrest without a warrant was pleaded or canvassed in evidence to justify the arrest of 7 June 2019. This now takes me to the arrest of 2 August 2019.

Arrest of 2 August 2019

[39] In Coetzee¹⁴ O'Regan J said:

"There are two different aspect of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]. And the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]... constitution recognizes that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair¹⁵". Both the substantive (reasons) and procedural components or

¹⁴ S v Coetzee 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC); 1997 91 SACR 379 (CC)

¹⁵ De Lange v Saints N.O. and Others 1998 (3) SA 785 (CC; 1998 (7) BCLR 779 (CC) at Para 18

aspects of one's liberty must sufficiently be dealt with and they must exist as that is what Section 12 (1) (a) of the constitution requires. Both the reasons for the arrest and the procedure followed to arrest must justify citizen's arrest.

[40] The evidence by Constable Ginya shows that, for plaintiff's arrest of 2 August 2019, Mqanduli Police was assisted by other stations to do their work. The work and dockets were divided among the police officers who were present. Of fundamental importance, Officer Mqomboti was assigned the docket of the plaintiff to deal with. No specific instruction was given at the time of assignment to Officer Mqomboti about the method or manner on how he must discharge or execute his duties. It is not Ginya who assigned work to Mqomboti and his team. Mqoboti, Repuleng and another police officer went to complainant's homestead, where complaints relating to threats the plaintiff was alleged making to the complainant and her family were received. On the basis of those complaints Mqomboti called Ginya and sought confirmation or views on whether he may arrest the plaintiff. Mqomboti merely consulted Ginya. Ginya did not oppose that the plaintiff may be arrested.

[41] On the strength of the complaints and that no objection or opposition by Constable Ginya, Mqombothi proceeded to exercise his discretion to arrest the plaintiff. The plaintiff testified that a female police officer called him asking his whereabouts. That female police officer turns out to be Rapuleng. They arrested the plaintiff for allegedly having committed an offence of rape. Rapuleng the female police officer told the plaintiff's neighbors that they are "*arresting this rapist.*" The evidence shows that a police officer who was pivotal in the arrest of the plaintiff was Rapuleng. It is her who called the plaintiff. It is also her who told the neighbours that they are arresting the plaintiff. However, Ginya positions himself as an arresting officer. He states that he instructed Mqomboti, who is now deceased, to arrest. The first task lying ahead of this court is to determine who

the arresting officer was on 2 August 2019. Should it be accepted that Ginya was indeed the arresting officer?

- [42] As evidence evinces, on 2 August 2019 Ginya was allocated work and dockets to work on that day like any other police officer who was present thereat. Plaintiff's docket and work relating thereto was not allocated to him. He was not working on the docket on the day. Mqomboti, Rapuleng and another police officer were allocated or assigned among others plaintiff's docket to work on. It is assumed that a senior officer was assigning work to junior officers like Ginya and Mqomboti. They would exercise their discretion on the specific work they were assigned to perform. In those circumstances it is improbable that a junior officer would instruct another junior officer on how to perform his duties.
- [43] Mqomboti, Rapuleng and another police officer went to complainant's home where they were advised of the threats the plaintiff was allegedly making to the complaint's family. It is on the strength of those complaint's that Mqomboti consulted Ginya to ask if he is not objectionable to him arresting the plaintiff. Ginya indicated that he is not objectionable to the plaintiff's arrest. His views on the plaintiff's arrest cannot transform into an instruction by any strength of imagination.
- [44] It is Mqomboti who initiated a call to Ginya as a person who previously dealt with the matter. In the call initiated by him, Mqomboti raised the topic of plaintiffs' arrest. It is Mqomboti who initiated a discussion about the plaintiff's arrest. Were it not for Mqomboti's call to Ginya, there would not have been anything said about plaintiff's arrest between Mqomboti and Ginya. It therefore cannot be accepted that Ginya intended to instruct Mqomboti to arrest the plaintiff. In the evidence before me I can confidently and reasonably conclude that Mqomboti called Ginya to indicate his intentions: he was communicating his intentions to arrest the plaintiff where Ginya showed no different intent. It is therefore a misnomer that Ginya instructed Mqomboti to arrest, when Ginya did not see a

need to arrest plaintiff since at least 7 June 2019. We know from the evidence that there is nothing significantly changed in the docket from what was the position on 7 June 2019. If Ginya's testimony is anything to go by, it should be accepted that the information in the docket did not permit to entertain a reasonable suspicion that an offence of rape had occurred. That should be obtained also on 2 August 2019 as nothing new was added into the docket.

[45] The only reason that prompted or triggered an intention to arrest the plaintiff was the complaint of threats allegedly made by the plaintiff to complainant's family. According to defendants' evidence, the plaintiff threatened to terminate the support he was giving to the complainant's family if they do not withdraw the case against him. That is the nature of the threats that raised the ire of the police officers. A proposition was accepted by the defendants' counsel during argument that, had there been no complaint as aforesaid, there would not have been any arrest effected by the three police officers. I share that view. That can never be a solid ground upon which to form a reasonable suspicion that an offence of rape has been committed. That directly offends the substantive component of plaintiff's freedom¹⁶.

[46] Uncontroverted evidence was adduced by the plaintiff that the three police officers who arrived at his home to arrest him did not introduce themselves. All they said is that they are the police officers coming to arrest him on charges of rape and the plaintiff obliged. It is for that reason the plaintiff did not know their names. By necessary implications or flowing therefrom plaintiff was never advised of his rights. There is not even a warning statement signed by the plaintiff and the officer who was arresting the plaintiff showing that the plaintiff was advised of his rights. That failure offended the procedural component of plaintiff's freedom¹⁷.

¹⁶S v Coetzee 1997 (3) SA 527 (CC).

¹⁷Zealand v Minister of Justice and Constitutional Development and Another 2008 (2) SARC 1 (CC) Para 33

[47] Section 35 of the Constitution, in relevant parts, provides that:

“1 Everyone who is arrested for allegedly committing an offence has the right –

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent”

.....

[48] Section 35 (1) (a) and (b) rights are sacrosanct. Police conduct in this regard cannot be condoned or countenanced in a civilized society founded on values of human dignity, equality, human rights and freedoms¹⁸. The police officers cannot be allowed to barge into someone’s place and fail to do a simple human and honourable thing of properly introducing themselves, as it is expected of them and further fail to advise that person of his rights enshrined in Section 35 (1) (a) and (b) of the constitution. Failure to advise plaintiff of these rights is tantamount to denying the plaintiff the exercise thereof.

[49] In Harris¹⁹, Centlivres CJ stated as follows about the rights

“There can to my mind be no doubt that authors of the constitution intended that those rights [that is the rights entrenched in the constitution] should be enforceable by the courts of law. They could never have

¹⁸Section 1 (a) of the Constitution.

¹⁹Minister of the Interior v Harris 1952 (4) SA 769 (A)

intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right ubi jus, ibi remedium.”

[50] The Constitutional Court ²⁰quoted with approval sentiments by Holt CJ ²¹

“If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enforcement of it. And indeed, it is a vein thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.”

I am convinced therefore that the procedural component of plaintiff’s arrest was unjustifiably violated by the members of SAPS when they were arresting him on 02nd August 2019. Accordingly, that arrest too was wrongful and unlawful.

Conclusion

[51] In conclusion, I find that defendant reliance on the provisions of Section 40 (1) (b) of Criminal Procedure Act 51 of 1977 as amended for the arrest of 02nd August 2019 is misplaced. Section 40 (1) (b) aforesaid provides that:

“1 A peace officer may without warrant arrest any person –

(a)

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

²⁰Masemola v Special Pensions Appeal Board and Another 2020 (2) SA (1) CC Para 51

²¹Ashby v White [1790] EngR 55; [1703] 92 CR 126 at 136

(c) ...

52. I have indicated above that the plaintiff was arrested on the basis that he allegedly made threats to the complainants' family; not because he was reasonably suspected of having committed an offence of rape with which he was charged. The defendant's situation was worsened by the fact that no arresting officer was called to testify about the arrest of 02nd August 2019. Whilst it is accepted that Mqomboti is no more, however, he was not alone when they were effecting the arrest on 02nd August 2019. There is no basis conceivable enough for defendant's failure to call the two police officers, especially Rapuleng who was seemingly pivotal during the plaintiff's arrest. It can only be inferred from that conduct that such a failure was deliberate because the defendant feared that the evidence of the two police officers would expose facts not favourable to him²².

[53] In the result I find the defendant liable for agreed or proven damages arising from the plaintiff's arrest on 7 June 2019 and 2 August 2019 and resultant detentions or deprivation of plaintiff's liberty. With regard to the arrest on 2 August 2019, the defendant is found liable for plaintiff detention or deprivation of liberty up to the 5 August 2019. The reason for defendants' liability for plaintiff's detention or deprivation of liberty up to 5 August 2019 is not for to seek and is borne out by the evidence.

[54] The defendant led uncontroverted evidence that Ginya informed the public prosecution, Mr Mampangashe on 05th August 2019 that he is not opposed to plaintiff being released on bail. Mr Mampangashe sought Ginya to depose into an affidavit stating his position that he is not opposing the grant of bail. Curiously the matter was postponed for bail application without any further ado. Mr Mampangashe failed to advise the court that the bail is not opposed. He simply sought postponement for bail application. There is nothing informing me of the reason why Ginya was not put on the witnesses stand and say what was sought

²²Mister Estates (Pty) Ltd v Killarney Hill (Pty) Ltd 1979 (1) SA 621 (A).

to be said by way of an affidavit. He should have been caused to take the witness stand and state that he is not opposing the grant of bail in favour of plaintiff and state his reasons. Ginya clearly expressed his intentions not to oppose the release of the plaintiff on bail on 5 August 2019. Accordingly, the defendant cannot be found liable for any damages beyond the 5 August 2019 as it is clearly the public prosecutors' fault that the matter was postponed without explanation. Unfortunately, the National Director of Public Prosecutions is not before this court to answer about Public Prosecutions failures alluded to above.

- [55] Every arrested person has a right at his or her first appearance after being arrested, to be charged or to be informed of the reason for the detention to continue or to be released and to be released from detention if the interests of justice permit subject to reasonable conditions²³. Section 50 (6) (a) of the Criminal Procedure Act 51 of 1977 as amended offers a similar right to every arrested person. The Supreme Court of Appeal²⁴ made the following dictum:

“14... In my view presiding officers of courts of first appearance must ensure that the rights in S35 (1) (e-f) of the Constitution are not undermined. It is imperative for a presiding officer to enquire from the prosecution why it is necessary to further detain a suspect. In that enquiry the reasons for further detention will emerge as to whether or not it is in the interests of justice to further detain or release the suspect. Thus, I say, mindful of the provisions of S12 (1) of the Constitution which deals with freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause. Failure to enquire at the first appearance of the reasons for further detention is clearly a contravention. If the above Constitutional imperatives and therefore the further detention of a suspect without just cause would be arbitrary and unlawful. In my

²³ Section 35 (1) (e-f) of the Constitution

²⁴De Klerk v Minister of Police 2018 (2) ALL SA 597 SCA; 2018 (2) SACR 28 (SCA) Para 14

view the police cannot be held liable for the further detention, even if the arrest is found to have been unlawful.”

[56] Not only the prosecution has caused an infraction to plaintiff's right but also the court of first appearance by failing to spear head the enquiry about plaintiff's further detention. Plaintiff's bail application should have been finalized on 5 August 2019 if Ginya was given an opportunity to state in court that he is not opposing the release of the plaintiff on bail. Had he been given that opportunity he would obviously have stated his reasons not to oppose the release of the plaintiff on bail. Unfortunately, the National Director of Public Prosecutions and the Department of Justice and Constitutional Development are not cited herein, whose conducts were affront to plaintiff's rights.

Costs

[57] There is no reason why I should deviate from the general rule. It has not been argued before me that there are any grounds for deviation. Therefore, costs should accordingly follow the result.

Order

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

58.1. The defendant is hereby found liable for agreed or proven damages arising from plaintiff's arrest on 07th June 2019 and the resultant deprivation of liberty on that day.

58.2. The defendant is hereby found liable for agreed or proven damages arising from plaintiff's arrest on 2 August 2019 and for his resultant detention up to and including 5 August 2019.

57.3. The defendant is liable to pay the costs of the suit.

Zono AJ
Acting Judge of the High Court

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