

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

15/11/16

Case Number: 47679/2014

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/11/2016
DATE

D. Molefe
SIGNATURE

BEN FAKADE BIKO

PLAINTIFF

AND

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MOLEFE J

[1] Plaintiff instituted an action against the defendant based in the delict of unlawful arrest and detention and seeks damages in the sum of R4 334 600, 00.

[2] The plaintiff was arrested on 16 November 2012 at or near Fochville by members of the South African Police Services (SAPS) on a rape charge of a 9 year

old child. He was detained in a Fochville Correctional facility until on 24 February 2014 when he was found not guilty and was acquitted.

[3] Prior to the trial the plaintiff conceded that the police had reasonable cause for effecting his arrest on a charge of rape of a child in terms of Section 40 (1) (b) of the Criminal Procedure Act 40 of 1977 ("CPA") and in this regard relied on **Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)**;

"Clear that in serious crimes such as those listed in Schedule 1, arrestor could seldom be criticized for arresting suspect in order to bring him or her before court".

Section 40 (1) (b) of the CPA provides that a peace officer may without warrant arrest any person – *("(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1".)*

[4] The issues to be determined by this Court are:

4.1 was the plaintiff's detention post arrest lawful or unlawful?

4.2 if unlawful, the quantum of the plaintiff's damages.

Unlawful Detention

[5] By agreement, counsel prepared the following agreed chronology of events document to assist the court; the facts therein are not disputed.

1. 15/11/2012: class teacher (Mosia) questions complainant due to her offensive smell;
2. 16/11/2012: Constable Mokoena is called to the school;
3. 16/11/2012: complainant made a statement to the police;

4. 16/11/2012: complainant examined by Doctor; J88 report made findings: *"old tear of hymen, child has a sexual transmitted disease in an offensive state"*;
5. 16/11/2012: plaintiff is arrested and held at Fochville police station;
6. 17/11/2012: mother made a statement to the police;
7. 17/11/2012: crime kit of sexual assault collected from the complainant;
8. 18/11/2012: police arrested Abram Oupa Phatlane (Troupa) for the same offence;
9. 18/11/2012: bail information (questionnaire) filled out for the plaintiff;
10. 19/11/2012: plaintiff appeared in court – remanded in custody for further investigation; held at Potchefstroom prison, awaiting trial section;
11. 20/11/2012: plaintiff appeared in court and made an application for bail – application dismissed;
12. 10/12/2012: complainant's mother makes a statement to police;
13. 21/12/2012: plaintiff appears in court – matter remanded for further investigations;
14. 15/01/2013: investigation diary – suspect to be checked for STD found in the complainant;
15. 16/01/2013: plaintiff appears in court and remanded in custody;
16. 09/01/2013; note by prosecutor – suspects in both cases should be taken to the district surgeon and examined to check if they have the similar STD as found in the child;
17. 24/01/2013: accused persons taken to Dr Rambau for examination and their blood samples sent to laboratory;
18. 25/01/2013: inform doctor/district surgeon of STD to determine the suspect;
19. 29/01/2013: awaiting the DNA and STD test results;
20. 25/02/2013: plaintiff appeared in court; remanded for further investigation;

21. 04/03/2013: investigation diary – “STD must be investigated”;
22. 07/03/2013: plaintiff appeared in court; remanded in custody;
23. 13/03/2013: investigation diary – ‘spoke to Prof Gaudji at university of Pretoria re: STDS’;
24. 18/03/2013: both accused persons to be taken to district surgeon for examination and Human Papiloma Virus HPV testing;
25. 22/03/2013: spoke to Crisis Centre to enquire if doctor will re-examine suspect;
26. 15/04/2013: plaintiff appears in court; matter referred to regional court Fochville;
27. 20/05/2013: plaintiff appears in regional court for trial; remanded in custody;
28. 08/07/2013: plaintiff appears in court; matter postponed to 19/07/2013 for copies of docket;
29. 19/07/2013: plaintiff appears in court; remanded in custody to 09/09/2013 for trial;
30. 09/09/2013: plaintiff appears in court; remanded in custody to 08/10/2013;
31. 08/10/2013: plaintiff appears in court; remanded in custody to 03/12/2013;
32. 03/12/2013: plaintiff appears in court; remanded in custody to 04/02/2014 (no intermediary);
33. 04/02/2014: matter remanded to 13/02/2014;
34. 13/02/2014: matter part heard; remanded to 17/02/2014;
35. 17/02/2014: remanded to 24/02/2014 for judgment;
36. 24/02/2014: plaintiff found not guilty and discharged.

Common Cause Facts

[6] Plaintiff was arrested on 16 November 2012 and was released on 24 February 2014 and spent 15 months in the awaiting trial section at Potchefstroom

prison. By end of February 2013 the investigation against the plaintiff was complete and docket ready.

[7] Plaintiff made 12 appearances in court and each time he was refused bail or bail was not considered. At that time, plaintiff was permanently employed, owned a house and had a permanent address and was not a flight risk. A bail questionnaire was completed and plaintiff was found suitable for release on bail.

[8] The chronology as reflected in the docket shows that the plaintiff was kept in custody pending his medical reports on his STD status to link him to the offence. The plaintiff cooperated with the police and submitted himself to medical examinations and tests whilst in custody. Even after medical examination were carried out and blood samples sent to the laboratory plaintiff was still kept in prison.

[9] Plaintiff was one of the two suspects arrested for the same offence and same complainant. The other suspect, Abrahm Oupa Phahlane was also not found guilty and was discharged on 25 October 2013.

[10] Plaintiff's counsel¹ submitted that there was no justification to keep plaintiff in custody pending the trial for more than a year. Once the medical examinations and tests were done he should have been released on bail. Counsel argued that there was manifest injustice in depriving plaintiff of his freedom when even after more than a year at the trial there was still no medical evidence linking or implicating him to the rape charge until he was discharged.

[11] Rape of a child under 16 years is a Schedule 6 offence. Section 60 (11) (a) of the CPA provides that:

¹ Adv. I Hussain SC

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) in schedule 6, the court shall order that the accused be detained in custody until he/she is dealt with in accordance with the law unless the accused having been given a reasonable opportunity to do so addresses evidence which satisfy the court that exceptional circumstances exists which in the interest of justice permit his or her release”.

[12] Defendant’s counsel², submitted that the plaintiff was lawfully arrested on 16 November 2012 in terms of section 40 (1) (b) of the CPA and that the subsequent detention after the lawful arrest was also lawful. The plaintiff was brought before court within a reasonable time on Monday 19 November 2012 and that the subsequent detention after he was brought before court was ordered by the court. Counsel for the defendant contends that after the plaintiff’s first appearance in court, the power of the police that was inherent in the power of arrest ceased. Counsel in this regard relied on **Minister of Safety and Security v Sekhoto 2011 (5) SA 367 SCA par 42** wherein it was held:

“While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court”.

² Adv. V Mashele

[13] It was further submitted on behalf of the defendant that should the court find that the detention was unlawful, the Minister of Police is not liable to compensate the plaintiff for damages suffered as a result of the unlawful detention but that the National Department of Public Prosecution (NDPP) should be liable for damages. Respondent's counsel contends that after the decision by the Public Prosecutor to prosecute the plaintiff and after the application for bail was dismissed by the Magistrate, the continued detention was not ordered by the police but by the court.

[14] There can be no doubt that the crime of rape of a minor child that was investigated and for which the plaintiff was arrested is serious and falls within the purview of Schedule 1 of the CPA. The issue to be determined is whether the plaintiff's subsequent detention for a period of 15 months was lawful.

[15] Deprivation of liberty remains a serious human rights violation. In **Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)** the court said the following at paragraph 18:

"The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundamental of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly".

[16] I agree with the submissions made by plaintiff's counsel that there was no justification to keep the plaintiff in custody pending trial for more than a year. The investigation of the case was completed by the end of February 2013 and the plaintiff was found to be suitable for release on bail. A report was compiled by the

Correctional Services confirming plaintiff's personal details including his employment status and proof of his residence.

[17] The purpose of arrest and detention is to bring the suspect before court. Thereafter less intrusive and oppressive means must be used to bring him to court and to ensure that he stands trial. Keeping a person presumed to be innocent in custody must be considered in exceptional cases. A person's constitutional right to liberty cannot easily be trammelled through the exercise of discretion on the part of an investigating officer (**Coetzee v National Commissioner of Police and Others 2011 (2) SA 227 GNP**).

[18] I am satisfied that the plaintiff's detention post his arrest was unlawful and the defendant has failed to prove that the plaintiff's lengthy detention for more than a year was justified in law.

[19] I have noted with concern that the defendant's defence and argument that the Minister of Police is not liable for plaintiff's damages for unlawful detention but that the Minister of Justice or Director of Public Prosecutions should be the liable party, was not pleaded. Defendant failed to plead that the detention was at the hands of the prosecution and subject to the further discretion of the magistrate. This defence was only raised for the first time in argument.

[20] Defendant is obliged in terms of rule 22 of the Uniform Rules to set out the defence he relies on. The purpose of pleadings is to clarify the issues between the parties, the allegations in the plea must be of sufficient precision to enable the plaintiff to know what the case is he has to meet. The defendant cannot therefore, rely upon a defence which is not pleaded, or which he is not allowed to incorporate into the plea by an amendment. A pleader cannot be allowed to direct the attention

of the other party to one issue and then, at the trial, attempt to canvass another. (See **Erasmus Superior Court Practice. Volume 2 DI 254 to 256. Second edition Van Loggerenberg**). On this basis alone, this defence should be disregarded and fails.

[21] There is also no merit on this defence. When a matter is “*postponed for further investigation*” as is the case in this matter, it means that the police are still investigating and the matter is not ready for trial. Chronology shows that from end of February 2013 to the date of the trial, the police repeatedly claimed to be waiting for blood results. However, no such results materialized and the matter was set down for trial on the same docket as it was in February 2013.

Quantum of Damages

[22] When assessing damages in matters such as the present, the evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest and the nature and duration of the detention is taken into account³. It was submitted on behalf of the plaintiff that he was locked up in the police cell for four days sharing the cell with 20 people. He had to sleep on the floor with a single dirty blanket. He was kept at the awaiting trial section in prison for more than a year. The cell was overcrowded with 49 prisoners in it. The conditions in prison were deplorable and unbearable. He was informed that for the charge he faced, there were prospects of him spending the rest of his life in prison and this caused him enormous stress. Plaintiff is a 47 year old man and was at the time of the arrest, employed as a welder earning R600 per week. Plaintiff's counsel submitted that his loss of earnings for a

³ See *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 935 B-F

year is R28 800 and that he should be awarded general damages in the sum of R1 825 000, 00 calculated at R5000, 00 per day.

[23] The purpose of an award for general damages in the context of the matter such as the present, is to compensate the claimant for deprivation of personal liberty and freedom as well as the mental anguish and distress.

In **Minister of Safety v Tyulu 2009 (5) SA 85 (SCA)** at par 26 Bosielo AJA (as he was then) emphasized that the primary purpose is *“not to enrich the claimant but to offer him or her some much-needed solatium for his or her injured feelings”*.

[24] Although the determination of an appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Defendant’s counsel referred me to the relevant comparisons made in **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA at 325)**:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that”.

Defendant’s counsel also referred me to the awards made in the following cases:

Thandano v Minister of Law and Order⁴; Minister van Wet and Order v Van den Heever⁵ and Manase v Minister of Safety and Security⁶.

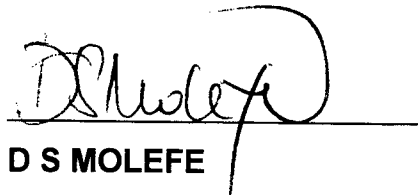
⁴ 1991 (1) SA 702 AT 707 B

⁵ 1982 (4) SA 16 ⁶ 2003 (1) SA 567

[24] As indicated earlier, awards made in previous cases can only serve as guidelines. An appropriate award will ultimately depend on the particular facts and circumstances of each case. I take into account the circumstances of the arrest; the duration of the detention, the indignity of being confined in prison, the personal circumstances of the plaintiff (albeit limited); the awards made in previous comparable cases and the gradual devaluation of the currency. Taking into account all the circumstances in this case, I deem R450 000, 00 to be a just and fair amount of damages for the plaintiff. The defendant is also ordered to pay an amount of R28 800 for plaintiff's loss of earnings.

[25] In the result the following order is made:

1. *The defendant is ordered to pay the plaintiff an amount of R478 800, 00;*
2. *Interest on the amount shall run at the prescribed rate from date of judgment to date of final payment;*
3. *The defendant is ordered to pay the plaintiff's costs of suit.*


D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Appellant	:	Adv. I Hussain SC
Instructed by	:	Russia Langa Attorneys
Counsel on behalf of Respondent	:	Adv. V Mashele
Instructed by	:	State Attorneys
Date Heard	:	28 October 2016
Date Delivered	:	15 November 2016