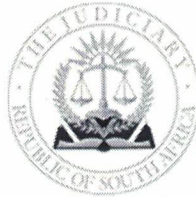


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 735/2014

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| (1) | REPORTABLE: <u>YES/NO</u> |
| (2) | OF INTEREST TO THE JUDGES: <u>YES/NO</u> |
| (3) | REVISED. |
| DATE: <u>6/09/18</u> SIGNATURE: <u>[Signature]</u> | |

In the matter between:

PHASWANE BAFANA JOHANNES

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff Bafana Johannes Phaswana has instituted an action against the defendant the Minister of Police arising out of an incident which happened on 15th March 2012.
- [2] The plaintiff alleges that he was wrongfully and unlawfully arrested and detained by members of the South African Police Services (SAPS) who were at all material times acting within the course and scope of their employment. He further alleges that he was arrested without a warrant and that as a result of the wrongful and unlawful conduct by the members of the SAPS, he had suffered damages in respect of pain and suffering, emotional dignity, emotional distress, violation of personal dignity, harassment and embarrassment. The plaintiff further alleges that he was brought to court after the expiry of 48 hours after his arrest. The plaintiff claim a globular sum of damages in the amount of R500 000-00.
- [3] The action is defendant. The defendant does not dispute that the plaintiff was arrested by members of the SAPS. The defendant denies that the arrest and detention was unlawful and aver that the plaintiff was arrested by the members of the SAPS in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) since the members of the SAPS reasonably believed him to have committed an offence listed in schedule 1 of the CPA, and further that they were justified in arresting the plaintiff without a warrant. The defendant denies that the plaintiff was brought to court after the expiry of 48 hours after his arrest. According to the

defendant the plaintiff was arraigned to court on the 19th March 2012 and that any further detention thereafter was not at their instance.

- [4] The parties agreed to separate merits and quantum. They further agreed that the defendant bore the onus of showing or proving that the arrest and detention of the plaintiff was justifiable and lawful.
- [5] The defendant called Alfred Mashudu Muladzi as its first witness. He testified that during 2012 he was the captain stationed at Makhado SAPS. He is the one who arrested the plaintiff on the 15th March 2012 during the evening.
- [6] He stated that when he reported for duty in the evening he found a docket opened for alleged rape of an 11 year old boy (victim). He perused the A1 statement in the docket. Later the victim came being accompanied by a church member who was the complainant's guardian. The victim told him where the plaintiff was residing. He together with the victim, complainant and his crew went to the plaintiff's homestead where he arrested the plaintiff.
- [7] He stated that before he arrested the plaintiff, he introduced himself, showed the plaintiff his employment card, and told him the purpose of their visit. The plaintiff denied having raped the victim. The plaintiff refused to accompany them and he grabbed the plaintiff by his shirt and took him to the police vehicle.

- [8] He further stated that he took the plaintiff to the police station, recorded his particulars in the occurrence book, and explained to him his constitutional rights. After explaining his constitutional rights, the plaintiff signed them, and thereafter he locked him in the police holding cells at Makhado SAPS. Thereafter he did not have any further dealings with this matter.
- [9] The witness was cross examined and he stated that before he arrested the plaintiff, he had a statement of the victim which positively identified the plaintiff, and also the fact that he was with the victim who pointed to him where plaintiff resided and also the place where the alleged rape took place. He conceded that he did not explain to the plaintiff his constitutional rights when he arrested him, but only did so at the police station for the purposes of detaining him.
- [10] The defendant called Enos Mpho Mfuni as its second and last witness. He testified that he is the warrant officer responsible for the child protection and family violence. He was the investigating officer in the plaintiff's case. He is the one who took a warning statement and finger prints from the plaintiff. Thereafter he took the plaintiff to hospital for blood to be taken from him for purposes of DNA analysis.
- [11] He stated that he also took statements from other witnesses. Thereafter he was responsible to make sure that the plaintiff appeared in court. He took the docket to the control prosecutor. The plaintiff's first appearance in court was on the 19th March 2012, but he is not the one who physically took the plaintiff to court. He was also not in court when the plaintiff made his first appearance.

- [12] He further stated that on the 22nd March 2012 he went to the control prosecutor to fetch the docket. On the docket there was no entry as to when the plaintiff appeared in court. However, the notes on the diary showed that the plaintiff appeared in court on the 19th March 2012. The date which appears on the charge sheet that is in the bundle of documents marked "Index C: Bundle of various documents" is the date of the plaintiff's first appearance in the regional court. The public prosecutor did not endorse the date of the 19th March 2012 on the docket.
- [13] The witness was cross examined and he conceded that he did not have the charge sheet of the district court in which the plaintiff made his first appearance. He conceded that he did not physically see the plaintiff appearing in court on the 19th March 2012, but was only told about that.
- [14] That concluded the evidence of the defendant and they closed their case. The plaintiff closed its case without leading any evidence. Both parties submitted their closing address.
- [15] It is trite that a person's liberty, personality and dignity are usually compromised by wrongful or malicious arrest. An arrest or detention is prima facie wrongful and unlawful and it is for the defendant to allege and prove the lawfulness of the arrest or detention once admitted (**See Lombo v African National Congress 2002 (5) SA 668 SCA**).
- [16] It is also trite that in the absence of a warrant an arrest is lawful if it is effected in terms of section 40(1) (b) of the CPA. However there are four jurisdictional facts which must exist before the power conferred by s 40(1) (b) may be invoked. Those jurisdictional facts are that the arrestor must be a peace officer, he must entertain a suspicion, it must be a suspicion that the arrestee

committed an offence referred to in schedule 1 of the Act, and that suspicion must rest on reasonable grounds. (See **Duncan v Minister of Law and Order 1966(2) 805 (A)**)

- [17] It is common cause that the arresting officer captain Mulaudzi is a peace officer. There was a complaint that was laid against the plaintiff. A docket was opened and a statement was also made by the complainant. Before captain Mulaudzi could act on the complaint laid, the complainant and the victim arrived at the police station. The complaint was about an alleged rape which is a schedule 1 offence. The complainant and the victim verified the complaint and even told captain Mulaudzi that they knew where the plaintiff was residing. Captain Mulaudzi was having first-hand information.
- [18] The complaint was about an alleged rape of minor boy below the age of the 16 years. Even though the victim was below the age of 16 years, he was accompanied by the complainant who is his guardian. Both the complainant and the victim verified what was contained in the A1 statement. Thereafter the complainant and the victim took captain Mulaudzi to the plaintiff's homestead where the victim identified the plaintiff as perpetrator. Rape of a child of below age of 16 is a very serious offence and fell within the ambit of schedule 1 offences. In my view even if the victim was below the age of 16 years, there were no grounds upon which captain Mulaudzi could have doubted his positive identification of the plaintiff. Captain Mulaudzi did not act merely on the basis of the A1 statement but the complainant and the victim were personally there to give him first-hand information, and even took him to where the plaintiff resided where the victim positively identified him. Therefore, in my view, the

remaining three jurisdictional facts were met and the arrest of the plaintiff was lawful and justifiable.

[19] Regarding the detention of the plaintiff, it is trite a person arrested with or without a warrant must be brought before a lower court as soon as possible before the expiry of 48 hours after arrest.

[20] Section 50(1) of the CPA reads as follows:

“50(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his her right to institute bail proceeding.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

(i) No charge is to be brought against him or her; or

(ii) Bail is not granted to him or her in terms of section 59 or 59 A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

(i) Outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day.”

- [21] In **Mashilo v Prinsloo [2012] ZASCA 146 (28 September 2012)** at para 16 Tshiqi, JA said:

“...The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expires before or during the weekend. Expedition relative to circumstances is what is dictated by the subsection and the detention. Deliberately obstructive behaviour, as was evidenced by Mashilo, is not tolerated. “

- [22] The plaintiff was arrested on the 15 March 2012 a date which the defendant alleges that it was on a Thursday. Therefore, the 48 hours was expiring on Monday the 19th March 2012. The defendant contends that the plaintiff's first appearance in the district court was on the 19th March 2012. However, the defendant has failed to attach copy of the charge sheet in the district court where the plaintiff allegedly made his first appearance. Copy of the charge sheet that has been included in the bundle of merits documents shows that the accused first appearance in the regional court was on the 21st of 2012 and the month is not clear. It is common cause that the 21st of March is a public holiday. However, it is not uncommon for an accused person to appear in court after hours, over the weekend or a public holiday for the purposes of a bail application.

- [23] The defendant's second witness, warrant officer Mfuni testified that on the 19th March 2012 he book the plaintiff's docket to the control prosecutor as the plaintiff was appearing in court that day. However he is not the one who

physically took the plaintiff to court, and was not present when the plaintiff appeared in court. He collected the docket from the control prosecutor on the 22nd March 2012, and that on the notes of the diary it was noted that the plaintiff appeared in court on the 19th March 2012. However, the defendant has failed to discover the notes of diary or to include them in the bundle of merits documents.

[24] The plaintiff in his particulars of claim has stated that he was brought to court for his first appearance after the expiry of 48 hours after his arrest. The defendant was all along aware of this contention by the plaintiff but opted to discover the charge sheet of the plaintiff's first appearance in the regional court which did not advance its case, but instead strengthened the plaintiff's case. They also failed to discover the diary which warrant officer Mfuni alleges that it has recorded the plaintiff's first appearance in the district court. Counsel for the plaintiff has correctly conceded that as far as it relates to the plaintiff's first appearance in the district court, it is very sketchy. The only version that the court is having is that which appears on the plaintiff's particulars of claim. With the documents submitted by the defendant, it cannot be established as to when the plaintiff made his first appearance in the district court. The onus is on the defendant to show that the detention of the plaintiff was also lawful.

[25] In my view the defendant has failed to show that the plaintiff was brought in the district court before the expiry of the 48 hours after his arrest. The 48 hours was expiring on Monday the 19th March 2012. Therefore, the plaintiff's further detention after the 19th March was unlawful.

[26] It therefore follows that on the alleged unlawful and wrongful arrest, the defendant has discharged the onus in proving that the arrest of the plaintiff was

lawful and justified. However, in relation to detention of the plaintiff, the defendant has failed to discharge the onus resting on it to prove that the detention was lawful and justified.

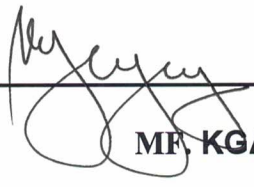
[27] I turn to costs. It is trite that costs follow the suit. However in this case both parties were partially successful. It will therefore, be just and equitable if each party pays his or its own costs.

[28] In the result I make this order

(28.1) The Plaintiff's claim on alleged unlawful and wrongful arrest is dismissed.

(28.2) The defendant is liable to pay 100% of the plaintiff's proven or agreed damages caused by the unlawful detention.

(28.3) Each party to pay his or its own costs.



MF. KGANYAGO J
JUDGE OF THE HIGH COURT POLOKWANE,
LIMPOPO DIVISION

APPEARANCE:

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|----------------------------------|----------|--------------------------|
| COUNSEL FOR THE PLAINTIFF | : | Adv Ramagalela |
| INSTRUCTED BY | : | Mabunda Attorneys |

COUNSEL FOR DEFENDANT : Adv LETSWALO
INSTRUCTED BY : State Attorney Polokwane

DATE OF HEARING : 14 August 2018
DATE OF JUDGEMENT : 6th September 2018