REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Case no: 4807/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO THE JUDGES: NO
(3) REVISED.

DATE: 25/04/2025 SIGNATURE: [redacted]

In the matter between:

MAKGOMO CHRISTINA MASHA — Plaintiff

And

MINISTER OF POLICE — Defendant

JUDGMENT

MB LETSOALO AJ

Introduction

[1] This is judgment with regards to the application for absolution from the instance made at the close of the Plaintiff's case in terms of Rule 39(6) of the Uniform Rules of this court. The action is based on an alleged arrest and detention without a warrant of an elderly woman emanating from a domestic violence. The Defendant denies the arrest and detention resulting in the Plaintiff adducing evidence first.

Pleadings

[2] According to the Particulars of Claim, the Plaintiff's case is for compensation against the Defendant in his employer capacity for her unlawful arrest and detention by the Sekhukhune police officers. Averments are that she was arrested for common assault on the 19th of October 2020 from her home at about 13 hours and released few hours later. Further that she was detained in deplorable and inhumane conditions at the Sekhukhune Police Station.

[3] The Defendant delivered a Plea denying the arrest, detention and unlawfulness of the arrest thereof. The Special Plea of non -compliance with the pre- litigatory notice and service of the Summons which was raised was later abandoned after Replication.

[4] Per parties' consent and incorporated in the pre-trial minutes, the merits are separated from the quantum. As a result no evidence was led nor will be considered herein under.

[5] The parties were directed by the court to deliver Heads of Argument for their respective parties as follows, the Plaintiff's by 4th February 2025 however same was presented to the presiding officer on 3rd April 2025; and the Defendant's by 11th February 2025 however same was presented on 19th March 2025.

Summary of evidence for the Plaintiff

[6] The court was presented with the testimony of both the Plaintiff and her son. On the 19th of October 2020 the Plaintiff was arrested from her home by two police officers clothed in blue police uniform. They showed her their identification card and told her she is arrested for assaulting her husband. She boarded the bluish, white and curry coloured marked police van as instructed by the police officers. Her son joined her in the same van and they were transported to the police station situated in Schoonoord (Sekhukhune SAPS).

[7] At the police station in an office other male and female police officers dressed in blue police uniform informed her that she is arrested for assaulting her husband. She responded in that they did not have physical assault but altercation. The police officer took her fingerprints, made her sign some paper, informed her to appear at court in Polokwane and then released.

Evidence for the Defendant

[8] No evidence was led on behalf of the Defendant at the close of the Plaintiff's case.

Absolution from the instance

[9] Application for absolution from the instance was brought on behalf of the Defendant. Argument for the Defendant is that no prima facie case was made out that warrants an answer from the Defendant on basis that; (a) vicarious liability was not pleaded (or established); (b) the people who allegedly arrested and detained the Plaintiff are not police officers; and (c) the case is hopeless as there is no credible evidence. It was submitted as a result that the application for absolution from the instance should be granted as the court might not find in the Plaintiff's favour at the end of the trial.

[10] I was referred to Ex Parte Minister of Justice: in re R v Jacobson and Levy 1939 AD 466 at 478 "prima facie evidence, in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. If the prima facie evidence or proof remains rebutted at the close of the case, it becomes "sufficient proof of the fact or facts (on the issues with which it is concerned) necessary to be established by the party bearing the onus of proof...."

[11] Reliance regarding hopelessness submission was on Children's Resource Centre Trust v Pioneer Foods (50/2012) [2012] ZASCA 182(29 November 2012) in para 35 that stated "...Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if steps directed at procuring evidence will not sustain the cause of action on which the claim is based. In other words if there is no prima facie case then it is factually hopeless".

[12] In contention it was submitted that the Plaintiff has made out a prima facie case upon which a court might find in her favour. It was argued that there is evidence about the Plaintiff's arrest and detention not preceded by a warrant of arrest and that the arresting officer did not exercise the discretion about the arrest. It was argued further that an arrest and detention without warrant of arrest is prima facie unlawful therefore the onus has reversed for the Defendant to prove the lawfulness of both the arrest and detention.

[13] I was referred to Ralekwa v Minster of Safety and Security 2004 (1) SACR 131 (T) and also Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568(A) at 589 E-F which held that "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just that the person who arrested or causes the arrest of another should bear the onus of proving that his action was justified in law".

[14] Further reference is made to Nissan South Africa (Pty) Ltd v Senyatsi (1319/21) [2024] ZAGPPHC 293 (22 March 2024) in para 16 "In deciding whether absolution from the instance should be granted at the close of the plaintiff's case it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true".

Legal framework and analysis

[15] Rule 39(6) of the Uniform Rules of this court " At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate".

[16] The test applicable for absolution from the instance at the end of the Plaintiff's case is formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H as follows: "When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[17] The amplified test as set out in Gordon Lloyd Page & Associates v Riviera and Another 2001 (1) (SCA) at 92E-93A "This implies that a plaintiff has to make out a prima facie case-in the sense that there is evidence relating to all the elements of the claim- to survive absolution because without such evidence no court could find for the plaintiff... Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interest of justice."

[18] The burden of proof rests on the Plaintiff as no admission of liability was made by the Defendant. The absolution from the instance may be granted at the close of either the Plaintiff's case[1] or the Defendant's case at the end of the trial. The Defendant herein had not yet led evidence and therefore the Defendant is entitled to have sought the order for absolution from the instance. Tsotetsi and others v Minister of Police (26369/2021) [2023] ZAGPJHC 129 (20 February 2023) following Scheepers v Video & Telecom Services held in para 11 that " In a case where the onus rests upon the Plaintiff, a Defendant is entitled to ask absolution on the ground that a prima facie case was not made out. Further that such an order does not bring finality to a matter".

[19] It was argued that the court is faced with the evidence of a single witness and that there is no corroboratory evidence by the Plaintiff's late husband (the complainant). Further that evidence regarding the complainant is hearsay since he passed away and thus cannot be led. It was argued for the Plaintiff that there is sufficient evidence adduced by both the Plaintiff and her son about the Plaintiff's arrest and detention and that this application is ill conceived.

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[1] Rule 39(6) Uniform Rules of Court.

[20] The courts have regarding absolution from the instance in a criminal case interpreted the 'no evidence' to mean no evidence upon which reasonable court acting carefully may convict: R v Herholdt (11156) 1957 ZASCA 22 (7 May 1957). I see no reason for the same interpretation not to find application in civil matters. Absolution from the instance '[It] is premised on the lack of evidence upon which a reasonable presiding officer might or could find for the Plaintiff'[2]. This court was presented with evidence of the Plaintiff and her son about the arrest and detention of the Plaintiff from her home by the Sekhukhune SAPS police officers. The argument for the Defendant cannot therefore be sustained.

[21] Another factor raised was non- disclosure of evidentiary documents. I concur that the disclosure of the docket contents could substantiate the oral evidence for the Plaintiff as prima facie evidence which may become conclusive proof of the cause of action if not rebutted. See Jacobson and Levy above. However as the Defendant is yet to present his case, there are probabilities that he may produce evidence in the form of evidentiary documents in order to refute liability. The fact that a party has not produced evidential material cannot be a ground to conclude that a prima facie case has not been established.

[22] It was argued that the Plaintiff's case is fatal as; the witnesses were unable to identity by names the relevant police officers, the Particulars of Claim have not averred vicarious liability and no evidence was led thereto. Contention for the Plaintiff is that the evidence established that the plaintiff was arrested by the police officers that were in their police uniform and were using their marked police vehicle. It was argued that not knowing the names of the police officers is not a reason to dispel the Plaintiff's case.

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[2] South Coast Furnishers CC v Secprop 30 Investments [Pty] Ltd 2012(30) SA 431 KZP at para 15.

[23] Minister of Safety & Security v Slabbert (668/2008) [2009] ZASCA 163 (30 November 2009) in para 11 states that "The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

[24] The court in addition to the purpose of the pleadings in Slabbert above was required to consider, the principle of vicarious liability as defined in Hirsch Appliance Specialist v Shield Security Natal (Pty) Ltd 1992 (3) SA 643 ; "In general the law does not hold one liable for the wrong of another but sometimes it does. So for example it holds one vicariously liable when one's servant commits a wrong in the course and scope of his employment. That this is so today is well settled... By vicarious liability, I mean a person is liable for the wrong of another although he is himself free from guilt or blameworthiness...."

[25] There is indeed evidence for the Plaintiff that she was arrested and detained by the police officers. Details about the genders and dress code of people that attended at the Plaintiff's home, at the police station, the type of vehicle used during the process, the identification as police officers, the precinct where witnesses were taken to was clearly presented. Other than these details, the purpose of the peoples' presence at her home and carrying out the said purpose, profiling of the Plaintiff and warning her to appear at court could only be done by the police officers in the absence of specific circumstances to the contrary as held in Senyatsi above.

[26] Regarding the non- pleaded vicarious liability it was argued for the Plaintiff that in terms of the minority judgment in Zealand v The Minister of Justice and Constitutional Development and Another [2008] ZACC 3 (11 March 2008) that it suffice for the Plaintiff to only plead that he was arrest then the onus rest on the arrestor to justify same. in South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A) at 714G which as referred to in Slabbert at para 12 it was said that: "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". It can be gathered cumulatively from the Particulars of Claim and evidence that all the relevant police officers at her home and at the police station were acting during the course and scope of their employment with the Defendant.

[27] A party has a duty to allege in the pleadings the material facts upon which it relies (own emphasis), see Slabbert above. The Particulars of Claim do therefore meet the purpose of the pleadings in that the Defendant is not ambushed but knew the case it had to meet. The Plaintiff has not as a result failed in her duty regarding pleadings and I find this to be one of those circumstances where reliance may be had on non- pleaded fact[3]. Therefore the names of the relevant police officers are immaterial. Further, the Defendant being the executive authority was cited in his capacity as "the employer and custodian of the South African Police Services".

[28] Based on the factors above it was argued that there is no credible evidence to sustain the Plaintiff's case. Put differently, that the Plaintiff has failed to establish a prima facie case warranting the reversed onus. Other than Hurley above I was also referred to other authority dealing with reverse onus once it is proofed that there was arrest or detention.

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[3] See Unicorn Shipping Lines above.

[29] Zealand v The Minister of Justice and Constitutional Development and Another [2008] ZACC 3 (11 March 2008) in para 25 "This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification".

[30] According to the Particulars of Claim the Plaintiff was arrested by the Sekhukhune SAPS Police Officers and detained at the Sekhukhune Police Station. The arrest and detention of the Plaintiff are not admitted in the Plea. The Plaintiff gave detailed evidence as to the when and where her arrest and detention was effected, the manner, the reason and what transpired at the police station. Applying Zealand and the trite principle regarding an arrest to this case, I concur with the submission for the Plaintiff that an arrest is prima facie unlawful and that the arrestor must justify same. The evidence for the Plaintiff supports the material facts relied upon to establish the Plaintiff's claim if not rebutted as stipulated in Jacobson above.

[31] Final argument for the Defendant regards tenability of the Plaintiff's case. According to Pioneer Foods in para 35 above a case is factually hopeless if there is no prima facie case , in other words no credible evidence to sustain it or is legally hopeless if it is advanced on untenable ground or susceptible to an exception.

[32] The right not to be deprived of freedom arbitrarily or without just cause was dealt with in Zealand as follows in para 29 "The applicant argues that his detention unreasonably and unjustifiably infringed his rights under section 12(1)(a) of the Constitution. That section

provides: "Everyone has the right to freedom and security of the person, which includes the right– (a) not to be deprived of freedom arbitrarily or without just cause".

[33] The court went further in para 52 regarding public law duties and private law remedies that "...I can think of no reason why an unjustifiable breach of section 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention. Moreover, South Africa also bears an international obligation in this regard in terms of article 9(5) of the ICCPR, which provides that- "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[34] It is evident that the Plaintiff pleaded with sufficient particularity her cause of action and adduced evidence regarding her arrest and detention. When Zealand is applied to it the arguments therefore for the Plaintiff that her arrest and detention must be both substantively and procedurally fair holds water. The Plaintiff's cause of action for unlawful arrest and detention is therefore not legally untenable. Considering the prima facie evidence established above, it cannot be concluded that there is no credible evidence that could sustain her case and thus factually hopeless.

[35] The Plea was also criticised making reference to the golden rule of pleading in terms of Rule 22 of the Uniform Rules. As correctly refuted during the hearing, it is too late to challenge the Plea from the bar. It may perhaps be argued at the end of the Plaintiff's case but definitely not at this stage for the absolution from the instance application.

Conclusion

[36] There is oral evidence by the Plaintiff and her son that the Plaintiff was arrested and detained without a warrant of arrest, by the Sekhukhune SAPS Police Officers. I find that a prima facie evidence is adduced and that if not rebutted a court applying its mind reasonably to the said evidence at the end of the trial could or might find in favour of the Plaintiff[4]. As the Plaintiff's case meet the test stipulated in Claude Neon Lights , the interest of justice does not warrant that the absolution from the instance be granted hereto and I intend not granting same[5].

[37] There are no justifiable grounds advanced as to why costs for this application should be awarded against either party. I deem it fit, just and reasonable to have costs considered in whole at the end of the trial.

Order

[38] I make the following order;

1. Application for the absolution from the instance is dismissed.
2. Costs in the cause.

LETSOALO MB

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE; LIMPOPO DIVISION

[4] See Claude Neon Lights above. See also Jacobson above.
[5] See Riviera above.

DATE OF HEARING : 28.01.2025

DELIVERED : This judgment was handed down electronically by circulation to the parties' legal representatives by email, and release to SAFLII. The date and time for hand-down is deemed to have been at 10:00 on 25 April 2025.

APPEARANCES

FOR THE PLAINTIFF : ADV H MPE

INSTRUCTED BY : RAMAESELA MPHAHLELE ATTORNEYS

FOR THE DEFENDANT: ADV VP SAKO

INSTRUCTED BY : OFFICE OF THE STATE ATTORNEY, POLOKWANE