

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 5729/2019

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

31 MAY 2021


JUDGE E MATOJANE

PHILELE RADASI

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 May 2021.

MATOJANE J**Introduction**

[1] It is common cause that Plaintiff was arrested without a warrant by Sgt Morotolo, a member of the South African Police Services (SAPS) and detained. She was taken to Court on Monday, 17 September 2018, where she was kept in the court cells until she was released without appearing in Court.

[2] Ms Radasi alleges that her arrest and detention was unlawful, and she claims R450 000.00 from the Minister of police in damages arising from her alleged wrongful arrest. The defendant has conceded the arrest and detention of the Plaintiff and has pleaded that the arrest was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA"), which permits a peace officer to arrest any person reasonably suspected of having committed an offence referred to in schedule 1 other than the offence of escaping from lawful custody.

Plaintiff's evidence

[3] The Plaintiff testified that she was asleep on 27 May 2018 when she got a call from her boyfriend at around 10 PM. The boyfriend asked her to come to the gate. He seemed drunk and was in a hurry as there was a car waiting for him. The boyfriend gave her a pair of tackies and told her to keep them for him. She took the tackies and went back to sleep.

[4] On 14 September 2018, her boyfriend's sister came to her home and informed her that her boyfriend had sent her to collect the tackies as the police were looking for them. She suggested to her that they all go to the police station. At the police station, she was informed that her boyfriend had robbed the complainant of the tackies, and she demanded R900.00 for the new pair.

[5] She informed the police officials that she was not with her boyfriend when he robbed the complainant, and neither was she aware of the robbery. She also told the police that she did not have the R900.00 to pay for the tackies.

[6] Present at this interview was the Plaintiff, the boyfriend's sister, another lady who accompanied the sister, Sgt Mrotolo and another male police officer, Sgt Ngoben. The boyfriend's sister informed the police that the Plaintiff must also be arrested so that her family could also suffer. Her boyfriend's sister told the police that she was pregnant with somebody else's child and robbed people. Plaintiff testified that her boyfriend's family did not like her and preferred another woman with whom her boyfriend has a child.

[7] She was after that placed under arrest and detained alone in a dirty, cold cell. Later in the evening, another prisoner was brought in. The prisoner appeared mentally unstable as she was screaming and doing "funny things". She never had a bath for three days as the shower was not working

The evidence of the defendant

[8] Detective Sgt Mrotolo testified that she had been a police officer for 16 years. On 14 September 2018. She testified that the relatives of the Plaintiff's boyfriend, who brought her to the police station, informed her that the Plaintiff was involved in an armed robbery. She alleges that the Plaintiff did not deny that she took part in the robbery. She, however, states that in the warning statement she took from the Plaintiff, the Plaintiff denied that she took part in the armed robbery.

[9] The Plaintiff informed her that the tackies were brought to her by her boyfriend and agreed that they should go and fetch them. The Plaintiff was cooperating. They went to her home and retrieved the tackies. She testified that she placed the Plaintiff under arrest for armed robbery as her boyfriend had earlier told her that the Plaintiff was present during the robbery.

[10] Under cross-examination, she testified that she interviewed the Plaintiff's boyfriend in the cells four months earlier on 29 May 2018 and took his warning

statement. She cannot remember if she wrote in the statement that Plaintiff's boyfriend implicated her in the robbery. She also could not remember whether she noted in her investigation diary whether the boyfriend told her that the Plaintiff participated in the robbery. She further could not explain why the said warning statement was not in the docket nor why it was never discovered.

[11] The second witness for the defendant was Sargent Hlamalani Ngobeni. He testified that he has been a police officer for twelve years and confirmed that he was present at the police station when the Plaintiff came to enquire if the police were looking for tackies. He testified that he concluded from the statement by Sgt Pelotona, who arrested the Plaintiff's boyfriend, that the Plaintiff was at the scene of the robbery where her boyfriend gave her the tackies. He conceded under cross-examination that he never enquired from the Plaintiff about her whereabouts when her boyfriend gave her the tackies. He stated for the first time that during the interview, the Plaintiff said that she was with her boyfriend during the robbery but never took part. Sgt Ngobeni denied that the Plaintiff was pregnant at the time of arrest, and the Plaintiff produced a birth certificate of her child, which showed conclusively that she was pregnant at the time of the arrest.

The law as applied to the facts

[12] Section 12(1)(a) of the Constitution provides that everyone enjoys a fundamental right to freedom and security, including a right 'not to be deprived of freedom arbitrarily or without just cause'. Section 40(1) of the Criminal Procedure Act 51 of 1977 grant discretionary powers to peace officers to arrest a person without a warrant as long as the peace officer reasonably suspects that a suspect has committed an offence referred to in schedule 1 other than an offence of escaping from lawful custody.

[13] The jurisdictional facts for section 40(1)(b) defence are set out **Duncan v Minister of Law and Order**¹, namely, that the arrestor must be a peace officer who

¹ 1986 (2) SA 805 (A) at 818G-H.

entertained a suspicion, based on reasonable grounds, that the arrestee had committed an offence referred to in schedule 1.

[14] In **Minister of Safety and Security v Sekhoto & another**,² the Supreme Court held that:

"Once the jurisdictional facts for an arrest . . . in terms of any paragraph of section 40(1) . . . are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest.

[15] It would fall to this Court to satisfy itself, firstly, if the arresting officer had reasonable grounds to carry out the arrest and, secondly, (if the answer to that is yes) if the arrest was necessary.

Reasonable suspicion

[16] In my view, the concept of a reasonable suspicion requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence. In **Mabona v Minister of Law and Order**³, Jones J held that the test is an objective one involving an enquiry into whether a reasonable person in the arrestor's position and having the same information would have considered that there were 'good and sufficient grounds' for suspecting that the arrestee had committed a schedule 1 offence, secondly, the arrestor is required to analyse and assess the quality of the information critically and not accept it without checking it where it can be checked. Thirdly, while the section requires a 'suspicion but not certainty', that suspicion must be based 'upon solid grounds' because if it is not, it is 'flighty or arbitrary' and not reasonable suspicion.

² 2011 (1) SACR 315 (SCA), paras 28-29.

³ 1988 (2) SA 654 at 658 E-H

[17] The gist of Sgt Mrotolo's evidence is that she arrested the Plaintiff based on what she was orally told by the Plaintiff's boyfriend four months earlier and what his sister told her during the interview. She undertook no further investigations before arresting the Plaintiff. She ignored the various statements in the docket that shows that the Plaintiff was not involved in the robbery.

[18] Her suspicion that the Plaintiff took part in an armed robbery does not qualify as a reasonable one for the following reasons. First, the complainant and her boyfriend in the armed robbery case both made statements under oath stating that they were robbed at gunpoint by three black males when they went out to buy food. Sgt Mrotolo admits that the two statements were in the docket and that she has read them. She concedes that no mention is made of a female person who was with the robbers.

[19] Second, Sgt Pelotona, who arrested the Plaintiff's boyfriend, made a statement. Sgt Morotolo confirmed that the statement was in the docket when she interviewed the Plaintiff's boyfriend the day after the robbery. Sgt Pelotona stated that whilst patrolling with his colleagues along Bendile Road in Soweto, they were stopped by one of the complainants who reported that he was robbed by three African males driving in a white bakkie. They chased the bakkie, and two males fell from the bakkie and ran away. They arrested the occupants of the bakkie and found a Samsung cellphone and a pair of tackies in their possession. No mention is made of a female person amongst the robbers.

[20] Sgt Morotolo testified that the relatives of Plaintiff's boyfriend, who brought her to the police station, told her that Plaintiff was involved in an armed robbery. She alleges that the Plaintiff did not deny that she took part in the robbery. She, however, states that in the warning statement she took from Plaintiff, Plaintiff denied that she took part in the armed robbery.

[21] She testified further that prior to interviewing the Plaintiff and four months earlier, the Plaintiff's boyfriend had told her that he handed the tackies to the Plaintiff at the robbery scene.

[22] Under cross-examination, Sgt Morotolo testified that she took a warning statement from the Plaintiff's boyfriend but could not remember whether she mentioned in the statement that the Plaintiff was involved in the robbery. She could not explain why the said warning statement was not in the docket and accordingly not discovered. She could also not explain why she did not arrest the Plaintiff in May after her boyfriend had implicated her in the armed robbery. It bears mentioning that the Plaintiff was in a relationship with her boyfriend for over five years at the time, and their eldest child was three years old, and the Plaintiff was expecting their second child. This raises the question of why should the boyfriend implicate the mother of his children in an armed robbery.

[23] Sgt Mrotolo conceded under cross-examination that the Plaintiff came to the station with her boyfriend's sister to enquire whether it was true that the police were looking for the tackies. She also admitted that the Plaintiff told her that the tackies were brought to her home by her boyfriend. She acknowledged that she proceeded to place the Plaintiff under arrest without first verifying the information which she provided.

[24] Sgt Ngobeni was present during the interview. He contradicted the evidence of Sgt Morotolo in a material respect. He testified that the Plaintiff said that she was with her boyfriend during the robbery but never took part. He was adamant that according to the arresting statement drafted by Sgt Morotolo the Plaintiff admitted that she was at the scene when her boyfriend committed the robbery.

[25] Sgt Ngobeni vehemently denied the averment by Sgt Morotolo that he was the investigating officer. He said that she was telling a lie. It also bears mentioning that Sgt Mrotolo said that she was the investigating officer only to deny that under cross-examination. She sought to distance herself from her the unlawful arrest of the Plaintiff.

[26] I find the evidence of the two police officers to be neither credible nor reliable, and I reject it. There was no information in the docket for Sgt Mrotolo and Sgt Ngobeni to form a reasonable suspicion that the Plaintiff might be involved in the commission of a crime. The jurisdictional requirements in s 40(1) were accordingly not established. The arrest and subsequent detention was unlawful as it was not intended to secure

the attendance of the Plaintiff at a criminal court but was intended to harass, intimidate and harm the Plaintiff. She was not a flight risk and had a fixed address which was known to Sgt Mrotolo. The Plaintiff could have been given the notice to appear in court instead of depriving her of her liberty and thus impairing her dignity.

Quantum

[27] In assessing the Plaintiff's damages, I find guidance from the Constitutional Court decision in **Minister of Safety and Security v Tyulu**⁴ where the Court held that:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts. (own underlining)

[28] It follows that the principles espoused by the Constitution are essential in assessing the Plaintiff's damages. Those principles are the following:

- (a) Section 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (b) Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.
- (c) Section 12. Everyone has the right to freedom and security of the person, which includes the right :

⁴ 2009 (5) SA 433 (SCA)

- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (d) Section 35(1)(f): Everyone has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (e) Section 35 (2)(e): Everyone who is detained has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;

[29] With these principles in mind, the decision of this Court must reflect these values and that a "strong statement" should be made that, in South Africa, we take the protection of liberty and security of the person seriously. If a person is unlawfully deprived of these protections, they are to be compensated in a manner that is commensurate with the value that we as a society attach to them.

[30] The Constitutional Court in **Raduvha v Minister of Safety and Security and Another**⁵ took judicial notice of the fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities. Plaintiff pleaded that during her unlawful detention, she was treated in a cruel and inhumane manner. She was detained in a filthy cold cell and denied her freedom arbitrarily and without just cause, and was restricted in her freedom of movement for three days.

[31] I have considered the fact that Plaintiff was 20 years old at the time of her arrest and was about four months pregnant. Her eldest child was three years old. There was no shred of evidence linking her to the commission of a crime; still, she was detained in a filthy cold cell and had to endure the company of a person she considered mentally disturbed because of how she was behaving, screaming and talking incomprehensibly. She could not have a bath for three days as the shower was not working, and the experience was traumatic to her.

⁵ 2016 (10) BCLR 1326 (CC) at para 68

[32] Both parties have referred me to comparable cases which are fact-specific and not much helpful. I have assessed the Plaintiff's damages in an amount that I consider proportionate to arbitrary infringement of her constitutional rights. I took into account the high-handed, malicious and highly reprehensible conduct of Sgt Mrotolo, which ought to be deterred. In my view, a higher amount of compensation is called for to mark the community's collective condemnation (denunciation) of what has happened to a relatively vulnerable Plaintiff.

[33] I believe that damages in the amount of R300 000.00 are appropriate for the time spent by Plaintiff in detention away from her home and family.

Costs

[34] At the beginning of the trial, the Plaintiff brought an application to amend its particulars of claim to reflect that Plaintiff was not arrested at her home but at the police station. Counsel explained that there was a miscommunication with the Plaintiff, who does not understand English. The amendment was intended to align the pleadings with the evidence in the docket. The defendant objected to the proposed amendment misguidedly, believing that it will lose some advantage. The defendant unreasonably requested ten days to consider the amendment. The objection to the amendment was mala fide as it was intended to cause an unnecessary delay.

[35] Proper notice of the proceedings was given to the Defendants in terms of Section 3(1) of the Institution of legal proceedings against certain Organs of State Act, 40 of 2002 on 16 October 2018. The defendant acknowledged receipt of the demand on 12 November 2018 instead of at least conceding liability; it defended the matter until trial even though there was no evidence in the docket implicating the Plaintiff in the commission of a crime.

[36] The Plaintiff had to wait for a substantial period to establish her claim through no fault of her own. It is accordingly only fair that the Minister should be ordered to pay interest on the capital amount from the date of demand to the date of payment to protect the Plaintiff against inflation.

[37] The cumulative effect of all this calls for a punitive costs order.

[38] In the result,

- (a) judgement is entered in favour of the Plaintiff
- (b) the defendant is ordered to pay the Plaintiff R300 000.00 in respect of damages for arrest and detention;
- (c) the defendant is ordered to pay the Plaintiff's costs on an attorney and client scale.
- (d) The defendant is ordered to pay mora interest at the prescribed rate of interest from the date of demand being 16 October 2018 to the date of payment,



**K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

Appearances

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