IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A35/2013

Date: 28 May 2014

Not reportable

In the matter of

D[...] J[...] Appellant

and

MINISTER OF SAFETY AND SECURITY Respondent

JUDGMENT

BAM J

1. The appellant appealed to a full court of this division against the judgment of Tuchten J, delivered on 6 September 2012, dismissing the appellant's claim for damages based on alleged unlawful arrest and detention. Leave to appeal was granted by the trial court.

2. The appellant issued summons against the respondent claiming damages in the amount of R1 530M for his alleged unlawful arrest and detention for a period of 34 days. In the appellant's particulars of claim it was simply averred that the *"arres en gevolglike aanhouding was onregmatig"*. To this the respondent, in its amended plea, pleaded that the appellant was lawfully arrested on a charge of rape and subsequently detained at a police station, and that his detention after his appearance in court was authorized by that court.

3. Neither party filed any request for particulars in preparation for trial. However, at a pre-trial conference held on 6 May 2011, the following questions were put by the appellant and answered by the respondent:

(i) "*Does the defendant admit that the arrest of the plaintiff took place on 23 March 2008?"*

Answer: *"Yes"*.

(ii)*"Does the defendant admit that the plaintiff was brought before court for the first time after arrest on 11th April 2008?"*

Answer: "*No. Plaintiff's first court appearance was on 25 March 2008, as per item 3 of List A of Plaintiff's Discovery Affidavit."*

(iii) *"Does the defendant admit that the plaintiff was detained for a period of 34 days?*

Answer: *"No, 33 days from arrest until bail was granted."*

4. The following relevant aspects were also agreed upon during the pre-trial:

(i) That the defendant accepted the onus to begin;

(ii) Regarding the *"quantum and the balance of the merits"*, the onus was on the plaintiff;

(iii) The bundle of documents compiled to be used at the trial was agreed upon to be what they purported to be and that they "*may be used without further proof unless any party objects to the use of a specific document. The contents of the documents remain in dispute"*.

5. The facts that were common cause were the following:

(i) On 22 March 2008 a complaint of rape of a retarded female child was laid against the appellant at the Makopane Police Station;

(ii) Consequently, on 23 March 2008 the appellant was arrested by Constable Swart of the South African Police Force on a charge of rape;

(iii) The arrest was effected without a warrant;

(iv) Subsequent to his arrest the appellant was locked up at the Mokopane Police Station;

(v) At his court appearance on 25 April 2008 the appellant was granted bail in the amount of R500 and subsequently released from custody.

6. At the inception of the trial, Mr Smit, appearing for the appellant, informed the court that what remained in

dispute was whether the appellant was lawfully arrested and for what period he was incarcerated before he appeared in court. It was further submitted by Mr Smit that the defendant would have to prove the reason for the arrest and that the appellant was brought before the court within 48 hours.

7. Counsel for the defendant, Mr Ncongwane, in his address to the trial court, prior to calling his first witness, confirmed that the appellant was arrested on 23 March 2008, and stated, with reference to the bundle of documents, that the appellant was brought before court on 25 March 2008. An amendment of the respondent's plea, which was not opposed, was then sought and granted. The amendment turned upon the subsequent detention of the appellant after his appearance in court, referred to in paragraph 2 above.

8. The arresting officer, Sergeant Swart, (at the time of arrest he had the rank of constable), testified that on 22 March 2008 he received information of a reported rape case in respect of a retarded female child, *("M").* He subsequently interviewed the mother of M, to whom I will refer to as "*Ms S".* M at the time was not yet 14. Ms S personally related to him that it was reported to her by one of her other children, *("MS"),* that the appellant, Ms S's brother in law, and M, whilst involved in a game with other children, were found in a bathroom on the premises. The appellant and the children were playing hide and seek when the appellant and M apparently decided to hide in the bathroom. The other children became concerned and started looking for the two of them and eventually found them in the bathroom behind a closed door. MS, who reported the incident to Ms S, apparently suspecting a suspicious activity between M and the appellant, returned to the bathroom and found a substance on the floor to which he referred as semen. It was then suspected that the appellant had raped M. When the appellant was confronted by Ms S with the allegations, he responded by saying: *"Are you taking the child's word against mine"*. The appellant then left the premises. According to the medical examination of M, recorded on the standard *"J88"* form, conducted that same night at 01h30, it was found that M did have bruises to her private parts, the *labio minora,* and that: *"Forceful penetration cannot be ruled out."* The contents of the J88, as well as the affidavit made by Ms S the previous day, were perused by Sergeant Swart the morning of 23 March. During cross examination by Mr Smit, the contents of Ms S's affidavit were read out by Sergeant Swart. The following facts, additional to the facts already mentioned by Sergeant Swart, were then recorded:

(i) MS, at the toilet, overheard the appellant telling M to put her hands on the toilet:

(ii) MS discovered that the door to the toilet was locked;

(iii) MS knocked on the door and the appellant opened;

(iv) MS asked M what has happened. M replied it was *"nothing but girl stuff."*

(v) When M was confronted by Ms S, she started crying and told Ms S that the appellant had ordered

her to pull down her pants and panties, to put her hands on the toilet and to bend over. M was however not prepared to tell the whole story;

(vi) Ms S also saw the "*whitish stuff*" on the floor, MS had told her about;

9. Sergeant Swart testified that according to the information received they, the police, considered it to be rape. He further stated that he could not say on the information received that it was in fact rape, but there was a reasonable suspicion that rape was committed Consequently, later the same day, 23 March 2008, the appellant was arrested on a charge of rape. The appellant, when confronted by Sergeant Swart, stated that there was a fight the previous day, that he was aware of the allegation against him and that he was also informed that a charge had been laid. When the sergeant asked the appellant what he *"thought"* about it, the appellant did not say anything to persuade the sergeant that the suspected rape did not occur.

10. In his evidence Sergeant Swart also identified a copy of the relevant police docket that formed part of the bundle of documents before the court. The sergeant also identified a copy of the court record of the Sexual Offence Court, Mokerong, (Exhibit *A*, page 72 of the record) reflecting, on the face of it, that on 25 March 2008 the accused was present in court, and that the case was postponed to 11 April 2008. Although Sergeant Swart testified that he was familiar with court records, he was not personally involved when the appellant attended court or when bail was granted. It was pointed out to the court by Mr Smit that Sergeant Swart could not testify about something he did not know about.

11. Sergeant Swart was aware of the fact that the prosecutor later declined to prosecute the appellant. He was however not aware of the reasons.

12. Section 40(l)(b) of the Criminal Procedure Act, No 51 of 1977, *"CPA"*, upon which the respondent relied for the justification of the appellant's arrest, provides that a peace officer, may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence mentioned in Schedule 1 of the CPA. It was common cause that Sergeant Swart was a peace officer and that rape is a Schedule 1 offence.

13. Every case has to be considered on its own facts. It is further trite that the test to be applied in order to determine whether there was in fact reasonable suspicion justifying arrest without a warrant, is objective, and, therefore that the arresting officer must have had reasonable grounds for the suspicion. See *Duncan v Minister of Law and Order* 1986(2) SA 805 (A) at 818F-H.

14. The evidence of the appellant, save his denial of having committed the crime, and what he conveyed to Sergeant Swart at the time of his arrest, in my view, is not relevant pertaining to the question whether a reasonable suspicion existed justifying his arrest. Accordingly the appellant's evidence in court in regards to the incident should not be taken into account.

15. In terms of the provisions of section 5 of The Criminal Law (Sexual Offences and Related Matters) Act, Nr. 32 of 2007, that came into operation on 16 December 2007, a child under the age of 16 cannot legally consent to sexual intercourse, and what is more, that, in terms of section 57 of that Act, a mentally disabled person is incapable to consent to a sexual act. Sexual intercourse with the child, or an attempt thereto, was clearly unlawful.

16. It was common cause that the appellant is a family member of M. It is therefore assumed that he knew that M was under the age of 16 and mentally retarded. This was obviously also within the knowledge of Sergeant Swart at the time of the appellant's arrest.

17. It was not in dispute that Sergeant Swart had the relevant information at his disposal. What was really challenged on appeal was the finding of the trial court that the said information justified a conclusion that a reasonable suspicion existed justifying the arrest of the appellant without a warrant, as envisaged by section 40(l)(b) of the CPA.

18. Accordingly, in my view, because of the fact that the test to be applied whether the information taken into account by the arresting officer justifying arrest without a warrant is objective, and that the information must have been within the knowledge of the arresting officer prior to the arrest, no information obtained subsequent to the arrest can be, or could have been, considered.

19. Accordingly, when the relevant information within the knowledge of Sergeant Swart is objectively considered, in my view there cannot be any doubt, whatsoever, that a reasonable suspicion indeed existed that the appellant raped M. The sergeant was entitled to consider all the information, even based on hearsay, and did not have to be convinced that there was in fact evidence proving the guilt of the arrestee beyond reasonable doubt. The latter issue was for the prosecutor, and perhaps later for a trial court, to decide about. There is no doubt that Sergeant Swart, in arresting the appellant had the intention to bring him before a court of law.

20. The appellant's contention that the arrest was unlawful was evidently without substance. It follows that the arrest of the appellant was lawfully effected in terms of the provisions of section 40(l)(b) of the CPA and that the learned trial judge's conclusion in that regard cannot be faulted.

21. The effect of the lawful arrest of the appellant was that his arrest and subsequent detention remained lawful, subject however to compliance with the provisions of section 50(l)(c)(ii) of the CPA. The latter section provides that an arrested person shall be brought before a court of law within 48 hours of his arrest.

22. The remaining issue on appeal raised on behalf of the appellant, namely whether the appellant's contention that he was unlawfully incarcerated because he was not brought before a court of law within 48

hours after his arrest, as provided for in section 50(l)(b) of the CPA, as a ground of appeal, needs to be considered.

23. In this respect the following aspects seem to be relevant:

(i) The appellant's particulars of claim simply allege unlawful arrest and detention for 34 days. No mention is made that the appellant was not brought before a court of law within the prescribed 48 hours;

(ii) The question put to the respondent's representatives during the pre-trial conference, pertaining to the issue whether the respondent admitted that the appellant was not brought before court before 9 April 2008, was met with a negative response, namely that the appellant was brought before court on 25 March 2008, apparently with reference to the applicable copy of the police docket and a copy of the court record;

(iii) At the inception of the trial the appellant's legal representative stated that the respondent bore the onus that the appellant was brought before court within the prescribed 48 hours;

(iv) When Sergeant Swart identified the court register of 25 March 2008 (Exh A), the correctness of the contents of the court record were not challenged, although, as alluded to above, it was pointed out by the appellant's legal representative that Sergeant Swart did not have personal knowledge of the contents of the document;

(v) No evidence was adduced by the respondent pertaining to the veracity of the contents of the relevant court records;

(vi) The appellant in his evidence before the trial court admitted that he was taken to court on 25 March 2008, but stated that he was returned to the police station without having appeared before the magistrate. This evidence was not challenged during cross-examination;

(vii) In argument before this Court, Mr Smit contended that the Mokerong court record reflecting the appellant's appearance on 25 March 2008 (Exh A), was a forged document, forged by the magistrate who signed it.

24. In its judgment, paragraphs 29-33, the trial court ruled that the appellant's evidence that he did not appear before the court on 25 March 2008 was accepted. In this regard the trial court also referred to the contents of the appellant's letter of demand directed to the National Commissioner of the SAPS as well as the reference made to the issue in the pre-trial minute and the opening address of Mr Smit. However, as a result of the

appellant's claim based on the allegation that he was not brought before court within the prescribed 48 hours, not particularized in the particulars of claim, the learned judge dismissed that part of the action.

25. In my view the appellant was obliged, as found by the trial court, to address the issue of the unlawful detention based on the failure to have the appellant brought before a magistrate, as contemplated by section 50(l)(c) of the CPA, in his particulars of claim. The appellant's particulars of claim however based the unlawfulness of the detention of 34 days solely on the alleged unlawful arrest. It follows that if the arrest was in fact lawful, as is the case here, the detention, *perse*, cannot be unlawful. The allegation that the appellant was not brought before court within 48 hours after the (lawful) arrest is a totally separate and new cause of action. It suffices to say that litigants are bound by the Rules, specifically in regards to what should be averred and canvassed in the pleadings. The cardinal Rule is that a party is bound by what is addressed in the pleadings. A defendant is entitled to be informed of what the plaintiff's case is, without the need to read between the lines or to contemplate, or speculate about, any possible alternatives to the initial cause of action. That is precisely the purpose of pleadings.

26. The appellant's contention that the parties *"agreed"*, at the pre-trial conference, that the *"48 hours issue"* was part of the appellant's case, is not substantiated by what was recorded at the pre-trial. As alluded to above, the question posed by the appellant in that regard was met with a complete denial, with reference to the contents of the court register of 25 March 2008. It could therefore not have been accepted by the appellant that the issue in question became part of its case as *"agreed"*.

27. The fact that the appellant's legal representative mentioned in his opening address that the respondent bore the onus to prove that the appellant was brought before the court within 48 hours of his arrest, was of no avail to the appellant. It clearly did not amend the particulars of claim. In my view the issue could, and should, have been rectified by an application to amend the particulars of claim. That did not happen.

28. It follows that I am in respectful agreement with the judgment of Tuchten J to dismiss the appellant's claim based on wrongful arrest and detention.

29. Although the trial court allowed the appellant to testify about the "*48 hours issue"*, it appears, in my view, that an objection to the evidence of the appellant in that regard, on the basis that it was irrelevant to the merits because it fell outside the issues canvassed in the pleadings, could have been upheld by the trial court.

30. In regards to the issue of whether the appellant was brought before a court of law within the prescribed 48 hours in terms of section 51(l)(c) of the CPA, the trial court found that the appellant's version stood un-contradicted and that the appellant's case was not remanded in court.

31. The appellant's ground of appeal in this regard entails that the trial judge erred in not finding that the

appellant was wrongfully incarcerated in that he was not brought before a court of law within the prescribed 48 hours. It was submitted by Mr Smit that the trial court should at least have found that the appellant was therefore wrongfully incarcerated until he appeared before the court on 11 April 2008. Accordingly, so it was argued by Mr Smit, the respondent should be held liable for the wrongful detention of the appellant from the day of his arrest until the 11 April 2008.

32. The trial judge however found, with which finding I agree, as alluded to above, that it was not the appellant's case in his pleadings that he was in that respect wrongfully detained.

33. However, although I have expressed my agreement with the trial court's dismissal of the appellant's claim, I find myself unable to agree with that court's founding that the appellant did not appear before the court on 25 March 2008.

34. In this regard it seems to me that the following evidence and evidential material have to be taken into account.

(i) It was agreed by the parties during the pre-trial conference that the documents in question could be used without further proof unless any party would object to the use of a specific document, although the contents of the documents remained in dispute.

(ii) During the evidence of Sergeant Swart, respondent's counsel, in leading the evidence, referred to the copy of the first page of the police docket concerning the charge against the appellant. The docket reflected that the matter was postponed to 11 April 2008 for further investigation. The document was identified by Sergeant Swart.

(iii) Secondly Sergeant Swart identified a copy of the court record of the Mokerong Court, reflecting the name of the appellant and the date of 25 March 2008 when the appellant appeared before the court and asked for legal representation. At that point Mr Smit remarked that the sergeant was testifying about something he did not know about. From this remark of Mr Smit it must be inferred that he raised the issue that the evidence Sergeant Swart was hearsay. The trial judge interposed and stated that all Sergeant Swart could say in that regard was that the document appeared like the normal document emanating from that court. That was confirmed by Sergeant Swart.

(iv) The said court record of the Mokerong Court (Appeal record, Exhibit A, page 72) reflected the following: The name of the appellant as the accused; that on 25 March 2008, the appellant in person appeared before magistrate MV Semenya; that his rights to legal representation were explained; that he elected to apply for legal aid; that Ms Makgato would represent the appellant; that the matter was remanded to 11/4/2008 for completion of investigation; and, that the appellant was in police custody.

The document was signed by magistrate Semenya.

(v) It was common cause that on 11 April 2008 the appellant indeed appeared before the said court. Although no copy of a warrant for the detention of the appellant from 25 March 2008 until 11 February 2008 was filed as exhibit, it can be assumed, on the probabilities, that such a warrant was indeed issued and signed by the magistrate, authorising the police station at Mokopane to keep the appellant in custody and to return him to court on the 11 April 2008. It is, in my view, logical that the police would not have kept the appellant in custody merely on the strength of the entry on the police docket that the appellant's next appearance would be on 11 April 2008.

(vi) Pages 73 and 75, reflecting court records of the same court, respectively for 11 April and 25 April 2008, as conceded by Mr Smit during argument, correctly reflected what it purports to be on the face of the documents. It was common cause that the appellant, on the said two dates, indeed appeared before the same magistrate, Ms Semenya, whose name appears on the court record of 25 March 2008.

(vii) The appellant testified that on 25 March 2008 he was informed by the police that he had to go to court and that he was in fact taken to court. At first the police took him to the wrong court, but he was subsequently taken to the Mahwelereng court where he was kept in the holding cells. The time was between 14h00 and 15h00. A policeman then called him from the holding cells and told him that he should enter the court. He told the court that he had been waiting at the staircase leading to the courtroom for half an hour. In that time he was asked by an attorney whether he would require an attorney to represent him. To that he responded that he was looking for an attorney. Subsequently the policeman in command was informed by a "*prokureurtjie"* from Legal Aid to return him to the holding cells from where he was taken back to the police station. The appellant denied that he appeared in court on that day.

(viii) Although the appellant testified that he complained to a police at the police station that he did not appear in court, it does not appear from the papers, or the evidence, that the appellant complained to anybody else, including the magistrate before whom he appeared on 11 April 2008 as well as the attorney who represented him on that day, that he did not appear in court on 25 March 2008, despite the fact that he was allegedly abused and assaulted at the police cells before he appeared in court on 11 April 2008.

(ix) The appellant testified that on 11 April 2008 and on 25 April 2008 he was again taken to the Mahwelereng court. On these occasions he however did appear before the magistrate when the case was postponed. On the 25 April 2008 bail was granted to him.

(x) The appellant's version that he did not appear in court on 25 March 2008 was challenged during cross-examination by Mr Ncongwane, with reference to the court register of 25 April 2008.

(xi) No further evidence was adduced by the respondent in regards to the veracity or the probative value of the court register in question.

(xii) In argument Mr Smit contended that the magistrate forged the court record of 25 March 2008.

35. In view of the agreement reached between the parties during the pre-trial conference and the evidence of Sergeant Swart identifying the cover page of the relevant police docket, and the court register of 25 March 2008, these documents were already before the court as evidentiary material. What remained was the question what weight was to be attached to the documents.

36. The probative value, or evidential weight, of the photo copy of the court register of 25 March 2008, turns upon the following:

(i) By definition a court register is an official document;

(ii) In terms of the provisions of section 19 of the Civil Proceedings Evidence Act, 25 of 1965,*("CPE Act"),* a certified copy of such document shall be admissible in evidence and be of the same force and effect as the original document;

(iii) Although the court register in question was not a certified copy, section 19 of the CPE Act clearly provides that secondary evidence in regards to the court record in question is admissible. In this matter secondary evidence would include a photocopy of the original court record, that was indeed before the court. In *Transnet v Newlyn Investments* 2011 (5) SA 543 SCA, at 551B to E, the following was stated:

"Once secondary evidence is admissible, there are no degrees of secondary evidence, ie the common law no longer requires that the best secondary evidence has to be produced." (and)

"Of course, production of a photocopy would be more reliable than oral evidence as to the contents of a document, but that goes to weight, not admissibility;"

(iv) Section 6 of the CPE Act provides that a document purporting to bear the signature holding a public office and bearing the seal or stamp of office to which such person is attached, on the mere production thereof, be *prima facie* proof that such person signed such document. In this case the document in question bore the official stamp of office and was signed by Magistrate Semenya, who also signed the court registers of 11 April 2008 and 25 April 2008.

37. It follows, in my view, although the documents in question were not certified true copies of the original, that it was in fact admissible evidential material before the court.

38. When the probabilities are considered, it is in my view highly unlikely that the magistrate, who signed the court record of 25 March 2008, as well as the records of the 11 April 2008 and the 25 March 2008, would have forged the document of 25 March 2008, as contended by Mr Smit.

The appellant's version that he was taken to court, kept in the holding cell and called to go to court, but at the stairway leading to the court, told by an attorney to return to the holding cells, especially in view of the specific nature of the entries made by the magistrate on the document in question, is totally improbable. This would mean that the attorney, the magistrate and the prosecutor conspired, for an unknown reason, not to allow the appellant to appear before court, but instead to commit fraud. It must also be taken into account that a warrant for the appellant's further detention in the police cells until the 11 April 2008, which had to be signed by the magistrate, was, on the probabilities issued. This warrant, on the appellant's version would have been, by implication, another fraudulent act committed by the magistrate. These implications concerning fraudulent conduct by independent court personnel, to say the least, are without substance.

39. On the appellant's version he was in fact taken to court by members of the SAPD tasked to do so. What is further remarkable is that on 25 March 2008 the police took the trouble to take the appellant from the first court in Makopane to the court in Mahwelereng, dealing with sexual offences, clearly for the purpose to have the appellant remanded by the court, but then allowed the appellant to return without appearing before court.

40. It follows, in my view, that the probabilities favour the finding that the appellant indeed appeared before the magistrate on 25 March 2008, consistent with the entries on the court register. The probabilities obviously militate against the appellant's version in that regard.

41. Taking into account what the appellant's version was, it is in my opinion clear that he should have included in his particulars of claim the averments pertaining to his non-appearence in court on the 25 March 2008, and to, in that regard, have instituted action against the Minister of Justice and Constitutional Development. The question whether the appellant would have succeeded in quantifying his damages in the circumstances of the matter, especially in view of the fact that he was lawfully arrested, is presently a matter of conjecture.

42. Accordingly I suggest that the appellant's appeal cannot succeed and that the following order be made:

The appeal is dismissed with costs.

A J BAM

JUDGE OF THE HIGH COURT

6 May 2014

I agree,

E M KUBUSHI

JUDGE OF THE HlGH COURT

I agree, and it is so ordered.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

For the appellant: MR E SMIT

For the respondent: ADV M NCONGWANE