

**REPUBLIC OF SOUTH AFRICA
HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 35135/12

15/6/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

T. L. RASHIJANE

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

MAKHOB A J:

[1] In this matter Plaintiff is Tebogo Rashijane and the Defendant is the minister of Safety and Security. The plaintiff's claim is for damages as a result of alleged unlawful arrest. He therefore claims damages in the amount of R 400 000 from the Defendant. Claim 2 and claim 3 were withdrawn by the Plaintiff.

[2] Plaintiff alleges that on the 27th October 2010 he was arrested and detained by

warrant officer Mofokeng acting in the course and scope of his duties with the Defendant.

[3] The following is common cause between the parties:

- That the Plaintiff was arrested by warrant officer Mofokeng who was acting within the course and scope of his employment with the Defendant.
- Plaintiff was detained and brought before a Magistrate. The matter was postponed several times before Plaintiff was released on bail on the 19th November 2010.
- The criminal case against the Plaintiff was ultimately withdrawn by the Prosecutor.

[4] The following is in dispute:

- That the arrest and detention of the Plaintiff was unlawful.
- That the detention of the Plaintiff after the first Appearance before a Magistrate on the 28th October 2010 until bail was granted on the 9th November 2010 was lawful.
- The quantum is also in dispute.

[5] Defendant called only one witness whereas the Plaintiff was the only witness for his case.

[6] Warrant officer David Mofokeng testified that he is a police officer in the South African Police Services attached to the organized crime unit. He is a police officer for 21 years and 9 years with the organized crime unit. He testified that he received a telephone call from his commander instructing him to go to Vanderbijlpark Police Station to attend to a ("truck hijacking") robbery case of which the suspects were already in custody. When he arrived at the police station he took over the case as the investigating officer of the case. He interviewed the suspects in the case and was informed by one of the suspects that during the commission of the robbery they were assisted by police officers who were driving a marked police vehicle with a blue light on. The other suspects managed to flee from the scene of crime including the police officers who were involved in the commission of the crime.

[7] On the 2ih October 2011 one of the suspects Mr George Yassim was prepared to take him to a house in Brixton to point out some of the suspects. He proceeded to the said house in Brixton and he was in a company of about 15- 20 police officers travelling in four police vehicles. On arrival to the said house they could not gain entry into the house as the house was well secured. They waited for about 15 minutes trying to draw the attention of the occupants of the house.

[8] Whilst they were waiting, the SAPS flying squad also arrived on the scene. A police Van from Brixton police station also arrived on the scene driven by the Plaintiff and he was alone in the vehicle. The Plaintiff alighted from the police van and Mr Yassim pointed him out as one of the police officers who assisted them during the "truck hijacking". Warrant officer Mofokeng testified further that he asked Mr Yassim three times whether Plaintiff was one of the suspects and Mr Yassim answered in the positive. Thereafter he (warrant officer Mofokeng) asked the Plaintiff whether he knew Mr Yassim. Plaintiff explained to him that he was on the scene because he was responding to a report of a burglary in progress and he said he did not know Mr Yassim.

[9] He then informed Plaintiff of the allegations against him Plaintiff became aggressive but was nevertheless arrested and taken to Brixton police station to inform his superiors about his arrest. The Plaintiff was thereafter transported to Vanderbijlpark police station.

[10] Yassim took them to a flat in Johannesburg to point out further suspects. The witness testified that he did not oppose the Plaintiff s application to be released on bail.

[11] Cross - examined by the Plaintiffs legal representative warrant officer Mofokeng testified that Yassim pointed out the house and explained that it is where he met the Plaintiff and other suspects and he did ask Yassim three times whether the Plaintiff is one of the police officers who was involved in the "truck hijacking" and Yassim answer in the positive.

[12] In addition warrant officer Mofokeng testified that the case against the Plaintiff could not proceed to trial as the complainant never returned from Zimbabwe and hence the case against Plaintiff was withdrawn. Defendant then closed its case.

[13] In his testimony Plaintiff denied that he was ever involved in any "truck hijacking" or met Yassim. On the 27th October 2010 he was asked by one captain Mkhwanazi to take him home, which he did and he used the police motor vehicle. On his return back to the police station in Brixton he heard on the police radio that there was a burglary in progress at number [...] Filan Street Brixton. He proceeded to number [...] Filan Street Brixton and on his arrival at the said address he saw a number of police officers and he asked what was happening.

[14] He testified further that he noticed a person at the back of a police van and this person was hand cuffed and crying, he was being assaulted by the police. One of the police officers upon seeing him (the Plaintiff) he asked the person at the back of the police van whether he (the Plaintiff) was the person and the person at the back of the police van nodded his head in agreement.

[15] Thereafter he was placed under arrest and his fire arm taken from him and he was handcuffed. Warrant officer Mofokeng asked him whether he was staying in the house, he denied that he was staying in that house and told him that he was also attending a report of a burglary in progress.

[16] He was first transported to Brixton police station and his superiors were informed of his arrest. He was detained and appeared in court three times and ultimately bail was granted and he was released on bail. After he was released on bail he was suspended from work.

[17] The story about his arrest was published in the Daily sun newspaper on the 29th October 2010 and he felt very bad about the whole ordeal and was heartbroken as this created a perception to his family and colleagues that he was a dishonest person.

[18] Cross - examined by the Defendant's legal representative he testified that the report of the house breaking was a false call or alarm. Asked why he attended the scene alone in the absence of a crew member as per police standing orders, he testified that he knew that there will be other police officers on the scene. Plaintiff thereafter closed his case.

[19] The onus rest with the Defendant to establish the lawfulness of the Plaintiff's arrest on a balance of probabilities, See Minister of Law and order and another V Dempsey 1988(3) SA 19 (A) at 38 B-C; Zealand V Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (cc) at paragraphs 24 and 25.

[20] Section 40 (1) Act 51 of 1977 reads as follows "(a) A peace officer may without warrant of arrest, arrest any person;

(a) Who commits or attempt to commit any offence in his presence;

(b) Whom he schedule reasonably suspects of having committed an offence referred to in schedule 1"

[21] In this matter before me the Defendant must show that the arrest was lawful. It must be shown that warrant officer Mofokeng had a reasonable belief that Plaintiff committed the offence of "truck hijacking" robbery.

[22] In Olivier V Minister of Safety and Security and another 2009 (3) SA 434 (w) on page 441 Horn J said " To this might be added that the facts on which the police officers relies for his suspicions must at least be realistic and well founded having regard to the circumstances of the particular case"

[23] In Minister of safety and security V Sekhoto and another 2011 (5) SA 367 (SCA) on page 383 paragraph 44 the court said the following "while the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or She is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some case a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial; the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime and those listed in schedule 1 are serious and not only because the legislature thought so - a peace officer could seldom be criticized for arresting a suspect for that purpose"

[24] The burden of proof in a civil case lies with the Plaintiff to prove the case on a balance of probabilities, See Pillay V Krishna and another 1946 AD 945

[25] Warrant officer Mofokeng the only witness for the Defendant gave his testimony in a clear and direct manner. He did not hesitate to answered questions or appeared to be uncertain.

[26] In contrast the Plaintiff's testimony is riddled with inconsistence and improbabilities. The Plaintiff expects the court to believe that immediately when he arrived at the scene where he was arrested, Mr Yassim was forced to point him out as one of the police officers who was involved in the "truck hijacking". It is inconceivable to this court that warrant officer Mofokeng being an experienced police officer will force Mr Yassim to point out Plaintiff, he did not even know that Plaintiff will show up on the scene neither did he knew him before. If indeed warrant officer Mofokeng wanted to implicate any police officer he would have forced Mr Yassim to point out one of the members of the flying squad who also arrived on the scene. At no stage during the proceedings in this case did warrant officer Mofokeng concede that he assaulted or threatened Mr Yassim to point out anyone as the suspect.

[27] The court rejects the testimony of the Plaintiff as improbable and false.

[28] In minister of safety and security V Tyokwana 2015 (1) SACR 597 {SCA} the court said the following on page 607 paragraph 40 "It has often been stressed by our courts that the duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not, See also Prinsloo and Another V Newman 1975 (1) 481 {A} at 492G and 495A and Minister for Justice and Constitutional Development V Moleko supra in paragraph 11. In Carmichel V Minister of Safety and Security and another (center for Applied Legal studies Intervening) 2002 (1) SACR 79 (CC) (2001) (4) SA 938; 2001 (10) BCLR 995; [2001] ZAC (22) paragraph 63 it was held that the police has a clear duty to bring to the attention of the prosecutor any factors known to them, relevant to the exercise by the magistrate of his discretion to admit a detainee to bail"

[29] In this matter before me warrant officer Mofokeng testified that the matter was withdrawn against the Plaintiff by the prosecutor not because the prosecutor was not satisfied that Plaintiff had a case to answer but because the complainant (main witness) was not traced.

[30] There is no evidence before this court that there was absolutely no evidence implicating the Plaintiff in the commission of the alleged robbery.

[31] The court is satisfied that the reason why the prosecutor proceeded with the matter against the Plaintiff was because warrant officer Mofokeng submitted his fair and honest statement. See Minister of Safety and Security V Tyokwana supra.

[32] The court does not believe that Yassim was forced to point out the Plaintiff or that the Plaintiff was at the wrong place at the wrong time. In my view that is for the trial court to decide.

[33] The court accepts that warrant officer Mofokeng exercised his discretion as the arresting officer rationally. See Minister of Safety and Security V Sekhoto supra.

[34] The court is satisfied that the Defendant succeeded in discharging its onus that the arrest of the Plaintiff was lawful.

[35] The court is satisfied that the Plaintiff failed to prove his case on balance of probabilities.

[36] Plaintiff's claim against the Defendant is dismissed with costs.

D MAKHOB
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 30 May 2016

Judgment delivered: 15 June 2016

Appearances:

For the applicant: Adv J Viljoen

Instructed by : Mills and Groenewalt Attorneys

For the respondent: Adv S Mkapane

Instructed by: State Attorney (L.Kopman)