IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVIUSION, PRETORIA)

9/9/16

Case number: 77688/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE 7/9/16
SIGNATURE

In the matter between:

BRYAN JAMES DE KLERK — Plaintiff

And

THE MINISTER OF POLICE — Defendant

JUDGMENT

TOKOTA AJ

[1] The trial in this matter took place on 4 and 5 August 2016. After both parties had closed their respective cases Counsel requested that

they be allowed to submit written submissions in the next two weeks after the matter was heard. It was agreed that after receipt of the heads of argument I should decide whether or not I need to hear oral argument.

[2] Heads of argument were received by me after having been filed on 29 August 2016. Having read the heads of argument I have decided that it is not necessary to hear oral argument and therefore this judgment need not be delayed any further. I am indebted to both Counsel for their heads of argument.

[3] The plaintiff, Bryan De Klerk, set the civil litigation in motion and claimed a sum of R1million from the Minister of Police, the defendant. This claim is based on the alleged unlawful arrest (claiming R500 000.00) and malicious prosecution (claiming R500 00.00), it being alleged that on 21 December 2012 members of the police acting within the course and scope of their duties with the defendant unlawfully arrested the plaintiff without a warrant and set the law in motion by instituting criminal proceedings against him. In his pleadings the plaintiff claimed that he was detained for 8 days. The Minister is cited herein in his official capacity as the nominal defendant in terms of the State Liability Act 20 of 1957. The defendant denies liability as alleged or at all.

[4] The facts of the case are largely common cause and can be summarised as follows:

4.1 On 11 December 2012 one Rael Lasarow, the complainant, laid a complaint of assault with intent to do grievous bodily harm allegedly perpetrated upon him by the plaintiff. The plaintiff was then requested by one detective constable Virginia Lerato Ndala to report at the police station Sandton to answer to the allegations.

4.2 On 21 December 2012 the plaintiff duly reported at the police station at about 8h30. His constitutional rights were explained to him after he was informed that Rael Lasarow had laid a charge of assault with intent to do grievous bodily harm against him. At the time Constable Ndala was in possession of the statement of the complainant and a medical report in the form of J88 indicating injuries sustained as a result of the alleged assault.

4.3 At the police station the plaintiff elected not to make any statement but stated that he would make a statement in Court. From his own version he was not detained in the cells. He was immediately taken to Court by means of a Citi Golf. He was informed that he

was being taken to Court and a bail of R1000 was recommended subject of course to the decision of the prosecutor. He was taken to Court at about 10h13.

4.4 When he arrived in court he was detained in the holding cell but was immediately called to court where he was remanded in custody. He did not apply for bail and no explanation was proffered as to why he did not do so.

4.5 He was then kept in prison until he was released on the eighth day. He was informed that the complainant had withdrawn the charges against him.

[5] As can be gleaned from the above facts the plaintiff was taken to Court within two hours of arrival at the police station. Therefore the detention, if any, by the members of the police cannot be said to have been eight days as claimed. Once he was taken to Court they had no control over him and any decision to detain him further was as a result of the Court order by the Magistrate.

[6] The plaintiff explained how it came about that he was accused of having committed a crime of assault. He testified that he had an

argument with the complainant, who was his employer, over his salary. An altercation ensued whilst they were arguing in the office and in the process he pushed the complainant who bumped against a wall picture hence he was injured.

[7] It appears that the primary basis upon which it is alleged that the arrest was unlawful is because it took place without a warrant.

[8] Mr Myburgh, who appeared for the plaintiff, contended in his written submissions, that assault is not one of the offences mentioned in schedule 1 of the Criminal Procedure Act and therefore by implication the police should have applied for a warrant of arrest or should not have arrested the plaintiff at all. He contended that during cross-examination the investigating officer said she arrested the plaintiff because he did not want to make a statement. This argument overlooks the fact that the police are also entitled to arrest without a warrant for *'any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.'*

[9] Furthermore when detective Ndala was cross-examined she categorically stated that she was entitled to arrest the plaintiff without a warrant because she suspected that he had committed an offence in schedule 1 of the Criminal Procedure Act. She was questioned as to

why she did not think of any other means of securing the plaintiff's attendance to Court other than the arrest without a warrant. She replied that she used her discretion. I did not get the impression that she arrested the plaintiff because he did not want to make a statement. She knew that it was his right not make a statement if he so elected. She impressed me as an honest and reliable witness. The police were so co-operative with the plaintiff. They did not want to detain him. They were working together as a team in order to facilitate his immediate appearance in Court. They even recommended that he be granted bail.

[10] Section 35 of the Constitution of the Republic of South Africa Act, 1996 deals with arrested, detained and accused persons. Section 35(1)(d) provides that everyone who is arrested for allegedly committing an offence has the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest, or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours, or on a day which is not an ordinary court day. Section 35(2) provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.

[11] Section 39 of the Criminal Procedure Act provides for the manner and effect of arrest. It provides:

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

[12] Section 40 of the Act provides:

"(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

Therefore arrest is one of the methods of securing attendance of an accused person in Court. The other methods are summons, written notice and indictment, in accordance with the relevant provisions of the Criminal Procedure Act.

[13] It cannot be gainsaid that an arrest is the most drastic method to secure a person's attendance at his trial and it ought to be confined to serious cases. It is a serious restriction of an individual's freedom of movement and it may also affect a person's dignity and privacy.

[14] The purpose of the arrest is no more than to bring the suspect before the court so as to enable that court to decide whether or not to release the arrested person. The enquiry to be made by the peace officer is not how best to bring the suspect to trial, it is only whether the case is one in which that decision ought properly to be made by a court.[1]

[15] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once that process has been done, the authority to detain, which is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court. Although it is generally desirable that if a person to be charged has a fixed and known address a summons should be used there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.

[1]See Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) (2011 (5) SA 367;

[16] In Louw v Minister of Safety & Security 2006 (2) SACR 178 (T) Bertelsmann J stated: "*I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting police officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.*

[17] The approach in Louw's case was followed by various High Court divisions.[2]

But this approach was not followed in Charles v Minister of Safety and Security 2007 (2) SACR 137 (W). GOLDBLATT J said:

"*I do not agree with the conclusion reached by Bertelsmann J, despite his full and careful reasons therefor and am of the view that it is clearly wrong.*

In my view the final sentence of the quotation from Schreiner JA in Tsose's case supra quoted by Bertelsmann J correctly sets out the existing law. The learned Judge of Appeal said:

*'But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.' **

The Legislature having granted a peace officer the right to make an arrest in the circumstances set out in s 40 has created a situation where due compliance with such section by a peace officer is lawful and affords

---

[2] See Gellman v Minister of Safety and Security 2008 (1) SACR 446 (W); Le Roux v Minister of Safety and Security and Another 2009 (2) SACR 252 (KZP) (2009 (4) SA 491); Ramphal v Minister of Safety and Security 2009 (1) SACR 211 (E); Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ) (2009 (6) SA 82).

such peace officer protection against an action for unlawful arrest. In my view, the court has no right to impose further conditions on such persons. To do so would open a Pandora's box where the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further where peace officers would be called upon to make value judgments every time they effect an arrest in terms of s 40. These judgments which they would have to make would later have to be considered and tested by judicial officers attempting to place themselves in the shoes of the arresting officer.

While s 40 exists in its present form it offers protection to those who legitimately rely upon it. Obviously the position will be different if the action of the policeman is mala fide or an abuse of the right given to him, but I need not deal with the possible exceptions, as they do not arise in the present case (see Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G - 819B)."

[18] The Constitutional Court declined to rule on the conflicting decisions holding that ..."*those involved in the day-to-day exercise and supervision of the power to make arrests are usually best positioned to establish appropriate operational parameters concerning the discretion to arrest. This is an area where internal regulation should be encouraged. Indeed, there has in fact been extensive internal regulation concerning arrests".*[3]

The Supreme Court of Appeal also criticised the approach in Louw's case.[4]

---

[3] Minister of Safety and Security v Van Niekerk 2008 (1) SACR 56 (CC) (2007 (10) BCLR 1102).

[19] It is trite that once the arrest is admitted in the pleadings the onus rests on a defendant to justify it since it constitutes an interference with the liberty of the individual concerned.

[20] The jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.
In Rhikotso *supra* [5]the Supreme Court of Appeal stated that there is no rationale for adding any other jurisdictional facts.

[21] In this case the detective was in possession of a statement by the complainant that he had been assaulted. The medical report recorded certain injuries sustained by the complainant. Even though the injuries were not legible in J88 presented in court they must have been legible in the original J88. The original can no longer be found. One must bear in mind a lapse of time since the incident occurred. That explains why claims ought to be prosecuted timeously.

---

[4] See Minister of Safety & Security v Sekhoto 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA 141)
[5] Footnote 4

[22] In Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) Didcott J said:

"*Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*"

[23] The plaintiff himself testified that the complainant was his employer. He had confronted him about his salary. An altercation ensued and he indeed pushed the complainant against a frame of a wall picture. He did not dispute that the complainant suffered injuries. Indeed he confirmed that any injuries sustained must have been caused by falling into the frame of the wall picture. When requested by the police to make a statement he exercised his rights to remain silent. In my view the suspicion was reasonable.

[24] Furthermore I find that members of the police acted reasonably in the circumstances of this matter and I am unable to criticise them. In my view any criticism against them would not be justifiable.

[25] The plaintiff was never put in the police cells. He was immediately conveyed to Court to enable him to apply for bail, if he so wished. They did not object to the bail being granted and in fact recommended that he be granted bail of R1000. In my view the defendant has discharged his onus. I therefore find that the detention was not unlawful.

[26] The above finding ought to dispose of the matter. Be that as it may in any event I deem it expedient to deal with the second claim of malicious prosecution.

[27] The requirements for successful claims for malicious prosecution are as follows: a claimant must allege and prove -

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendant acted without reasonable and probable cause;

(c) that the defendant acted with malice (or animo injuriandi); and

(d) that the prosecution has failed or charges have been withdrawn.[6]

[28] The plaintiff's claim collapses on the first element. The person who set the law in motion was the complainant not the police. There was a reasonable and probable cause for the arrest. The plaintiff has failed dismally to show any malice on the part of the police. On the contrary he showed that they acted in good faith. On this analysis it follows that the second claim must also fail. In the light of the decision reached it is accordingly not necessary to consider any quantum of damages.

[29] In the result I make the following order.

1. The plaintiff's claim is dismissed with costs.

B R TOKOTA
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 4 AND 5 AUGUST 2016.
DATE JUDGMENT DELIVERED 9 SEPTEMBER 2016.

[6] See Minister of Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA)in para [8]; MRudolph v Minister of Safety & Security 2009 (5) SA 94 (SCA) para 16

Appearance for the plaintiff: Adv S J Myburgh

Instructed by Gildenhuys Malatji Inc.

Appearance for the defendant: Adv D D Mosoma

Instructed by the State Attorney Pretoria