REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

18/11/16

CASE NO: 56174/12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... DATE

..... SIGNATURE

In the matter between:

RISENGA, RISIMATI FORSTER Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

J U D G M E N T

NONYANE, AJ:

[1] Mr Risimati Foster Risenga (the plaintiff) instituted an action against the Minister of Safety and Security (the defendant) for damages arising out of his unlawful arrest and detention.

[2] At the commencement of the trial I was informed by both Counsel for the plaintiff and defendant that the plaintiff has withdrawn Claim 2 of his particulars of claim and his objection to the defendant's Notice of Amendments to the plea. The plaintiff tendered costs occasioned by such withdrawal. I was also informed that the defendant has also waived its special pleas.

[3] It is common cause between the parties that the plaintiff was arrested without a warrant at Mamelodi East on 08 February 2012 by Warrant Officer Ackerman (hereinafter referred to as "Ackerman") acting within the course and scope of his employment with the defendant. It was also common cause between the parties that the charges against the plaintiff were withdrawn on the 19 June 2012.

[4] The issue that has to be determined by the Court is the lawfulness of the plaintiff's arrest and the subsequent detention.

[5] Plaintiff claims that he was unlawfully arrested and detained for a period of two days.

[6] Defendant's defence is based on the provisions of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 as amended (hereinafter referred as "the Act")

[7] The Facts of this case are that the plaintiff was arrested by Ackerman on the 08 February 2012 at Mamelodi East at around 6am.

[8] The plaintiff testified that on the morning in question he was preparing to go to work when two Police officers knocked on his room. One of the police officers was Ackerman.

[9] On entering his room the other police officer who was with Ackerman asked him what clothes he wears to work. He told him that he wears a blue work suit. He also asked him if he drinks and he told him that he does not drink. The police officer then took his Identity document which was on the table and produced handcuffs. He informed him that he was under arrest for rape. He asked the police officer if he was joking but the police officer continued to handcuff him. He then realised that it was serious and he told both police officers that he was innocent but they ignored him.

[10] They then took him outside and put him in their car and proceeded to Mamelodi Hospital. On the way he asked them who the complainant was but Ackerman told him that he will meet the complainant in Court.

[11] When they arrived at Mamelodi Hospital the plaintiff's blood was drawn and he was taken to the Police Station. He was charged with rape the following day and the charges against him were withdrawn on 19 June 2012.

[12] Ackerman testified that he received a call from Monica Sebothoma (hereinafter referred to as "the complainant") advising him that she saw the person who raped her. He then on the 08 February 2012 together with his colleague went to the complainant who told them that the suspect was staying two houses away from her house. They went there and on arrival they asked where the men rooms were. They knocked at each room and in one of the rooms the plaintiff responded and opened the door and the complainant pointed him out as the man who raped her. It is important to point at this juncture that the plaintiff's testimony was that he did not see the complainant pointing him as the culprit.

[14] Ackerman's further testimony was that they went inside and searched the room and could not find the cell phone that was robbed from the complainant. The plaintiff also disputed this testimony and insisted that his room was not searched

[15] The defendant's Counsel argued that the arrest was justified as Ackerman is a police officer and contended that the defendant's defence is premised on Section 40(1)(b) of the Act and that it was properly pleaded in the defendant's plea.

[16] Counsel for the defendant contended that from the evidence and documents placed before Court, it should be common cause that

Ackerman is a peace officer whom, after entertaining the suspicion, arrested the plaintiff for committing a Schedule 1 offence of rape.

[17] She further contended that the only question that needs to be asked is whether the suspicion was reasonable.

[18] Counsel for the plaintiff rejected this argument and contended that what is in dispute is not whether or not the suspicion was reasonable, but whether Ackerman had in actual fact entertained the suspicion.

[19] The plaintiff's Counsel argued that not all 4 jurisdictional factors were pleaded in the defendant's plea to justify the arrest as required in terms of Section 40(1)(b) of the Act. He referred the Court to paragraph 13.2 of the Defendant's Plea which read:

"13.2 The Defendant Pleads specifically that the Plaintiff was lawfully arrested in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1997 (as amended), in that

13.2.1 The arresting Officer W/O Ackerman was a peace officer as defined in Act 51 of 1977;

13.2.2 W/O Ackerman reasonably suspected Plaintiff of having committed an offense referred to in

Schedule 1 of the Criminal Procedure Act namely the offence of rape."

[20] The plaintiff's Counsel argued that the aspect of the reasonableness of the suspicion may only be considered after the arresting officer has entertained his suspicion before effecting the arrest.

[21] He contended that, *in casu*, Ackerman did not entertain the suspicion and therefore the issue of the reasonableness of the suspicion does not arise.

[22] I tend to agree with the contention of the plaintiff counsel."Arrest without warrant is only permissible where the peace officer entertains a *reasonable suspicion* that the person he is arresting has committed an offence listed in *Shedule* 1." *See Etienne Du Toit et al* "Commentary on the Criminal Procedure Act" Service 51, 2013 at 5-12.

[23] The hurdle that this court is faced with is the evaluation of whether the requirements of effecting arrest without a warrant, particularly the entertaining of the suspicion, as set out in section 40(1)(b) of the Act had been satisfied by Ackerman before arresting the plaintiff.

[24] Counsel for the defence referred me to the cases of *The Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA), *Vilakazi v Minister of Safety and Security* (25211/2010) North Gauteng High Court [10 May 2013] and *Rusike v Minister of Police* (52960/2009) North Gauteng High Court [27 March 2013] which she contended are similar to the present case.

[25] She argued that the plaintiffs in the cases of *Vilakazi* and *Rusike* were arrested in terms of section 40(1)(b) of the Act on the basis of having been pointed out by the complainant to the arresting officers and the courts found the arrest to be lawful.

[26] On my analysis of these cases, I found that they are distinguishable from the present case in that the issues to be decided were not issues relating to the entertainment of the suspicion. In the *Vilakazi* case the court had to decide the reasonability of the suspicion.

[27] I also found that the arresting officers, in all these cases, had in actual fact entertained the suspicion before effecting arrest.

[28] In *Rusike* Inspector Botha did not effect arrest on mere pointing out of Rusike (the suspect) by Naidoo (the complainant). He entertained the suspicion by reading the docket, interviewing the complainant and when the suspect was pointed out to him, the suspect was in

possession of the complainant's truck and the keys and he then arrested him.

[29] Also in *Vilakazi* Constable Phiri did not just arrest Ms Vilakazi (the suspect) on the basis that she was pointed out by the complainant. He, over and above the pointing out of the suspect by the complainant to him, proceeded to entertain a suspicion by asking the suspect whether she knows the source of the R30 000.00 that was fraudulently deposited into her account. Ms Vilakazi did not know the source of the money and on further questioning she intimated to Constable Phiri that she wanted to make a withdrawal and invest some of the money. Constable Phiri was also shown a statement in respect of the fraudulent transaction. As Ms Vilakazi was a student, unemployed and did not know the source of the money, Constable Phiri arrested her on suspicion of having committed fraud.

[30] In the present case Ackerman admitted that the arrest of the plaintiff was solely based on the pointing out of the plaintiff by the complainant as the suspect who raped her. He testified that he avoided asking him question before his rights could be read out to him which usually happens at the police station.

[31] Except for the pointing out nothing has been placed on record to prove that Ackerman entertained the suspicion. He did not even enquire from

the complainant how come she did not know the plaintiff when they are actually neighbours.

[32] It is clear from the papers before me and the evidence tendered that Ackerman in effecting arrest did not satisfy all the jurisdictional facts stated in Duncan v Minister of Law and Order, 1986 (2) SA 805 (A). He failed to demonstrate that this crucial element was satisfied before effecting arrest.

[33] The parties have indicated to me that the issue of quantum has become settled. Counsel for the plaintiff disclosed that the amount the parties have agreed upon, in the event that I find the arrest to be unlawful, is R60 000,00.

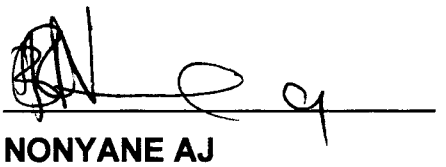
[34] Having heard arguments from both counsel for the plaintiff and defendant, considered the cases cited above and all relevant factors, I find the arrest and subsequent detention of the plaintiff to be unlawful.

[35] It is trite that costs should follow the cause. In this case costs of suit are awarded to the plaintiff including the costs of counsel.

[36] In the result the following order is made:

1. Judgment is granted in favour of the plaintiff for payment of the sum of R60 000.00.

2. The defendant is ordered to pay interest on the sum of R60 000.00 at the rate of 10.50% calculated from the date of judgment to date of payment.
3. The defendant is ordered to pay the plaintiff's costs of suit including the costs of counsel.



NONYANE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Counsel for the Plaintiff	:	Adv. R Baloyi
Instructed by	:	Mashamba Incorporated
Counsel for the Defendant	:	Adv. L A Pretorius
Instructed by	:	The State Attorney