

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 16853/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date: 6 June 2022

In the matter between:

TSIETSI MALATJIE
TEBOGO EDWARD SMITH
PHAKAMILE XUBAZANE

FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

[1] The plaintiffs were arrested on a charge of rape on 6 August 2019. They were detained for two days at the Tsakane police station. They first appeared in court on 8

August 2019. The matter was postponed and they were detained for a further thirteen days after which the charges of rape were withdrawn. The plaintiff's claim that they were unlawfully arrested.

[2] The parties agreed during the pre-trial that the merits and quantum be separated. The defendant admitted the respective arrests and the parties agreed that the defendant had the duty to begin and the onus to prove the lawfulness of the arrest.

Common cause facts

[3] It is common cause that a Ms. N[....] (the complainant) attended to the Tsakane police station on 4 August 2019 and gave a statement that she was kidnapped and raped by three African males on 28 July 2019. The first plaintiff is referred to by name in the complainant's statement.

[4] The plaintiffs were arrested on 6 August 2019.

The defendant's case

[5] The defendant called two witnesses.

(i) *Sergeant Rakwena*

[6] The first witness was the investigating officer, Sergeant Rakwena. The material aspects of his evidence comprise the following:

- i. He was stationed at Springs and received the docket with CAS number 64/08/2019 on 5 August 2019. The docket already contained the complainant's statement.
- ii. The plaintiffs were arrested by Captain Kgomo and he found them at the Tsakane police station after they were arrested;
- iii. Sergeant Rakwena obtained a statement from the complainant's boyfriend, one Tiny, on 7 August 2019 confirming that the complainant reported to him that she was raped.

iv. At the plaintiffs' first appearance in court on 8 August 2019 the case was postponed for the plaintiffs to obtain legal representation and for purposes of a bail application to 16 August 2019. On 16 August 2019 the matter was postponed again to 21 August 2019. While sergeant Rakwena was preparing for the bail application and conducting further investigation, the complainant admitted that she laid false charges against the plaintiffs. She made a statement to that effect on 18 August 2019. Sergeant Rakwena immediately discussed the matter with the State Prosecutor. Because the plaintiffs' case was set down to be heard in court again on 21 August 2019, and because it generally takes about two days to secure the presence of an accused in court when the accused is requisitioned, it was unlikely for the plaintiffs to have appeared in court before 21 August 2019. When the plaintiffs appeared in court on 21 August 2019 the case was withdrawn.

[7] During cross-examination Sergeant Rakwena was asked whether he was aware of the fact that the complainant was mentally impaired. He denied that she was mentally impaired and testified that although she can be described as 'slow', she was able to answer the questions he asked her.

[8] Sergeant Rakwena also testified during cross-examination that:

i. When he received the docket, the complainant was already interviewed by Warrant Officer Phaala, and examined by a medical practitioner. The J88 was in the docket and although it is not indicated that the complainant was injured, the remark was made on the J88 that although no injuries were visible the possibility of penetration could not be excluded. Sergeant Rakwena also highlighted that it is not indicated on the J88 that the complainant was mentally impaired;

ii. It was put to Sergeant Rakwena that the plaintiffs went to the police station out of their own volition 'after hearing from the boyfriend'. They were subsequently arrested by Captain Kgomo. Since Sergeant Rakwena was not present when the plaintiffs went to the police station the statements put to the witness will be dealt with under Captain Kgomo's evidence;

iii. It was put to Sergeant Rakwena that he failed to conduct a proper and thorough investigation. He testified that while he was investigating on 6 August 2019 and when he attended to the charge office after the plaintiffs were arrested, he spoke to the complainant and she confirmed the content of her statement at that time. This evidence was not contested.

[9] During re-examination Sergeant Rakwena testified that he carries about 50 active dockets, and that the plaintiffs were arrested by Captain Kgomo before he could conduct a thorough investigation.

(ii) *Captain Kgomo*

[10] Captain Kgomo testified that he was on duty at the Tsakane police station on 6 August 2019. Three men entered the charge office. They were complaining about another man harassing them at Extension 15. They said this man was threatening them with violence. He took them to Extension 15 and they pointed out the house where the alleged harasser lives. Captain Kgomo, his colleague and the three plaintiffs alighted and they found a male and his girlfriend at the home. When Captain Kgomo asked the man, Tiny, why he was harassing the three plaintiffs. Tiny said that they were the men who raped his girlfriend. The lady then provided Captain Kgomo with the CAS number and confirmed that these three men raped her. Captain Kgomo then informed the three plaintiffs of the charge against them and arrested them. He transported the three plaintiffs together with the alleged harasser and his girlfriend, the complainant in the rape case, to the police station.

[11] Captain Kgomo further testified that he phoned the investigating officer, Sergeant Rakwena, when he arrived at the police station, to find out if the case exists. Thereafter he arrested the suspects. The investigating officer arrived at a later stage and charged the plaintiffs with a charge of rape. He was no longer involved in the matter.

[12] Captain Kgomo's evidence does not clearly indicate when he arrested the plaintiffs, whether it was when they were still at Extension 15 or at the police station.

[13] During cross-examination it was put to Captain Kgomo that the three plaintiffs arrived at the Tsakane police station out of their own volition. It was pertinently put to him that the plaintiffs explained who was harassing them. He confirmed that he wanted to establish whether and why the alleged harassment occurred. The plaintiffs' complaint was not immediately attended to. They were told to leave and given a number to call to enquire when they should be back. He transported the complainants in an official vehicle to the alleged harasser's home.

[14] Although Captain Kgomo could not recall the detail of the interaction between himself and the three plaintiffs before he took them to the alleged harasser's house, he did recall that the plaintiffs attended to the Tsakane police station complaining about being harassed by a certain man, hereafter referred to as Tiny.

[15] Captain Kgomo denied that he and his colleague alighted from the vehicle at Tiny's house while they left the three plaintiffs in the car. He reiterated that they all got out. It was put to him that the plaintiffs claim that they were arrested at the police station. He reiterated that he arrested them at Tiny's house after they were identified by the complainant as her assailants and after he was provided with the CAS number.

[16] Captain Kgomo confirmed that rape is a serious offence, and that he knew where the plaintiffs stayed before the arrest was made. It was put to him that he was not obliged to detain or arrest the plaintiffs when they were pointed out as the rape victims, but he said he was obliged to do so because rape is a serious offence. He confirmed that he knew where the first plaintiff resided. He could not, when cross-examined, recite section 41(b) of the Criminal Procedure Act 51 of 1977 (the CPA). In answer to a question whether he took into consideration the fact that the plaintiffs came to the police on their own, he said that the harassment complaint could also be a cover-up. He confirmed that when a rape victim points out a suspect he would arrest the suspect. He reiterated that he was not aware of the rape case before the complainant informed him thereof at Extension 15 at Tiny's house. He testified that on the day he arrested the plaintiffs he reasonably believed that they were the ones who raped the complainant.

[17] After Captain Kgomo was cross-examined and no questions were posed to him in re-examination, I asked him whether the three plaintiffs informed him that the alleged harasser indicated that they raped his girlfriend or whether they brought up the issue of rape at all when they informed him that they were being harassed. He said that they said nothing about rape. Neither counsel asked any follow-up question despite having been provided with the opportunity to do so.

The plaintiff's case

[18] The plaintiffs only led the evidence of the second plaintiff, Mr. Smith. He testified that the plaintiffs individually came across the complainant's boyfriend (Tiny) who uttered swearwords and alleged they had taken his girlfriend by force. Because this happened to all three plaintiffs they saw it in a serious light and decided to go to the police station. They went to the police station on Tuesday 6 August 2019. They explained their 'grievance' to Captain Kgomo who attended to them in the charge office. They informed him that 'there is a person behind who paint our characters' who avers that they kidnapped his girlfriend, held her hostage and raped her. I find it apposite at this juncture to point out that this evidence was not put to Captain Kgomo when he was cross-examined.

[19] Captain Kgomo indicated that he would take them to confront the harasser, Tiny. Because there was no official vehicle available at that time he gave them a number to call to enquire when they should return. To make a long story short, the plaintiffs left the police station. Mr. Smith testified that while they were at the first plaintiff's house, Captain Kgomo and a lady colleague of his appeared and took them to Tiny's house. I pause to mention that it was not put to Captain Kgomo that he picked up the three plaintiff's at the first plaintiff's house. This is in my view not an important aspect and nothing turns on this. Mr. Smith directed Captain Kgomo to Tiny's home.

[20] Mr. Smith testified that the plaintiffs remained in the police vehicle when they arrived at Tiny's house. The police officials returned after some time in the presence of the said Tiny and the complainant. Captain Kgomo said they would discuss the issue further at the police station and transported them all back. On the way to the

police station he was dropped off near his own vehicle. He rejoined the group at the police station. Captain Kgomo denied that he dropped Mr. Smith off on the way to the police station.

[21] At the police station the plaintiffs were separated from the complainant and Tiny, and the lady police officer who accompanied Captain Kgomo said she was going to see whether a rape case was opened. The investigating officer arrived later. The lady police officer came back and said things were taking another direction and informed them they were under arrest for rape. Sergeant Rakwena appeared again and charged them with rape.

[22] Mr. Smith testified that he requested Sergeant Rakwena to separate the complainant from her boyfriend and inquire from her whether he raped her. Sergeant Rakwena failed to accede to his request. I pause to note that this evidence was not put to Sergeant Rakwena when he was cross-examined by the plaintiffs' counsel.

[23] Mr. Smith denied that they were pointed out by the complainant at Tiny's house.

[24] During cross-examination, Mr. Smith was informed that Sergeant Rakwena opened a docket for perjury against the complainant. He had prior knowledge of this fact and confirmed that Sergeant Rakwena asked them to be state witnesses in the perjury case. Mr. Smith was asked why he declined to provide a witness statement to Sergeant Rakwena in that matter. Mr. Smith said he was not going to assist Sergeant Rakwena because the latter refused to comply to his request to separate the complainant from her boyfriend and ask her in private whether he raped her.

[25] It became clear during cross-examination that Mr. Smith was not certain as to when and by whom the plaintiffs were arrested. He testified that it was at the police station that they were informed that they were arrested. The witness's attention was drawn to two notices in terms of Act 40 of 2002 written by attorneys regarding the incident. The first was written on behalf of the first plaintiff, but the second on behalf of all plaintiffs. It was pointed out that in none of these letters it was stated that the plaintiffs were arrested at the police station. In the first letter it is recorded

‘...pursuant to the arrest our client was taken to Tsakane police station for detention as from the date of 6 August 2019 ...’

[26] Mr. Smith confirmed that when they appeared in court the Magistrate’s enquired whether they wanted legal representation and the matter was postponed to allow them to obtain legal representation, and for a bail application. The plaintiffs closed their case after Mr. Smith testified.

[27] After evidence was led on 30 May 2022 the matter was postponed to 3 June 2022 for closing argument. Both counsel filed written heads of argument. Plaintiffs’ counsel indicated that it can be accepted that Captain Kgomo arrested the plaintiffs although Mr. Smith’s evidence was not crystal clear in this regard.

Discussion

[28] Section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 provides that a peace officer may without a warrant arrest any person ‘whom he reasonably suspects of having committed an offence referred to in Schedule 1.’ It is not in dispute that rape is a Schedule 1 offence.

[29] The Supreme Court of Appeal recently held in *Biyela v Minister of Police*¹ that the suspicion in question need not be based on information that would subsequently be admissible in a court of law. The court explained that the standard of a reasonable suspicion is very low - it should be more than a hunch, and it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information.

[30] When the matter was argued, counsel for the Plaintiffs indicated that the court can accept that the plaintiffs were arrested by Captain Kgomo. Although the parties are *ad idem* about the fact that Captain Kgomo arrested the plaintiffs, there is some uncertainty as to whether the plaintiffs were arrested at Tiny’s residence in Extension 15 or at the Tsakane police station after the plaintiffs together with the complainant

¹ (1017/2020) [2022] ZASCA 36 (1 April 2022) paras [33], [34].

and Tiny returned with Captain Kgomo to the police station. In light of the facts of this matter I am of the view that it is irrelevant whether the plaintiffs were arrested at Tiny's house, and then brought to the Tsakane police station where they were formally charged, or whether they were arrested and charged at the police station.

[31] Captain Kgomo testified that he arrested the plaintiffs because the complainant identified them as her assailants. She had a CAS number to verify that a rape case has been opened. These objective facts are in my view sufficient to establish a reasonable suspicion that the plaintiffs raped the complainant.

[32] This is, however, not the end of the matter. In *Biyela* the Supreme Court of Appeal (the SCA) reiterated the well-known fact that an arresting officer is not obliged to arrest if a reasonable suspicion arises. He or she has a discretion that must be exercised properly. The SCA explained that '[o]ur legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.'

[33] The plaintiffs' counsel submitted that Captain Kgomo failed to properly exercise the discretion whether to arrest the plaintiffs after the reasonable suspicion arose that they raped the complainant. Counsel submitted that Captain Kgomo failed to consider that the plaintiffs reported at the Tsakane police station out of their own volition, that they were sent back but retained contact with the police, that they voluntarily accompanied Captain Kgomo to Tiny's home and even directed him thereto, and that Captain Kgomo knew where they resided. Captain Kgomo only considered that rape is a serious offence and that the plaintiffs were identified as the rapists by the complainant.

[34] It is apposite at this juncture to state that I cannot accept Mr. Smith's evidence that the plaintiffs informed Captain Kgomo that Tiny was spreading false rumours that they kidnapped and raped his girlfriend. This was not put to Captain Kgomo when he was cross-examined. Captain Kgomo's evidence that the plaintiff's complaint was that the alleged harasser, Tiny, threatened the plaintiffs with violence, was not contested during cross-examination. Captain Kgomo's evidence that he did

not know of any case of rape before being informed thereof by Tiny and the complainant was also not contested.

[35] It is trite that violence against women and children in South Africa are endemic. The rape in question falls within Schedule 6 because the complainant alleged that she was raped by three assailants. The serious nature of the offence outweighs the fact that the plaintiffs' places of residence was known to Captain Kgomo, or that they reported to the police station out of their own volition in circumstances where they complained about threats of violence levelled against them. Captain Kgomo's decision that the plaintiffs had to be detained because of the fact that the offence in question is a serious offence and because the complainant identified the three plaintiffs as the assailant, cannot be faulted.

[36] The plaintiff's counsel submitted that the investigating officer failed to conduct a thorough investigation before the plaintiffs were arrested. The SCA's explanation in *Biyela* is indicative thereof that it is not required that the police must first conduct a *thorough* investigation before a suspect may be arrested. The jurisdictional requirement is that a reasonable suspicion must exist. The defendant proved on a balance of probabilities that the arrest was lawful and in accordance with the requirements of s 40(1)(b) of the CPA.

[37] As for the plaintiffs' detention, no case was made out that the Magistrate's order to detain the plaintiffs after their first appearance was informed by the defendant's action. It is trite that accused standing trial for allegedly having committed Schedule 6 offences carries a reverse onus and must satisfy a court that exceptional circumstances exist to permit bail. *In casu* the evidence before this court is that the plaintiffs' case was postponed from 8 August 2019 to 16 August 2019 for a bail application. There is no evidence as to why the matter was then again postponed to 21 August 2019. However, it was not pleaded by the plaintiffs, and no evidence was led to the effect that the postponement can be attributed to the defendant.

[38] There is no reason not to apply the general principle that costs follow the result. The defendant, however, seeks an order that the costs of senior and junior

counsel should be paid by the plaintiffs. The submission is that the monetary value of the plaintiffs' claims amounts to three million rand, hence the employment of both senior and junior counsel was justified. Counsel for the plaintiff submitted that the plaintiffs' cases were based on the same incident and that no complex legal principles necessitated the services of senior counsel. I am of the view that the complexity and extent of the plaintiffs' case did not require the services of two counsel. The combined monetary value of the claims, and the fact that public funds are at stake, however justify the employment of senior counsel.

ORDER

In the result, the following order is granted:

- 1. The plaintiffs' respective claims are dismissed with costs, which costs include the costs of senior counsel.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the first to third plaintiffs:	Adv. F I Baloyi
Instructed by:	Magagane Attorneys Inc.
Counsel for the defendant:	Adv. M M W Van Zyl (SC)
With:	Adv. C G V O Sevenster
Instructed by:	State-Attorney, Pretoria
Date of the hearing:	30 May 2022
Date of argument:	3 June 2022
Date of judgment:	6 June 2022