REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 4789/2012

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

16 May 2014
DATE **JUDGE: MATOJANE**

In the matter between:

KEVIN STEMAR Plaintiff

and

THE MINISTER OF POLICE 1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION 2nd Defendant

JUDGMENT

MATOJANE, J

Introduction

[1] This is a claim for damages consequent upon an alleged unlawful arrest, unlawful detention and malicious prosecution. The plea is based on a defence

contained in s 40(1)(b) of the Criminal Procedure Act of 1977 (the Act), which provides for an arrest by a peace officer without a warrant of arrest.

[2] It is common cause that plaintiff was arrested by employees of the first defendant, acting within the course and scope of their employment with the South African Police Service, without a warrant of arrest on 28 November 2010 on a charge of a rape of a minor child. Plaintiff was subsequently taken to court and his bail application was refused. The matter was remanded on numerous occasions until if was finalised on the 25 October 2011. The plaintiff was discharged at the end of the state's case.

The pleadings

[3] Claim 1 is the claim arising from the alleged unlawful arrest. The plaintiff's particulars of claim as amended states:

> "5.1 On or about 28th November 2010 at or near the plaintiff's permanent place of residence; he was arrested without a warrant by members of the Jabulani Police station on the alleged charges of rape.
>
> 5.2 The plaintiff was thereafter detained at the Jabulani Police Station at the instance of the said arresting officers and various other Policemen until the plaintiff appeared in the Johannesburg Magistrate Court on the 1st of December 2010.
>
> 5.3 The policemen as aforesaid acted at all relevant times within the scope of their employment with the First and Second Defendant;
>
> 5.4 As a result of Plaintiff's unlawful arrest and detention, Plaintiff suffered damages in the amount of R150 000.00."

[4] The defendant admits the arrest but pleads that the arrest and the ensuing detention was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 in that a charge of rape had been laid against the plaintiff by the complainant who had pointed out plaintiff as the perpetrator.

[5] Claim 2 is the claim based on malicious prosecution. The claim is formulated as follows in the particulars of claim:

> "6. On or about the 28th of November at the Plaintiff's permanent place of residence, the defendants wrongfully and maliciously set the law in motion by:
> 6.1 Charging the plaintiff with rape; and
> 6.2 By insisting that plaintiff be detained without bail without any evidence to warrant criminal charges or plaintiff's detention When charging and prosecuting the plaintiff, the first and second defendants had no reasonable and or probable cause for doing so, nor did they have any reasonable belief and / or evidence in the truth of the information at their disposal."

[6] Because the first defendant bore the onus of proving that the police's actions were justified in law, defendant testified first. The first defendant led the evidence of the complainant's stepmother, Mrs Ngubane, a witness to whom complainant made the first report about the alleged rape and the State Prosecutor. The defendant also applied to have the statements by the investigating officer and the arresting officer both of whom had since died to be admitted into evidence as an exception to the hearsay rule. I provisionally granted the application.

The evidence

[7] Ntombifikile Ngubane, complainant's stepmother testified that her sister, Jeanette had sent complainant, who was then 15 years old, to a local shopping centre to buy hairpieces on Sunday at about 10am. Complainant took a long time to return from the shops; Mrs Ngubane went to look for complainant and reported the matter to the police when she did not find her at the shopping centre. Complainant arrived home shortly after she herself got home at about 4pm. Jeanette was the first to inform her that complainant had been raped. After inspecting the complainant, she and Jeanette went to the street and flagged down a passing police vehicle and reported the rape. She requested the police to first take them to the residential flat where the alleged rape took place as complainant had informed her that she knows the place. On arrival at plaintiff's flat, the police knocked at the door, plaintiff opened and complainant pointed plaintiff out as the person who raped her. Under cross-examination it was pointed out to her that in her statement to the police she stated that a neighbour broke the door and two men were found inside the flat. She stated further that neighbour managed to catch one of the suspects. She replied that there must have been a mistake as they found plaintiff alone in the flat.

[8] The evidence of Jeanette Zulu is to a large extend the same as that of Mrs Ngubane except for the fact that she did not witness the arrest. She testified that she stopped a passing police car and told the police that a child who was in the premises had been raped. She walked to the police station and was not present when plaintiff was arrested.

[9] The third state witness was Mrs Cheryl Slack, who is employed by the National Director of Public Prosecution as a regional court prosecutor; she testified that based on her perusal of the complainant's statement, statement by the arresting officer, the doctor's report and statement by other witnesses she was satisfied that the state had a *prima facie* case and proceeded with the prosecution of the plaintiff despite the fact that the DNA report excluded the plaintiff as the donor of the semen found in the complainant's panties.

[10] She conceded under cross-examination that the complainant's statement was not commissioned and was not dated. It was suggested to Mrs Slack that upon receipt of the DNA evidence confirming that plaintiff was not linked to the alleged rape, the state should have withdrawn charges against the plaintiff and accordingly plaintiff's continued detention became unlawful and malicious. She testified that at the request of plaintiff's legal representative, they approached the senior prosecutor to discuss the matter. Based on the fact that the complainant was a minor and that her mother corroborated her version and the medical evidence indicated signs of vaginal penetration having taken place and that the complainant was able to point out the scene of the alleged crime and identify plaintiff as the perpetrator, she came to a conclusion that the state had a *prima facie* case even if the DNA report indicated otherwise. She further stated that the plaintiff who was represented could have brought another bail application on new facts as the defence was furnished with the DNA analysis report.

Plaintiff's evidence

[11] The plaintiff for his part testified that the police arrested him at his home on the 28 November 2010 until the 1 of December 2011 when he was discharged. He had been to a hip-hop session the previous day where he was performing and selling t-shirts. The session started on Saturday at 2 pm and ended on Sunday morning. When he got to his flat he sat with his friends and they all went to sleep at 9:30 am. At about 11am his friend, Siyabonga came to visit him in the company of the complainant. They sat with him until he again fell asleep. Later Siyabonga woke him up to tell him that he was leaving, he fell asleep again. Hours later he was woken by a knock at the door when the police ordered him to open the door.

[12] The police asked permission to come in and one of the policeman said that there were other people outside. The policeman brought them in. Complainant was among the people who were brought inside the flat, the policeman asked complainant if plaintiff was the person who raped her, plaintiff was then handcuffed. The police went with complainant into the bedroom and came out with his friend who was also handcuffed. Plaintiff told the police that he did not know complainant and took police to Siyabonga's house where they found the security gate locked. His bail application was refused. He was incarcerated for the full period while the matter was brought before court and remanded on numerous occasions and ultimately placed for plea and trial on the 25 November 2011, when he was discharged at the end of the state's case.

Discussion

[13] Section 40(1)(b) of the Act provides as follows:

> "(1) A peace officer may without warrant arrest any person-
> (a) …;
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
> (c) …"

[14] In order to succeed in a defence based on section 40(1)(b) of the Act the defendant is required to establish:

> (i) that the arrestor is a peace officer;
> (ii) that the arrestor in fact entertained a suspicion;
> (iii) that the suspicion which he held was that the suspect (the arrestee) had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and
> (iv) that the suspicion rests upon reasonable grounds.
>
> (See **Duncan v The Minister of Law and Order** 1986 (2) SA 805 (A) at 818G-H.)

[15] It is not in dispute that Warrant Officer Tleane was in fact a peace officer as defined in the Act nor that rape of a minor is an offence referred to in Schedule 1 of the Act. What falls to be decided is accordingly whether Warrant Officer Tleane entertained a suspicion that the plaintiff had raped the minor child

and whether reasonable grounds existed for such a suspicion. It is clearly established on the evidence of Mrs Ngubane and Zulu that their only source of information about the alleged rape is the complainant herself. The plaintiff's unchallenged evidence under oath is that he told the police that complainant came with his friend, Siyabonga at his flat. Mrs Ngubane in her statement to the police, when the events were still fresh in her mind stated that a neighbor broke the plaintiff's door and two men were found inside the flat. She stated that a neighbor managed to catch one of the suspects. Complainant on the other hand stated that the front door neighbor heard her screams, came and broke the door open and found her on the bed naked and one suspect ran away and the other locked himself in the bedroom.

[16] The requirement that the arrest be made only on probable cause, in my view, requires that an arrest without a warrant must stand on firmer grounds than mere suspicion, the arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the perpetrator otherwise, law-abiding citizens will be left at the mercy of the officer's whim. In my view, the particularity of the information on which a warrant of arrest may be issued cannot be less stringent than where a warrant is absent; the question therefore in this case is whether the arresting officer could, on the information before him, have procured a warrant of arrest of the plaintiff. I think that no warrant would have been issued on the evidence then available. The arresting officer never bothered to interview and obtain a statement from Siyabonga who it appears played a role in the commission of this alleged rape.

[17] Section 40(1)(b) does not require direct evidence but requires of an arresting officer to hold a suspicion and that such suspicion should rest upon reasonable grounds. The above factors, in my opinion, do not constitute very strong circumstantial evidence, which would found a reasonable suspicion that plaintiff raped the complainant. In the circumstances I consider that the defendants have not established all the jurisdictional facts required to justify an arrest in terms of section 40(1)(b) of the Act.

[18] Section 39(3) states "*The effect of an arrest shall be that the person arrested shall be in lawful custody and he shall be detained in custody until he is lawfully discharged or released from custody*". This section pre-supposes that an arrest will be valid. If the arrest of a person is unlawful, his or her subsequent detention will also be unlawful. Du Toit et al 5-5 (note 17). The claim based on unlawful arrest and detention must accordingly succeed. That leaves claim 2. I turn to deal with it.

Claim 2: Malicious Prosecution.

[19] In order to succeed in a claim for malicious prosecution the plaintiff is required to establish that:

(a) The defendant set the law in motion by instigating or instituting legal proceedings;

(b) The defendant acted without reasonable and probable cause;

(c) The defendant acted with malice;

(d) The prosecution has failed.

See **Minister of Justice and Constitutional Development v Moleko** 2008 All SA 47 (SCA).

[20] It is common cause that the law was set in motion as envisaged above and plaintiff was discharged at the end of the state's case after a year. What remains to be established is whether defendants acted without reasonable and probable cause with *animo iniuriandi.* At paragraph 6.2 of his Particulars of claim, plaintiff alleges that defendants acted "wrongfully and maliciously" by charging the plaintiff with rape and insisting that plaintiff be detained without bail without any evidence to warrant criminal charges or plaintiff's detention.

[21] I now proceed to determine whether plaintiff has established absence of reasonable and probable cause with *animo iniuriandi*. In **Relyant Trading (Pty) Ltd v Shongwe** [2007] 1 ALLSA 375 (SCA) para 14 the court set out the test to be applied as follows:

> "The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted in the absence of reasonable and probable cause was explained in the **Beckenstrater v Rottcher and Theunissen** [1955 (1) SA 129 (A) at 136 A-B] as follows:
>
> > "Where it is alleged that a defendant had no reasonable cause of prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if despite his having such information, the defendant is shown not to have believed in the plaintiffs guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."
> >
> > "It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiffs guilt. Where

> reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: for it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives, [see Beckenstrater v Rottcher and Theunissen 135 D-E]"

[22] It follows that not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence. Mrs Slack testified that she had the contents of the docket at her disposal, she relied on the information conveyed to her by Mrs Ngubane, Mrs Zulu,(the latter two can only tell her what they were told by complainant) the complainant and the medical report. The belief of the state prosecutor, in my view, could not have been objectively reasonable because complainant was a single witness regarding the alleged rape and her evidence is unsatisfactory in all material respects. It is perhaps important to note and to ask the question as to why the state prosecutor opposed plaintiff's application for bail in the light of such contradictory statements in the docket and also why after receiving the DNA analysis report that excluded plaintiff as the donor of the semen found on complainants panties, the state did not withdraw charges against the plaintiff. Finally why was the case postponed eleven times for further investigations without the state realising that it did not have a strong case and having plaintiff released on bail.

[23] By her own admission, the Mrs Slack consulted with the complainant on the date of the trial, had she consulted with the complainant and other witnesses earlier when the matter was postponed, and instructed the investigating officer to obtain a statement from Siyabonga, she would have realized that the vague suspicions and allegations by the complainant and other witnesses could not be transformed into probable cause.

[24] Pre-trial detention unquestionably involves a serious deprivation of individual liberty and must be justifiable according to the demands of the Bill of Rights. That the defendant's case was based on shaky grounds is borne out by the fact that the case had to be postponed in court eleven times for further investigations over a period of a year. In my view, the defendants were obliged to consider, each time that the matter was postponed for further investigation, whether there is a reasonable apprehension that the plaintiff will abscond or fail to appear in court if released on bail. In the circumstances of this case, it was in my view, constitutionally untenable for the magistrate to have allowed so drastic an invasion of the plaintiff's personal liberty by agreeing to so many postponements when charges could have been withdrawn and plaintiff recharged when the defendants were ready to proceed with the prosecution. To summarise, I find that defendants acted without reasonable and probable cause with *animo iniuriandi.*

Hearsay evidence

[25] The defendant brought an application in terms of section 3 of Act 45 of 1988 for the admission of hearsay evidence emanating from the statements of

the investigating officer and the arresting officer both of whom have since died. The plaintiff opposed the application on the basis that he will be prejudiced in his case as such evidence cannot be subjected to cross-examination to test whether it is trustworthy.

[26] Section 3 of Act 45 of 1988 sets out clear rules in regard to the admission of hearsay evidence. It reads:

> "3(1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:*
>
> *(a) each party against whom the evidence is to be adduced, agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) the person upon whose credibility the probative value of such evidence depends, himself (or one can read herself in there as well), testifies at such proceedings, or;*
>
> *(c) the court having regard to*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
>
> *(vii) any other factor which should in the opinion of the court, be taken into account,*
>
> *is of the opinion that such evidence should be admitted in the interests of justice."*

[27] It is necessary to first determine whether the statements by the investigating officer and the arresting officer are, indeed hearsay evidence. The Act in section 4 clearly defines hearsay evidence and reads as follows:

> "*For the purposes of this section, hearsay evidence means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.*"

Based on this definition, it is clear that the statements are in fact hearsay evidence as per definition. I must therefore, determine whether the evidence is to be admitted in terms of section 3.

SECTION 3(1)(a):

[28] The defendant does not agree to the admission of the hearsay evidence as evidence in these proceedings.

SECTION 3(1)(b):

[29] It is common cause that "the persons upon whose credibility the probative value of the evidence depends", have since passed away.

SECTION 3(1)(c):

[30] What remains is for this Court to decide whether such evidence should be admitted in the interests of justice. Section 3(1)(c) sets out seven factors and circumstances to be considered in deciding whether such evidence should be admitted. Many of the factors are also interlinked:

(i) THE NATURE OF THE PROCEEDINGS:

This is a civil trial in which the issue to be decided is whether the police officers had reasonable grounds for arresting the plaintiff without a warrant.

(ii) THE NATURE OF EVIDENCE:

The nature of the evidence on the face of the statements made by the two officers is not difficult to establish. In his statement warrant officer Tleane corroborates the evidence of Mrs. Ngubane that Mrs. Ngubane stopped him as he was doing patrol duties and was informed that complainant had been raped at Jabulane flats. He arrested plaintiff after complainant had pointed him out. At the time of his arrest, plaintiff was with his friend, Siyabonga who was not arrested despite complainant's allegation that she was abducted and raped by two males. There can be no doubt that there are significant dangers and, therefore, also real prejudice to the plaintiff in admitting such evidence. The plaintiff told the police that complainant came to his flat in the company of Siyabonga, plaintiff will not be afforded an opportunity to test the credibility of the statement made by the arresting officer that complainant told him that Siyabonga was asleep when plaintiff was raping her. The role, if any of Siyabonga cannot be ignored, Mrs. Ngubane in her statement said a neighbour caught one suspect who was fleeing and complainant also stated that another suspect fled. The plaintiff would not be able to subject such evidence to through cross-examination

(iii) THE PURPOSE FOR WHICH THE EVIDENCE IS TENDERED:

It is clear that the evidence is sought to be admitted in order to

dispense with the requirement to establish the jurisdictional facts required by section 40(1)(b) of the Act. This evidence is decisive in that it is the only evidence relied upon by the defendants to prove that the employees of the defendants reasonably suspected that plaintiff committed an offence referred to in Schedule 1.

(iv) THE PROBATIVE VALUE OF THE EVIDENCE:

The statements are of limited probative value. The arresting officer confirms the evidence of Mrs Ngubane and Mrs Zulu that they told him that complainant had been raped and that he arrested the plaintiff. The statement does not reinforce the other evidence about what happened at the time of plaintiff's arrest. Both Mrs Ngubane and complainant have different versions about the role of Siyabonga at the time plaintiff was arrested. Most importantly, the statement does not explain on what basis did the arresting officer reasonably suspect that plaintiff raped the complainant apart from the say so of the minor complainant.

(iv) THE REASON WHY THE EVIDENCE IS NOT GIVEN BY THE PERSON UPON WHOSE CREDIBILITY THE PROBATIVE VALUE OF SUCH EVIDENCE DEPENDS.

The reason is obvious. The authors of the statements are deceased.

(v) ANY PREJUDICE TO A PARTY WHICH THE ADMISSION OF SUCH EVIDENCE MIGHT ENTAIL.

In dealing with the other relevant factors, I have already indicated that plaintiff will be prejudiced by the admission of the evidence of the arresting officer. The prejudice to plaintiff in respect of the other statement by the investigating officer lies in the fact that plaintiff cannot elicit favourable concessions from the evidence by the investigating officer that he traced the neighbour and the later told the investigating officer that he knows nothing about alleged rape. The plaintiff will further be denied an opportunity to challenge the evidence by the investigating officer that he was subsequently told that the person who rescued complainant was taken by the police and was released at the police station. The contents of the two statements are not capable of being clarified or even amplified without the testimony of the two officers.

(vi) ANY OTHER FACTOR WHICH SHOULD, IN THE OPINION OF THE COURT, BE TAKEN INTO ACCOUNT:

The evidence contained in the two statements do not establish the jurisdictional facts for a section 40(1)(b) defence.

[31] After considering all the relevant factors, I find that the evidence of the two officers should not, in the interest of justice, be admitted as evidence against the plaintiff in terms of the provisions of section 3(1)(c) of the relevant Act.

[32] In summary, my conclusion is that the defendants have failed to discharge the onus that rest on them to justify the arrest of the plaintiff, accordingly both claims by the plaintiff succeeds.

[33] I turn now to the question of quantum to which the plaintiff is entitled as a result of his unlawful arrest and malicious prosecution. I have had regard to the fact that plaintiff, who is presumptively an innocent man, has been in custody for a period of a year awaiting trial where there was no probable cause to believe that he had raped the complainant. The burden of a prolonged pre-trial detention is substantial where it is as a result of deliberate violation of persons basic constitutional rights. That plaintiff's family relationships and source of income has been impaired is beyond question. It cannot be denied that plaintiff's feeling of self-respect was impaired by being falsely accused of raping a minor child and having to appear in court on eleven occasions when the matter was postponed. In these circumstances, I am of the view that damages in the amount claimed are appropriate to assuage plaintiff's violated constitutional rights. I am also of the view that it is not fair for the plaintiff to be put out of pocket for seeking to right a wrong committed against him when his constitutional rights were violated in this manner, accordingly a punitive costs order is called for.

Costs and the order

[34] The following order is made

(a) Claim 1: The defendants are ordered jointly and severally to pay the plaintiff the amount of R100 000.00.

(b) Claim 2: The defendants are ordered jointly and severally to pay plaintiff the amount of R350 000.00.

(c) Interest on the abovementioned amounts at prescribed rate from the date of summons to date of payment.

(d) The defendants are further ordered jointly and severally to pay plaintiff's costs on an attorney and client scale.

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K E MATOJANE
JUDGE OF THE HIGH COURT