



IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: 1127/2015

In the matter between:

KGOSIETSILE ERNEST DINTOE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

DATE OF HEARING	:	28 FEBRUARY 2017
DATE OF JUDGMENT	:	23 MARCH 2017

COUNSEL FOR PLAINTIFF	:	ADV D. SMIT
COUNSEL FOR DEFENDANT	:	ADV S. MPAKANE

JUDGMENT

DJAJE AJ

Introduction

- [1] The Plaintiff instituted an action for damages against the Defendant in the amount of R500 000-00 for unlawful arrest, detention and assault by members of the South African Police Service acting within the scope and authority of their employment with the Defendant. The Defendant pleaded that the arrest and detention of the Plaintiff was lawful and denied the assault on the Plaintiff. The matter proceeded on merits only as counsel for the Defendant had no instructions in relation to quantum.

Evidence

- [2] Plaintiff testified that his wife left to attend a funeral in Bapong on **12 June 2015**. He testified further that he tried to stop her from leaving due to service protests in the Bapong area but she decided to go nevertheless. She returned home on **14 June 2015** after he could not get any details from her about the funeral and who had died. On that day of **14 June**, the Plaintiff was from church and on his arrival at home he found his wife sitting in a police vehicle with police officers. It is his testimony that he did not speak to the police officers and went straight to the police vehicle to open the door where his wife was seated. Immediately the vehicle took off and he was unable to open the door to talk to his wife. Thereafter, he decided to go to the police station to look for his wife and also to hear why the police were at his house. On arrival at the police station he met a certain lady at the entrance who was on duty and he enquired about his wife from her. The lady then showed him a room where his wife was. At that time Constable Morokane then instructed the lady not to show the Plaintiff where his wife was. The Plaintiff testified that he had already seen the room pointed out to him and he went to the door to knock. As he was about to knock he was grabbed and assaulted from behind by a number of police officers including Constable Morokane. He was assaulted,

pepper sprayed and fell down. Subsequent to him falling down he was cuffed on his hands and feet.

- [3] After the said assault, it is the Plaintiff's testimony that he was then taken to the cells where he was searched by other inmates at the instruction of the police officers. He was further pushed against the wall by one of the inmates. He was then released from the cells after five hours. He did not appear in court. On his release he was seen by a doctor who gave him an injection that caused him to sleep and woke up the following day in Klerksdorp. He could not remember how he travelled to Klerksdorp from Lichtenburg. Plaintiff testified that he had injuries as a result of the assault on him by the police officers. Counsel for the Plaintiff handed in a medical certificate which indicated that on **17 June 2015** Plaintiff had the following injuries:

"BP 130/80 severely stressed; Heamatoma frontal between eye/bridge of the nose; soft tissue injury trapezius/sulocipital; both wrists circular marks where the cuffs were put on".

It is the Plaintiff's case that he was never informed by the police why he was arrested and his constitutional rights were also not read to him.

- [4] The Defendant had two witnesses namely, Constable Moraladi and Constable Morokane. Both of them testified that they were on duty patrolling in Lichtenburg on **14 June 2015** when they received a message from the control room about a complainant who required police escort to her house. The complainant was the Plaintiff's wife who was unknown to them at that time. They both accompanied her to her home after informing them that the Plaintiff phoned her and threatened her. As a result of the said threats she was afraid to go to the house alone and fetch her belongings. On their way to the Plaintiff's house they received another message from the control room at the police station that the Plaintiff was at the police station looking for his wife and very aggressive. On

arrival at the Plaintiff's house, before anyone of them could alight from the vehicle they noticed the Plaintiff's vehicle approaching at a very high speed. Constable Moraladi described the way the Plaintiff was driving his car as being reckless. The Plaintiff alighted from his vehicle and went directly to the back of the vehicle where his wife was seated. He tried to open the door and Constable Moraladi instructed Constable Morokane to drive off as the Plaintiff was trying to drag his wife out of the police vehicle. They drove off with the wife and the Plaintiff tried chasing the vehicle but because of the speed they were travelling at, he could not catch up.

[5] At the police station the two officers took the Plaintiff's wife to the trauma room to obtain her statement. According to Constable Moraladi who was with her in the trauma room she did not want to open a case docket against the Plaintiff but just to register domestic violence. Whilst in the trauma room, Constable Moraladi testified that he heard a noise in the passage and the door to the trauma room was pushed open by the Plaintiff. Immediately he prevented the Plaintiff from gaining entry and Constable Morokane together with other officers were on the outside pulling the Plaintiff away from the door and restraining him from entering the trauma room. It is the Defendant's case that the Plaintiff was overpowering the officers and pepper spray had to be used to restrain him. In total four police officers were involved in trying to restrain the Plaintiff from entering the trauma room.

[6] Constable Morokane testified that after the Plaintiff was restrained he was handcuffed and placed in a waiting cell. According to him his rights were read to him and he was also given a written notice of rights to sign and he refused. Morokane further informed the court that he was intending to open a case against the Plaintiff on behalf of the state and he was prevented from doing so by his superior who is related to the Plaintiff. As a result the Plaintiff was never taken to court or any docket opened against him. In his evidence Morokane stated that he arrested the Plaintiff for

domestic violence, *crimen injuria* and resisting arrest. Further that he read him his constitutional rights as soon as he cuffed him.

Submissions

- [7] It was argued that the Defendant has not been able to lay a basis for the arrest of the Plaintiff. The submission on behalf of the Plaintiff was that the police officers admitted in evidence that they did not speak to the Plaintiff at any stage and therefore there was no basis for an arrest on *crimen injuria*. On the charge of resisting arrest the Plaintiff argued that at no stage did the officers attempt to arrest him, the only time when the Plaintiff was on the ground and handcuffed was after he tried to knock on the door where his wife was. At that time the Plaintiff was not even aware that his wife was busy with a domestic matter against him and could not have known that he was being arrested. It is the Plaintiff's case that when the police officers had him on the ground and cuffed him he did not resist and that was the first attempt to arrest him.
- [8] On the charge of domestic violence counsel for the Plaintiff argued that the Defendant has also failed to lay a basis for reliance on section 40 (1) (q) of the Criminal Procedure Act 51 of 1977 (*"the Act"*). The argument by the Plaintiff on this aspect was that the only evidence before court is that the Plaintiff's wife informed the police that the Plaintiff threatened her telephonically. It was argued further that Constable Moraladi and Morakane did not interview the Plaintiff's wife themselves about the threats made but rather that they were informed through the control room at the police station. According to the Plaintiff the two officers did not do any investigations to establish the truth of the allegations in order to form a reasonable suspicion. It is the Plaintiff's case that he was assaulted by the police and the Defendant has failed to show that the arrest was lawful and that the Plaintiff indeed committed a schedule 1 offence.

- [9] It was argued for the Defendant that the police officers who testified managed to prove the lawfulness of Plaintiff's arrest. The submission made was that the Plaintiff had no right to demand his wife from the police as she had asked them for protection against him. Further that the police had a duty to stop the Plaintiff from entering the trauma room where his wife was seated. The allegation of assault by the Plaintiff is attacked as being false on the basis that the Plaintiff in the particulars of claim stated that the police assaulted him with open hands which is contradictory to what he testified in court that he was assaulted with fists and kicked. Further that the Plaintiff never opened a case of assault against the police officers who allegedly assaulted him. The medical record provided by the Plaintiff is attacked on the basis that it does not indicate who assaulted the Plaintiff and that the injuries thereon could have been caused by the inmates who were fighting with the Plaintiff in the police cells or at the time when the Plaintiff was sedated by the doctor and ended up in Klerksdorp.
- [10] The Defendant's argument is that the police officers in arresting the Plaintiff were acting in terms of section 40 (1) (a) of the Act in that the Plaintiff committed an offence of domestic violence, resisting arrest and *crimen injuria* in the presence of the arresting officer, Constable Morokane. It is the Defendant's case therefore that the police acted lawfully in arresting and detaining the Plaintiff.

Law

- [11] Section 40 (1) (a) and (q) of the Criminal Procedure Act 51 of 1977 provides as follows:

“ 40. Arrest by peace officer without warrant

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

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

.....

(q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

- [12] It is trite that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)** Rabie AJ explained:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

- [13] As to whether the discretion is exercised properly the following was stated in **Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA)**:

“[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached. See also Omar v Government of the Republic of South Africa & Others (Commission on Gender and Equality as Amicus Curiae) 2006 (1) SACR 359 (CC) where the following was said at par 48:

“....The police official does have discretion. He or she is obliged forthwith to arrest the respondent only if it appears that there are reasonable grounds to suspect that imminent harm to the complainant may result from the alleged breach. In considering whether imminent harm may follow, several factors have to be taken into account. The police official may also come to the conclusion that there are insufficient grounds for an arrest and must then notify the respondent to appear before court.”

- [14] In **Zealand v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC)** par 24, the court stated that:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

Analysis

[15] It is not disputed that the Plaintiff was arrested and detained by Constable Morokane acting within his scope of employment with the Defendant on 14 June 2015. The Defendant in its plea relied on the provisions of section 40 (1) (q) of the Act as justifying the arrest and detention of the Plaintiff. However, during argument the Defendant raised section 40 (1) (a) of the Act as the justification for arresting and detaining the Plaintiff. Counsel for the Plaintiff made a submission that this uncertainty is an indication that Defendant had no justification for arresting and detaining the Plaintiff. It is therefore important to evaluate the evidence based on both sections 40(1) (a) and (q) of the Act.

[16] In terms of section 40 (1) (a) of the Act an arrest without a warrant is justified if there is an attempt to commit an offence or an offence is committed in the presence of the arresting officer. In this matter according to Constable Morokane the Plaintiff was arrested as he committed three offences in his presence, being domestic violence, *crimen injuria* and resisting arrest. In terms of the Domestic Violence Act 116 of 1998 an act of domestic violence is defined as:

“physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards complainant where such conduct harms, or

may cause imminent harm to, the safety , health or wellbeing of the complainant.”

- [17] In his testimony Constable Morokane stated that the Plaintiff was about to open the door of the trauma room where the complainant or his wife was, with Constable Moraladi. This was an act of domestic violence according to Constable Morokane which was committed in his presence thus justifying the arrest. It is not clear from his testimony which conduct of the Plaintiff was an indication of a commission of domestic violence. There is no evidence of a commission of any of the above mentioned acts by the Plaintiff in his presence and to whom it was directed as the Plaintiff's wife did not open a case of domestic violence against the Plaintiff.
- [18] During argument counsel for the Defendant conceded that there was no evidence that the Plaintiff committed an offence of *crimen injuria* and as such I will not deal with that aspect. The other offence allegedly committed by the Plaintiff in the presence of the arresting officer was resisting arrest. Resisting arrest occurs when a person interferes with law enforcement's officer's duty to attempt to effect a lawful arrest. The evidence presented makes no indication that Constable Morokane attempted to arrest the Plaintiff at any stage. According to Constable Morokane the Plaintiff was attempting to gain entry into the trauma room and he prevented him from doing so. In the process of preventing the Plaintiff he was assisted by other police officers and eventually hand cuffed the Plaintiff. There is no evidence that the Plaintiff was informed that he was under arrest before being prevented from entering the trauma room. All that happened was that the Plaintiff was restrained and brought down by the police when he attempted to enter the trauma room. That cannot be described as resisting arrest by the Plaintiff in any way.
- [19] In terms of section 40 (1) (q) of the Act an arrest without a warrant is lawful if there is a reasonable suspicion that a person has

committed an act of domestic violence which constitutes an offence in respect of which violence is an element. It is the evidence of the Defendant that the two police officers involved in this matter were informed via the control room at the police station that the Plaintiff's wife required police escort to her house as she was threatened by the Plaintiff. The two officers did not speak to the Plaintiff's wife themselves to hear the details of the threats made by the Plaintiff. The only evidence is that the Plaintiff's wife reported that the Plaintiff threatened her telephonically which can amount to verbal or psychological abuse.

[20] In terms of section 3 of the Domestic Violence Act 116 of 1998

“a peace officer may without a warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspect of having committed an offence containing an element of violence against the complainant”.

It is clear from the quoted section that it is required that the offence must contain an element of violence and not just an act of domestic violence. Therefore in terms of section 40 (1) (q) of the Act the suspicion must be that there is an element of violence in the offence committed. This requires the police to exercise their discretion in arresting the Plaintiff.

[21] In **Minister of Safety and Security v Sekhoto and Another** (*supra*) the following was stated:

“Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s40 (1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.”

- [22] The question is whether Constable Morokane exercised his discretion properly and acting in good faith, rationally and not arbitrarily. In **Minister of Safety and Security v Sekhoto (supra)** at paragraph 39 Harms DP (as he then was)

“said peace officers are “entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached.”

- [23] There is no evidence in this matter how Constable Morokane formed his suspicion or whether there were any reasonable grounds upon which his suspicion was based that there was an element of violence in the offence committed by the Plaintiff that required him to arrest without a warrant. The Defendant has not been able to prove that the arresting officer exercised his discretion rationally.

- [24] I thus find that Constable Morokane in arresting the Plaintiff did not form a reasonable suspicion that he committed an act of domestic violence which constitutes an offence in respect of which violence is an element and as such did not exercise his discretion properly. In my view, there were no sufficient grounds for him to base his suspicion if any.

- [25] In assessing the evidence in its totality the arresting officer in exercising his discretion was unreasonable and the arrest and detention of the Plaintiffs were unlawful. Therefore the Defendant is found to be liable for 100% of the Plaintiffs damages resulting from his arrest and detention.

Assault

[26] In proving the allegation of assault the Plaintiff testified that when the police approached from behind he was assaulted by being kicked and hit with fists. As a result of the assault he was injured on his face. It is however not clear from his evidence how if he was approached from the back the police officers managed to assault him on his face. It is further his evidence that in the police cells another inmate fought with him by banging him against the wall. He testified again that after his release he was sedated and woke up in Klerksdorp without knowing how he arrived there. There is therefore no evidence how the injuries noted by the doctor on the Plaintiff were inflicted and when. On this aspect the Plaintiff has not been able to prove that the said injuries were inflicted by the police during their scope of employment with the Defendant. In my view the Plaintiff's claim for assault against the Defendant cannot succeed.

Costs

[27] The Plaintiff has succeeded in proving his claim and there is no reason why costs should not follow the event.

[28] Consequently, I make the following order:

1. The Defendant is liable for 100% of the Plaintiff's proven damages;
2. The Defendant is ordered to pay costs of suit.

J T DJAJE

ACTING JUDGE OF THE HIGH COURT

