

SOUTH AFRICA / JUDGMENT

Sheriff v Minister of Police (33167/15)

[2023] ZAGPJHC 803 (19 July 2023)

[2023] ZAGPJHC 803

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

33167/15

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: 33167/15

Heard on: 20 April 2023

Judgement: 19 July 2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter

CLEODENE MAXSIENE SHERIFF PLAINTIFF and THE MINISTER OF POLICE DEFENDANT

JUDGEMENT

Strijdom AJ

1. This is an action for unlawful arrest and unlawful detention brought by the plaintiff against the Minister of Police for actions taken by members of the South African Police services acting within the course and scope of their employment with the defendant. The action against the defendant arises out of the unlawful warrantless arrest on 13 October 2014 at about 17h30 of the plaintiff. Furthermore, the plaintiff claims for the unlawful detention of the plaintiff from 13 October 2014 at about 17h30 to 14 October 2014 to about 11h30 when the plaintiff was released.
2. Matters that are common cause between the parties:

- 2.1 The identity and locus standi of the plaintiff;
- 2.2 The plaintiff has complied with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002;
- 2.3 The arresting officer who arrested the plaintiff did so within the course and scope of employment;
- 2.4 Plaintiff was arrested on 13 October 2014 and released on 14 October at court on warning;
- 2.5 Plaintiff was arrested without a warrant of arrest;
- 2.6 The plaintiff was detained at Eldorado Police station;
- 2.7 The plaintiff was charged with assault and resisting arrest and,
- 2.8 The plaintiff appeared in court within 48 hours after her arrest.

3. The defendants' plea is that:

- 3.1 The plaintiff was arrested in terms of Section 40(1)(a) of the Criminal Procedure Act 51 of 1977; alternatively;
- 3.2 The plaintiff was arrested in terms of Section 40(1)(b); and
- 3.3 The plaintiff's arrest was compliant with Section 50 of the Criminal Procedure Act.

Plaintiffs' Case

5. The plaintiff (Cleodene Maxsiene Sheriff) testified that on 13 October 2014 she and her sister (Ignatia Peterson) went to Eldorado Park police station to report a case of intimidation by her sisters' tenants.
6. On arrival at the police station, she was assisted by an unknown police officer who refused to assist them on the basis that their matter was related to an eviction. Despite numerous attempts to get assistance the police officer refused to assist despite the fact that he was told that the two of them and family members were threatened with violence, pointed with firearms and intimidated in various ways including WhatsApp messages.
7. The plaintiff took out her cellphone and took a picture of the said police officer. Sergeant Phakula asked the plaintiff to delete the picture and she refused. Phakula jumped the counter and attempted to grab the cellphone and tried numerous times to take the cellphone whilst another female officer grabbed both the plaintiff's arms. Phakula choked the plaintiff and she bit Phakula on her hand.
8. Colonel Van Aswegen appeared and the plaintiff told him that she wanted to open an assault case against Phakula. Ignatia and the plaintiff went to the colonel's office to open a case of intimidation against the tenants and an assault case against Phakula. Ignatia made her statement and it was given back to her for her signature. A lady appeared at the door of the office and gave a thumbs up to the colonel. The colonel jumped up and grabbed the plaintiff

with her left arm and said this one is going to the cells tonight. On their way to the cells the colonel choked her and she bit him.

9. She further testified that she was taken to the female cells and locked. The colonel did not indicate that she was under arrest.
10. Male police officers took her out of the cell for fingerprint taking and informed her that she will be going to court the next day. She made a request to make a telephone call to her family for her chronic medication as she was asthmatic and had eczema. She was informed that she was not allowed to have visitors and she will not die.
11. On the morning of 14 October 2014, she was driven to court and along the way she was asked whether she wanted to make a statement and she said she will make a statement in court. She was asked to sign a notice of rights and a warning statement.
12. At Kliptown court she was taken to a holding cell which has men and she was the only women. She appeared in court at 11h30 and was released on warning. The colonel and Phakula later testified in the criminal trial, and the plaintiff was acquitted.
13. Ms Peterson testified that she and the plaintiff went to Eldorado Park police station on 13 October 2014 to lay charges of intimidation against her tenants who were harassing her family members and herself with intimidation, threats and death.
14. Her evidence about the sequence of events since their arrival up to the time when the colonel grabbed the plaintiff with her arm from the office is identical to that of the plaintiff.
15. She stated that when the plaintiff was pulled out of the office by the colonel there were a number of police officers who entered the colonel's office. She further confirmed that after the plaintiff was pulled out of the colonel's office she remained in the office and does not know what happened to the plaintiff up to the time of detention.
16. After the plaintiff was taken away Ms Peterson returned home and later, she, together with her parents, returned to the police station in order to give the plaintiff a jersey, as well as her asthmatic medication. They were denied access to the plaintiff by the police and the police refused to take the plaintiff's medication.

The Defendant's Case

17. Sergeant Phakula testified that on 13 October 2014 she was stationed at the counter in the reception area of the Eldorado Park Police station assisting a complainant. She heard officer Tibane informed the plaintiff and her sister that they were going to be assisted. The plaintiff was unruly, shouting and pacing up and down taking pictures.

18. She jumped over the counter to take the cellphone from the plaintiff, a scuffle ensued, and the plaintiff bit her. She denied that there was another female officer who held the plaintiff's arms behind her back. After the plaintiff bit her, she left her and went to attend to her bite wound. She thereafter went to Colonel van Aswegen's office and informed him that she was going to open a case against the plaintiff.
19. Sergeant Mdluli testified that on the day in question he found the plaintiff and her sister in Colonel van Aswegen's office. Colonel van Aswegen sought his assistance in taking the plaintiff to the cells.
20. He (Mdluli) walked behind Colonel van Aswegen as he took the plaintiff to the cells. He denied that the plaintiff was taken to the cells by 8-10 police officers. The plaintiff bit Colonel van Aswegen's hand and blood came out. Sergeant Mdluli thereafter grabbed the plaintiffs' wrist and subdued her and took her to the cells area with the assistance of officer Zwane. He considered this as his arrest of the plaintiff.
21. Sergeant Mdluli further testified that he did not read the plaintiff's rights at the time of subduing her because the plaintiff was unruly, swearing and shouting, and he only read her rights at the cells area.
22. He testified that the plaintiff was released from the police station on 14 October 2014 at 08h55 to Kliptown Magistrate's Court.

Evaluation of the Evidence

23. In assessing conflicting versions of evidence, the court must take into account the probabilities of the versions put forward, the reliability, and credibility of the witnesses. [1]
24. The plaintiff made a favourable impression on the court as an intelligent witness whose account was truthful and reliable. She impressed me as a good witness and there is nothing to cast doubt on her veracity concerning her arrest and detention. There are also no inherent improbabilities in the version of the plaintiff to reject her evidence.
25. There are no material contradictions in the evidence of the plaintiff and her evidence was corroborated on material aspects by her sister (Ignatia Peterson).
26. It must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. The contradictory versions must be considered and evaluated on a holistic basis.
27. Ms Peterson also impressed me as a reliable and credible witness. There are no material contradictions in her evidence, and she did not contradict the evidence of the plaintiff. Her testimony was consistent with the probabilities and was corroborated by the evidence of the plaintiff and the common cause facts.

28. Sergeant Phakula did not impress me as a reliable and credible witness. She contradicted herself on material aspects. Under cross-examination the following was elicited:

28.1 She testified that she did not attempt to take the cellphone from the plaintiff. She later conceded that she tried to take the cellphone

from the plaintiff. In her statement to the police, she stated that “when I take the cellphone out of her hand, she bite me with her teeth on my left hand.”[2]

28.2 She testified in chief that W/O Tibane went to the plaintiff and her sister to inform them that the officers are still busy with other complainants. During cross-examination she conceded that she did not hear the conversation between W/O Tibane and the plaintiff.

28.3 She testified that the plaintiff took a photo of her and W/O Tibane. During cross-examination she conceded that the plaintiff only took a photo of W/O Tibane.

28.4 Her statement to the police did not contain material facts of the incident and is contradictory with her evidence.

28.5 She conceded that she violated the plaintiff’s constitutional rights to her property and dignity.

29. Sergeant Mdluli’s statement to the police is inconsistent with his evidence. He conceded the following under cross- examination:

29.1 At the time when he grabbed the plaintiff, she was already arrested by Colonel van Aswegen;

29.2 He raised for the first time in cross-examination that he arrested the plaintiff and it was after the plaintiff had bitten the colonel;

29.3 He admitted that the fact that he arrested the plaintiff should have been contained in his statement. He could not explain why such arrest was not disclosed;

29.4 He conceded that in his statement he did not disclose that he read the plaintiff her rights at the time of the alleged arrest;

29.5 He conceded that in his statement he did not disclose all the material facts because it was late, he was supposed to knock off duty.

29.6 He testified that he detained the plaintiff. He later conceded that he did not detain the plaintiff and cannot remember as the incident happened long ago.

30. It is highly improbable that if Sergeant Mdluli had arrested the plaintiff that he would not have stated it in his statement. It is more probable that he did not arrest her as she was already arrested by Colonel van Aswegen. The plaintiff also testified that she was not arrested by Sergeant Mdluli. He only assisted Colonel van Aswegen to take her to the cells.

31. Taking into account the probabilities, reliability and credibility, the version of the plaintiff is accepted.

Unlawfulness of the Arrest and Detention

32. For an arrest and detention without a warrant, such arrest or detention may be justified within the provisions of Section 140 (1) of the Criminal Procedure Act. The defendant pleaded that the arrest was justified in terms of Section 40 (1)(a) alternatively 40 (1)(b) of the CPA.
33. In terms of Section 40(1) a peace officer may without warrant arrest any person-
 - (a) Who commit 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.
34. No testimony was led from the following witnesses:
 - 34.1 Sgt Tibani who was allegedly taken a photo by the plaintiff.
 - 34.2 The police officer who was assisting Phakula to take the cellphone;
 - 34.3 Colonel van Aswegen.
35. The evidence of the plaintiff is that the colonel (arresting officer) simply informed her at the time of her arrest that that this one is going to the cells. This is corroborated by the evidence of Ms Peterson.
36. No evidence was tendered by the defendant that the arresting officer (Colonel van Aswegen) reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1. The assault on sergeant Phakula was not committed in the presence of Colonel van Aswegen.
37. The defendant failed to prove that a Schedule 1 offence was committed. No evidence was led that Sergeant Phakula was assaulted when a dangerous wound was inflicted as described in Schedule 1 of the CPA.
38. It was stated in *Rex v Jones*[3] that assault GBH is not a Schedule 1 offence unless a dangerous wound has been inflicted and affirmed that a dangerous wound was one which threatened life or use of a limb or organ.
39. The court rejected the evidence of Sergeant Mdluli that he arrested the plaintiff for the assault on Colonel van Aswegen. The evidence of the plaintiff revealed that at the time when Mdluli grabbed the plaintiff she was already arrested by the colonel. Mdluli did not make an arresting statement that he arrested the plaintiff for biting the colonel.

40. Even if all the jurisdictional factors were present which in my view is not, an officer's discretion is so integral to a warrantless arrest provided by the aforementioned Section 40(1)(b) that it can be stated as a matter of law, that no lawful arrest can take place without the exercise of discretion on the part of the arresting officer. As testified by the plaintiff there was in fact no discretion exercised by Mdluli as he merely acted on instruction from the colonel. The plaintiff was not informed that she was arrested, nor the reason for such arrest.
41. On a conspectus of all the evidence I concluded that the defendant failed to discharged the onus to prove that the arrest of the plaintiff was lawful. this is not only procedurally unlawful but also unconstitutionally unlawful.
42. In *Mvu v Minister of Safety and Security*[4] it was decided that "Even where an arrest is lawful, a police officer must apply his or her mind to the arrestee's detention and the circumstances relating thereto. This includes considering whether detention is necessary at all".
43. No evidence was led by the defendant that detention of the plaintiff was necessary.
44. Section 56(1) of the CPA provides as follows;
"If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time in Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice..."
45. In my view the police could have warned the plaintiff to appear in court and not arrest and detain the plaintiff.
46. It was submitted by the defendant that police bail does not apply to offences listed in part II and III of Schedule 2 of the CPA (the offence of assault when a dangerous wound is inflicted falls in part II of schedule 2) I disagree with the submission that the plaintiff was charged for assault when a dangerous wound is inflicted. No evidence was led that the nature of the assault was when a dangerous wound was inflicted. There was no valid reason why the plaintiff could not be released on police bail in terms of Section 59(1)(a) of the CPA.
47. In terms of section 59(A)(1) of the CPA a prosecutor may in respect of the offences referred to in Schedule 7 of the CPA in consultation with the police official charged with the investigation, authorise the release of an accused on bail. Schedule 7 makes provision for assault, involving the infliction of grievous bodily harm. The evidence does not reveal that the plaintiff was afforded the opportunity to be released on warning or bail. I therefore concluded that the detention of the plaintiff was unlawful.

Quantum

48. In Rahim[5] the Supreme Court of appeal listed inter alia the following as factors relevant when determining the amount of damage to award for the deprivation of liberty: (a) the circumstances under which the deprivation of liberty took place (b) the conduct of the defendant and (c) the nature and duration of the deprivation.
49. The correct approach in the amount of damage for unlawful arrest and detention is to have regard of all the facts of a particular case and to determine the quantum on such facts.[6]
50. In assessing the quantum on the proved facts, the court take into consideration the age, marital status, children, and employment status of the plaintiff as well as her medical condition particularly the fact that she is asthmatic. The court will also take in consideration the condition of the cell in which the plaintiff was detained.
51. The plaintiff was treated in an inhuman fashion tantamount to gender-based violence wherein she was manhandled by two female officers and other male officers who dragged the plaintiff to the cells.

Comparable cases:

52. In Louw and another v Minister of Safety and Another[7] the plaintiff was detained 20 hours and was awarded R75 000.00
53. In Olivier v Minister of Safety and Security and Another [8], the plaintiff was six hours in detention and was awarded R50 000.00
54. In Lepasa v Minister of Police[9] the plaintiff was detained for about 24 hours and was awarded R120 000.00
55. In Van Rensburg v City of Johannesburg[10] the plaintiff was awarded R75 000.00 and was detained for 6 hours.
56. In S v Williams and Other the Constitutional Court held as follows:

“The rights entrenched in chap 3 are available to every person; that included children and adults, women and men, prisoners, and detainees. The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman, and degrading...”

57. The plaintiff suffered an arbitrary deprivation of her personal liberty and was humiliated and traumatised by virtue of her arrest and detention.
58. Having considered the circumstances under which the plaintiff was arrested and detained as well as the awards in previous comparable cases, I am of the view that the following award would be a fair and reasonable assessment of the damages.
59. In the result the following order is made:
 - (a) Unlawful arrest: R100 000.00;
 - (b) Unlawful detention: R120 000.00;

- (c) Interest at the prescribed rate from date of judgement to payment;
- (d) Costs to be taxed on the magistrate's court scale.

STRIJDOM J J

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Appearances:

For the Plaintiff: Adv J M V Malema

Instructed by: Madelaine Fourie Attorneys

For the Defendant: Adv Mduduzi Nombewu

Instructed by: State Attorney

- [1] Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others [2002] ZA SCA 98 (6 September 2002) at 141 to 150 E)
- [2] Caselines: 004: 15 p81 paragraph 4
- [3] 1952 (1) SA 327
- [4] (07/20296)[2009] ZAGP JHC 5 Willis J
- [5] Rahim v Minister of Home Affairs [2015] ZASCA 92; 2015 (4) SA 433 (SCA)
- [6] Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) PAR 26 AT 93 D-F)
- [7] 2006 (2) SA SACR 178T
- [8] 2009 (3) SA 434 (W)
- [9] Case number 04299/15 on the 6/2/2023 by Francis J
- [10] 2009 (2) SA 101 (W)

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