REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2021/7738

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

22/11/2024
DATE

In the matter between:

KHUMALO SIBONGILE JACQUELINE PLAINTIFF

And

MINISTER OF POLICE FIRST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS SECOND DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 22 November 2024.
Delict – Claim for damages – Unlawful arrest – Detention – claim for damages.

JUDGMENT

MUDAU, J:

[1] Plaintiff instituted action for damages against the defendants for unlawful arrest and detention by members of the South African Police Service (SAPS) without a warrant and sought an amount of R 300 000.00 (Claim A). Claim B was instituted against the second defendant, the Director of Public Prosecution also for R 300 000.00. Claim B was subsequently withdrawn by the plaintiff through a notice of amendment in terms of rule 28(1) of the Uniform Rules, which was served on the defendants on 6 November 2024. The remaining Claim A is defended. Since the matter proceeds against the 1st defendant only, any reference to the defendant is to the first defendant. In this regard defendant has filed a plea and special pleas to the claim. However, the special pleas have since been abandoned and accordingly require no further determination. In the pretrial minute dated 5 November 2024, the defendant admitted that SAPS members acted at all times of the arrest and detention within the course and scope of their employment with the first defendant.

[2] Before the trial commenced, the defendant sought a postponement of the matter from the bar without any substantive application, due to the unavailability of its witnesses. It is trite that postponement applications are not there for the taking. An applicant for a postponement seeks an indulgence[1]. The applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application [2]. But also, an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. In this case, the set down for trial was served a considerable time before. The application for a postponement was not only opposed, but totally unjustified. The application was dismissed. Only one witness, the plaintiff, testified. There were, accordingly, no witnesses who testified on behalf of the defendant.

Factual Background

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[1] *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75F–G.
[2] *National Police Service Union and Others v Minister of Safety and Security 2000 (4) SA 1110 (CC)* at 1112C–F.

[3] Plaintiff was arrested at home on Friday, 31 July 2020 and charged with the offence of common assault under the Domestic Violence Act.[3]. The complainant in the matter was her brother. The plaintiff testified that on the day of her arrest, three male police officers came to her family house looking for her. They asked her mother on her whereabouts. Plaintiff was in her bedroom and clad in her pajamas. Upon joining them in the living area, she was ordered to dress up after being told that they had been looking for her for a long time. She assumed they were police officers as they had a police docket with them and were also armed. She retreated to her bedroom. But as she was getting dressed up and still half dressed, one of them peeped inside her bedroom ordering her to hurry up. She grabbed items of clothing that she could and got dressed up. The officers were not dressed in their official police uniform and were not driving a marked police vehicle, but a white sedan, in which she was ordered inside. She sat at the back with one officer.

[4] Before that incident, she had previously been to the police station after having received a note to present herself. It was then that she learnt that her brother had opened a case against her. She responded that it was in fact her brother who fought her. She was thereafter asked to sign the warning statement which she did. On the occasion of her arrest, she explained to the arresting officers that she thought the matter was over. Despite her explanation, she was arrested and detained at the Dobsonville Police Station. At the police station, before her detention in the cells, she was made to sign a notice of rights - SAPS 14A form (exhibit A), which was never explained to her. Her private possessions, such as cell phone and belt were registered separately in form SAPS 22, which she signed per exhibit B. She was detained inside a holding cell that was very dirty. The blankets were provided were dirty and had what appeared to be vomit, and so was the sponge and the toilet.

[5] She also testified that there was food that was provided whilst in detention. She, however, could not eat that food because the cell was filthy, had a non-functioning toilet, had dirty blankets on the floor and had an unbearable smell. She only drank the juice that was provided. She could not use the toilet facility to

[3] 116 of 1998.

relive herself as there was no toilet paper. Through an interleading security door, she managed to go to another cell. There, the toilet was a lot better than the initial toilet where she was detained. She was taken to the Magistrate's Court cells on the morning of Monday, 3 August 2020. There, she was released without a court appearance but had remained anxious. No one explained to her the reason for her release. She subsequently joined her mother and took a taxi home. She was in detention for 3 days.

[6] During cross examination, she explained that the dispute with her brother started when her brother was throttling his two-year-old son for allegedly eating his peanuts. When she intervened to stop the abuse of the child, her brother said he could do anything to the child as the child was his. Her brother turned on her. He throttled, slapped and kicked her. She fell to the ground as a result. She pushed him away. Her mother came and reprimanded him. At that stage, she was bleeding from her hands and feet. She later opened a charge against him at the police station. Her brother opened a counter charge. She disputed that there was any valid charge of assault against her.

Law on Arrests

[7] Section 40(1)(b) the Criminal Procedure Act[4] (the CPA) provides that a peace officer may effect an arrest without a warrant if there is reasonable suspicion that a suspect has committed an offence referred to in Schedule 1 of the Act. It is trite that to prove that an arrest was lawful, the first defendant has to prove the following jurisdictional facts: (i) the arresting officer was a peace officer; (ii) the arresting officer entertained a suspicion; (iii) that the suspect to be arrested committed an offence referred to in Schedule 1; and (iv) the suspicion rested on reasonable grounds. It is common cause that the plaintiff in this case was arrested without a warrant. The alleged assault on her brother was not within sight of any peace officer.

[8] It is trite that arrest, by definition constitutes a serious restriction of an individual's freedom of movement and can also affect a person's dignity and privacy as the uncontested facts in this case show. It is also trite that the onus to prove that an

[4] 51 of 1977.

arrest was lawful rests on the arresting officer.[5] In *Minister of Law and Order and Others v Hurley and Another*[6] it is stated thus:

> "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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."[7]

[9] Accordingly, the lawfulness or otherwise of an arrest is closely connected to the facts of each situation.[8]

[10] On what a reasonable suspicion entails, the court in *Biyela v Minister of Police*[9] stated as follows:

> "[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.
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> [34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively."

[11] In compliance with section 35 of the Constitution, the notice of rights (exhibit A) makes reference to assault subject to the Domestic Violence Act. Section 5 (2) of the Domestic Violence Act provides that: "(2) If the court is satisfied that-

(a) there is *prima facie* evidence that the-

(i) respondent is committing, or has committed an act of domestic violence;

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[5] *Minister of Safety and Security & another v Swart* [2012] ZASCA 16; 2012 (2) SACR 226 (SCA) at para 19.
[6] [1986] ZASCA 53; 1986 (3) SA 568 (A).
[7] Id at 589E-F.
[8] See generally *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15; 2007 (10) BCLR 1102 (CC); 2008 (1) SACR 56 (CC) at para 20.
[9] [2022] ZASCA 36; 2023 (1) SACR 235 (SCA).

(ii) complainant is suffering or may suffer harm as a result of such domestic violence; and

(b) the issuing of a protection order is immediately necessary to protect the complainant against the harm contemplated in paragraph *(a)* (ii),

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order in the prescribed form against the respondent...".

[12] Accordingly, an interim protection order may be granted to a complainant to protect him/her against acts of domestic violence. Simultaneously, and in terms of the interim protection order, a warrant for the arrest of the defendant will be authorised, but the execution of the warrant will be suspended subject to compliance with the provisions of the order.[10]

[13] Where there is an alleged contravention of the conditions provided in the protection order, the complainant may hand the warrant of arrest, together with an affidavit stating the nature of the alleged breach of the protection order, to any member of the SAPS in terms with s 8(4)(a) of the Domestic Violence Act. In that event, there is a positive duty, when there is a complaint of a contravention of a protection order, to ascertain firstly the existence of that order *and* the terms of the order. The police have a further duty, secondly, to ascertain if the complaint by the complainant in a domestic violence matter *is* a contravention of the terms of the protection order, after having regard to both the complaint and the order itself.[11] [Italicised for emphasis]

[14] The police are at liberty if it appears to the member concerned that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach, he or she *must* forthwith arrest the respondent. Before making the decision that the complainant may indeed suffer imminent harm, he or she must consider the factors set out in s 8(5) of the Act. These factors are: "(a) the risk to the safety, health or wellbeing of the

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[10] See in this regard *Khanyile v Minister of Safety and Security & another* 2012 (2) SACR 238 (KZD).
[11] See *Maganyele v Minister of Police* [2022] ZAGPPHC 353 at para 18.

complainant; (b) the seriousness of the conduct comprising an alleged breach of the protection order; and (c) the length of time since the alleged breach occurred".

[15] I am not persuaded that the suspicion the arresting police harboured was, objectively viewed, based on reasonable grounds. The defendant failed to meet the jurisdictional facts as required in section 40 of the CPA or for that matter, the Domestic Violence Act, in the absence of any evidence. It follows that the first defendant failed to discharge the onus which rests upon it to establish on a balance of probabilities that the arrest was lawful. The arrest and subsequent detention of the plaintiff was therefore, unlawful.

[16] In *casu* there is a direct causal link between the police's wrongful act, the plaintiff's unlawful arrest, and the harm done due to the plaintiff's subsequent detention for a further 3 days without bail.

[17] It has been stated in numerous court decisions that, if an accused or a suspect does not represent a danger to society, will in all probability stand his trial, will not abscond, will not harm himself and is not in danger of being harmed by others, and may be able and keen to disprove all the allegations against him or her, an arrest will ordinarily not be the appropriate way of ensuring their presence.[12] The facts in this case fall squarely within this approach. There is no evidence regarding this matter to suggest that the arrest was in the first place justified.

[18] The plaintiff contended that in the event that the arrest is found to be unlawful, an appropriate award of damages would be R 300 000.00, the amount claimed in the summons. The defendant on the other hand, submitted that an amount of R 60 000.00 would be reasonable in the circumstances.

[19] On the question of quantum, the court in *Thandani v Minister of Law and Order*[13] held:

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[12] See in this regard *Louw & another v Minister of Safety and Security & others* 2006 (2) SACR 178 (T) at 185D, relying on *S v Van Heerden en Ander Sake* 2002 (1) SACR 409 (T).
[13] 1991 (1) SA 702 (E).

"In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual."[14]

[20] In the particulars of claim, the R 300 000.00 was calculated at R 50 000.00 per day for a maximum period of 6 days. This has not been established. The plaintiff, an adult woman and mother to a 30-year-old woman of her own, is a grade 12 drop out with a security certificate. Accordingly, taking into account all of the circumstances of this matter and having regard to the nature and impact of her arrest and unlawful detention, I am satisfied that a globular award in the amount of R 150 000.00 would represent a reasonable and appropriate award of damages.

[21] I therefore make the following order:

1. The first defendant is ordered to pay to the plaintiff's damages in the sum of R 150 000.00 for the unlawful arrest and subsequent detention of the plaintiff on 30 August 2020.

2. The first defendant is ordered to pay interest on the above stated amount of damages at the prevailing legal rate *a tempora mora* from date of judgment to date of payment.

3. The first defendant is ordered to pay the plaintiff's costs of suit on scale A.

[redacted]TP MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

[14] Id at 707B.

APPEARANCES:

For the Plaintiff:	Adv F. J. Mamitja
Instructed by:	N.H. Attorneys
For the Defendants:	Adv J. Mawila
Instructed by:	State Attorney
Date of Hearing:	12 November 2024
Date of Judgment:	22 November 2024