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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:16523/2018
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
NOT REVISED
09.05.23**

In the matter between:

NQOBI NKABINDE

First Plaintiff

PHIWANKOSI VELAPHI NKABINDE

Second Plaintiff

SIPHIWE CHRIS NKOSI

Third Plaintiff

and

MINISTER OF POLICE

First Defendant

DIRECTOR OF NATIONAL PROSECUTING AUTHORITY Second Defendant

Neutral Citation: *Nqobi Nkabinde and Others v Minister of Police and Another* (Case No. 16523/2018) [2023] ZAGPJHC 445 (9 May 2023)

JUDGMENT

YACOOB J:

1. The plaintiffs claim damages from the defendants, jointly and severally, for wrongful arrest and detention, wrongful prosecution, and loss of income, in the amount of R2,1 million each.

2. The second defendant is apparently the National Director of Public Prosecutions, incorrectly cited. However the second defendant did not object to the mis-citation and participated in proceedings.
3. The plaintiffs bore the duty to begin for the malicious prosecution claim, while the defendants did for the unlawful arrest and detention claim. Since the rule is that where the duty is on the defendants for one element and on the plaintiffs for another, the plaintiffs must begin, I ruled that the plaintiffs must begin.
4. The third plaintiff was no longer a part of this matter by the time it was heard. The attorneys no longer represented him, nor did he appear at the hearing. Mr Vobi submitted that the third plaintiff wished to have his claim postponed *sine die*, but of course he had no mandate from the third plaintiff. I make no order regarding the third plaintiff, and if he wishes to attempt to prosecute his claim he will no doubt face some procedural hurdles. The case of the third plaintiff was then separated from that of the first and second plaintiffs in terms of Uniform Rule 10(5).
5. After the plaintiffs closed their case, the defendants made a successful application for absolution on the claim for unlawful prosecution.
6. This was granted on the basis that there was no evidence of either malice or negligence on the part of the prosecution placed before the court. There was no evidence that the prosecutor interfered or was careless of the liberty of the plaintiffs.

7. Although the docket had been provided to the plaintiffs, they did not place it before the court, so the court only had their say so that there was no evidence against them. This was insufficient for the court to conclude that the prosecution was malicious. The plaintiffs had to bear the consequences of their failure to adduce evidence and absolution was granted against the first and second plaintiffs for malicious prosecution. Costs were reserved.
8. It remains to deal with the unlawful arrest and detention claim.
9. The defendants called 4 witnesses, 3 members of the South African Police Services and one prosecutor.
10. The first witness was Warrant Officer Mavhusha. He testified that he and Constable Mngoma were patrolling at Bramley View, they had started just before 07h00. At Brighton Road they saw a white Quantum parked off the road, there was a *cul de sac*, and it was an industrial area.
11. Mr Mavhusha saw four men standing outside near the taxi. He went up to them, identified himself as a policeman, and asked them what the problem was and why they were there. One of them came towards him and told him the taxi (the white Quantum) was broken down. He also was told that their friend was in the taxi with his girlfriend. Mr Mavhusha said he got the impression the man was trying to prevent him from getting closer to the taxi.
12. He approached the taxi and a fifth man came out of the taxi, attempting to flee, but Mr Mavhusha accosted him. He tried to look through a window of the taxi at the time the man emerged. He also heard a woman scream that she was being

raped. The man said that was a lie, that she was a sex worker who had been paid.

13. The woman was naked and there were condoms inside and near the taxi. She told Mr Mavhusha that “all of them” raped her. She appeared to be traumatized. He then arrested all five men, also reading them their rights.

14. The woman could not put her clothes back on because she said they had been thrown out of the taxi. He had to telephone a woman police officer to ask her to bring some clothes. She said she had been there since about 04h30.

15. Mr Mavhusha then took the men to Sandringham Police Station. The taxi started easily and was driven to the Sandringham Police station. It was not stuck. He booked the men in and opened the docket at Sandringham, and then took the men to Norwood Police Station, because there were no proper cells at Sandringham. The documents filled in when the plaintiffs were booked in show that they were arrested for rape.

16. Detective Sergeant Manenje who specializes in rape cases took the woman to the doctor.

17. Mr Mavhusha was taxed in cross examination with some inconsistencies with his statement, which did not include reference to being told that someone was in the taxi with his girlfriend or that one of the men outside came towards him as he approached them. He was adamant that even though he had not put some details in the statement made at the time, he remembers that they happened.

18. Mr Mavhusa handed over the docket to the detective, he does not know what happened with the investigation.
19. The second witness was Detective Sergeant Manenje. She is attached to Sandringham Social Crime Prevention. She was on standby to be called if a case of rape or something dealing with children or gender-based violence occurred. She was called in because there was a rape case. She went to the Sandringham police station around 09h00. The processing of the arrest and the docket had not been complete but a statement had been taken from the complainant and the arresting officer had made a statement.
20. Sgt Manenje looked at the statements and then met the complainant. She introduced herself and asked the complainant if she was the complainant in a rape case. She confirmed that she was, and Sgt Manenje explained the procedure. Sgt Manenje began filling in a form with her which was the form which needed to be filled in before going to the doctor. When they got to the point where the complainant had to explain what had happened she started crying and got angry, asking if she had to be asked by everyone in the police station what happened.
21. Eventually Sgt Manenje took the complainant to a clinic for an examination. Eventually the complainant told her what had happened, although she was crying. This was while they were on their way to the clinic.
22. The complainant had gone with two siblings to a tavern in Yeoville. While they were waiting for transport in the street, a Quantum arrived, and the three of them

got into it. There were three men in the taxi, the taxi went to Orange Grove and the two siblings got out and two men got in.

23. One of the men told her to spread her legs and called her a harlot. While telling the story, she began crying more. She was distressed but Sgt Manenje tried to calm her and asked her to continue. She said they took her into the next seat, because she had been in the seat behind the driver, and began stripping her, throwing her clothes out of the window, and they then began raping her while the taxi was still moving. They continued even after the taxi stopped. She said the police appeared and she screamed that she was being raped. Sgt Manenje appeared to be quite distressed while relating this part of the evidence.

24. Sgt Manenje left the complainant at the clinic because she had to do other things in the case. She asked the Norwood station commander to get the suspects' finger prints and buccal samples for DNA comparison. She then also interviewed the suspects. She told them the offence was gang rape and read them their rights in accordance with procedure. The two plaintiffs declined to give a statement, and told her they would talk to their lawyers.

25. She then went back to fetch the complainant from the clinic, and collected the J88 and sexual offences kit at the same time. The complainant then said she wanted to wash and was hungry, and asked her to take her to an address in Alexandra. She did so and told her that she would fetch her again. She does not remember at what time she dropped the complainant off. Sgt Manenje then said she wasn't sure if she dropped the complainant off before or after interviewing the suspects.

26. When Sgt Manenje went back to fetch the complainant she was not there and could not be found in the area. The telephone number also did not reach her. Sgt Manenje had wanted to go with the complainant to try and recover the clothes that had allegedly been thrown out of the window.
27. Sgt Manenje stopped working on this case in July 2016. By that time the complainant had not been found. She was pointed to an entry in the docket in May 2017 in which the prosecutor noted that the victim could not be found and that it would possibly not be prosecuted. She confirmed that the complainant was never found and that the case could not proceed without the complainant. She never visited the scene of the crime because she had wanted to go there with the complainant. The case was in any event withdrawn in October 2016, although that was after Sgt Manenje had left that unit.
28. Under cross examination it emerged that on one of the occasions she looked for the complainant, Sgt Manenje found her sister, who said that the complainant lies and uses men for money. Sgt Manenje said, quite rightly, that this did not cause her to doubt the complainant's story because a person's behaviour does not have a bearing on whether they were raped or not. The sister's evidence may only have been relevant if the matter went to trial.
29. Sgt Manenje testified that it was not unusual for a rape victim to disappear. She was experienced in these matters, she has worked with sexual offences for a long time.
30. The next witness for the defendants was Lieutenant-Colonel Mogaila. He was the head of visible policing at Norwood SAPS. He testified to describe the condition

of the cells at Norwood. However he had only been stationed at Norwood since January 2022. His evidence therefore did not assist with the condition of the cells in May 2016.

31. The last witness for the defendants was Ms R E Khoda, a Regional Prosecutor based at Booyens Regional Court. She was stationed at Johannesburg Magistrates Court in 2016. She testified about the plaintiffs' court appearances in the matter. The first appearance was on 24 May 2016, it recorded that bail was opposed because it was a schedule 6 offence. It was adjourned for address verification to 31 May 2016. On 31 May the docked was not at court and the address was not verified so it was postponed again to 13 June 2016, when it was crowded out to 21 June 2016. The matter was postponed a further three times. On 20 July bail was finally granted.

32. According to Ms Khoda she read the complainant's statement, and decided to enrol the matter as a schedule 6 offence because she could see from the statement that it was gang rape.

33. The first plaintiff testified at the beginning of the trial and again in rebuttal. He had been out drinking with his friend B who was a taxi driver, together with three other friends, one of whom was the second plaintiff. They were accompanying B in his taxi. B stopped the vehicle and told them it was stuck. The four men were sitting and talking in the back. There was also a woman in the vehicle.

34. The four men got out to urinate and B told them he wanted to speak to the woman who was his "person". There were cottages near the taxi and they did not want to disturb people in the cottages so the four of them went further away. He

did not know when the woman alighted the taxi, according to him they had been driving and picking up and letting off passengers.

35. They had been drinking in the taxi and took alcohol with them when they got out.

They stood around drinking. He then heard someone say there is police, hide the liquor. He put his on the ground. The police came and asked them what they were doing and one of them said the vehicle is stuck. The police were told that the driver was in the vehicle and went to the vehicle. When the policeman came back it was with B and they made the four remaining men lie on the ground and that they were under arrest. The first plaintiff asked what he had done and was told he would hear. They were neither told the charge nor read their rights. He was cuffed and put in a van.

36. When they got to Sandringham Police Station he overheard people saying “here are the rapists” and he was surprised. Their fingerprints were taken and they were taken to Norwood. They put them in a cage and they were given documents. The cages had some sponge mattresses and blankest but no other people. It was dirty. Buccal samples were taken and they were given notices of rights, and the first plaintiff indicated that he would give his statement to his lawyer. He was very confused about allegations of rape.

37. They were not given any food, and the next day they went in a van to court. They were given two slices of bread and some juice. They were not allowed to make any phone calls. They were taken back to Norwood because at court they were told to come the next day. They were taken to different rooms this time but they were still dirty. The toilet was not functional, there was water flowing the whole time. They were given potatoes and rice to eat.

38. They went to court the next day and nobody told them anything and then they were taken to Johannesburg prison, where they had to sleep in overcrowded cells.

39. The first plaintiff's evidence in rebuttal of the defendant's case contradicted that of his evidence in chief, in which he testified in cross examination that he heard the complainant scream that she was being raped when the police arrived. It was suggested that the evidence given by the plaintiffs in the first part of the hearing could not be considered. However, it was a single trial and the plaintiffs had adduced evidence in one trial. That they were permitted to adduce evidence in rebuttal did not mean the other evidence was not considered.

40. When B stopped the vehicle and told them it was stuck, not one of the men went to check what was wrong with the vehicle. The four who got out just continued drinking.

41. The second plaintiff similarly gave evidence twice, once at the outset and once in rebuttal. He confirmed that the friends had been drinking, and went with Bongumusa in his taxi. There was a woman in the taxi at some point and B said at some point that the taxi was stuck. The four of them got out to urinate and went and sat near the taxi, and about an hour later the police came. He told them the vehicle was stuck. When the police peeped in the taxi a woman screamed and then the police went and investigated. The police then came back and made them lie down and told them they had raped.

42. The second plaintiff mirrored that of the first plaintiff, save that he testified that they were told at the scene that they were arrested for rape, and that he heard

the complainant scream, which the first plaintiff denied when he testified in rebuttal.

43. It is common cause that the plaintiffs were arrested by peace officers within the meaning of the term in the Criminal Procedure Act, 51 of 1977, and without a warrant. The first defendant relied on section 40(1)(b) of the Act in pleading that the arrest was lawful.

44. Section 40(1)(b) requires that an arrest without a warrant, in order to be lawful, must be effected by a peace officer who entertains a suspicion on reasonable grounds that an offence listed in Schedule 1 of the Act has been committed by the person being arrested. The onus is on the defendants to establish that this is the case.

45. Rape is an offence listed in Schedule 1. It was submitted for the plaintiffs that because the plaintiffs were charged with gang rape which fell within Schedule 6, it did not fall under Schedule 1. This argument is fallacious. Gang rape is clearly a sub category of rape. It is a more serious category, and is listed in Schedule 6 for that reason, to make it harder for suspects to get bail. It is still also rape, and for purposes of section 40(1)(b), still a Schedule 1 offence.

46. The arrest was effected by peace officers. What remains to be established is whether the arresting officer entertained a suspicion on reasonable grounds that the plaintiffs had committed the rape.

47. Taking the evidence of the plaintiffs and the defendants' witnesses as a whole, what emerges as common cause is that there were men drinking outside a taxi

stopped in the early hours of the morning, that a woman screamed when the police approached the taxi, and that another man was in the taxi with the woman.

48. The plaintiffs were unable to dispute the defendants' evidence that the woman was naked and that she screamed that she was being raped, or that she said she was raped by all of them.

49. At that point, in my view, there was already reasonable grounds for suspicion against the plaintiffs, as part of the group.

50. The second plaintiff told the police that the taxi had broken down. When the taxi was able to be driven to the police station with no problem, this would have been an additional ground for suspicion. The J88 also supported a finding that the woman had been raped, although this appeared later in the day.

51. The plaintiffs deny that anyone tried to prevent the police from going towards the taxi, and told the police that their friend was there with his girlfriend. This is odd, taking into account that their version was that they were keeping a distance from the taxi because B wanted to be alone with his person.

52. To the extent that the plaintiffs' version is inconsistent with that of the defendants, I reject it. In any event, the inconsistencies are ultimately negligible.

53. It was argued on behalf of the plaintiffs that the suspicion entertained by the arresting officer was unreasonable because he did not do sufficient investigation before arresting the five men. I disagree. It was patently reasonable, when faced with a screaming naked woman, to suspect the men she accused of raping her.

54. It was submitted that the arresting officer ought to have exercised his discretion at the scene to find more evidence before effecting an arrest, particularly when faced with more than one version. Again I disagree, and consider it reasonable for the police to have effected the arrest there and then, and then continue to investigate. It would have been difficult to find the suspects at a later date, nor would further investigation at that point have prevented the arrest.

55. It was submitted for the plaintiffs that the arrest was unreasonable because the plaintiffs did not commit the rape. This court is not in a position to decide whether the plaintiffs committed the rape, nor is it required to. The issue is not whether they committed it, but whether it was reasonable to suspect them at the time of the arrest. It was.

56. The reason why the charges were withdrawn are also relevant. They were withdrawn because the complainant disappeared. This distinguishes this case from one where there was no evidence on which to arrest in the first place, and which was then withdrawn because no further evidence came to light. In this matter the evidence was the screaming, naked woman, accusing all five men of having raped her. As serious as a deprivation of liberty is, this one was justified by the circumstances in terms of section 40(1)(b) of the Act.

57. It is clear that once the plaintiffs were arrested their continued incarceration, although not ideal, was not due to any particular negligence or wrongdoing on the part of any of the defendants. If the system had worked better, the incarceration might have been a little shorter, but it does not appear that there was any inordinate delay that was avoidable.

58. Both the plaintiffs and the defendants submitted that costs should follow the result. I agree, including the costs of the unlawful prosecution claim.

59. For these reasons, the first and second plaintiff's claims are dismissed with costs.

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Plaintiff: SI Vobi and A Nongogo

Instructed by: Oni Attorneys

Counsel for the Defendants: MH Mokale and B Nkoana

Instructed by: The State Attorney (Johannesburg)

Date of hearing: 16 – 20 and 23 May 2022

Date of judgment: 9 May 2023

