



NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 1736/2019

RANDAL FELIX

Plaintiff

And

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

Govindjee AJ:

Background

[1] The plaintiff claims compensation against the defendants for unlawful arrest and subsequent detention. The parties formulated the issues for determination as follows:

- a. Whether the plaintiff's arrest and initial detention (detention before the first court appearance) was lawful or unlawful and whether the arresting officer exercised his discretion at all or in a rational manner;
- b. Whether the plaintiff's further detention after the first court appearance until his release was lawful or unlawful;
- c. Whether the plaintiff is entitled to any general and/or special damages in respect of these claims.

[2] The plaintiff was arrested on 9 November 2016 on a charge of sexual assault. He was detained at the Hankey Police Station and appeared before a magistrate at Hankey Magistrate's Court on 10 November 2016. He was remanded in custody and spent time at St Albans prison. He was only released on bail on 15 December 2016 and the case was eventually withdrawn in January 2018.

[3] The plaintiff claims R50 000 damages against the first defendant for wrongful and unlawful arrest. The claim against first defendant for unlawful detention is based on the conduct of the investigating officer, and the alleged failure to properly investigate the matter and to take steps to release the plaintiff from detention as soon as possible. The claim against the second defendant for unlawful detention relates to the prosecutor's conduct in persisting with the case against the plaintiff, and failing to take steps to ensure his release, whereas no reasonable grounds existed for his continued detention. The outcome, it is suggested, was a violation of various constitutional rights justifying a damages claim against the defendants, jointly and severally, in the amount of R750 000.

Evidence

[4] The plaintiff testified first, by agreement between the parties and with the consent of the Court, for practical reasons. He is a 52-year-old seasonal worker earning R300-R350 per month. He has two children and is engaged to be married. The plaintiff was previously convicted of rape.

[5] The plaintiff was at home on 7 November 2016. A neighbour, Dalene Plaatjies ('Plaatjies'), was hanging up washing in his yard. Her sister, Heidi Plaatjies was sitting in the yard and asked him to go to the shop to purchase a tablet. He went to fetch his jacket from his bedroom, which had no door but only a curtain. Two young children were playing, jumping from one bed to another. He took his jacket from a wardrobe and exited. Plaatjies was standing by the curtain and instructed the children to accompany her. The plaintiff took the money from her sister and went to the shop, which was a few doors down the street. The children had been taken across the road to a neighbour.

[6] The street was full of people when the plaintiff returned from the shop. The plaintiff asked Plaatjies about this and told her that he had not done anything to the children. The police arrived and took Plaatjies and the children to the police station. The plaintiff heard later that the police were looking for him. He was not at his home at the time but had no concerns about the incident. He went to the police station of his own accord the next day. A detective was called from Humansdorp and engaged with the plaintiff. The plaintiff indicated to the detective that he had not done anything wrong and was told that a complaint of sexual assault had been laid. The plaintiff was then charged, had his fingerprints taken and was locked up at the Hankey

Police Station for the night. The conditions there were good. He was taken to the Magistrate's Court in Hankey the next day and the case was postponed with no mention of bail. Nothing was placed on record at the time.

[7] The case was postponed to 17 November 2016 and the plaintiff was incarcerated at St Albans prison until then. The cells were overcrowded, people slept on the floor or had to share beds. The court seemed full of people interested in the case when the plaintiff appeared in court on that date. The matter was again postponed without enquiry or any information placed before the magistrate.

[8] The plaintiff experienced the same conditions at St Albans between 17 November and 1 December 2016. He slept badly and there was minimal food. His court experience on 1 December was similar and he returned to St Albans until 12 December 2016, when he appeared in court again. These court appearances took approximately a minute each. No evidence was led and he was released on R500 bail on 15 December 2016. The case was eventually withdrawn on 18 January 2018. The plaintiff confirmed that he had Legal Aid representation subsequent to his first court appearance.

[9] Under cross-examination, the plaintiff confirmed that Plaatjies had alleged that he had sexually assaulted a child when she reported the matter to the police. The child was approximately six years old and had also made a statement together with another child. This had led to his arrest and his constitutional rights had been explained to him. He denied that the arresting officer could have formed a reasonable suspicion to arrest, and had subsequently spent time in prison for no

reason, since the charges had ultimately been dropped. The plaintiff blamed this mainly on the Magistrate's Court.

[10] The plaintiff admitted that he had been on parole for 20 years from 2003 and had violated his parole conditions by visiting a friend at the time that Sergeant Grooboom had looked for him on 8 November 2016. He was asked by the magistrate if he wanted to bring an application for bail or legal assistance when he was first brought before that court on 10 November 2016. He had elected to apply for legal aid and had not applied for bail. His recollection of his subsequent court appearances was extremely vague. The plaintiff explained this with reference to his age and the long period of time that had elapsed. He admitted giving names of two friends of his wife (Krige and Basterman) and that his attorney had wanted to consult with them on 1 December 2016. An alternative address was provided on 12 December 2016 and the plaintiff had been released on bail once that address was confirmed.

[11] Sergeant Mzwamadoda Grootboom, the investigating officer, testified that he was a detective working for SAPS for more than 16 years, based in Humansdorp. His duties since 2012 involved investigation of sexual-related offences. He had been informed about the incident involving the plaintiff and had driven to Hankey Police Station. Constable James was busy with the complainants at the time, opening a docket. He observed two children aged between 6 and 7 years of age accompanied by one or two adult ladies. He read the statements that had been taken from Plaatjies, Nadine Witbooi and Anisha Lewis. The statements formed a major part of the cross-examination and various parts of these statements bear repeating:

D Plaatjies:

2.

'Op Maandag 2016-11-08 ongeveer na 17h00 was ek oppad na my bure se wasgoedlyn om my wasgoed te was en op te hang. Terwyl ek verby die huis van my bure loop het ek gehoor hoe praat Randall in die huis met die kinders. Sy woorde was 'Kom aan, kom aan'. Ek het om die huis geloop en Anisha wat wel bekend aan my he geskreeu 'Hier kom hulle, hier kom hulle'. Ek het daadelik agterdogtig begin word toe ek die kind hoor skreeu.

3.

Ek het deur die kombuis na die kamer van die huis geloop. Toe ek in die kamer deur kom toe sien ek Nadine Witbooi wat ook welbekend is aan my spring van die een bed na die ander bed teryl Randal Felix voor die bed gestaan het waarvandaan Nadine gespring. Ek het Randal gevra hoekom hy nou nog daar staan my suster het hom mos lankal gestuur Hy het gesê hy is besig om 'n jacket aan te trek. Ek het op daardie oomblik nie 'n jacket in sy hande gesien nie. Hy het na die rigting beweeg waar die klere klas was om 'n jacket te soek.

4.

Ek het met die twee kinders Nadine Witbooi en Anisha Lewis voor in die sitkamer gaan sit. Randal het intussen verby gekom en uit betweeg hy het vir die kinders gesê hulk moet by my wag. Ek het Anisha gevra hoekom het sy geskreeu en gesê Oom Randa wou snaakse goete "stoutdoen" "sex" met Nadine @Stokke. Ek het my suster geroep en gevra om Nadine

@Stokke se ma te gaan roep daa was Niemand volwasse genoeg in die huis om toe te sien na die kinders daardie oomblik.

5.

Ek het die volunteeer van Victim Sentrum Clementi Peters gevra om verder met die kinderste praat want ek was te emosioneel. Na die onderhoud met kinders was die polisie gekontak. Ek is baie bekommerd oor Nadine Witbooi want daar is nie volle beheer oor haar nie. Ek verlang verdere polisie ander soek.”

N W:

“2.

Op Maandag 2016-11-07 ongeveer na skool die middag het ek en my maatjie A L wat netso oud is soos ek by hulle huis gespeel. Ons het daarna oorkant na ons huis gegaan speel daar was niemand by ons huis nie. Ek en A was in ons huis in die kamer. Oom Randall wat bekend is aan my het daar aangekom. Oom Randall Feliz my ouma se boyfriend het gesê dat A my tjommie moet by die venster staan waar die gordyn is en kyk of daar nie mense kom nie.

3.

Oom Randall het my gevat en my op die bed neergelê op my rug. Ek was nie bang omdat ek hom ken hy slaap en bly daar by my ouma se huis. Oom Randall het met sy hele liggaam op my bors gelê. Hy het snakkse goete met my gedoen. Hy het op en af beweeg op my liggaam ek het al my klere en onderklere aangehad en ook oom Randall. A my tjommie het geskreeu hier kom hulle toe speing 'n van my af en soek aan sy jersey. Ant Dilene het daar ingekom en gevra hoekom ons sê hoer kom hulle wat het dan gebeur. Ek het niks gepraat nie. A het Ant Dilene gesê dat Oom Randall het my stoutgemaak.

4.

Ek het vir Ant Dalene gesê wat met my gebeur het. Dit was nie reg was Oom Randall met my gedoen het nie. Ek het niemand die reggegee om met sy stout te maak. Ek verlag verdere polisie ondersoek.”

A. L

“2.

Op Maandag 2016-11-17 ongeveer na 17h00 het ek en my maatjie N W @Stokke se huis gegaan. Terwyl ons in die huis was het oom Randall daaraangekom. Daar was Niemand grootmens “Volwasse behalwe oom Randall in die huis. Terwyl ek en N @Stokke in die kamer was het Oom Randall ges ej moet by die venster waar ‘n gordyn is. Staan en kyk of daar nie mense aankom nie.

3.

Oom Randall Felix was bekend is aan my het vir @ Stokke N op die bed op haar rug gelê. Sy het al haar klere aangehad. Hy het gesê ek moet die venster dop hou. Ek het gesien hoe oom Randall met sy klere aan op Stokke @ N sy bors klim hy het haar stoutgemaak “sex”. Ek het oemand hoor aankom en gesê “Hier kom hulle”. Toe e nog so praat toe sien ej antie Dalene staan in die kamer deur. Antie Dalene het Oom Randall gebr of haar suster hom nie lankal gestuur het hy het gesê hy wil n jacket aantrek. Hy het sonder ‘n jacket gestaan. Antie Dalene het met ek en Stokke @ N in die voorhuis gaan sit. Oom Randall het die die kamer gekom en gesê da tons net daar by haar moet bly.

4.

Antie Dalene het gevra hoekom ek dan so geskreeu het “Hier kom hulle” toe sy aankom wat het gebeur. Ek het dadelik aan Anti Dalene gesê dat

Oom Randall het “Stokke @ stoutgemaak. Anti Dalene het Stokke se ma laat roep want daar was niemand by die huis wat groot was nie.”

[12] Grootboom testified that he considered Plaatjies’ statement, read with the other two statements, to mean that the plaintiff had sexually assaulted Witbooi on Monday 7 November. He interviewed Plaatjies and Witbooi to confirm this. The latter confirmed that both she and the plaintiff had their clothes on at the time of the incident. Grootboom took this as confirmation that there had been no rape, but that a sexual assault was committed. He considered the docket, including the investigation diary containing the address of the plaintiff, and proceeded to look for him. He had also noted as important the information that the plaintiff and victim of the alleged offence stayed at the same address, and that this was not the plaintiff’s first offence. The plaintiff was not at the stated address and Grootboom left a message for him on 8 November 2016.

[13] On 9 November 2016, Grootboom visited the Department of Correctional Services and considered their records. The plaintiff was on their system and on parole following the rape conviction. He requested the correctional officer to print the parole conditions. He considered the plaintiff to be a high-risk person under practically permanent house detention. He looked for the plaintiff again without success and left another message for him before returning to Humansdorp. He received a call that the plaintiff was looking for him and at the Hankey Police Station. He returned to Hankey, introduced himself and arrested the plaintiff, informing him of his rights in English and giving him a copy of the applicable document. The plaintiff

acknowledged that he understood his rights and was detained. As it was the afternoon, the plaintiff could not be taken to court until the following day.

[14] Grootboom testified that he was ready to oppose bail on that day (10 November 2016) because of the seriousness of the alleged offence, because the plaintiff was on parole for a similar offence and because he resided at the same address as the minor complainant. He had the witness statements at hand and the parole conditions were already in the docket. He had also already deposed to an arrest statement by that time, and had taken the plaintiff's warning statement. No application for bail proceeded on that day, and the case was postponed. The witness confirmed that he had no discretion to release the plaintiff on warning given the seriousness of the allegation.

[15] The investigation diary shows that the public prosecutor requested the investigating officer to answer various questions on 10 November 2016. Grootboom had responded on 15 November and again on 29 November 2016, in respect of a further enquiry. Grootboom was instructed to attend the bail hearing scheduled for 1 December 2016. On that date, the prosecutor noted that the defence wanted to consult with Krige and Basterman, and the prosecutor again requested Grootboom to check whether the alleged victim had been penetrated, to which he responded on 5 December 2016. On 12 December 2016, the prosecutor made another note in the investigation diary for Grootboom. He was to follow up on an alternative address to see whether the plaintiff could reside there, and to ensure that no minor female children lived at the specified address. He confirmed that information on 14 December 2016 and the plaintiff was released on bail on 15 December 2016.

[16] Grootoom testified that he was ready to deal with a bail application on the plaintiff's first appearance in court on 10 November 2016. He believed he had no power to do anything other than wait for the prosecutor and court for further instructions. It was put to him in cross-examination that he should have investigated an alternative address at an earlier stage, particularly because the plaintiff resided in the same house as the minor child complainant. He responded that this did not cross his mind given the seriousness of the alleged offence and the importance of safeguarding the minor and community. He admitted that he had not taken a statement from the child's mother and had also not approached the Victim Support Centre or Plaatjies' sister. Grootboom explained that Plaatjies' statement suggested that the child's mother did not take full responsibility for her and no request for such information had been received from the prosecutor. He had also not been able to access the inside of the house to consider aspects of the plaintiff's version of events. Grootboom had also never obtained an additional statement from the victim and witness in respect of what they understood about the word 'stoutmaak', as requested by the prosecutor on 10 November and 17 November 2016. His commander had reiterated that request and he had only followed some of the instructions received at that point. Grootboom had, however, noted on 15 November 2016 that Constable James was to obtain the statement requested since the child only spoke to her and James was Afrikaans speaking. He considered the host of suggested contradictions in the various statements obtained to be minor, and that the overall picture of events remained consistent.

[17] Advocate Du Toit testified that she was a public prosecutor employed by the National Prosecuting Authority and based in Hankey during 2016. She had been working as a public prosecutor for 14 years at that time, and was responsible for prosecuting the case involving the plaintiff. She received the docket on 10 November 2016 and her role entailed considering the statements and evidence before deciding whether to place the matter on the roll. She was satisfied that the plaintiff was sufficiently linked to the complaint and enrolled the matter. On the first court appearance, Du Toit had read the charge and the magistrate had taken time to inform the plaintiff of his rights, including the possibility of applying for bail. The plaintiff had elected to apply for legal aid and had not applied for bail on his first court appearance.

[18] The matter had been remanded from 10 November to 17 November 2016 for Mr Alberts, a legal aid practitioner, to represent the plaintiff. Alberts had needed time to consult with the plaintiff and the matter had once again been remanded until 1 December 2016. On that date, Alberts had requested assistance from the investigating officer to consult with certain witnesses (Krige and Basterman) and Du Toit had instructed Grootboom to assist in that regard. Importantly, Alberts had advised Du Toit that he would decide whether or not to proceed with the bail application depending on the information he obtained following the consultations. The state was ready to proceed and Grootboom had been advised on the first appearance to prepare for the bail application and to be ready at any time. The investigation diary entries confirmed this. The plaintiff had not applied for bail and had not requested to be released.

[19] On 12 December 2016, Alberts approached Du Toit having consulted with the witnesses and discussed the possibilities of bail if an alternative address was provided. Du Toit subsequently instructed Grootboom to verify the situation at the address provided. Du Toit considered these discussions to be negotiations. The attitude of the second defendant was to proceed with a formal bail application and to allow the court to decide whether the plaintiff should be released on bail. Following an application on 15 December 2016, the plaintiff was released on R500 bail. Du Toit testified that it was the duty of the plaintiff to place facts before the court to justify the existence of exceptional circumstances for purposes of bail given that the alleged offence formed part of Schedule 6 of the Criminal Procedure Act, 1977.¹ Alberts would have informed the plaintiff in this regard once he had been appointed as legal representative. Du Toit had never withdrawn the charges; the matter had been transferred to the Regional Court and the case was withdrawn there.

[20] Under cross-examination, Du Toit stated that she did not consider the statements contained in the docket to be inconsistent. Individual words could not be read in isolation. There was no material difference between 'snaakse goed' and 'stoutmaak' when read in context. The statements made it clear that the plaintiff was on top of the child and her enquiry in relation to penetration was out of concern for the child, and to investigate whether a more serious offence had been committed. Du Toit was convinced of the case in respect of sexual assault. Asking the investigating officer to obtain a statement from Plaatjies' sister would not have taken the matter further. It was also unnecessary in the circumstances to obtain another report from Victim Support or to consult with the children involved, since the regional court

¹ Act 51 of 1977.

prosecutor would do that. Her further comments to Grootboom in the investigation diary were due diligence enquiries, and were influenced by the plaintiff being on parole for 20 years following the rape conviction. Regarding the timing of the enquiry in respect of the alternative address, Du Toit noted that she was open to investigate all possibilities in respect of the plaintiff's release, but that this ultimately depended on the court. The instruction that had been communicated to Grootboom to verify the alternative address had been issued at the request of Alberts. There was no guarantee that the plaintiff was going to be released. Alberts was on record for the plaintiff since 17 November 2016, and the matter had been remanded at his request until 1 December 2016 for a formal bail application. Alberts had not proceeded with the bail application on that date, as he wanted clarification on some matters. Du Toit had assisted him with his request in respect of an alternative address when that issue arose, at the instance of Alberts, and then played a proactive role. Alberts was still considering the bail application when the matter was postponed from 12 December until 15 December 2016, when the plaintiff was eventually released.

The pleadings

[21] The plaintiff claims that his arrest without a warrant for sexual assault by an employee of the first defendant was wrongful and unlawful. Any suspicion that the plaintiff had committed an offence referred to in Schedule 1 of the **Criminal Procedure Act, 1977**² ('the **CPA**') could not have been reasonable. Proper investigation would have clarified this. There was no basis for suspecting that the plaintiff would abscond or fail to appear in court had a summons or written notice

² Act 51 of 1977.

been issued, and it was foreseeable that the National Prosecuting Authority would ultimately not prosecute the matter and that the charges were likely to be withdrawn. It was further claimed that the plaintiff had been unlawfully detained from 9 November until 15 December 2016, and that the first defendant was liable for this. In particular, there were no grounds for the detention, simple investigative steps were not taken and the prosecutor was not properly informed that there was no basis for linking the plaintiff to the alleged crime. No steps were taken to release the plaintiff from detention as soon as possible and the first defendant opposed the plaintiff's release on bail.

[22] In respect of the second defendant, it was the prosecutor that had caused the magistrate to remand the plaintiff in custody. This was caused by the failure of the prosecutor to acquaint herself with the docket, which demonstrated the lack of reasonable grounds or justification for the continued detention. Charges were not promptly withdrawn and the magistrate was not properly informed that there were no objective facts reasonably linking the plaintiff to the alleged crime. No steps were taken to ensure that the plaintiff was released from detention as soon as possible. The plaintiff suffered damages resulting from a violation of his constitutional rights.

Analysis

[23] Was the plaintiff's arrest lawful and did the arresting officer properly exercise his discretion to arrest the plaintiff for sexual assault? The position in respect of section 40(1)(b) of the **CPA** has been clarified in *Duncan v Minister of Law and*

Order.³ The jurisdictional facts for a section 40(1)(b) defence are that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

[24] The burden of proof rests on the first defendant in this regard. It is the requirement that the suspicion must rest on reasonable grounds that was placed in issue in this matter. Put differently, Grootboom's suspicions, in order to be reasonable, must be objectively sustainable in that those suspicions must have rested upon reasonable grounds.⁴ In **Mabona & Another v Minister of Law and Order and Others**,⁵ the court held as follows in relation to the notion of a 'reasonable suspicion' and the objective test that is applicable:

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his

³ 1986 (2) SA 805 (A) at 818H-I. Also see *Minister of Safety and Security v Sekhoto and another* 2011 (5) SA 367 (SCA).

⁴ *Duncan supra* at 818H.

⁵ 1988 (2) SA 654 (SE) as quoted in *Mahleza v Minister of Police and Another* [2019] ZACGHC 137; 2020 (1) SACR 392 (ECG) at para 11.

disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’⁶

[25] Grootboom testified that he considered Plaatjies’ statement, when read together with the two children’s statements, to constitute sufficient grounds to suspect that the plaintiff had sexually assaulted Witbooi. He interviewed Plaatjies and Witbooi to confirm his suspicions. The statements in question, when read in totality, are extremely suspicious. The plaintiff is heard saying ‘Kom aan, Kom aan’; Lewis, standing guard at the window at the request of the plaintiff, shouts ‘Hier kom hulle, hier kom hulle’. Whether ‘snaakse goete’ or ‘stoutdoen sex’, Plaatjies’ understanding of events is clear. Those suspicions are clearly reinforced by the statements of both children: the plaintiff placed Witbooi on her back on the bed and lay on top of her, doing ‘snaakse goete’ to her, moving up and down on her while fully clothed. He jumped off her when Lewis screamed. For Lewis, what happened was as follows: “Ek het gesien hoe Oom Randall met sy klere aan op Stokke @ Nadine se bors klim...hy het haar stoutgemaak ‘sex’...”

[26] Even when considering the plaintiff’s expressed denial at the time, the only reasonable conclusion to draw is that Grootboom had analysed and weighed the

⁶ At 658 E-H.

information available, checking what could be checked to form the mature suspicion that the plaintiff had committed the offence of sexual assault on a minor child, which is a Schedule 1 offence, and should be arrested.⁷ Grootboom's suspicions cannot be said to have been flighty or arbitrary and a reasonable person in his position would have considered that there were good and sufficient grounds for the suspicion he held. The arguments advanced by Mr Swarts in respect of the expected conduct of the investigating officer go too far and exceed the boundaries of an arrestor's process of forming a reasonable suspicion and properly exercising a discretion. The jurisdictional facts were therefore satisfied and Grootboom exercised his discretion lawfully and reasonably in deciding to effect the arrest. On the plaintiff's own version of events on this point, that decision would have been fortified in Grootboom's mind by the plaintiff being absent from his home when Grootboom searched for him on 8 November 2016, in clear violation of his parole conditions. The arrest, in the circumstances, amounted to an effective method of initiating a prosecution and bringing the plaintiff before court.

[27] Once the jurisdictional facts have been satisfied, the peace officer may arrest the suspect and the effect is that the arrested person is considered to be in lawful custody, to be detained until lawfully discharged or released.⁸ The arrestee should then be brought before court as soon as possible, but not later than 48 hours after the arrest.⁹ The initial detention was not seriously challenged by the plaintiff, who was brought before court as soon as possible and well within the 48-hour period. That

⁷ *Mabona supra*.

⁸ Section 39(3) of the CPA.

⁹ Section 50(1)(c) of the CPA.

initial period of police detention, following the lawful arrest, is found to have been lawful.¹⁰

[28] Was the plaintiff's further detention, after his first court appearance until his release, lawful? Section 35(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. An accused who is in custody in respect of an offence shall be informed by the court of the reasons for his or her further detention or be charged and entitled to apply to be released on bail.¹¹ The accused is entitled to be released on bail, subject to the provisions of section 50(6) of the CPA, at any stage preceding conviction, if the court is satisfied that this is in the interests of justice.¹² If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.¹³ As is evident, there is a fine interplay amongst three different institutions of government in this process.¹⁴

'The police carry the responsibility to ensure a criminal suspect is brought before a court as required by s 35(1)(d). This is an administrative function to be exercised within the broader executive authority of government. The decision to charge a suspect under s 35(1)(e) is one that falls under the authority and competence of the National Prosecuting Authority, an

¹⁰ See *Jacobs v Minister of Safety and Security* [2013] ZAECHGHC at para 40.

¹¹ Section 50(6)(a) of the CPA.

¹² Section 60(1)(a) of the CPA.

¹³ Section 60(1)(c) of the CPA.

¹⁴ Froneman J in *De Klerk v Minister of Police* [2019] ZACC 32 at para 132 (citations omitted) as cited in *Mahlangu and Another v Minister of Police* [2020] ZASCA 44 at paras 14, 15.

independent institution under the Constitution. The decision to release or detain a suspect falls within the independent judicial authority or competence of the judiciary.'

[29] The arrestor has a limited role in respect of determining whether a suspect ought to be detained pending a trial. That is typically the role of the court which, together with the prosecuting authority, fulfils a key function from this point. In *Minister of Police and Another v Du Plessis*, the Supreme Court of Appeal defined the latter's role as follows:¹⁵

'Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted...As pointed out...in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.'

[30] The uncontested evidence of Du Toit confirms that the plaintiff was charged on the first court appearance. Far from being an arbitrary execution of duties, Du Toit had clearly given proper consideration to the statements before her and had satisfied herself that a charge of sexual assault was warranted in the circumstances. The magistrate had informed the plaintiff of his rights, including the possibility of applying for bail. As the plaintiff confirmed, he elected to apply only for legal assistance on that date.

¹⁵ [2013] ZASCA 119 at para 28 (citations omitted); 2014 (1) SACR 217 (SCA).

[31] In terms of section 60(11)(a) of the **CPA**, and notwithstanding any other provision of that Act, where an accused is charged with any offence referred to in Schedule 6, the court shall order that the accused be detained in custody until dealt with in accordance with the law. The accused may, however, having been given the opportunity to do so, adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.¹⁶ This is consistent with the section 35(1)(f) constitutional right to be released from detention if the interests of justice permit, subject to reasonable conditions. Schedule 6 includes rape and makes reference to ‘an offence referred to in Schedule 5 and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule...’ The offence of sexual assault is listed in schedule 5 and, when considering the previous rape conviction, constitutes a schedule 6 offence.

[32] The onus placed on the accused in terms of these provisions must, however, not be confused with the public law duties of the police and the public prosecutor.¹⁷

‘The rights and duties of the police and the prosecutor which may arise from the position of the burden of proof in bail proceedings must not be equated with their public law duties which may arise from the Constitution, and given content by the prosecutor’s special relationship with the court and the role which he fulfils in criminal proceedings. Once an accused person is brought before a court, the authority to detain him, which arises from the power to arrest a suspect, is exhausted. His further detention is

¹⁶ Section 60(11)(a) of the CPA.

¹⁷ *Singata and Another v Minister of Police and Another* [2015] ZAECBHC 19 at para 41.

then within the discretion of the court. That discretion is subject to wide ranging statutory directions. Section 60(11)(a) provides that court must order that an accused person be detained in custody pending his trial, unless the accused satisfies the court that exceptional circumstances exists which in the interest of justice permits his release. While section 60(11)(a) may shift the burden of proof to the accused, the issue remains essentially the same as in any other proceedings where a court is called upon to decide the question of the release of an accused on bail, namely a judicial determination whether his release from detention is in the interest of justice. Because an order made in terms of section 60(11)(a) affects the freedom of the person concerned, it brings into play his entrenched right in section 12(1)(a) of the Constitution not to be deprived of his freedom arbitrarily or without just cause. That means, as in the case of *Woji v Minister of Police*, that the police and the prosecutor may be found to have a public law duty to assist the court in giving effect to, and protecting the entrenched right of the accused in section 12(1)(a).'

[33] A Schedule 6 charge, coupled with the burden to place exceptional circumstances before the court in order to be released on bail, does not relieve the police and prosecutor from further disclosures to the court in appropriate circumstances. For example, if there was no evidence to substantiate the charges, or the only evidence implicating the accused is weak or entirely dependent upon the admission of hearsay evidence emanating from a co-accused, it would be expected for detailed disclosures to be forthcoming.¹⁸

¹⁸ *Singata supra* at paras 42, 43; Also see *National Director of Public Prosecutions v Swarts* [2020] ZACGHC 64 at para 15.

[34] I am not convinced that this case falls within that bracket. Unlike cases such as *National Director of Public Prosecutions v Swarts*,¹⁹ there are no objective facts pointing to it being in the interests of justice for the plaintiff to have been released at the time of his first appearance in court, or thereafter, until his representative was prepared to proceed with the bail application. To borrow from *Schuster*, no matter what the facts that may have been put before the magistrate by the prosecutor on that date, these would not have prevented the detention of the plaintiff until the formal bail hearing.²⁰ There is also no suggestion in this matter that a malicious prosecution was being perpetuated.²¹ On the contrary, the conduct of the public prosecutor, in particular, cannot be faulted. There was also no evidence of wrongful conduct on the part of the police subsequent to the lawful arrest which, as a separate delict, caused the plaintiff to be deprived of his liberty after the first court appearance.²² While it is so that the investigating officer did not comply with all the public prosecutor's instructions immediately, for various reasons, these enquiries were directed towards ascertaining whether there had been penetration, which may have resulted in a rape charge. Considering all the information available to the public prosecutor and investigating officer at the time, it is understandable that their focus remained on opposing the formal bail application, which was expected to proceed on 1 December 2016. (Alberts was appointed as representative on or about 17 November 2016 and had requested a remand in order to consult with the plaintiff.) This is evident from the trail of correspondence in the investigation diary, and particularly the prosecutor's note on 17 November 2016:

¹⁹ *Supra* at para 17.

²⁰ *Minister of Safety and Security and Another v Schuster and Another* [2018] ZASCA 112 at para 14.

²¹ *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130 at para 38.

²² *Mahlangu supra* at paras 23, 25.

“IO, Although I have appreciation for your explanation just because they had clothes on does not mean that he didn’t penetrate her. I still need an explanation as to what she understands about ‘stoutmaak’. If necessary take the victim to a social worker or file a report etc. This accused is on parole for raping a child. Please obtain his parole conditions & prepare yourself for a FBA on 1.12.16.”

[35] It is equally clear that the matter was postponed on 1 December 2016 at the instance of the defence, in order for Alberts to consult with Krige and Basterman. That the prosecutor reiterated her request for the alleged victim to be taken for a medical examination to determine whether she had been penetrated was, in all probability, out of concern for the child and because of the possibility of rape, particularly given the plaintiff’s prior conviction. It is clear that this issue was not the direct cause of the further remand. Similarly, the postponement on 12 December 2016 would have followed from a request from Alberts for the alternative address to be checked, given the likely complexities of the bail application: the plaintiff resided in the same house as the minor complainant, was charged with sexual assault of a minor and had previously been convicted of rape. In the circumstances, the delays occasioned cannot be placed at the door of the defendants.

[36] The reality of this matter is that it was by order of court that the plaintiff remained in detention until released on bail, and that the defence took its time to prepare for a formal bail application, including engaging in discussions with the

prosecutor about the possibilities in that regard.²³ In respect of the role of the court, the Supreme Court of Appeal has noted as follows in *Mahlangu*:

‘Court orders providing for judicial detention are constitutionally significant. As a general principle, all court orders...have force from the moment that they are issued, and are binding until set aside (irrespective of whether or not the orders concerned are valid, and whether correctly or incorrectly granted), or otherwise impugned at the instance of the person who alleges that it should be impugned, where it might not be required to actually set the order aside. An invalid order is not a nullity. Even in the absence of a contested bail application, every court order, including the initial order for detention, should be a deliberative judicial act and must consider the rights of the arrested person and weigh those in the scales of justice against the interest of the public to have persons reasonably suspected of being perpetrators of crime detained, where appropriate, pending their prosecution. A court order which simply directs the detention of an accused person without giving due consideration to these constitutional imperatives, as occurred in the notorious ‘reception courts’ and *De Klerk*, is liable to be impugned. Where an order for detention is impugned successfully, it is desirable that such order should be set aside rather than be allowed to remain in existence with an uncertain status.’²⁴

[37] In addition, there is no evidence to suggest that the court in which the plaintiff appeared was a ‘reception-type’ court. The magistrate’s remand orders were not impugned and remained valid and binding, causing the continued lawful detention of

²³ See *Stuurman v The Minister of Police and Another* (unreported) (case no. 1836/2019, ECD) at para 54 *et seq.*

²⁴ *Supra* para 17.

the plaintiff. That detention cannot be ascribed to the actions or omissions of any of the defendants.²⁵ There was, on the documentation available, just cause for the plaintiff's deprivation of liberty during that time. There is no evidence of wrongful conduct on the part of the defendants which caused the further judicial detention of the plaintiff, who had to remain in custody until the requirements for his release on bail could be satisfied. The bail application proceeded when plaintiff's representative was ready to proceed in that regard, presumably with the full consent of the plaintiff.²⁶ That the bail application did not proceed sooner, given the circumstances surrounding each of the remand orders, cannot be blamed on the defendants in this case. As in *Mahlangu*, it is clear that the plaintiff was never prevented from applying to be released on bail:²⁷

'Public policy considerations, determined with reference to constitutional values and the constitutional order referred to above, limit liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued a bail application to finality...The onus was on the plaintiffs to prove why they did not pursue a bail application.'

[38] In sum, the conduct of the defendants did not cause the plaintiff's detention beyond 10 November 2016. Despite reasonable grounds existing for his continued detention, the plaintiff could have applied to be released on bail at an earlier stage in consultation with his representative. The plaintiff's further detention after the first

²⁵ See *Mahleza v Minister of Police and Another* [2019] ZAECHGHC 137 at para 29.

²⁶ *Mahlangu supra* at para 39.

²⁷ *Mahlangu supra* at paras 40, 41.

court appearance until his release was lawful and the plaintiff is not entitled to any damages from the defendants in respect of his claims.

[39] The present case is not a constitutional matter in the sense that the *Biowatch* principle ought to be evoked.²⁸ This case turned on the facts and costs must follow the result.

Order

[40] In the result I make the following order:

- 1. The plaintiff's claims are dismissed, with costs.**

A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the Plaintiff : *Mr L. Swarts, Swarts Attorneys*
80 Standford Road, Korsten, Port Elizabeth

Obo the 1st Defendant : *Adv B. Ndamase / Adv L. Ntikinca*

²⁸ *Schuster supra* at para 26.

Instructed by : *State Attorneys, 29 Western Road, Central,
Port Elizabeth*

Obo the 2nd defendant : *Adv. M du Toit*

Instructed by : *State Attorneys, 29 Western Road, Central,
Port Elizabeth*

Heard : *16 – 18 March 2021*

Delivered : *13 April 2021*