



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 4164/2015

In the matter between:

OSCAR SENZO CEBEKHULU

PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

SECOND DEFENDANT

JUDGMENT

Delivered on 14 December 2017

POYO DLWATI J:

[1] The question to be answered in this matter is whether the plaintiff was unlawfully arrested and detained by the members of the South African Police Services (SAPS) and thereafter was unlawfully further detained at the instance of the second defendant from 14 February 2014 until 28 July 2014.

[2] The plaintiff's summarised evidence was that on the day of his arrest, which has been established as 8 January 2014, he was at his uncle's home in

KwaNyamazane within Pietermaritzburg. Three police officers arrived at his uncle's house. They knocked on the door. He opened for them. They asked him if he was Senzo and he confirmed that he was. They told him that they were arresting him for rape.

[3] He asked them who was it that he was alleged to have had raped. The police officer told him to wait for a certain Gogo. The Gogo arrived with a child. The plaintiff told them that he knew the Gogo but did not know the child. He was accused of having raped the child. He testified that he knew the Gogo because he used to cut grass for her at her house in exchange for payment which is what the plaintiff did for a living. He was then arrested and taken to a small police station which was later established as Mountain Rise Police Station.

[4] At the police station, photographs of him facing different directions were taken. He was also questioned by two police officers about the offence. He again told them that he knew the Gogo but not the child. He also told them that he knew nothing about the offence. It was common cause that he made his first appearance in the Pietermaritzburg Magistrate's Court on 10 January 2014. His matter was adjourned to 14 February 2014 for a formal bail application as the State was opposed to bail. On 14 February 2014, after hearing the application, the learned magistrate refused bail. Thereafter his matter was adjourned on numerous occasions. All he remembered was that he was told that the child needed counselling.

[5] On about two occasions he was told by the learned magistrate that the matter was being remanded for the final time but this turned out not to be so. He was only released on 28 July 2014 when he was told that the charges against him were being withdrawn and that he would be phoned when needed. He later obtained legal advice and that is how these proceedings were instituted.

[6] Under cross-examination he testified that he did not know the Gogo's name even though he used to cut grass for her. He conceded that there was a school and a crèche close to his uncle's house. He, however, denied that some children used to pass his uncle's house on their way to and from school or crèche. He testified and was adamant that he did not know the child who was the complainant nor did he know her age. It only emerged under cross-examination that the Gogo knew his uncle's house as she had sold his uncle the house where they stayed.

[7] He did not know how the police knew where he stayed. When it was put to him that Mr G Roos, the investigating officer in his case, would tell the court that he was directed to the plaintiff's house by the child, his response was that he did not know as he also did not know the child. He conceded that it was strange that Mr Roos who did not know him and where he stayed would come to his house with a child he did not know.

[8] When he was referred to the child's statement, he denied that he committed the offence he was charged with as he did not know the child. He testified that he did not see the child pointing at him on the day of his arrest. He conceded that if the child referred to him as uncle it signified familiarity and respect. He did not know why the child would point him as the person who committed this offence against her. He could not comment on the doctor's findings on the child as contained in the J88 report at page 8 of Exhibit 'B'. He conceded that he had no problems with the Gogo who was also the child's grandmother.

[9] He accepted that the police came to arrest him after the child and the Gogo had gone to lay a complaint with the police. He also testified that he did not deny that the child had been sexually violated but that it was not him who

had violated the child. He contradicted himself immensely when he was asked whether his constitutional legal rights were explained to him at the time of his arrest. His final answer in this regard was that it was possible that his legal rights were explained to him but that he could not remember. He conceded that his rights must have been explained to him at Mountain Rise Police Station if that is what Mr Roos would say and that he had signed the notice of rights form as appearing at page 24 of Exhibit 'B'. He conceded that he did not remember all the things that happened on the day of his arrest as he was confused by what was happening.

[10] He was adamant that at the time of his arrest, in the presence of his uncle, he told Mr Roos that he knew the Gogo but not the child. He did not know how his lawyer could have written in a letter at page 12 of Exhibit 'C' that he had been arrested at 10H00 yet when asked in court, he testified that he did not know the time of his arrest. He conceded that it was possible that at the time of his arrest some community members were outraged about what he was alleged to have done, hence Mr Roos opposed his release on bail. He did not know why the Gogo had intimated in her statement to the police that she did not know the plaintiff yet he used to cut grass for her.

[11] He conceded that when the charges were withdrawn against him on 28 July 2014 he was not told of the reasons but later changed this and testified that some person in court, not dressed as a court official, told him that the charges were being withdrawn as there was insufficient evidence against him. He also conceded that the offence he was accused of having committed was serious. He appreciated the reasons given to him as to why bail was opposed but testified that it was not nice to be refused bail.

[12] When it was put to him that the police arrested him because of the charges laid against him, the child and the Gogo's statement together with the J88 report which were evidence against him, his response was that he was not saying that the police were not supposed to take him to the police station but that he just wanted the truth, that he did not commit this offence, to come out. He was adamant that the learned magistrate ought to have given him bail even though he could not disagree with the learned magistrate's decision that he failed to show exceptional circumstances for him to be released on bail. That, in summary, was the plaintiff's case.

[13] Mr Roos testified on behalf of the first defendant. The gist of his evidence was that after taking down the child's and the child's mother's statements he went to collect the J88 report at the Thuthuzela Centre where the child had been examined. The doctor's conclusion was that the findings on the gynaecological examination were suggestive of blunt penetration of the hymenal orifice. After receiving the J88 report he had a reasonable suspicion that a crime had been committed.

[14] His suspicion was also solidified when the child pointed out the plaintiff's home, the plaintiff and the bedroom, which happened to be the plaintiff's, where the crime had been committed. He then arrested the plaintiff and explained his constitutional legal rights to him through Ms Sli Buthelezi, a social worker, who assisted him as an interpreter. He testified that he had to get the plaintiff out of the scene as community members who had gathered there were outraged when they heard from the child's mother what the plaintiff was alleged to have done.

[15] He testified that he did not need a warrant of arrest in order to arrest the plaintiff as it was a schedule 6 offence and the information he had was enough

for him to effect the arrest. He denied that the plaintiff had told him that he knew the Gogo but not the child. He conceded that he opposed bail as the victim was six years old and the offence was quite serious and a schedule 6 offence. Furthermore, the plaintiff and the child were neighbours and he was therefore quite concerned about her safety if the plaintiff was released on bail. He was concerned that since the plaintiff's home was next to a school and a crèche, there was a chance that the offence might be perpetrated again. Furthermore, at that stage he had not verified the plaintiff's address.

[16] He conceded that there were delays in having the child interviewed by the prosecutor as the prosecutor responsible for this was off sick for some time. He further conceded that there were delays in having the child attend counselling as the child's mother was not available at times due to work commitments. Furthermore, the child's mother did not want the child to be interrupted at school and preferred that counselling be done during school holidays. Furthermore, as the counselling was being done by psychologists from Child Line, there were delays due to the number of victims to be counselled. Mr Roos testified that after August 2014 he went on long leave and thereafter retired from the SAPS, hence he had no further dealings with the matter.

[17] Under cross-examination, he denied that he had no basis to arrest the plaintiff. In his view he had a strong case against the plaintiff and the matter was very serious hence even the learned magistrate refused the plaintiff bail. He testified that he did not see a need for him to confirm with the child what he had been told by Ms Buthelezi that the child had pointed at the plaintiff and told her that it was him. He testified that as at 14 February 2014 his investigations were not complete as he still needed to obtain the plaintiff's SAP69 and the counsellor's report. That, in a nutshell was the case for the first defendant.

[18] Ms Thandeka Mkhize and Mr Thwala, both prosecutors in the Pietermaritzburg Magistrate's court, testified on behalf of the second defendant. Their evidence in brief was that there were no inordinate delays in dealing with the plaintiff's matter. Ms Mkhize, in particular, testified that it was important that the child be interviewed by the prosecutor in order to assess whether the child would be able to narrate her story in court. Because of Ms Patty David's, the prosecutor assigned to interview child complainants in sexual offence matters, unavailability Ms Mkhize ultimately interviewed the child on 24 April 2014. She concluded that the child needed counselling in order for her to be able to speak easily about the offence. She also referred the matter to a Regional Court prosecutor for a decision.

[19] Ms Mkhize testified that it took a while to obtain a counsellor's report as counselling was outsourced. Furthermore, it would only be the counsellor who determined how many sessions the child had to attend before she could be declared as trial ready. She further testified that she could not apply for the charges to be withdrawn at that stage as that decision would be premature in the absence of the counsellor's report. She reiterated that in her view the child was trial ready but needed counselling in order to cope during the trial. She testified that in her view the state had a strong case against the plaintiff hence she could not apply for the charges to be withdrawn. She further testified that the charges being withdrawn against the plaintiff did not mean that the state did not have a case against him.

[20] She testified that, in any event, even if the matter would have been transferred to the Regional Court it would have taken more than six months before a trial date would be allocated due to the backlog of cases they had at the time. When asked as to whether the plaintiff could have brought another bail application if he felt that there were delays, her response was that a new bail

application could have been considered on new facts. She denied that the plaintiff's continued detention was unlawful in any way.

[21] Mr Thwala's relevant evidence was that at no stage did he advise the plaintiff that the charges were being withdrawn against him due to insufficient evidence. He testified that on 28 July 2014 he asked for an adjournment because Mr Roos' note on page 76 of Exhibit "B" intimated that the counsellor's report would be received during August 2014. He conceded that the withdrawal of charges was merely to allow the investigations to continue without the plaintiff being deprived of his liberty. That in a nutshell was the evidence on behalf of the second defendant.

[22] Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 provides 'that a peace officer may without warrant arrest any person- whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. Rape and or sexual offence against a child are some of the offences listed under Schedule 1.

[23] Mr *Shepstone*, on behalf of the plaintiff, submitted that even though Mr Roos had a reasonable suspicion that a crime had been committed he ought to have satisfied himself that he was arresting the right person when he arrested the plaintiff and not only rely on the say so of Ms Buthelezi that the child told her that it was him and pointed at the plaintiff.

[24] Ms *Takchund*, on behalf of the defendants, on the other hand submitted that there was no fault that could be attributed to the first defendant about how and why the plaintiff was arrested. She submitted that Mr Roos had satisfied all the elements for a lawful arrest in that he had a reasonable suspicion that a

crime had been committed. She submitted that the plaintiff's claim ought to be dismissed in this regard.

[25] I agree with Ms *Takchund's* submission in this regard. In my view, Mr Roos had more than a reasonable suspicion that the plaintiff had committed a crime. As held in *Woji v Minister of Police* 2015(1) SACR 409 (SCA) para 8 'the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion.' The child's statement, the child's mother's statement, the J88 report and the fact that the child had pointed out the plaintiff, his home and his bedroom were clear indications that one, objectively, can reasonably suspect that a crime had been committed. In my view the first defendant discharged the onus of justifying the arrest of the plaintiff.

[26] In so far as the wrongful detention, Mr *Shepstone's* submissions were that at the very least the charges against the plaintiff ought to have been withdrawn on 25 April 2014 as it was clear on that date that the child needed counselling. He submitted that it should have been determined on 24 April 2014, when Ms Mkhize interviewed the child that she was not trial ready. He submitted that at the very least, the plaintiff ought to have been released on 2 June 2014 when it was clear that the counselling would take some time.

[27] Even though Mr *Shepstone* did not persist in argument about the period of detention from the date when bail was refused on 14 February until 25 April or 2 June 2014, I deem it necessary to address this period for the sake of completeness. Mr Roos's evidence was that for the purpose of the plaintiff's bail application he submitted an affidavit detailing the reasons why he was opposed to bail. These appear at page 10 of Exhibit "A". Furthermore, since it was a schedule 6 offence the onus was on the plaintiff to show exceptional

circumstances to justify his release. In his view the plaintiff failed to show such exceptional circumstances hence bail was refused.

[28] These must have been the learned magistrate's reasons for refusing bail even though this is not apparent on the record of bail proceedings which is part of Exhibit "B". In any event the plaintiff testified that he could not question the magistrate's decision to refuse him bail. In my view, this is a concession that in the circumstances of his case bail was correctly refused. It is further clear from Exhibit "B" that the plaintiff's matter was postponed from time to time due to valid reasons in my view.

[29] As held in *Minister of Justice and Constitutional Development & another v Zealand* 2007 (2) SACR 401 (SCA) para 17, a 'decision by a court to remand an accused person in custody results in lawful detention of that person if there are justifiable reasons for such detention. Such a decision needs to be set aside before lawful detention in terms thereof ceases.' In my view, therefore, the decision of the magistrate to refuse bail on 14 February 2014 was never set aside until 28 July 2014. The successive remand orders issued by the magistrate had the effect of rendering the plaintiff's detention lawful.

[30] In my view, the plaintiff's detention was justified by acceptable reasons that were provided especially by Ms Mkhize when she testified. In my view there was just cause for his detention. Ms Mkhize's evidence was clear in this regard. She testified that it was necessary to have the child interviewed by Ms David as she was quite experienced in sexual offence cases. Furthermore, that she was a woman added an advantage to the girl child as she would have been more comfortable to talk. However, when it seemed that this was causing a delay in dealing with the matter, she, Ms Mkhize, interviewed the child and made certain recommendations, one of which was counselling.

[31] I do not agree with Mr *Shepstone's* submission that at that stage the charges ought to have been withdrawn. As Ms Mkhize testified, it would have been premature to withdraw the charges at that stage due to the fact that the report by the counsellor would have informed her decision. In her view, the child was trial ready but she needed counselling to cope with the event and to enable her to speak easily and assist her with being court familiar. She was therefore at that stage not sure how long it would have taken to do the counselling and to obtain the report.

[32] She further testified that the initial report would have indicated to her whether the child needed intensive counselling, in which case she would have withdrawn the charges. However, if it was a matter of one or two further sessions, she would not have withdrawn the charges. Ms Mkhize therefore believed that there were no inordinate delays in dealing with the plaintiff's case. I agree with her views. Furthermore as testified to by Ms Mkhize and submitted by Ms *Takchund* one had to also consider all the issues raised at the bail application before the charges could be withdrawn.

[33] I also agree with Ms *Takchund's* submission that the rights of the child as provided for in s 28 of the Constitution were of paramount importance and ought to have been prioritised in the circumstances. It is also important to note that the child's mother did not like that the child's schooling be interrupted due to the counselling, hence, as per page 74 of Exhibit "B", further counselling would have to be held during the July school holidays. This evidence was never challenged. Furthermore, if the plaintiff felt that there was an inordinate delay in finalising his matter, he could have brought another bail application on new facts, which was the delay. This was not done and it can be taken as a concession that there was no inordinate delay.

[34] In my view, the plaintiff failed to discharge the onus that his continued detention was unlawful or wrongful and the second defendant has justified the plaintiff's further detention.

Order

[35] Accordingly, the plaintiff's claim is dismissed with costs.

POYO DLWATI J

APPEARANCES

Date of Hearing	:	04 December 2017
Date of Judgment	:	14 December 2017
Counsel for Plaintiff	:	Mr Shepstone
Instructed by	:	Sanjeev Singh Inc.
Defendants	:	Ms Takchund
Instructed by	:	State Attorney Durban