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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO: 4996/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES:

(3) REVISED: YES/NO

SIGNATURE: Naude-Odendaal J

DATE:05/09/2024

In the matter between:

M[...] E[...] S[...]

PLAINTIFF

and

MINISTER OF POLICE

1st DEFENDANT

DIRECTOR OF PUBLIC PROSECUTION

2nd DEFENDANT

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Plaintiff instituted action for damages against the 1st and 2nd Defendants. In respect of the 1st Defendant, the claim is premised on unlawful arrest and detention and by members of the South African Police Service (SAPS). In respect of the 2nd Defendant, the claim is premised on malicious prosecution. This notwithstanding, the Plaintiff submits the 2nd Defendant is jointly liable with the 1st Defendant for further detention.

[2] The Plaintiff was arrested on or about the 21st of November 2017 at Madobi Village, Limpopo Province. The Plaintiff was thereafter detained at Hlaganani SAPS and Matatshe prison and appeared in Court on the 30th of November 2017. The Plaintiff was charged with rape of a minor child. The charges were withdrawn against him on 14 September 2018.

[3] The Plaintiff filed a notice to amend and amended particulars of claim. The amended particulars of claim and notice to amend were, however, abandoned and the trial proceeded on the first particulars of claim and plea filed by the parties.

[4] It is not in dispute that the Plaintiff was arrested for alleged rape of a minor child and was detained and prosecuted, it is however disputed that the arrest and detention was unlawful and the prosecution was malicious. It should further be noted that the Plaintiff was not detained until 14 September 2018, but only until 6 June 2018 when he was released on warning. There was an earlier bail application at the beginning of the Plaintiff's appearance at court, but the Plaintiff was referred for observation and psychiatric evaluation in terms of Sections 77, 78 and 79 of the Criminal Procedure Act, 51 of 1977. It was only after the psychiatric evaluation and report that the Plaintiff was released on warning.

[5] The 1st Defendant's case is that the arrest and detention was lawful and the 2nd Defendant's case that the Prosecutor had no malice when they decided to place the matter on the roll and proceed with prosecution. It was submitted that the

prosecutor who dealt with the case of the Plaintiff acted in good faith.

LEGAL POSITION:

[6] Having admitted the arrest of the Plaintiff without a warrant of arrest, the onus to prove that the arrest was lawful, rests on the Defendant. The Defendant had to prove on a preponderance of probabilities that the Arresting Officer at the time of the arrest, harboured a reasonable suspicion that the Plaintiff had committed a Schedule 1 offence, which must be objectively justifiable.

[7] The jurisdictional pillars for reliance on **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977**, have to be met by the Respondent. The legal position regarding the justification of a warrantless arrest in terms of **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977** was stated as follows in **Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H:-**

"The so-called jurisdictional facts which must exist before the power conferred by s40(1)(b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.*
- 2) He must entertain a suspicion.*
- 3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).*
- 4) That suspicion must rest on reasonable grounds.*

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i e, he may arrest the suspect. In other

words, he then has a discretion as to whether or not to exercise that power (cf **Hoigate- Mohammed v Puke (1984) 1 All ER 1054 (HL) 1057**). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf **Divisional Commissioner of S A Police, Witwatersrand Area, and Others v S A Associated Newspapers Ltd and Another 1966 (2) SA 502 (A) 512; Groenewa/d v Minister van Justisie 1973 (3) SA 877 (A) 884**)"

[8] In **Duncan v Minister of Law and Order 1986 (2) SA 806 (A)** at 814D-E, the following was held:-

"The test is not whether a policeman believes he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion."

[9] In **Biyela v Minister of Police 2022 (1) SACR 235 (SCA)** at para 34 - 35, **Musi AJA** held 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.

[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.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence."
(footnotes omitted)

[10] In the present matter, it is common cause that the Plaintiff was arrested by a police officer. The police officer entertained a suspicion that the Plaintiff had committed an offence of rape of a minor child which is in fact an offence falling under Schedule 6 of the Criminal Procedure Act, 51 of 1977 and much higher than a Schedule 1 offence.

[11] From the evidence presented on behalf of the Defendant, it is clear that the arresting officer had reasonable grounds to affect a warrantless arrest as envisaged in Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977. Warrant Officer Chabalala testified that he is a police officer stationed at Giyani Family Violence and Child Protection Unit. He is an Investigating Officer and has been in the employ of the South African Police Services for 30 years. On the 21st of November 2017, Warrant Officer Mongani, an investigating officer in the present case, approached him and informed him that he was busy with a rape case. The victim was 8 years old.

The allegations were that she was raped by her father.

[12] W/O Chabalala further testified that he then accompanied W/O Mongani to the Complainant's home where they interviewed her. The Complainant then accompanied W/O Chabalala and W/O Mongani and pointed out the suspect's home (Plaintiff), as well as the suspect (Plaintiff). W/O Chabalala showed the Plaintiff his appointment card, informed him of his rights and arrested him.

[13] W/O Chabalala testified that before the Plaintiff was arrested and before going to the Complainant's home to interview her, he had perused the docket, the statements and the J88. There were injuries noted on the J88. He went to the Complainant's home to verify the facts before he proceeded to arrest the Plaintiff. The victim child confirmed to him that she was raped by her father and pointed him out.

[14] W/O Mongani also testified that he is an Investigating Officer at SAPS Giyani with 33 years of experience at SAPS. According to W/O Mongani, upon receipt of the complaint, he took the docket and started with his investigations. The docket was opened on the 5th of November 2017 and he only arrested the Plaintiff on the 21st of November 2017 after having done some investigations. He testified that he read the docket before he effected an arrest. According to W/O Mongani, he considered the J88 and the injuries inflicted on the child, he also read and considered the statements in the docket. W/O Mongani also took the statements of the other children. He went to the Complainant, S[...] T[...] and interviewed her. He also requested the Complainant to accompany them to show them where the perpetrator lives and point him out, whereafter the Plaintiff was arrested.

[15] In my view, the arrest was therefore lawful. This matter however does not end here. The Plaintiff also claimed for unlawful detention. In **Mvu v Minister of Safety and Security 2009 (6) SA 82 at 89F-G and further at 90A-D, Willis J** stated

that *"there is an important distinction between the [arrest and detention which is] not properly understood by many"*. Even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and *"this includes applying his or her mind to the question of whether detention is necessary at all"*. If the officer fails to do this, the detention is unlawful.

[16] It was held by **Wallis J in Mvu v Minister of Safety and Security *supra***, that seen in this light, viewed objectively, the arresting officer should have applied his mind to avoid detaining the Plaintiff. In the present matter, due to the nature of the allegations and charge leveled against the Plaintiff, and having considered the injuries indicated on the J88, as well as the relationship between the victim and the Plaintiff, the members of the Defendant correctly applied their minds and detained the Plaintiff. The detention was therefore also not unlawful.

[17] The Plaintiffs legal representative submitted that if the court does not find the arrest and detention to be unlawful, it should at least be found that the further detention of the Plaintiff from 9 March 2018 was unlawful, as the DNA results became available on the 9th of March 2018 and according to him, the DNA results did not match that of the Plaintiff. This contention is however incorrect. The DNA results stipulated as follows:-

"The result can be summarized as follows:

- No semen was detected on the exhibit (PA4002585953). Therefore no DNA comparison will be carried out."*

[18] The fact that no comparison could be carried out due to no semen being detected does not mean the Plaintiff was innocent. A trial court further does not have regard to DNA results only, in isolation, as the only determinative factor, when convicting or acquitting an accused person of an offence.

[19] It is clear that there were ongoing investigations in respect of the present matter. The Plaintiff was also sent for psychiatric observation due to his own sister having made the allegations that he was not mentally stable, which report was dated the 25th of May 2018 according to the Plaintiffs version, and as already stated, released on warning on the 6th of June 2018, although the charges against him was only withdrawn on the 14th of September 2018 by the 2nd Defendant. In my view, also the Plaintiff's further detention to 6 June 2018 was not unlawful.

[20] This then brings me to the second claim against the 2nd Defendant for Malicious Prosecution. The onus is on the Plaintiff to prove malicious prosecution. In **Minister of Justice and Constitutional Development v Moleko (131/07) [2008] ZASCA (31 March 2008)** the Supreme Court of Appeal held at para 8 as follows:-

"In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove -

- 1. that the defendants set the law in motion (instigated or instituted the proceedings);*
- 2. that the defendants acted without reasonable and probable cause;*
- 3. that the defendants acted with 'malice' (or animus injuriandi).and*
- 4. that the prosecution has failed."*

[21] In this case, the charges were withdrawn against the Plaintiff, and the fourth requirement does not need to be entertained any further.

[22] The requirement that the Plaintiff in an action for malicious prosecution

must prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the instigator or prosecutor is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant.

[23] Whether a prosecution is wrongful or lawful depends on whether there was a reasonable and probable cause coupled with the *animus iniuriandi* of the defendant in instigating, initiating or continuing it. It is not whether the prosecutor possessed evidence to secure a conviction since that is for the trial court to decide after the conclusion of evidence; but, the honest belief by the prosecutor that, having carefully collected and objectively assessed the available information, the Plaintiff was probably guilty of the crime. In coming to that decision the prosecutor must have grappled with both the subjective and objective elements in the exercise of that discretion.

[24] It is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for malicious prosecution. So much depends on the absence of a reasonable and probable cause, and the *animus iniuriandi* of the defendant in instigating, initiating or continuing the prosecution. It is widely accepted that reasonable and probable cause means an honest belief founded on reasonable ground(s) that the institution of proceedings is justified. (See **Beckenstrater v Rottcher & Theunissen 1955 1 SA 129 (A) 136A-B; Newman v Prinsloo 1973 1 SA 125 (T) 149H**)

[25] It is about the honest belief of the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence. Ultimately, it is for the trial court to decide at the conclusion of the evidence whether or not there is evidence upon which the accused might reasonably be convicted. (See **S v Lubaxa 2001 2 All SA 107 (A) para 10; S v Suhuping 1983 2 SA 119 (B) 120H-121I; S v Khanyapa 1979 1 SA**

824 (A) 838F-G.)

[26] The Plaintiff was charged with a charge of rape of a minor child. The essential elements of this crime are the perpetrator's (a) unlawful and (b) intentional (c) sexual penetration (d) with complainant (victim) (e) without her consent. And in the present instance a minor child, aged 8 years old.

[27] The prosecutor who took the ultimate decision to prosecute the Plaintiff, testified that at the time she took this decision, she had before her the following documents:-

- (a) the case docket;
- (b) the minor child's aunt's statement (Complainant's Statement);
- (c) the statement of the minor child (victim) (Victim's Statement); and
- (d) the J88.

[28] She testified that upon reading the statements and J88, she realized an offence was committed. The offender was mentioned. According to her a *prima facie* case was made out and it appeared that a possible crime was committed and that the Plaintiff was linked to the crime. The matter was consequently enrolled.

[29] In the present matter, there was no evidence presented that the prosecutor (or anybody else) was moved by any intention other than to have the Plaintiff stand trial for the charges leveled against him and to bring him to justice. There was further also no evidence that the prosecutor acted without reasonable and probable cause or that the prosecutor acted maliciously.

[30] The Plaintiff failed to prove two requirements in order to succeed with the claim for malicious prosecution, namely that the 2nd Defendant acted without reasonable and probable cause and that the 2nd Defendant acted with malice. The claim for malicious prosecution therefore stands to be dismissed.

[31] As a general rule, costs follow the result. There is no reason to deviate in the present matter from the general rule.

ORDER:

[32] In the result, I therefore make the following order:-

1. The action is dismissed (Both Claims A & B).
2. The Plaintiff is ordered to pay the Defendant's costs.

**M. NAUDÉ-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

HEARD ON : 8 -9 MAY 2024

HEADS OF ARGUMENT FILED : 3 JUNE 2024

JUDGMENT DELIVERED ON : 5 SEPTEMBER 2024.

This judgment electronically by was handed down circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **5 SEPTEMBER 2024 at 10h00**

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