

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

**Appeal Case Number: A136/2023
Court *a quo* Case Number: 1582/2019**

In the matter between:

MPHO DOCTOR MOKOENA

APPELLANT

and

THE MINISTER OF POLICE

1ST RESPONDENT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

CORAM: CJ MUSI, JP *et* MOLITSOANE J, *et* GROENEWALD, AJ

HEARD ON: 26 APRIL 2024

DELIVERED ON: 08 AUGUST 2024

JUDGMENT BY: GROENEWALD, AJ

INTRODUCTION:

- [1] This is an appeal against an order of a single Judge of this Division. The appeal is before us with leave of the court *a quo*.

- [2] The appellant instituted action proceedings in the court *a quo* against the first and second respondents based on unlawful arrest and detention as well as malicious prosecution.
- [3] The appellant was arrested by members of the SAPS on 18 May 2017.
- [4] On 19 May 2017 the appellant appeared in the District Court, Frankfort where his bail application was opposed by the State. The matter was postponed twice and on 30 May 2017 the appellant's bail application was refused. The appellant remained in custody until he was eventually acquitted on 5 September 2018.

THE UNLAWFUL ARREST AND DETENTION:

- [5] In a claim for unlawful arrest and detention a plaintiff must inter alia prove that the deprivation of his or her liberty was wrongful.¹
- [6] Any arrest or detention is *prima facie* wrongful and the onus rests on a defendant to justify the arrest and detention.²
- [7] It is common cause that the appellant was arrested without a warrant of arrest.
- [8] In terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (*the CPA*) a peace officer may without a warrant arrest any person whom he or she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.
- [9] In *Minister of Safety and Security v Sekhoto*³ the court held that the following jurisdictional facts must be present in terms of section 40(1)(b) of the CPA:

¹ De Klerk v Minister of Police 2021 (4) SA 585 (CC) at 593D - F

² Mahlangu and another v Minister of Police [2021] JOL 50340 (CC) at par 32; Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA) at 373, par 7; De Klerk v Minister of Police *supra* at 593E

³ Ibid at 373, par 6; Also see Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H

- [9.1] The arrestor must be a peace officer;
 - [9.2] The arrestor must entertain a suspicion;
 - [9.3] The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1;
 - [9.4] The suspicion must rest on reasonable grounds.
- [10] The Court *a quo* held that the appellant was lawfully arrested in terms of section 40(1)(b) of the CPA.
- [11] It is common cause that the arresting officer in this matter is a “*peace officer*” as envisaged in section 40(1)(b) of the CPA. The appellant however disputes that the arresting officer entertained a reasonable suspicion that the appellant committed an offence referred to in Schedule 1 of the CPA when he effected the arrest of the appellant.
- [12] According to the appellant, rape of a minor child is not an offence referred to in Schedule 1 of the CPA and the arresting officer therefore did not have the authority to arrest the appellant without a warrant in terms of in section 40(1)(b) of the CPA.
- [13] The offences referred to in Schedule 1 of the CPA include the following:
- “Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.” (Emphasis added).*
- [14] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (*Act 32 of 2007*) deals with “*rape*” and provides the following:
- “Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape.”*

[15] Section 4 of Act 32 of 2007 deals with "*compelled rape*" and is not applicable in this matter.

[16] From the charge sheet it is evident that the appellant was charged with rape in terms of section 3 of Act 32 of 2007.

[17]

[17.1] In order to substantiate his submission, that the appellant was not charged with an offence referred to in Schedule 1 of the CPA, the appellant referred to the following offence also referred to in Schedule 1:

"Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively". (Emphasis added)

[17.2] According to the appellant the offence that he was charged with does not fall under Chapters 3 or 4 of Act 32 of 2007 and is therefore not an offence referred to in Schedule 1.

[17.3] The appellant's argument is however misplaced as he was charged in terms of section 3 of Act 32 of 2007, and not Chapter 3 or 4 of Act 32 of 2007.

[17.4] Because the appellant was charged with rape in terms of section 3 of Act 32 of 2007 he was actually charged with an offence referred to in Schedule 1, as envisaged in section 40(1)(b) of the CPA.

[18] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of section 40(1)(b) of the CPA is objectively justiciable.⁴

[19] In *Biyela v Minister of Police*⁵ the court held the following:

"[34] The standard of 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 the arrest harboured a reasonable suspicion that arrested person committed a Schedule 1 offence."

[20] Once the jurisdictional facts for an arrest in terms of section 40(1)(b) of the CPA are present a discretion whether or not to arrest arises. The peace officer is not obliged to arrest.⁶The discretion to arrest must be exercised properly.⁷

[21] In *Groves NO v Minister of Police*⁸ the Constitutional Court held that an arresting officer has to collate facts and exercise his discretion on those facts. The

⁴ *Biyela v Minister of Police* (1017/2020) [2022] ZASC 36 (01 April 2022) at par 33

⁵ *Ibid* at par 34 and 35

⁶ *Minister of Safety and Security v Sekhoto supra* at 379C-E;

⁷ *Biyela v Minister of Police supra* at par 36

⁸ [2023] JOL 61903 (CC) at par 52

arresting officer must be able to justify the exercising of his discretion on those facts.

- [22] Sergeant Nakane was the arresting and investigating officer in this matter. At the time of the arrest Sergeant Nakane had the statement of the complainant in his possession. The statement was taken from the complainant by another police official. The appellant is related to the complainant and they were staying in the same dwelling at the time of the incident. In her statement the complainant identified the appellant as the person who raped her and stated that she recognized his voice. According to the complainant the appellant penetrated her anus with his penis.
- [24] In her statement the complainant further indicated that, when she woke up the morning after the alleged incident, she confronted the appellant and asked him why he did that to her. The appellant then told her not to ask him that question. According to the complainant she told the appellant that she was going to tell her father about the incident but the appellant then said that her father would not do anything to him. The complainant further stated that the appellant raped her again and also threatened that he would hit her if she told her parents.
- [25] Sergeant Nakane had an interview with the complainant on 15 May 2017 before he arrested the appellant. According to Sergeant Nakane he had to cut the interview short because the complainant became very emotional and started crying. Although the victim did not mention during the interview that she was raped she did say that she was touched by the appellant.
- [26] In the J88-report by a medical practitioner, Dr GJ Gronum, dated 3 May 2017 it was confirmed that the complainant had tears in her anus and was sodomized. In my view the J88 corroborates the version of the accused.
- [27] Sergeant Nakane also interviewed the aunt of the complainant before he arrested the appellant.

- [28] The complainant laid the charge against the appellant with the SAPS on 2 May 2017.⁹ The appellant learned about the complainant's charge against him on the same day that the charge was laid.¹⁰ The appellant was living in Tweeling at the time.¹¹ That same day the appellant left Tweeling and went to Ermelo.¹² The appellant remained in Ermelo until the time of his arrest on 18 May 2017. Despite having knowledge about the charge against him the appellant failed to present himself to the police.
- [30] Having considered all the relevant facts of this matter I am not persuaded that Sergeant Nakane exercised his discretion to arrest the appellant in an improper manner.
- [31] I am therefore of the view that the appellant was lawfully arrested in accordance with the provisions of section 40(1)(b) of the CPA. The appellant therefore failed to prove that the deprivation of his liberty was wrongful and his claim for unlawful arrest and detention was correctly refused by the court *a quo*.

MALICIOUS PROSECUTION:

- [32] In order to succeed with a claim for malicious prosecution a plaintiff must allege and prove the following:
- [32.1] That the defendants set the law in motion – they instigated or instituted the proceedings;
- [32.2] The defendants acted without reasonable and probable cause;
- [32.3] The defendants acted with “*malice*” or *animo iniuriandi* – that is, with the intention to injure the plaintiff; and

⁹ Record, bundle H2, p.82, lines 23-24; Complainant's statement, Bundle B (Plaintiffs Discovery) at 104

¹⁰ Record, Bundle H2, p.75, lines 6 - 10

¹¹ Record, Bundle H1, p.6, lines 10 - 15

¹² Record, Bundle H1, p.14 , line 21 to p.15, line 11

[32.4] The prosecution failed.¹³

[33] Ms De Beer was the prosecutor in the criminal trial of the appellant. According to her she carefully considered the content of the docket and was subsequently satisfied that there was a *prima facie* case against the appellant. She therefore took the decision to proceed with the prosecution of the appellant.

[34]

[34.1] The appellant was not discharged at the close of the case for the prosecution, in terms of section 174 of the CPA, during the criminal trial.

[34.2] Section 174 of the CPA provides that if, at the close of the case for the prosecution, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which it may be convicted on the charge, it may return a verdict of not guilty.

[34.3] The fact that the appellant was not discharged in terms of section 174 of the CPA, at the close of the case for the prosecution in the criminal trial, in my view demonstrates that there was at least a *prima facie* case against the appellant.

[35] I am therefore of the view that the appellant failed to prove that the respondents acted without reasonable and probable cause and with malice. The court *a quo* therefore correctly dismissed the appellant's claim for malicious prosecution.

COSTS:

[36] A successful litigant is generally entitled to his or her costs.¹⁴ I am unable to find any reason why the general principle should not be applied in this matter. Costs should therefore follow the result.

¹³ Minister for Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA) at par 8

¹⁴ Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A) at 679B, Baptista v Stadsraad van Welkom 1996

[37] In my view this matter was not very complex and the costs consequent upon the employment of counsel should therefore be awarded on Scale A.

[38] Accordingly I make the following order:

[38.1] The appeal is dismissed.

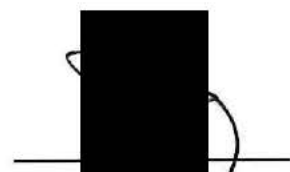
[38.2] The appellant is ordered to pay the respondents' costs of the appeal, including costs of counsel as per Scale A.


WJ GROENEWALD, AJ

I concur


CJ MUSI, JP

I concur


P MOLITSOANE, J

On behalf of the Appellant:

Adv ID Masoka

Appearing with:

Adv CZ Muza

Instructed by:

Matlho Attorneys, Bloemfontein

On behalf of the Respondents:

Adv K Motholo

Instructed by:

State Attorney, Bloemfontein