

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 6936/2021

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED: YES/NO

Naude – Odendaal J

[REDACTED]

SIGNATURE

DATE

13/11/2024

In the matter between:

SEBATHA CALVIN

PLAINTIFF

and

MINISTER OF POLICE

1st DEFENDANT

PROVINCIAL COMMISSIONER OF
 SOUTH AFRICAN POLICE SERVICE:
 LIMPOPO PROVINCE

2nd DEFENDANT

FRANK SIBANDA

3rd DEFENDANT

 JUDGMENT

NAUDE-ODENDAAL J:**INTRODUCTION:**

- [1] The Plaintiff instituted action for damages against the Defendants arising from his arrest and detention on 2 January 2021 at or near Mataung Village, Mafefe, Limpopo Province, which the Plaintiff alleges was unlawful. The arrest was carried out by a member of the South African Police Services, Malipsdrift, while acting in the course and scope of employment of the 1st Defendant and therefore the Plaintiff claims vicarious liability against the 1st and 2nd Defendants. The Plaintiff alleges that he suffered damages in the amount of R1000 000.00 (One Million Rand).
- [2] The Plaintiff was arrested on the 2nd of January 2021, by the Defendants on charges of rape and was detained for a period of 10 (ten) days. The Plaintiff was released from custody on 12 January 2021 on bail. The Plaintiff reappeared in court on 11 March 2021, and the matter was remanded until 14 March 2021 on which date the public prosecutor withdrew all charges against the Plaintiff.
- [3] Although the Defendants admit the arrest and detention, the Defendants maintain that the arrest was lawful and conformed to prevailing legal prescripts.
- [4] The Defendants called two witnesses. The trial proceeded on both merits and quantum. The Defendants had a duty to begin in the trial and had to prove that the arrest and detention were lawful.

THE EVIDENCE:

- [5] The Defendants' first witness was Captain Matabane. Captain Matabane is employed by the South African Police Services and has been so employed for 31 years. He is a detective commander stationed at Malipsdrift Police Station. On the 2nd of January 2021, Captain Matabane received a docket from the Community Service Centre (CSC) whereafter he proceeded to peruse the contents of the docket.
- [6] The Complainant was a minor female child born in 2009. She alleged that she was raped by a neighbour when she went to the neighbour's homestead to charge her phone. Captain Matabane testified that he read the Complainant's statement, which was accepted and marked Exhibit A during trial.
- [7] After having perused the contents of the docket, Captain Matabane drove to the Complainant's homestead which is at Mafefe Village. Upon arrival at the Complainant's address, he found the Complainant together with her mother at their homestead. Captain Matabane testified that he discussed the complaint with the Complainant and her mother and asked them where the suspect could be found.
- [8] The Complainant and her mother then took Captain Matabane to a homestead where they found the Plaintiff busy plastering. The Complainant pointed to the Plaintiff as the perpetrator who raped her.

- [9] Captain Matabane testified further that he then informed the Plaintiff that he was under arrest for rape, explained to him his Constitutional rights and thereafter took him to Malipsdrift Police Station. Captain Matabane testified further that at the Malipsdrift Police Station, he called the Family Violence, Sexual Offences and Child Protection Division and referred the matter to them for further investigation.
- [10] Captain Matabane also testified that the statement by the Complainant contains a different name. The Statement speaks of Kholofelo Madutlela, but when he was arrested by Captain Matabane, the Plaintiff indicated that he is Calvin Sebete. The Complainant however pointed the Plaintiff out whereafter he was arrested. According to Captain Matabane, Kholofelo Madutlela and Calvin Sebete is one and the same person.
- [11] Captain Matabane testified that based on the Complainant's statement, her age, the evidence in the docket and the pointing out by the Complainant and her mother, he arrested the Plaintiff.
- [12] Under cross-examination, Captain Matabane testified that he did not ask the Plaintiff any questions before arresting him as his duties were not to investigate or to usurp the duties of the trial court, but to arrest. He merely informed him of the reason for his arrest and of his Constitutional Rights.

- [13] Captain Matabane further testified under cross-examination that he believed he should have affected arrest because according to the Complainant's statement the Plaintiff had perpetrated the offence multiple times against the Complainant and he feared the Plaintiff may commit the same offence against other victims. Captain Matabane testified that the Complainant was still very young and she was also told by the Plaintiff not to tell anybody of the incident and if she told anybody, he threatened to kill her.
- [14] According to Captain Matabane he had a reasonable suspicion that the Plaintiff committed the offence. He had the statement of the Complainant, considered the contents thereof and she pointed the Plaintiff out. According to Captain Matabane, he believed the Complainant.
- [15] Captain Matabane further testified when asked why the Plaintiff was not given police bail, that rape is a serious offence and not an offence that falls within the purview of police bail being granted. He further stated that the Plaintiff was arrested to bring him before a court of law.
- [16] Captain Matabane was also asked under cross-examination why the Complainant was not taken for a medical examination before the arrest was affected to which he responded that he does not do the medical examinations, he affected the arrest and called the Family Violence, Sexual Offences and Child Protection Division who took the matter and investigations further. He testified that they take Complainant's for medical examinations etc.

- [17] Captain Matabane confirmed under re-examination that the Plaintiff is the Complainant's neighbour. They know each other very well.
- [18] The Defendants called Warrant Officer Frank Sibanda as their second witness. He testified that he is a member of the South African Police Services and has been so for a period of 20 years. He was the Investigating Officer in the present matter. His duties include, but are not limited to investigating rape charges. He is stationed at the Family Violence, Sexual Offences and Child Protection Division.
- [19] Warrant Officer Sibanda testified that on the date in question he went to Malipsdrift and found the Plaintiff in the cells. He asked the Plaintiff the reasons for his arrest. According to W/O Sibanda the Plaintiff informed him that there was a girl who caused him to be arrested.
- [20] Warrant Officer Sibanda went to the Complainant's residence and interviewed her and satisfy himself of the facts. She told him that she used to charge her phone at the Plaintiff's residence and showed him where the Plaintiff's residence was. She also confirmed to him that the Plaintiff raped her. W/O Sibanda confirmed that they were neighbours. He also arranged for the Complainant to undergo a medical examination.
- [21] Under cross-examination, W/O Sibanda stated that the Complainant was taken to the doctor where a J88 was completed. He stated that he was present when the

Complainant was examined by the doctor and the doctor told him that there are signs that the Complainant was sexually active and that she was sexually penetrated.

- [22] W/O Sibanda further stated that the Complainant was taken to a forensic social worker who confirmed, upon interviewing the Complainant that she was sexually violated. He further stated that he learned through experience of working with matters involving children, that children seldom lie.
- [23] W/O Sibanda also testified that he spoke to the Plaintiff. The Plaintiff confirmed to him that the Complainant often comes to his house to charge her phone, but denied having raped her.
- [24] W/O Sibanda confirmed that the charges against the Plaintiff were withdrawn, but stated that he was not informed of the reasons for the withdrawal of the charges.
- [25] After the two witnesses testified for the Defendants, the Defendants closed their case.
- [26] The Plaintiff elected not to come and testify. According to the Plaintiff, the Defendants had the duty of proof and the arrest and detention was not in dispute. The Plaintiff proceeded to close his case without leading any evidence.

LEGAL POSITION:

[27] Having admitted the arrest of the Plaintiff without a warrant of arrest, the onus to prove that the arrest was lawful, rests on the Defendants. The Defendants 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.

[28] The jurisdictional pillars for reliance on **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977**, have to be met by the Defendant. 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 E R 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; Groenewald v Minister van Justisie 1973 (3) SA 877 (A) 884**)”

- [29] 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.”

- [30] 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)

[31] 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.

[32] 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. Captain Matabane

testified that he has been a police officer for 31 years. He is a detective Commander stationed at Malipsdrift Police Station. He received and perused the docket and in particular the statement of the Complainant (Exhibit "A"). The Complainant specifically mentioned the perpetrator's name. The Plaintiff was also the Complainant's neighbour and well known to her.

[33] Captain Matabane further testified that he then went to the Complainant's home where they found her and her mother. The Complainant and her mother then accompanied Captain Matabane and pointed out the suspect's home (Plaintiff's), as well as the suspect (Plaintiff). He informed the Plaintiff of the allegations against him and that he is being arrested on a charge of rape, his rights and arrested him.

[34] Captain Matabane considered the severity of the offence, the age of the Complainant, the fact that the offence had occurred on a number of times, the possibility that the Plaintiff could also commit the offence towards other children and posed a threat, as well as the fact that the Plaintiff threatened the Complainant that if she told anybody, he would kill her. Captain Matabane also considered the fact that the Plaintiff was well-known to the Complainant and that they were in fact neighbours.

[35] In my view, Captain Matabane had a reasonable suspicion that the Plaintiff had committed a Schedule 1 offence. His suspicion was based on reasonable grounds and 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.

- [36] 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 evidence of W/O Sibanda in relation to the confirmation by the Doctor to him that the Complainant showed signs that she was sexually penetrated, as well as the confirmation by the forensic social worker who confirmed that she was sexually violated, the relationship between the victim and the Plaintiff and close proximity in which they lived from each other, the members of the Defendant correctly applied their minds and detained the Plaintiff. The detention was therefore also not unlawful and the action stands to be dismissed.

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

ORDER:

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

1. The action is dismissed.
2. The Plaintiff is ordered to pay the Defendants' costs.


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

APPEARANCES:

HEARD ON : 3 JUNE 2024
HEADS OF ARGUMENT FILED : 18 JUNE 2024

JUDGMENT DELIVERED ON : 13 NOVEMBER 2024.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **13 NOVEMBER 2024 at 14h00**

FOR THE PLAINTIFF**INSTRUCTED BY**

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POLOKWANE HIGH COURT