

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **22/24189**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: /NO

_____	_____
DATE	SIGNATURE

In the matter between:

PHELELANI SOKHELA

Plaintiff

and

MINISTER OF POLICE

First Defendant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

JUDGMENT

MANENTSA AJ

INTRODUCTION

[1] Mr Phelelani Sokhela, the Plaintiff, brought an action against the First to Third Defendants for damages and alleged loss of income as a result of his unlawful arrest, detention and malicious prosecution.

[2] The Plaintiff's First Claim is for unlawful arrest and detention. He claims general damages of R10 million against the Minister of Police and the Minister of Justice and Correctional Services ("the Defendants").

[3] The Second Claim is for malicious prosecution in which the Plaintiff claimed the sum of R2 million against the First and Second Defendants and the Third Defendant, the National Director of Public Prosecutions, jointly and severally.

[4] The Third Claim was for loss of income pursuant to the alleged malicious prosecution and detention of the Plaintiff in which he sought to claim damages in the amount of R3 million. At the commencement of the trial, the court was advised that the Plaintiff does not intend to pursue the Third Claim. The claim was accordingly abandoned.

[5] The trial proceeded with the hearing of evidence in respect of the First and Second Claims. After the testimony of the Plaintiff, he elected to close his case and the Defendants made an application for absolution from the instance in respect of the Second Claim, namely the claim for malicious prosecution. Having heard arguments on the application for absolution from the instance, I delivered a judgment on 13 November 2024 granting the application for absolution from the instance. The order that I made went further to also dismiss the Plaintiff's Second Claim. The parties have, by agreement, requested that I rectify the error in the order which dismisses the Second Claim. I deal with this aspect later in the judgment.

[6] In the light of the abandoning of the Third Claim, and the order granting absolution from the instance in respect of the Second Claim, this judgment relates to the First Claim only, that of the alleged unlawful arrest and detention of the Plaintiff.

THE PLEADED CASES

[7] The trial commenced on the basis of the Plaintiff's amended particulars of claim dated 23 September 2022.¹

[8] At the end of the trial and in the light of the evidence led by the Plaintiff, an application to amend the particulars of claim was brought to amend paragraphs 5, 9 and 10 of the particulars of claim dated 23 September 2022 and further deleting the Third Claim. The Defendants did not oppose the application for amendment. The amendments were therefore granted.

[9] The Plaintiff effected the amendments by delivering amended particulars of claim on 20 November 2024.²

[10] There were no consequential amendments made to the Defendants' plea.

[11] The Plaintiff's pleaded case in respect of the First Claim can be summarised as follows:

1. On 20 February 2021 at around 21h00 and at Kwa-Thema, the Plaintiff was arrested, without a warrant for alleged offence of Rape. The said police officers were at the time in the employ of the South African Police Service and acting within the course and scope of their employment.
2. The Plaintiff was arrested and detained at Kwa-Thema Police Station charge office for approximately two (2) hours and thereafter was then transported from Kwa-Thema Police Station to Springs Holding Cells in a blue light motor vehicle and detained for approximately three (3) days in sub-human and degrading conditions. The Plaintiff was denied food for the whole three (3) days.
3. The Plaintiff applied for bail, however the bail was denied.
4. The Plaintiff was further detained at Modderbee Prison from 23 February 2021 ultimately released when charges were withdrawn against him

¹ CL2B-1 to 2B-9.

² CL011-2 to 011-9.

on 31 March 2022 by order of court at the Springs Magistrate's Court.

5. During the Plaintiff's detention at Modderbee Prison, he suffered hardship during his incarceration in that the conditions in prison were shocking, the quality of food was poor, the bedding was atrocious, the Plaintiff had problems with obtaining medication;

6. The arrest and subsequent detention was unlawful and was intended to torture, harass, intimidate and harm the Plaintiff, alternatively was wrongful.

7. As a result of the foregoing the Plaintiff was unlawfully deprived of his liberty, suffered impairment to his dignity, suffered psychological trauma and harm.

8. As a result of the foregoing, the Plaintiff has suffered general damages in the amount of **R10 000 000.00** for unlawful arrest impairment of dignity, unlawful detention loss of freedom, deprivation of his freedom of movement, pain, suffering and psychological trauma.

[12] The Defendants' pleaded defences can be summaries as follows:

1. The Defendants admit that on the 20th February 2021 at Kwa Thema, the Plaintiff was arrested without a warrant by a peace Officer for an alleged offence of Rape. The arrestor was a peace officer who reasonably suspected that the Plaintiff committed on offence referred in Schedule 1, being Rape and the suspicion was based on reasonable grounds.

2. The Defendants admit that the Plaintiff was detained at Kwa-Thema station for a while under conditions consonant with human dignity in terms of Section 35 of the Constitution Act 108 of 1996 read together with Section 50 of the Criminal Procedure Act 51 of 1977, and was thereafter transported to Springs Police Station until taken to court for his first appearance on the 23rd of February 2021.

3. The Defendants plead that the Plaintiff was detained at Modderbee Correctional Centre (i.e Modderbee Prison) with a warrant of committal pursuant to the Plaintiff failing to convince the honorable court to be released from detention based on the interest of justice.

4. The Defendants deny that the Plaintiff's arrest and detention was unlawful and that they are liable for the general damages claimed by the plaintiff.

[13] During the course of the testimony of the witnesses, it emerged that the Defendants rely on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 as a basis of justification of the Plaintiff's arrest. As it is clear from the pleaded defences set out above, section 40(1)(b) was not expressly pleaded as a defence in the plea.

[14] Section 40(1)(b) of the Criminal Procedure Act provide 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.

[15] It is trite that the object of pleading is to define the issues so as to enable the other party (and the court) to know what case has to be met.³ The defence afforded by section 40(1)(b) of the Criminal Procedure Act was however foreshadowed in the Defendants' plea in that the Defendants pleaded that the Plaintiff's arrest was without a warrant and by a peace officer who reasonably suspected that the Plaintiff had committed an offence referred to in schedule 1, being Rape. The Defendants went further to allege that the suspicion was based on reasonable grounds. Thus, the defence in section 40(1)(b) of the Criminal Procedure Act is cognisable from the plea. The defence is not an unpleaded issue and I retain the wide discretion to consider the defence, where there is no prejudice to the Plaintiff.⁴

[16] The disputed issues for the Court's determination are thus the following:

1. Whether the Plaintiff's arrest was unlawful. The First Defendant bears the onus to justify the lawfulness of the arrest.⁵
2. Whether the unlawful arrest resulted in the unlawful detention of the Plaintiff.
3. Whether the Defendants should be held liable for the period of detention of the Plaintiff from 20 February 2022 to 31 March 2022 in the event

³ Robinson v Randfontein Estate GM Co Ltd 1925 AD 173 at 198; Molusi v Voges NO 2016 (3) SA 370 (CC) at 381H – 382A; Makhwelo v Minister of Safety and Security 2017 (1) SA 274 (GJ) at 276 G-H.

⁴ Robinson (supra) at 198; Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 108E; De Klerk v Ferreira 2017 (3) SA 502 (GP) at 536F.

⁵ The Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA) at para 7.

that it is found that the detention was unlawful. In this regard and again although not expressly pleaded, the Defendants contend that the plaintiff's failure to secure bail on 24 March 2021 provided a *novus intervenus* in the chain of causal liability. The period of any unlawful detention should be calculated from 20 February 2021 to 24 March 2021, and not from 20 February 2021 to 30 March 2022 (a period comprising 405 days). The Plaintiff bears the onus of proof in respect of the full period he alleges he was unlawfully detained.⁶

4. The issue of quantum.

THE EVIDENCE

[17] The Plaintiff presented his own evidence. He testified that on 19 February 2021 he was at a nearby tavern from 7pm until 5am of the following morning, 20 February 2021. He returned to his home and slept. At about 9am, he was woken up by a female voice shouting loudly and making accusations that he had raped two minor children of that woman.

[18] The Plaintiff testified that when he heard the loud shouting, he woke up, opened the door and asked the woman what had happened, what is going on. The female then said *"I mentioned that I will find you. You are the one who raped my children at night."*

[19] The Plaintiff requested to question the children on the accusations. The woman, who the Plaintiff had now identified as "S[...]", Ms L[...] M[...] refused for the Plaintiff to talk to the children. The Plaintiff consulted members of the community who advised him to take the matter up with the local leaders, the Izinduna.

[20] The Plaintiff approached the Izinduna who said this was a serious accusation and that it is not the first time that this woman has made such accusations. There are many people who had been arrested because of her allegations. The Izinduna

⁶ De Klerk v Minister of Police 2020 (1) SACR 1 (CC) at para 60

advised the Plaintiff to go to the police station and request their assistance to confront the children.

[21] The Plaintiff went to the local police station at about 5pm. He found a Ms Khumalo at the reception area who referred him to Capt Ndaba. The Plaintiff informed Capt Ndaba of the accusations of rape made by L[...] M[...] against him. Capt Ndaba instructed the Plaintiff to wait until there is a police van available to go to the children and their mother to “*hear the whole story*”. But whilst they were waiting, a certain Radebe arrived at the office where the Plaintiff was waiting alleging that he has met a lady who has accused the Plaintiff of raping her children. At that point Capt Ndaba said there was nothing he can do but to arrest the Plaintiff. The Plaintiff was arrested there and then. The Plaintiff was unsure of the exact time he was arrested.

[22] The Plaintiff testified to a notice of constitutional rights which shows that he signed the notice at 23h00 on 20 February 2021. The Plaintiff testified that he was given this notice when he was put in a police van to be transported to the Springs Police Station.⁷

[23] The Plaintiff further testified to a document called a J88 Form which appeared to have been populated and signed at 23h20 on that night.⁸

[24] The Plaintiff testified that when he arrived at the Springs Police Station he was put inside holding cells and given a wet mattress to sleep on for three days, without food.

[25] Under cross-examination, however, the Plaintiff conceded that he did not suffer the alleged harsh conditions at the instance of the police. The cross-examination went as follows:

MR PHATHELA: So you were taken to Springs cells the same night?

MR SOKHELA: Yes.

⁷ CL3D-23.

⁸ CL3D-7.

MR PHATHELA: It is your evidence that while you were at the cells, the fellow inmates requested the documents that were given. Am I correct?

MR SOKHELA: Yes.

MR PHATHELA: It is your evidence that they said "you are not going to get anything because you are arrested for rape." Am I correct?

MR SOKHELA: Yes.

MR PHATHELA: So all this was said by the inmates?

MR SOKHELA: It was said by the inmates.

MR PHATHELA: It is your evidence that you were given a wet mattress to sleep on.

MR SOKHELA: Yes. It came with the police from the other side. They went to take that mattress from the other side and brought it along.

MR PHATHELA: Wet as it is?

MR SOKHELA: It was not wet, but it became wet in the cell because there was water.

[26] On 24 March 2021, the Plaintiff made a formal application for bail.⁹ His formal application failed. He was refused bail and returned to custody at the Modderbee Correctional Facility until 31 March 2022 where the charges against him were withdrawn.

[27] The evidence is that the withdrawal of the charges was pursuant to a statement made under oath by a senior prosecutor, Ms Annelie Jordaan, on 28 March 2022 which sets out, inter alia, details of two other instances when Ms L[...] M[...] had made allegations of rape of her children by two other men. The senior prosecutor's statement concludes by alleging that L[...] M[...] is not a good mother as her children were violated whilst in her care.¹⁰

[28] The Plaintiff's evidence was not fully challenged under cross-examination, particularly in respect of the key issues of the time of arrest and the basis, or information, that was available to the arresting officer when effecting the arrest.

⁹ CL3E-12.

¹⁰ CL3D-89 to 3D-90.

[29] The Plaintiff maintained his version under cross-examination that his arrest came as a result of Sgt Radebe arriving at the police station looking for the Plaintiff because of Ms M[...]’s accusation of rape of the two minor children. It was at that point in time that the Plaintiff was arrested.

[30] The Plaintiff’s demeanour was unimpressive. He smiled and giggled when he was cross-examined on the seriousness of the allegations of sexual assault on the minor children. I therefore agree with the submission made in the heads of argument of Mr Phathela, the Defendant’s counsel, that the plaintiff maintained an unusual posture throughout his testimony and cross-examination. He would avoid eye contact and at best was looking down. Notwithstanding, I do not find that this unimpressive demeanour diminishes the credibility and probability of the Plaintiff’s testimony.

[31] The Defendants presented their case through four witnesses. The first witness was Ms L[...] M[...].

[32] Ms M[...] testified that on the night of 19 February 2021 she was at her friend’s place drinking alcohol and braiding her friend’s hair. She had left the children sleeping alone at her home, about 6 metres from her friend’s house. She went back and forth to her home on several times to check on the children until returning home to finally sleep at 1am on the following day. She woke up that morning and prepared breakfast for the children but at around 12 midday, she realised that the children were *“not walking normally”*. She enquired from the children on why this was so and was told by the children that the Plaintiff had raped them. She did not check for injuries on the children’s bodies but proceeded to go to the Plaintiff’s house in order to confront him on what the children were alleging.

[33] Ms M[...] testified that she returned to her home and whilst she was considering on whether to go to report the crime at the police station, she spoke to the father of one of the minor children, S[...], who informed him that the Plaintiff has threatened to shoot Ms M[...] if she were to report the crime to the police. She was therefore scared of reporting the crime.

[34] Ms M[...], however, ultimately went to the police station to report the crime. She met the Plaintiff at the police station when she arrived. Whilst she was laying the complaint, Sgt Radebe arrived and demanded to take the two minor children to a nearby hospital to conduct medical examinations in order to verify the allegations of sexual assault. The registering of the complaint was halted. Ms M[...] and the two minor children were transported to a nearby hospital by Sgt Radebe where the medical tests were conducted. After the tests, Sgt Radebe phoned the “*other policeman*” to confirm that the children have tested positive for sexual assault.

[35] Under cross-examination, Ms M[...] was challenged on her recollection of events of the night of the alleged rapes. She testified that during the period between 8pm and 1am (a period of five hours) she had gone back and forth to check on the sleeping children on three occasions, namely at 9:30pm, 10:30pm and 11:30pm. On all of the three occasions, she found the children sleeping. In her examination in chief, she confirmed that when she went home to sleep at 1am, she did not observe anything wrong with the children because she was drunk. Ms M[...] did, however, concede under cross-examination that if the children were indeed raped during the intervening period between 8pm and 1am, they would not have slept through the night because of pain from the sexual assaults.

[36] Interestingly, Ms M[...] also testified that she did not observe any bleeding from the children at home in the morning until when medical examinations were conducted on the children at the hospital.

[37] The demeanour of Ms M[...] was equally unimpressive. She also avoided eye contact with the court and counsel. Her recollection of the events of the night are also questionable because, on her own version, she was drunk and could not remember much.

[38] Ms M[...]’s recollection of the events leading to the arrest of the Plaintiff were also unconvincing. When she was questioned about the alleged telephone call between Sgt Radebe and Capt Ndaba, after the medical examination on one of the children had been completed, she was not sure that Sgt Radebe had indeed made a telephone call to Capt Ndaba.

[39] The Defendants' second witness was the arresting officer, Capt Ndaba. He is now a retired officer, having served the police services for 38 years and as a Captain for 15 years.

[40] Capt Ndaba testified that he met the Plaintiff for the first time at the charge office when the complainant, L[...] M[...], arrived to lay a complaint of rape of the minor children. Ms M[...] had identified the Plaintiff at the police station as the person that raped the children. At that point, Capt Ndaba escorted the plaintiff to a small office that was usually used to register cases. Capt Ndaba then phoned members of the Child Protection Unit.

[41] I pause to mention that Cpt Ndaba's version is contrary to the Plaintiff's testimony that he had arrived at the police station earlier and had already told Cpt Ndaba about Ms M[...]’s accusations of raping her minor children.

[42] Sgt Radebe from this unit then arrived at around 9pm when Sgt Nkosi was still busy taking the statement of the complainant, Ms M[...]. Sgt Radebe took the two minor children and their mother to a nearby hospital to conduct medical examinations to verify the allegations of sexual assault.

[43] Capt Ndaba further testified that Sgt Radebe called him after a while and said that he should proceed with making the arrests because the results of the medical examinations have returned positive for sexual assault. According to Capt Ndaba, it was at that point that he arrested the Plaintiff by explaining his constitutional rights.

[44] Capt Ndaba testified that the factors that informed the arrest were (i) the suspicion of rape of the minors, (ii) a doctor's report that revealed a positive result of sexual assault as informed by Sgt Radebe, and (iii) the seriousness of the crime which is detailed in Schedule 5 of the Criminal Procedure Act. He further testified that he had a discretion to arrest without a warrant in terms of section 40 of the Criminal Procedure Act.

[45] Under cross-examination, Capt Ndaba conceded that arrests should be effected as a means of last resort. He further conceded that he did not consider swearing out an arrest warrant because the suspect was in front of him and he had been told by Sgt Radebe over the phone of the positive results of the examination of the sexual assault.

[46] Further under cross-examination, Capt Ndaba conceded that had he actually received the telephone call from Sgt Radebe, which he deemed to be an important fact, he would have recorded that fact in his statement. Yet he failed to record this important fact in his statement.¹¹

[47] Capt Ndaba also conceded that at the time of making the arrest he had only been aware of the complaint made by Ms M[...] of the alleged sexual assault of the minor children. The complainant's statement (the A1 statement) had not been completed. The investigation diary shows that the A1 statement was finally completed at 01h30 on 21 February 2021. This was after the arrest of the Plaintiff which Capt Ndaba's contends to have been at 11pm on 20 February 2021. Capt Ndaba also conceded that he only received the J88 Form after finishing the process of arresting the Plaintiff.

[48] Finally, Capt Ndaba also conceded that he made no attempts to verify the Plaintiff's story of approaching the Izinduna after being accused of raping the minor children by the complainant and the Izinduna's advice to the Plaintiff to report the matter to the police station because the complainant had made similar allegations against two other men. Capt Ndaba also conceded that he never interviewed the children at the police station when they arrived with the complainant. He could not therefore verify the story through the children.

[49] I cannot fault the demeanour of Capt Ndaba. He appeared to answer questions frankly and honestly. I accept that he gave credible testimony. But, I find that I cannot accept his evidence that he arrested the Plaintiff after receiving a telephone call from Sgt Radebe that the medical examinations were positive for

¹¹ CL3D-24.

sexual assault. Cpt Ndaba's own arresting statement does not mention the telephone call between him and Sgt Radebe.

[50] The arresting statement rather states clearly that the complainant arrived at the police station around 9pm with two little children. She pointed out the Plaintiff and told Cpt Ndaba that the Plaintiff raped her children, and Cpt Ndaba then arrested and detained the Plaintiff.¹²

[51] The Defendants' third witness was Sgt Radebe, a member of the Family Violence, Child Protection and Sexual Offences Unit. He is a police officer of 19 years service.

[52] Sgt Radebe testified that he met the plaintiff for the first time when charging him for rape on 21 February 2021 at the holding cells at Springs Police Station.

[53] Importantly, however, Sgt Radebe admitted that when he arrived at Kwa-Thema Police Station on 20 February 2021, the plaintiff was already arrested as he was in the holding cells. His testimony was as follows:

MR PHATHELA: You have been invited today to assist the Court in the matter wherein one Phelelani Sokhela is suing the state. Now that will relate to occurrences of 20 February 2021. Will you recall Phelelani Sokhela?

MR RADEBE: Yes, I still remember.

MR PHATHELA: Do you also remember having an interaction with him?

MR RADEBE: Yes, I do.

MR PHATHELA: Under what circumstances did you have an interaction with him say from 20 February 2021?

MR RADEBE: I was charging him for a rape case.

MR PHATHELA: When was the first time when you had an interaction?

MR RADEBE: I met him for the first time on the 21st [indistinct].

MR PHATHELA: So you are the one who charged him?

MR RADEBE: Yes.

MR PHATHELA: When was he arrested before you charged him?

¹² CL3D-24 to 3D-25

MR RADEBE: He was arrested on the 20th it was on a Saturday.

MR PHATHELA: Where were you on the day yourself?

MR RADEBE: On my arrival he was already arrested. He was put in the holding cells.

[54] Later in his testimony, Sgt Radebe testified that he arrived at the police station for the first time at 9:20pm.

[55] Sgt Radebe testified that upon arriving he interviewed the complainant, Ms M[...] who explained the allegations of rape made by the minor children against the Plaintiff. He instructed the police officer who was taking the complainant's statement to stop whilst he takes the children to the Far East Rand Crisis Centre to conduct medical examinations. He testified that he agreed with Capt Ndaba that after the medical examinations were completed, he will call Cpt Ndaba to advise whether he should proceed with the arrest. Sgt Radebe then took the children to the Far East Rand Crisis Centre and whilst a medical examination was being conducted on the older child, he left to attend to another case. At around 11pm he received a call from the nursing staff at the hospital. When he returned to the hospital he was advised by the nurse that the J88 examination is positive. He then called Capt Ndaba as per their agreement and informed him of the positive examination of the child for rape and so Cpt Ndaba can continue with the detention. The evidence was as follows:

MR RADEBE: Because it was a busy weekend I dropped them then I attended another case. Around 23:00 they called me and said they are done.

MR PHATHELA: Did you eventually go back?

MR RADEBE: Yes, I did.

MR PHATHELA: Why were they calling you back?

MR RADEBE: Because I asked them if they are done to call me.

MR PHATHELA: Then when you arrived there, what happened?

MR RADEBE: When I arrived the nurse told me that they are done with the first child. The J88 is positive the charge can proceed.

MR PHATHELA: What did you do upon receiving that information?

MR RADEBE: I went out and called Mr Ndaba as per our agreement. I said to Mr Ndaba that this child is positive so he can continue with the detention.

[56] Sgt Radebe admitted that at the time of making the call to Capt Ndaba, the J88 Form had not been fully completed. According to Sgt Radebe, he made the telephone call to Capt Ndaba at about 11pm.

[57] Under cross-examination, Sgt Radebe sought to retract his earlier testimony of the arrest of the Plaintiff. His evidence was as follows:

MR MVUBU: Thank you, sir. Now Sokhela says he was arrested at 21:00 because he says it is the arrival of the complainant that led to his arrest. That is 21:00 on 20 February 2021. What do you say?

MR RADEBE: I cannot dispute that, but he was not arrested, he was just put in the police cells.

[58] Sgt Radebe further testified as follows:

MR MVUBU: So are you saying the police are in the habit of just throwing people in a police cell without any form of recording?

MR RADEBE: You can put a person in the holding cell for the purpose of investigating.

MR MVUBU: What provision of South African Police Act? What provision of the Criminal Procedure Act? What provision of the Standing Orders of the police do you find what you are saying?

MR RADEBE: If we are given a Station Order we can detain a person for a maximum of three hours whilst we are busy investigating.

[59] It became clear under cross-examination that the Station Orders which Sgt Radebe sought to rely on cannot take precedence over police Standing Orders issued by the Minister of Police or National Instructions issued by the Police Commissioner which neither of grant police the power to arrest and detain a person for purposes of conducting an investigation. But ultimately, Sgt Radebe had to concede that the Plaintiff was arrested and detained in Kwa-Thema Police Station when he arrived in that he was not free to go home. His freedom of movement was restricted.

[60] Sgt Radebe's demeanour was not undesirable. However, his testimony was contradictory in a number of respects, particularly in respect to the exact time of

arrest and detention of the plaintiff. I must accept his testimony in chief that when he arrived at the police station at 9pm on 20 February 2021, the plaintiff was already arrested and held in detention in Kwa-Thema Police Station. He instructed for the taking down of the complainant's statement to stop in order to take the children to the hospital to conduct medical examinations which would verify the allegations of sexual assault and at that stage, a decision would be taken on charging (as opposed to arrest) the Plaintiff. But for all intents and purposes, the plaintiff was already arrested and detained.

[61] The Defendants' fourth and final witness was Mr Thokozani Zondi, employed at the Modderbee Correctional Facility. He testified that he is responsible for the nutrition, health and security of inmates at the Correctional Facility. He further testified that upon being advised of this case, he made enquiries at the Correctional Facility and determined that the Plaintiff had been detained at the G-Unit of the Facility. There were no complaints that had been registered by the Plaintiff relating to his allegations of assaults by officials at the Correctional Facility. Mr Zondi testified that the food at the Correctional Facility is of a high quality and is tested by the head nurse and head of the correctional centre or a manager delegated by him. He sought to refute the allegation of broken windows at the Correctional Facility.

[62] Under cross-examination, however, Mr Zondi conceded that he had not met the Plaintiff during his time of incarceration at the Modderbee Correctional Facility and he therefore could not comment on the Plaintiff's stay there.

WAS THE ARREST UNLAWFUL?

[63] It is common cause that the Plaintiff's arrest was effected without a warrant. The Defendants plead that the Plaintiff's arrest was because the arresting officer held a reasonable suspicion that the Plaintiff had committed the offence of rape. The arresting officer exercised the power to arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act.

[64] It is trite that the jurisdictional facts that must exist before the power conferred under section 40(1)(b) 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 of the Act.
4. That suspicion must rest on reasonable grounds.¹³

[65] Once such jurisdictional facts are found to exist, the arresting officer has a discretion as to whether or not to exercise that power.

[66] The tests for determining the reasonableness of the suspicion is objective.¹⁴

[67] The suspicion must be based upon solid grounds.¹⁵

[68] The Plaintiff contended that the arresting officer could not have held a reasonable suspicion that the Plaintiff had committed an offence of rape of the minor children. The arresting officer had placed sole reliance on Ms M[...]’s accusations of rape. The Plaintiff’s counsel, Mr Mvubu, argued that an accusation alone cannot ground a reasonable suspicion since the arresting officer had admittedly failed to verify the accusations by, amongst others, interviewing the children who were present at the police station at the time when their mother was making the accusations of rape.

[69] It was further argued on behalf of the Plaintiff that the Standing order G-341 states that it is only in exceptional circumstances, which are absent in the present case, where a police officer is specifically authorised to arrest a person without a warrant. Any arrest without a warrant, which is not specifically authorised by law, will be unlawful.¹⁶

[70] I find that there was no reasonable suspicion that the Plaintiff had committed a crime of rape at the time of Cpt Ndaba arresting the Plaintiff. On any version, as confirmed by testimony of the Plaintiff, Capt Ndaba and Sgt Radebe, the arrest was

¹³ Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818H.

¹⁴ Mabele v Minister of Police [2024] ZAECELLC 25 (21 May 2024) at para 23.

¹⁵ Mabona and Another v Minister of Law and Order and others [1988] 3 All SA 408 (SE) at 410.

¹⁶ CL09-6 to 09-17.

effected based on the sole accusations of Ms M[...] who had arrived at the police station and accused the Plaintiff of sexually assaulting her two minor children.

[71] The Plaintiff testified that the arrest was effected when Sgt Radebe arrived at the police station. According to Sgt Radebe, the Plaintiff was already arrested when he arrived at the Kwa-Thema Police Station. Notwithstanding the contradictions between the Plaintiff's testimony and Sgt Radebe's testimony, what is clear is that the arresting officer arrested the Plaintiff around 9pm once he was told of the alleged rape by Ms M[...].

[72] Capt Ndaba, for his part, conceded that he did not swear out a warrant but deemed it necessary to arrest the Plaintiff who was there in front of him at that point in time. But, what is undisputable is that the Plaintiff had already been held against his will prior to Sgt Radebe taking the two minor children to the nearby hospital to conduct the medical examination. The arrest had been effected even before the medical examinations and the J88 Form had been fully completed.

[73] The arresting officer did not apply the discretion upon him properly. The arresting officer was not obliged to effect an arrest.¹⁷ The arresting officer failed to properly consider and investigate the story surrounding the accusations of rape. The arresting officer ought to have been aware of the possible danger of solely relying on the complainant's accusations based on unsworn and untested information.¹⁸

[74] The need to strike while the iron is hot was not justified under the circumstances of the present case because the Plaintiff was the one who had already approached the police station to deal with the accusations against him. There was no evidence to the arresting officer that the plaintiff was going to disappear or even intimidate witnesses.

[75] One of the purposes of an arrest is to ensure an accused's appearance in court.¹⁹ A warning that the Plaintiff should remain within the jurisdiction of the police

¹⁷ Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) at para 28.

¹⁸ Mabaona (supra) at p 659 A-D.

¹⁹ Olivier v Minister of Safety and Security and Ano 2009 (3) SA 434 (WLD) at 443B.

station while the police were investigating the matter and conducting medical examinations would have sufficed until the police complete their investigations.

[76] There was a faint suggestion by Sgt Radebe that the community were “revolting” outside the police station wanting to harm the Plaintiff. None of the other witnesses testified to this alleged “revolt” and I find that there was no such incidence.

[77] I find that the arrest of the plaintiff on 20 February 2021 at approximately 9pm was unlawful. But for the unlawful arrest, the Plaintiff would not have been detained at the Springs Police Station.

THE DETENTION OF THE PLAINTIFF

[78] As I have found that the arrest and detention of the plaintiff was unlawful, the remaining issues for determination are causation and damages.

[79] It is common cause that the Plaintiff was detained at the Springs Police Station until 23 February 2021 where he made his first appearance at the Springs Magistrate's Court. But for the unlawful arrest, the Plaintiff would not have been detained at the Springs Police station. It was argued on behalf of the Plaintiff that the Magistrates' Court was a “reception” court that did not break the chain of causation when the plaintiff was remanded in custody.

[80] It is common cause that on 24 March 2021, the Plaintiff made a formal application for bail that was refused. The Plaintiff testified that the state opposed the bail application and Sgt Radebe testified that the Plaintiff is a danger to the community and should be denied bail. This evidence was not challenged at all under cross-examination.

[81] The Defendants sought to suggest that the Plaintiff failed to provide exceptional circumstances in his formal bail application to justify the granting of bail. Under cross examination, the Plaintiff was referred to the bail application²⁰ where he

²⁰ CL3D-85.

stated that the exceptional circumstances were the fact that he is the father of nine minor children.

[82] Cpt Ndaba, the arresting officer was questioned his under cross-examination that the police had reconciled themselves that unless the Plaintiff is granted bail, he will spend his time in jail. Cpt Ndaba's response was as follows:

MR NDABA: I cannot speak on behalf of the child [indistinct], after I am done with the dockets, they take the dockets. I am done with that matter. They are the ones who proceeded with the case.

MR MVUBU: Sorry, M'Lord, can I just ask something from my colleague?

COURT: Yes.

MR MVUBU: May I just ask that question again, captain. I understand the answer you have given me. If we accept that he can only be granted bail by a court. It means you then appreciate that up until such a time, he will be in jail.

MR NDABA: Yes.

[83] In closing argument, Mr Mvubu on behalf of the Plaintiff, argued strongly that the arresting officer had the necessary foresight that unless the Plaintiff is able to produce exceptional circumstances he would not be released on bail. The argument went further that the magistrate does not have a discretion to grant bail unless exceptional circumstances are demonstrated. The arresting officer had the foresight that this particular accused could be faced with the challenge of satisfying the test of exceptional circumstances.

[84] It cannot be gainsaid that but for the arrest, the detention of the plaintiff would not have happened. The factual causation test is therefore satisfied. However, in our law there is no blanket principle that the police's liability terminates on the first appearance of an unlawful arrest of that person. Even if the continued detention of the unlawfully arrested person is lawful after a court appearance, the police's liability may continue.²¹

²¹ Manyoni v Minister of Police and Another (41499/2018) [2021] ZAGPJHC 87 (23 June 2021) at para 27.

[85] The Plaintiff's counsel referred the court to the case of *De Klerk v Minister of Police*²² which is the leading case on the legal principles relevant to determining the question of legal causation and liability pursuant to an unlawful arrest. The majority judgment in *De Klerk* on which I am bound, held that the liability of police for detention after court appearance should not be determined solely on the basis of whether a further detention was lawful, although that is a relevant consideration. Instead, liability should be determined in accordance with the principles of legal causation, including constitutionally infused consideration of public policy.²³

[86] The majority judgment further held that the conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. Every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.²⁴

[87] In the present case, the conduct of the police after the arrest cannot be said to have been unlawful. There was no evidence that the police falsified evidence in order to oppress the possibility of the Plaintiff obtaining bail.²⁵ Sgt Radebe merely testified at the bail hearing that the plaintiff is a danger to the community and should not be released on bail. It was not clear however, from the evidence, on what basis Sgt Radebe formulated this view. He was not challenged on this somewhat baseless statement. There was no evidence led, and so I cannot find that Sgt Radebe wrongfully and culpably influenced the decision on bail by for example, falsifying evidence or depriving the bail court of relevant information.

[88] I am also unable to find that there is evidence that the arresting officer had the necessary foresight to appreciate that the Plaintiff would be unable to advance exceptional circumstances to justify his release on bail. The Constitutional Court has held that an applicant is given broad scope to establish the requisite circumstances,

²² 2020 (1) SACR 1 (CC).

²³ *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) at para 47.

²⁴ *De Klerk* ibid at para 63.

²⁵ Compare to Manyoni (*supra*) at para 32.

whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent.²⁶

[89] The Full Bench of the Cape Division in *S v Petersen*²⁷ held that generally speaking “exceptional circumstances” is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

[90] As an example, where an accused adduces independent evidence of innocence and such evidence is so strong that it can be said that he has reasonable prospects of success at his trial, he would have established exceptional circumstances.²⁸

[91] The standard of proof required from an accused to establish exceptional circumstances is on a balance of probabilities.²⁹

[92] In my view, the Plaintiff failed to adduce sufficient facts and evidence at the bail application to demonstrate that it would be in the interests of justice for him to be released on bail. An allegation of fathering nine children, without more, cannot be regarded as advancing exceptional circumstances. With respect, there is nothing unusual about fathering nine children.

[93] The record shows that the Plaintiff stated in the formal bail application that as soon as he heard of the rape accusations against him, he approached the police because he was also aware of the of two other people that were arrested for raping the same children. But it seems to me that the plaintiff should have done more than to simply make this statement. He should have insisted that his legal representatives call Izinduna or anyone else to testify at the bail hearing to illustrate the pattern of Ms

²⁶ *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) at paras 75 and 76.

²⁷ 2008 (2) SACR 355 (C) at para 55

²⁸ *S v Mohamed* 1999 (2) SACR 507 (C) at 517D-H.

²⁹ *S v Mauk* 1999 (2) SACR 479 (W).

Makhnya making accusations of rape of her children by various men. The Plaintiff should have taken strenuous trouble to present a case that shows weaknesses in the allegations and demonstrates to the bail court that the complainant has the habit of making random accusations and that there are prospects of him succeeding in proving his innocence at trial.

[94] A further principle that emerges from *De Klerk* is that where a court undertakes a deliberative evaluation whether an arrested person should be detained, police liability for wrongfully arresting that person is truncated. Not so where there is none.³⁰

[95] In the present case, there is no evidence that the magistrate considering the Plaintiff's bail application did not undertake a deliberative evaluation or failed to apply his or her mind to the question of the applicant's bail application. I therefore find that the Plaintiff's failed bail application constitutes a *novus intervenus* which breaks the chain of legal causation and the Defendants cannot be held liable for the further period of detention after 23 March 2021.

QUANTUM

[96] I now turn to consider the appropriate award of damages for the unlawful arrest and detention of the plaintiff from 20 February 2021 to 21 March 2021, a period of 33 days.

[97] The courts have found that previously awards are usually helpful in order to arrive at a fair compensation.³¹

[98] The Defendants did not seriously challenge the Plaintiff's submission that an amount of R30,000 per day is acceptable as reasonable compensation for the Plaintiff's unlawful arrest and detention. I was referred to a number of cases where

³⁰ De Klerk at para 106.

³¹ *Xakambana v Minister of Police* 2021 JOL 49407 (ECM) at para 23.

the courts have awarded varying amounts in damages for varying periods of detention.³²

[99] I have also considered other judgments.³³ I do not consider that the cases enunciate any precedents in determining the appropriate award for damages.

[100] I therefore find that the Plaintiff is entitled to compensation of R30,000 for each day of his detention of 33 days. I intend to make an award directing the First and Second Defendants, jointly and severally to make payment of R990,000 (nine hundred and ninety thousand rand) to the Plaintiff.

CONCLUSION

[101] As mentioned above, at the close of the Plaintiff's case, the Defendants applied for absolution from the instance in respect of the Plaintiff's Second Claim.

[102] On 13 November 2024, I granted the application for absolution. However, the order went further to dismiss the Second Claim. At the time of the closing arguments, the parties brought to my attention that the usual and appropriate order in an application for absolution from the instance does not include a dismissal of the claim. The parties agreed to request the court to correct the order insofar as it went beyond granting absolution.

[103] The parties submitted that it is competent for the court to make this correction in terms of Rule 42 of the Rules of Court which allows a variation of an order which contains a patent error. I am in agreement that an order dismissing the Second Claim constitutes an error of law because at the stage of the close of the Plaintiff's case, the correct legal position is that the court would find that there has not been evidence upon which a court could or might find for the plaintiff but not whether the evidence led failed to establish liability.

³² *Alves v LOM Business Solutions (Pty) Ltd and Ano* 2012 (1) SA 399 GSJ, *Latha and Another v Minister of Police and others* 2019 (1) SACR 328 (KZP), *Manyoni* (supra), *Mahlangu and Another v Minister of Police* 2021 (7) BCLR 698 (CC).

³³ *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ); *Minister of Police v Lebelo* 2022 (2) SACR 201 (GP).

[104] In the circumstances, the order dismissing the Second Claim must be amended by rescinding prayer 2 of the order of 13 November 2024.

[105] What remains is the question of costs. There was agreement between the parties that costs should follow the result and should be taxed on Scale C of Rule 67A of the Rules of Court.

ORDER

[106] In the result, the following order is made:

1. The First and Second Defendants are hereby ordered to jointly and severally pay the plaintiff the sum of R990,000 (nine hundred and ninety thousand rand) as damages for unlawful arrest and detention.
2. The First and Second Defendants shall pay interest at the prescribed rate on the said amount calculated from date of judgment to date of payment.
3. The order of 13 November 2024 dismissing the plaintiff's Second Claim is hereby rescinded by deleting prayer 2 of the order.
4. The First and Second Defendants are hereby ordered to pay the costs of the action, to be taxed, on Scale C of Rule 67A of the Rules of Court.

BL MANENTSA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 11 – 15 November 2024

Date of Judgement: 13 December 2024

For the Plaintiff

Adv K Mvubu

Instructed by

Mjuze Attorneys

Ref: 002/MOP/MN/22

For the Defendants

Instructed by

Adv Phathela

The State Attorney

Ref: RT Poee