

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

- |     |                                        |
|-----|----------------------------------------|
| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED: <b>NO</b>                     |

Date: **27 May 2025** Signature: \_\_\_\_\_

**APPEAL CASE NO:** A23/057795

**COURT A QUO CASE NO:** 2018/19387

In the matter between:

**THE MINISTER OF POLICE**

1<sup>st</sup> Appellant

**THE NATIONAL DIRECTOR  
OF PUBLIC PROSECUTIONS**

2<sup>nd</sup> Appellant

**And**

**MKHIZE MBONGISENI CYPRIAN**

Respondent

**Coram:** Dlamini J (Twala J *et* Mfenyana J concurring)

**Heard:** 23 April 2024

**Delivered:** 27 May 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *CaseLines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:00 27 May 2024

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## JUDGMENT

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**Dlamini J**

### INTRODUCTION

[1] This appeal came before us as a result of leave being granted by the Supreme Court of Appeal (SCA) to this court. The appellants, cited as defendants in the court below, are appealing the entire order and judgment of Victor J, delivered on 22 August 2022, sitting as the court of first instance in the Gauteng Division, Johannesburg ("the court *a quo*"). The court *a quo* refused leave to appeal.

[2] The respondent was arrested on 18 October 2017, on a charge of raping a minor, that took place in June 2017. The arrest was carried out by members of the South African Police Service (SAPS) without a warrant. Following his remand, he was granted bail on 2 November 2017. After several appearances, the charges were, on 6 April 2018, withdrawn against the respondent, after his attorneys of record submitted representation to the senior public prosecutor, arguing that on the day of the alleged rape, the respondent could not have committed the offence he was charged with, as he was in Kwa-Zulu Natal.

[3] After the charges were withdrawn, the respondent instituted this action against the appellants for unlawful arrest, detention, and malicious prosecution.

[4] The appellants defended the action and contended in their defence that the arrest, detention, and prosecution of the respondent were justified under the provisions of section 40 (1) of the Criminal Procedure Act<sup>1</sup> (the CPA).

[5] The court *a quo* ruled against the appellants and held that the respondent's arrest, detention, and prosecution were unlawful.

[6] Aggrieved by this decision, the appellants filed an application for leave to appeal before the court *a quo*. The Deputy Judge President heard and dismissed the application for leave to appeal.

[7] The application is opposed by the respondent, arguing that the judgment of the court *a quo* should stand and not be interfered with.

#### BACKGROUND FACTS

[8] It is apposite to set out a brief narrative of the relevant facts and circumstances presented at the trial, which have a bearing on the issues to be determined in this appeal.

[9] In the trial, the respondent testified on his own behalf and did not call any witnesses. Captain Nduku, Investigating Officer Bopedi, Ms Van der Walt, and Mr Mabogoane were called to testify on behalf of the first and second appellants.

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<sup>1</sup> Act 51 of 1977



## THE APPELLANT'S CASE

### *The Arresting Officer*

[10] Mr. Nduku, a captain in the SAPS testified that on 18 October 2018, whilst on duty, he was alerted about a rape incident that had been reported at Moroka Police Station. He proceeded and met with the complainant and her mother. They all went to the respondent's residence. They found the respondent and the complainant positively identified the respondent as the person who allegedly raped her.

[11] Captain Nduku was adamant that he had applied his mind and studied the docket. Since the complainant had pointed out the respondent as the perpetrator, he was therefore entitled, and there was no other means of securing the respondent's attendance in court other than to arrest the respondent. There was also some debate about whether the respondent had requested his cellphone from the Captain. He denies that the respondent asked for his cellphone.

### *The Investigating Officer*

[12] Mr. Bopedi, a member of SAPS, confirmed that he was appointed as the investigating officer in the matter, and was responsible for charging the respondent at the Moroka Police Station, where the respondent was already in custody. He maintained under cross-examination that he neither refused the respondent access to his cellphone to enable the respondent to locate his whereabouts on the day of the alleged rape, nor did he generally refuse the respondent his cellphone. According to him, the respondent chose not to make any statement.

### *The Prosecutors*

[13] Mrs Van der Walt confirmed that she was the designated prosecutor in the respondent's trial. According to her, when she received the docket, it contained the statement of the complainant, the complainant's mother, a J88, which confirmed that the complainant had been penetrated before. She was certain that the docket did not include the respondent's statement, as the respondent had elected not to make a statement.

[14] Probed by the court *a quo* regarding whether she should have proceeded with the respondent's prosecution in light of the respondent's submission that his car tracking unit indicated that his car was in KZN on the day of the alleged incident, she insisted that she would have proceeded with the prosecution on the basis that the docket contained sufficient information to enable her to proceed with the prosecution.

[15] Mr Mabogoane testified that he was the prosecutor who withdrew the case against the respondent. He confirmed that the charges were withdrawn against the respondent upon receiving the tracker report of the respondent's motor vehicle which placed the respondent in KZN on the day of the alleged rape of the complainant.

### RESPONDENT'S CASE

[16] Mr Mkhize, a member of the SAPS, testified that on 18 October 2017 he was approached by Captain Nduku, who was in the company of the complainant and her mother. The respondent confirms that the complainant pointed him out and alleged that the respondent had raped her around June 2017.

[17] The respondent's main defence was an alibi. He asserts that on the day of the alleged rape he was in KZN. He maintains that the tracker in his motor vehicle and cellphone records would corroborate his version that on the day of the incident, his car was parked in KZN.



[18] During cross-examination, there was some debate about whether the respondent had asked the arresting officer to hand him his cellphone. The respondent contends that he asked both the arresting officer and the investigating officer to hand over his cellphone, but the two officers refused. The officers deny that the respondent requested his cellphone. According to them, the respondent refused to make a statement and insisted that he would make his statement in court.

[19] The respondent confirmed that following his arrest, he was granted bail on 2 November 2017. After making several court appearances, his legal representatives made submissions to the senior public prosecutor insisting that on the day of the alleged rape his car tracker and cellphone records indicated that he was in KZN and could not have committed the offence. As a result of these representations, the charges were withdrawn against him on 6 April 2018.

[20] As I indicated earlier, at the conclusion of the trial, the court *a quo* found in favour of the respondent. Additionally, the court *a quo* awarded the respondent damages in the amount of R300,000.00 for unlawful arrest and R150,000.00 for malicious prosecution.

[21] The nub of the appeal concerns the findings of the court *a quo* against the appellants, and the award of damages in favour of the respondent, as well as the cost order granted by the court *a quo*. The grounds for leave to appeal are outlined in the notice of leave to appeal and are deemed to be incorporated into this judgment.

[22] The respondent opposes the appeal.

[23] This then brings the appeal before us.

## ISSUES FOR DETERMINATION

[24] It is trite that in defending a claim for unlawful arrest the four jurisdictional facts set out in Section 40 (1) (b) of the CPA must be pleaded, that the arrestor was a peace officer, that he or she entertained a suspicion, that the suspicion entailed that the person to be arrested had committed a Schedule 1 offence and lastly the suspicion rested on reasonable grounds.<sup>2</sup>

[25] In broad terms, the issues arising for determination in this appeal, which also arose in the court *a quo*, concern whether the arrest and detention of the respondent by the appellants were unlawful. Tied to this is the question of whether the subsequent prosecution of the respondent was unlawful. Additionally, if a finding is made in favour of the respondent, the determination of the appropriate damages to be awarded to the respondent.

### *Unlawful Arrest*

[26] Once, the arresting officer had reasonable suspicion that the respondent had committed the offence for which they were arrested, the arresting officer has a discretion whether to arrest the suspect or not. At issue in this regard is a narrow question, whether the arresting officer had any other means of ensuring that the respondent attends court other than arresting the respondent.

[27] Before us, the appellants argue that the court *a quo* erred in finding that the arrest of the respondent was unlawful. They contend that the court *a quo* erred in concluding that had the arresting officer applied his mind to the offence, studied the docket, he would have found it unnecessary to arrest the respondent.

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<sup>2</sup> Section 40 (1) (b) of the Criminal Procedure Act, sets out the essential jurisdictional facts which are required to be present to justify an arrest without a warrant. These are:

- (a) The arresting officer must be a peace officer
- (b) The arresting officer must entertain a suspicion
- (c) The suspicion must be that the suspect committed an offence referred to in Schedule 1.
- (d) And, the suspicion must be based on reasonable grounds.



The appellants insist that the court *a quo* also erred in criticizing Captain Nduku for failing to obtain a warrant before arresting the respondent.

[28] Having analysed the events and the relevant timeliness of the evidence presented, the court *a quo* concluded that the respondent's arrest was unlawful. The court *a quo* held that; -

*"But if there are other circumstances which are suggestive of it being unnecessary to arrest, then a summons would suffice. In this case, the plaintiff had a fixed and known address. He had fixed and known employment. And those circumstances, following the dictum of Schreiner JA in Tsose, the arrest of the plaintiff was unnecessary. It is of importance that when the plaintiff was brought to trial, it is the function of the judicial officer to guard against the accused being detained on improper grounds and to ensure that the detention is not unduly extended".*

[29] It is trite that a court of appeal will be hesitant to interfere with the trial court's factual findings and evaluation of the evidence, and will only interfere when the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. ***S v Francis***.<sup>3</sup>

[30] It is now a well-established principle of our law that a person's freedom and security are sacrosanct and protected by our Constitution. In ***Mahlangu and Another v Minister of Police***,<sup>4</sup> the Constitutional Court captured this principle as follows at [43]; -

*"it is trite now that public policy is informed by the Constitution. Our Constitution values freedom, understandably so when regard is had to how, before the dawn of democracy, the freedom of the majority of our people was close to non-existence. The primacy of "human dignity, the*

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<sup>3</sup> 1991 (1) SACR 189 (A)

<sup>4</sup> 2021 (2) SACR 595 (CC)



*achievement of equality and the advancement of human rights and freedoms” is recognised in the founding values contained in section 1 of the Constitution. Section (7) (1) of the Constitution provides that the Bill of Rights “enshrines the rights of all people in our country and affirms democratic values of human dignity, equality and freedom.”“These constitutional provisions and the protection of section 12 of the right of freedom and security of the person are at the heart of public consideration”.*

[31] In ***De Klerk v Minister of Police***,<sup>5</sup> the court held that; -

[62] *“The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons”.*

[32] In line with the principles set out in ***Mahlangu***<sup>6</sup> above, in my view, once it was established that the respondent was a police officer with a known and fixed address, issuing a warrant of arrest would have been a reasonable, practical, and less drastic method of securing the respondent’s attendance in court. The arrest of the respondent under these circumstances was unwarranted and excessive. There were no reasons presented to justify the respondent’s arrest instead of issuing a warrant.

[33] Also, considering that the alleged rape occurred in June 2017 and the respondent’s arrest took place in October 2017, there was evidently sufficient time for the arresting officer to obtain a warrant instead of arresting the respondent. This issue was dealt with comprehensively and, in my view, correctly

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<sup>5</sup> 2020 (1) SACR 1(CC)

<sup>6</sup> Ibid

by the trial court. The court *a quo*'s findings cannot be faulted. Therefore, the court *a quo* was correct in finding that the respondent's arrest was unlawful.

### *Malicious Prosecution*

[34] The question that arose in the court *a quo* and which still arises in this appeal is whether, in deciding to prosecute the respondent, the second appellant had reasonable and probable cause to believe that the respondent was guilty of the offence with which he had been charged, meaning that the prosecution of the respondent was not malicious. If it is found that the prosecution was malicious, then the determination of the amount of damages to be awarded to the respondent follows.

[35] The case made by the appellant is that the court *a quo* erred in finding that the second appellant maliciously prosecuted the respondent on the basis that the state prosecutor had intimated that even if there was a tracker report in the docket confirming that the respondent's car was in KZN on the day of the alleged rape, she would have proceeded with the prosecution. The appellant argued that because the respondent's car was in KZN, therefore the respondent could not have committed the offence.

[36] The principles of what constitutes a malicious prosecution are now well established. The claimant must allege and prove that the defendants set the law in motion and instituted the proceedings. Additionally, the claimant must prove that the defendants acted without reasonable and probable cause. Lastly, the determination hinges on whether the defendants acted with malice.

[37] In deciding this issue, the court *a quo* found in favour of the respondent and held that the prosecution of the respondent was unlawful. The court *a quo* stated; -

*"I have already referred to the startling evidence of Mrs Van der Walt who said she would have prosecuted anyway, even if there was proof of the*



*tracker report. She could have also called the plaintiff's phone records. She did not do so. The cell phone towers that record the movement of the relevant cell phone user would have accurately reflected the plaintiff's whereabouts on the day in question. Instead, she pursued the prosecution on a hunch that the plaintiff had lent his car to someone to drive to KZN without a little evidence to corroborate that thesis.*

[38] The court *a quo* continued and held that; -

*"In this case, therefore, I find that the defendants were aware of what they were doing in instituting the prosecution. That they, at least, must have foreseen the possibility that they were acting with disregard to the plaintiff's rights. And that it was negligent of the second defendant to continue with the prosecution".*

[39] In my view, the court *a quo* misdirected itself by finding that the respondent's prosecution was unlawful. This is because the decision to prosecute the respondent was based on lawful and probable grounds. By focusing on the comments of the prosecutor, the court disregarded the fact that the prosecution had in its possession the docket, which contained the complainant's statement, alleging that the respondent raped her. Additionally, the complainant's mother made a statement. Significantly, the docket included a J88, which confirmed that the complainant had been penetrated with a blunt object. On these facts, the state was entitled to proceed with the prosecution.

[42] Also, the prosecutors' comment that even if there had been a tracker report or cell phone records in the docket indicating that the respondent's car was parked in KZN, she would not have withdrawn the charges against the respondent is of no moment. What is significant, in my view, is the prosecutor's submission that, based on the information contained in the docket, the respondent had a case to answer, especially since the complainant had identified the respondent as the perpetrator. Additionally, at the time the prosecutor made the comments, the docket did not contain the respondent's car tracker report and



cell phone records. This information was only forwarded to the senior public prosecutor when the respondent made a representation for the charges to be withdrawn.

[40] It follows therefore, that on this issue, the order of the court *a quo* must be set aside, and the appellant is entitled to relief in this regard.

#### *Damages Awarded*

[41] The final issue for determination is what constitutes just and equitable compensation to be awarded to the respondent.

[42] After analysing the parties' submissions and considering various case law on this matter, the court *a quo* awarded the respondent R 300,000.00 for unlawful arrest and detention. The appellant was ordered to pay the respondent R 150,000.00 as compensation for malicious prosecution.

[43] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solace for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. ***Minister of Safety and Security v Tyulu***.<sup>7</sup>

[44] As I have alluded to earlier, the Court of Appeal is constrained from interfering with the amount of damages awarded by the trial court when that amount is a matter of estimation and discretion. This is because the trial court is endowed with a wide discretion, which discretion must be exercised judiciously. ***Dikoto v Mokhatla***.<sup>8</sup>

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<sup>7</sup> [2009] ZASCA 55; 2009 (5) SA 85 (SCA)

<sup>8</sup> 2006 (6) SA 235 (CC) ; 2007 (1) BLCR 1 (CC)

[45] Considering all the circumstances of the case, I find no reason to interfere with the amount of damages awarded. This amount reflects fair and just compensation for the respondent's damages.

[46] I have already determined that the prosecution of the respondent was not malicious and that the appellants were entitled to prosecute the respondent on the available information. Therefore, it follows, as it should, that the amount of damages for unlawful prosecution awarded to the respondent must be set aside.

[47] In the result, the appeal against the decision of the court *a quo* in relation to malicious prosecution should succeed.

#### COSTS

[48] I now turn to the issue of costs. The trite principle of our law is that costs follow the results and are awarded to the successful party., The court *a quo* held that the first and second appellants shall be liable for the respondent's costs. The parties have achieved varying degrees of success in the matter, with the respondent achieving a higher degree of success. The effect of this is that the respondent is substantially successful in opposing this appeal. In the circumstances there can be no reason to deviate from the established principle that costs follow the result. The limited success achieved by the appellant in respect of the prosecution does not warrant such a deviation.

[49] In all the circumstances alluded to above, the appeal is partly upheld.

#### ORDER

In the result, the following order is made: -

- (1) The appeal is upheld only in respect of malicious prosecution.
- (2) The order of the court *a quo* is set aside and substituted by the following order;



- (3) The arrest and detention of the plaintiff by employees of the first defendant is unlawful.
- (4) The first defendant is liable to pay to the plaintiff an amount of R300 000 for damages suffered consequent upon his unlawful arrest and detention.
- (5) The plaintiff shall pay the second defendant's costs.
- (6) The first appellant is ordered pay the costs of the appeal.

A handwritten signature in black ink, appearing to be 'J Dlamini', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

**J DLAMINI**  
*Judge of the High Court*  
*Gauteng Division, Johannesburg*

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