



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 15 August 2025

Case no: 16981/2019

In the matter between:

**PRIDE MNGOMEZULU**

Plaintiff

and

**MINISTER OF POLICE**

First Defendant

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second Defendant

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**JUDGMENT**

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**WILSON J:**

- 1 The plaintiff, Mr. Mngomezulu, sues for wrongful arrest and detention and for malicious prosecution arising from an accusation that he raped a nine-year-old child, K, after a drinking session at the house of a friend, B, in September 2017. Mr. Mngomezulu was arrested at his home around a year later, on 9 August 2018, after K's sister, D, reported that K had told her that Mr. Mngomezulu had put his penis in her vagina while they were both at B's house the year before.

- 2 D gave a statement to the police prior to the arrest, relaying what K had told her. K was examined on 10 August 2018. The examination revealed injuries to K's vagina consistent with penetration. The injuries were not recent, which was consistent with an attack on K some months before she reported the attack to D. K herself gave a statement to the Soweto Family Violence Child Protection and Sexual Offences Unit on 11 August 2018, in which she said she had been raped at B's house by a man known to her as Linda. It was common cause at trial that K's reference to Linda was a reference to Mr. Mngomezulu.
- 3 Mr. Mngomezulu gave no comment to the police at his post-arrest interview. He appeared at the Protea Magistrates' Court on 13 August 2018. He was eventually granted bail on 24 August 2018. On 1 October 2018 the case against him was provisionally withdrawn. Before me, the Control Prosecutor, a Mr. Madibela, said that the decision to provisionally withdraw the case was made on the basis that a statement had not been obtained from B, who, Mr. Madibela had been told, was present when K's rape took place. A statement was eventually obtained from B on 11 May 2019. In it, B denied any knowledge of the incident. The prosecution has not been pursued further in the six-and-a-half years since B's statement was made.

### **The wrongful arrest claim**

- 4 Mr. Mngomezulu was arrested without a warrant on the authority of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977. An arrest without a warrant under this section is lawful if and only if the arrestor is a peace officer; the arrestor entertains a suspicion; that suspicion is that the arrestee has

committed an offence identified in Schedule 1 of the Act; and that suspicion rests on reasonable grounds (see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H). In an action for wrongful arrest, the onus of establishing these requirements rests on the first defendant, the Minister.

5 Sergeant Xolisa Mbiza was the only witness called to discharge that onus on the Minister's behalf. On 9 August 2018, Sgt. Mbiza was an ordinary constable on patrol in Soweto. He was called to Jabulani Police Station, where he met D. Officers to whom he referred as his "colleagues" at the police station – he did not say who – introduced Sgt. Mbiza to D and told him to accompany her and arrest Mr. Mngomezulu. Sgt. Mbiza went to Mr. Mngomezulu's house with Constable Vilakazi and Sgt. Heisi, with whom he had been out on patrol earlier in the day. D pointed out Mr. Mngomezulu to Sgt. Mbiza, who then arrested Mr. Mngomezulu on suspicion of rape.

6 There is no dispute that Sgt. Mbiza was a peace officer at the time he arrested Mr. Mngomezulu. Nor is there any dispute that rape – the offence for which Mr. Mngomezulu was arrested – is a schedule 1 offence. However, despite a valiant effort from Ms. Khosa, who appeared for the Minister, Sgt. Mbiza did not set out, in his evidence-in-chief, the basis on which he suspected Mr. Mngomezulu of having committed that offence.

7 At the point of arrest, only D's statement was available to the police. Both the report on K's medical examination and K's statement identifying Mr. Mngomezulu were only generated after the arrest. Sgt. Mbiza did not say, in his evidence-in-chief, that he had seen D's statement. What Sgt. Mbiza did say was damning. He said that he did not need a suspicion of any sort to arrest

Mr. Mngomezulu. All he needed was an instruction from his unnamed colleagues that Mr. Mngomezulu had been accused of a serious offence, together with D's identification of Mr. Mngomezulu.

8 This is, of course, grossly wrong. There was a duty on Sgt. Mbiza to consider and act on information linking Mr. Mngomezulu to K's rape and to assess whether that information give rise to a reasonable suspicion that Mr. Mngomezulu had committed it. Furthermore, Sgt. Mbiza was required to "analyse and assess the quality of the information at his disposal critically". He was not entitled to "accept it lightly or without checking it where it [could] be checked". It is "only after an examination of this kind" that Sgt. Mabiza should have allowed himself to entertain the suspicion that would have justified Mr. Mngomezulu's arrest (*Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E-H, approved at *Powell NO v Van Der Merwe NO* 2005 (5) SA 62 (SCA) at paragraph 38).

9 The admissions made by Sgt. Mbiza during his examination-in-chief were inconsistent with the required assessment. Sgt. Mbiza was not a cog in a bureaucratic machine, acting only on instructions from his superiors or colleagues. His was vested with the power to arrest Mr. Mngomezulu without a warrant if and only if he himself had considered the relevant material and formed the reasonable suspicion that Mr. Mngomezulu had raped K on the basis of that material. That suspicion had to be formed on the evidence relevant to the offence presented directly to him. It did not arise simply because he received instructions from other police officers to effect an arrest. I think this would have been so even if those officers themselves reasonably

suspected Mr. Mngomezulu of raping K. However, given that no-one other than Mr. Mbiza testified about the arrest on the Minister's behalf, I need not go that far.

10 Faced with such frank admissions, wiser counsel might have declined to cross-examine Sgt. Mbiza at all. However, Mr. Magwane, who appeared for Mr. Mngomezulu, cross-examined Sgt. Mbiza extensively. It was during cross-examination that it dawned on Sgt. Mbiza that he had made damning admissions during his evidence-in-chief. Sgt. Mbiza tried to walk those admissions back by saying that he had acted after having interviewed D in the presence of his colleagues. Even then, however, Sgt. Mbiza still could not get it quite right. He adjusted his earlier statement by emphasising the importance of his alleged interview of D rather than the instructions he received from his unnamed colleagues. Nonetheless, he frankly admitted that he had not read D's statement prior to Mr. Mngomezulu's arrest. Nor did he say what it was about the interview he says he conducted with D that generated a suspicion – reasonable or otherwise – that Mr. Mngomezulu had raped K. Even in cross-examination, Sgt. Mbiza said nothing that remotely approximated a sound rational basis for arresting Mr. Mngomezulu on suspicion of K's rape.

11 Sgt. Mbiza was a very poor witness. He seemed at sea during much of his evidence. He was plainly only dimly aware that a reasonable suspicion that the arrestee has committed a serious offence is necessary before a warrantless arrest can be made. He was clearest and most confident when asserting (wrongly) that he needed only an instruction from another police officer and an allegation that a sufficiently serious offence had been

committed. Accordingly, I reject as wholly improbable the proposition that Sgt. Mbiza applied his mind to whether such material as was before him founded a reasonable suspicion that Mr. Mngomezulu had raped K. I also reject Sgt. Mbiza's version that he interviewed D, an assertion not made in his contemporaneous statement, and which appeared to me to have been tagged on to his cross-examination to make up for the damaging admissions he made in his evidence-in-chief. The fact that Sgt. Mbiza accepted that he did not read D's statement renders it unnecessary to consider whether D's statement would, on its own, have been enough to ground a reasonable suspicion that Mr. Mngomezulu had committed K's rape.

- 12 Since Sgt. Mbiza was the sole witness called to justify the arrest, and the onus to justify the arrest falls upon the Minister, the claim for wrongful arrest and detention must succeed.

### **The malicious prosecution claim**

- 13 In order to uphold the malicious prosecution claim, I must find that one or both of the defendants set the law in motion against Mr. Mngomezulu; that they did so without reasonable and probable cause; that they did so maliciously; and that the prosecution has failed (see *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA), paragraph 8).
- 14 In light of my conclusion on the wrongfulness of Mr. Mngomezulu's arrest, the only one of these elements capable of sustaining any controversy is that of malice. The Minister clearly set the law in motion; he did so without reasonable and probable cause (at least at the point of arrest); and the prosecution of Mr. Mngomezulu failed when the charge was withdrawn.

- 15 I cannot accept that malice has been established. The arrest was inept, but it was not malicious. The police officers who instructed Sgt. Mbiza to arrest Mr. Mngomezulu had a statement from D, which was later supplemented by a medical report confirming that an offence had been committed, together with a statement from K herself which identified Mr. Mngomezulu. Sgt. Mbiza may have been sorely mistaken about what he needed to consider before he arrested Mr. Mngomezulu, but his incompetence was so grave as to exclude the kind of active malice required to sustain a malicious prosecution claim. In other words, to be fairly characterised as malicious, Sgt. Mbiza would have to have known that there was no basis on which to arrest Mr. Mngomezulu. As was clear from the evidence, Sgt. Mbiza knew very little at all – other than that he had been told to go and arrest Mr. Mngomezulu.
- 16 For his part, Mr. Madibela was perfectly entitled to place the matter on the criminal court roll on the basis of D's statement, K's statement and the medical report confirming K's vaginal injuries. Whatever the inherent strengths or weaknesses of a case reliant solely on that evidence, such a prosecution cannot realistically be called malicious. The only criticism that might reasonably be made of the conduct of the prosecution is that it was abandoned too early. The malicious prosecution claim fails.

### **Damages and costs**

- 17 The parties were agreed that, if I upheld the wrongful arrest and detention claim, R350 000 would be the appropriate measure of general damages. This is well within the guideline set in *De Klerk v Minister of Police* 2021 (4) SA 585 (CC), in which the plaintiff was awarded R300 000 in general damages in

respect of 7 nights' detention. Mr. Magwane accepted that I had not heard the evidence necessary to sustain Mr. Mngomezulu's pleaded claim for loss of income. Costs must follow the result, but I do not think that this case justifies an award of counsel's costs beyond those permitted on scale "A".

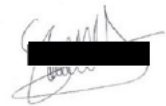
## **Order**

- 18 The most unfortunate feature of this case is that a wrongful arrest claim has been sustained in circumstances where the arresting officer ignored or did not take the necessary steps to obtain objectively available material that would have allowed him to form the reasonable suspicion necessary to effect the arrest lawfully. I have my doubts about whether D's statement would have been enough, on its own, to ground such a suspicion. But there is no doubt in my mind that once that D's statement had been supplemented with K's statement and the medical report – both of which were only obtained after Mr. Mngomezulu's arrest – a reasonable arresting officer would easily have formed a reasonable suspicion that Mr. Mngomezulu had raped K.
- 19 By failing to acquaint themselves fully with the material that was available on 9 August 2018, and perhaps also by refusing to wait for more evidence to become available, Sgt. Mbiza, together with whomever directed him to arrest Mr. Mngomezulu on the evening of 9 August 2018, acted with gross incompetence. The cost of that incompetence sounds not just in the award that I am now duty-bound to make, but in the anguish no doubt caused to D and K, both of whom the justice system has plainly failed. Whomever K's assailant was, nowhere near enough was done to bring them to justice in a manner consistent with the applicable law. We must do better than this.

20 I give judgment as follows –

20.1 The first defendant will pay the plaintiff the sum of R350 000 plus interest at the prescribed rate to run from 7 June 2019 to the date on which the judgment is satisfied.

20.2 The first defendant will pay the plaintiff's costs of suit. Counsel's costs may be taxed on scale "A".



**S D J WILSON**  
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 15 August 2025.

HEARD ON: 5 and 6 August 2025

DECIDED ON: 15 August 2025

For the Applicant: VM Magwane  
Instructed by the MG Mali Attorneys Inc

For the Respondent: IM Khosa  
Instructed by the State Attorney