

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

Not reportable

Case no: 5780/2019

In the matter between

THABANG STEPHEN POTSANE

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Neutral citation: *Potsane v Minister of Police* (5780/2019) [2025] ZAFSHC 206 (4 JULY 2025)

Coram: MPAMA AJ

Heard: 18,19 & 28 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15h00 on 07 July 2025

Summary: Claim for damages – unlawful arrest and detention.

ORDER

1 The plaintiff's claim is dismissed with costs.

2 Each party is to pay own costs for the postponement on 5 November 2024.

JUDGMENT

Mpama AJ

Introduction

[1] On 16 January 2019, the plaintiff was arrested and detained by a member of the South African Police Services (SAPS) without a warrant for allegedly committing an offence of rape. The member of SAPS was acting in the course and scope of his employment.

[2] Aggrieved by his arrest and detention, the plaintiff commenced action proceedings against the defendant.

[3] When the trial commenced before me, there was an application for the separation of issues. In accordance with the provisions of rule 33(4) of the Uniform Rules of the Court, I ordered separation of issues and the matter proceeded only on merits.

The pleadings

[4] On 12 December 2019, the plaintiff issued summons against the defendant. In his particulars of claim (POC) he alleged that he was arrested on 16 January 2019 on allegations of assault and rape. He was detained and made his first appearance in court on 22 January 2019. He was denied bail and kept in police custody until 11 June 2019 when the case was withdrawn by the State at the instance of the complainant. The officer who arrested him had no reasonable ground to arrest him as he did not commit any Schedule 1 offence and the defendant failed in his duty to protect him in that the police officers were allowed to or not restrained from inflicting unlawful actions against him. As a result of his unlawful arrest and detention, his life was disrupted and he suffered damages to the tune of R900 000.

[5] The defendant pleaded as follows to the plaintiff's claim:

(a) that the defendant admits the arrest of the plaintiff without a warrant; (b) that the arrest and detention were justified in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA); (c) that there was reasonable suspicion that the plaintiff committed a Schedule 1 offence, to wit rape of A[...] M[...] M[...] on 13 January 2019 at his place of residence; and (d) that the arrest of the plaintiff was neither wrongful nor unlawful.

The evidence

[6] The defendant relied on the evidence of two witnesses to wit, Ms M[...] A[...] M[...] (Ms M[...] or the complainant) on the rape charge and Warrant Officer Simon Molahlehi

Makhethi (the arresting officer). The plaintiff testified and called no witness(es). The defendant's evidence can be succinctly summarised as follows.

Ms M[...]

[7] On 13 January 2019, she was in the company of Moleboheng and other females at Marabastad tavern. They met the plaintiff at the tavern. The plaintiff offered to buy her some liquor but she declined his offer. They remained in the tavern drinking liquor. After a while Moleboheng ran out of the tavern. She does not know why she ran away and she remained in the tavern drinking liquor. In the early hours, at about 12 am, she went to the toilet. As she opened the toilet door, the plaintiff confronted and accused her of assisting Moleboheng to run away.

[8] He grabbed and took her out of the gate. He slapped her and said, since she allowed Moleboheng to escape, she will take her place. The plaintiff conveyed her to his residence, where he produced a knife and forcibly raped her. Thereafter, she remained in the plaintiff's home until dawn, having been too afraid to leave. Upon departing in the morning, she met her cousin en route, to whom she disclosed what happened and the cousin advised her to report the matter to the police. They both proceeded to the police station where she laid a charge of rape. Her statement was obtained and she was also taken to hospital. The doctor noted a bruise on her wrist. She had no intentions of opening a case but her cousin insisted that she should do so. On 11 June 2019, upon her father's advice, she executed a withdrawal statement to prevent her boyfriend from learning of the alleged rape.

[9] During cross-examination, the complainant was confronted with her prior statement to the police. It was suggested that, whereas in that statement she alleged the plaintiff had been armed with a firearm, in court she referred to a knife. She denied ever having asserted that the plaintiff possessed a firearm. Moreover, it was put to her that, in her withdrawal statement, she said she was withdrawing the charges as she has discussed the matter with her boyfriend. She disputed ever saying this and insisted that her boyfriend had no knowledge of the case.

[10] Most matters canvassed thereafter in cross-examination related solely to the plaintiff's defence to the charge of rape and are immaterial to the issues presently before court.

Mr Makhetha

[11] He is a police officer, at the time of the plaintiff's arrest he was a detective attached to Family Violence, Child Protection and Sexual Offences Unit (FCS). On 13 January 2019, he was on stand-by duty when he received a telephonic communication from Warrant Officer Sekgese of Maokeng police station advising of a rape docket and that the complainant's statement has been filed. He proceeded to the police station and on arrival approached W/O Sekgese who provided him the docket. Upon receipt of the docket, he approached the complainant who was still in the police station and read back her statement for confirmation. Thereafter, he transported her to the hospital for medical examination.

[12] On return from hospital, he requested the complainant to accompany him to the scene of the crime. The complainant took him to the plaintiff's place, however, on arrival the plaintiff was not there. He tried on three occasions, without any success to find the plaintiff.

[13] It was on 16 January 2019 when he was informed that the plaintiff was present in the police station to enquire about an assault case he had opened. The plaintiff was brought to him. He informed him about the rape allegations levelled against him, effected arrest and explained his rights. The plaintiff denied raping the complainant and said he had consensual sex with her. He wrote down his (Mr Makhetha) statement and filed it in the docket. He detained the plaintiff. The following day he was taken to court. Later on, the complainant withdrew the charges, citing that her boyfriend was against her attending the case. He had considered the complainant's and the witness's statement already filed in the docket when he effected the arrest of the plaintiff.

[14] During cross-examination, he was asked to explain what made him to arrest the plaintiff. His response was that he arrested the plaintiff on the basis of the complainant's and witness Bohlale Hlabanelo's statements. He also mentioned that he knew that a person can be arrested if there were reasonable grounds that show that he has committed an offence or transgressed the law. He denied that the arrest and subsequent detention were unlawful. He was asked to explain whether the plaintiff proffered an explanation when confronted about the charges and his response was that the plaintiff said he had consensual sex with the complainant. When asked about the J88, he said he

could not read the Dr's handwriting, however, when he interacted with the doctor in hospital, the doctor said the complainant had a bruise on the wrist. He testified further that, according to his experience, the presence or absence of injuries in a rape case has no bearing on whether rape occurred or not. He asserted that, since the statements he had were very clear, showing that the complainant was forcefully taken, it was not necessary for him to look at the J88. He was uncertain on whether the plaintiff applied for bail or not as his matter was postponed to 24 January 2019 for bail application, however he does not know whether the plaintiff proceeded with the application.

[15] It was put to him that the matter was at some stage, referred back to him with a query as to why the complainant had said to the doctor that she was raped by an unknown person. He confirmed and said he tried to do get clarity from the doctor, unfortunately the doctor had already left the hospital. This concluded a case for the defendant.

The plaintiff's evidence

[16] Mr Potsane testified as follows: On 12 January 2019, he was at his place of residence when his girlfriend, Moleboheng arrived in company of her friends, one of whom was the complainant. They all consumed liquor at his residence and subsequently proceeded to the tavern. They remained in the tavern until approximately 20h00, at which time Moleboheng departed to her place of residence to bathe. Later, she returned to the tavern, still accompanied by her friends including the complainant.

[17] The plaintiff testified that they continued consuming alcohol at the tavern until about 21h00. The complainant would periodically visit the restroom, which was located outside the tavern and he would accompany her on each occasion. The complainant began to vomit. Together with his friends, they took the complainant to his residence. Upon arrival, he unlocked his home, provided the complainant with some blankets, secured her inside and returned to the tavern.

[18] He remained in the tavern until about 06h00 when he left with Kaliso and proceeded back to his residence. On arrival, they found the complainant who requested transport fare. In his possession, he had a R200 note and, together with Kaliso and the complainant, they proceeded to a nearby shop to obtain change.

[19] En route, they met the complainant's cousin, who informed the complainant that her mother was seeking her. The group of four proceeded to the shop where he obtained change. He gave the complainant R50. The complainant left with her cousin and he has not seen her since.

[20] On 16 January 2019, he visited the police station to enquire about an assault case he had laid. Whilst there, he was approached by a police officer who said he has been looking for him in connection with a rape case opened by the complainant. He tried, without any success, to explain what happened. He denied the charges and did not make any explanation to Mr Makhetha. He was arrested, detained and taken to court the following day.

[21] In court, he wanted to apply for bail but was told by the court that his address has not yet been verified. The matter was postponed for seven days in order to verify his address. Once again, he was told his address has not been verified. He never got an opportunity to apply for bail. He denied ever informing Mr Makhetha that he had consensual sex with the complainant.

[22] He remained in custody. His trial was transferred to the regional court. He was detained until the matter was withdrawn by the State on 11 June 2019.

[23] He was cross-examined at length and it was put to him that his version in court differs from the one in the POC. He was confronted about the dates of his arrest, it being put to him that, in his testimony, he said he was arrested on 16 January 2019 and appeared in court on 17 January 2019 whereas his POC provide he made his first appearance in court on 22 January 2019. His response was that he cannot recall the exact dates of his arrest.

[24] He was confronted with Hlabanelo's statement made to the police alleging that Hlabanelo was in his company in the tavern, he witnessed him forcefully taking the complainant to his residence, he tried without success to stop him and left him with the complainant after he threatened to stab them both. His response was that he has no knowledge of Hlabanelo and that never happened. It was put to him that, in the light of the complainant and Hlabane's statements, the arresting officer was justified to arrest him. This concluded a case for the plaintiff.

Submissions to court

[25] The plaintiff contended that the contents of the J88 medical report, coupled with the fact that the complainant remained at the plaintiff's place of residence following the incident, ought to have raised reasonable doubt in the mind of the arresting officer regarding the veracity of the complaint. It was further argued that the complainant's version of events was fraught with material inconsistencies, particularly in respect of how she encountered the plaintiff at the tavern, the nature of the weapon allegedly used during the commission of the offence, and the reasons advanced for the subsequent withdrawal of the charge. In conclusion, the plaintiff argued that the arrest and detention were unlawful and not justified.

[26] Conversely, the defendant contended that the arresting officer was fully justified in effecting arrest. The evidence adduced by the complainant, together with that of the witness, gave rise to a reasonable suspicion that the plaintiff committed a Schedule 1 offence. Accordingly, argued the defendant, the arresting officer lawfully exercised his discretion. Any subsequent withdrawal of the charges occurred only after the arrest and is therefore irrelevant. Moreover, the arresting officer considered the statement proffered by the plaintiff, yet remained satisfied that a reasonable suspicion persisted.

[27] The issues for determination are whether the arrest of the plaintiff and his subsequent detention were unlawful.

Applicable law

[28] It is trite that the deprivation of liberty is prima facie unlawful and the defendant bears an onus to prove that it was lawful and justified. In *Mahlangu & Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 at para 25 the Court said:

'The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without a just cause applies to all persons in the Republic.'

[29] Section 40(1)(b) of the CPA provides:

'A peace officer may, without warrant, arrest any person –

(a) . . .

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.’

[30] In *Duncan v Minister of Law and Order* [1986] ZASCA 24; [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H it was held that the jurisdictional facts for a subsection (40)(1)(b) defence are that:

(a) The arrestor must be a peace officer;

(b) The arrestor must entertain a suspicion;

(c) The suspicion must be that the suspect committed an offence referred to in Schedule 1;

(d) The suspicion must rest on reasonable grounds.

If these requirements are met with, the arrest will be deemed lawful.

[31] The test of whether a peace officer ‘reasonably suspects’ a person of having committed an offence within the ambit of s 40(1)(b) is an objective one. The test is not whether the police believe that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. See *Minister of Safety & Security v Sekhoto & Another* [2010] ZASCA 141; 2011 (1) SACR 315 SCA; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) para 6.

[32] The test of whether a suspicion is reasonable is objectively determined. In *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA), Musi AJA at para 34 expressed as follows:

‘The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable under the prevailing circumstances is determined objectively.’

The Court continued, at para 35, and said:

‘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 the 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.’

Once the arresting officer has established the required suspicion, he will then be vested with a discretion to arrest and such discretion must be exercised rationally.

[33] The question is whether the defendant discharged the onus of proving, on a balance of probabilities, that the arrest of the plaintiff was lawful.

Evaluation

[34] The power of the arresting officer to arrest without a warrant is conferred by s 40(1)(b) of the CPA. The test is whether the arrestor on the facts presented had formed a reasonable suspicion that the plaintiff had committed an offence falling within Schedule 1 of the CPA.

[35] The primary consideration is what was within the peace officer's purview at the time of the arrest. Events occurring thereafter, including during the course of the investigations are not material for the purposes of this determination. The court must look at what the peace officer knew at the time of arrest and not what was discovered later.

[36] At the outset, it is necessary to point out that the plaintiff, who was the only witness for his case, was a poor witness. His evidence is riddled with contradictions and dealt much with his defence to the rape charges. Little or nothing was said regarding the unlawfulness of the arrest.

[37] The complainant and the arresting officer testified in a consistent and reliable manner. Although their testimonies exhibit some discrepancies, they did not contradict themselves on points of substance. The plaintiff's challenge to their credibility does not, in my opinion, undermine their evidence. Therefore, it is my conclusion that both witnesses were credible witnesses.

[38] Before me it was not disputed that the complainant was raped on 13 January 2019, she reported the alleged rape to the police on the same date and furnished a written statement to the police. The trial bundle contains Hlabanelo's statement dated 13 June 2019. During cross-examination, the plaintiff was confronted with that statement whereupon he denied any acquaintance with Hlabanelo and disavowed the truth of the averments contained therein. The allegations made by Hlabanelo in his statement corroborates those made by the complainant in all material aspects. They have

corroborated each other on how the complainant was confronted by the plaintiff for allowing Moleboheng to escape and the complainant was forcefully taken by the plaintiff to his residence.

[39] It is undisputed evidence that the arresting officer was armed with the complainant's and Hlabanelo's statements when he arrested the plaintiff. The arresting officer cannot be faulted for not perusing the J88. His undisputed evidence is that the complainant took him to the plaintiff's place but the plaintiff was not there. In addition to this, he had read the complainant's statement, therefore with the facts presented before him there was no doubt as to the identity of the plaintiff as the person who allegedly raped the complainant.

[40] The matters concerning the complainant's withdrawal statement and the inconsistencies surrounding the reasons for such withdrawal are irrelevant as they occurred 'after the fact' and bear no material significance to the issues in this matter.

[41] The detention of the plaintiff is a direct consequence of his arrest. Therefore, if the arrest is unlawful so is the resultant detention. As to whether the plaintiff applied for bail or not, it is not clear due to his conflicting versions. In any event, the plaintiff has not alleged that the arresting officer unlawfully opposed his bail and contributed to his further detention.

[42] It is my view that the actions of the defendant met the requirements of s 40(1)(b) of the CPA. The arrest and the subsequent detention of the plaintiff are deemed lawful. The arresting officer correctly exercised his discretion on whether to arrest or not.

[43] The general rule with regard to costs is that 'costs follow suit'. I find no reason to deviate from this principle. I am further required to determine the issue of costs occasioned by a postponement of the matter on 5 November 2024, on which date the matter was postponed and the question of costs was reserved. It is common cause between the parties that the defendant served his discovered documents one day prior to the commencement of trial. as a result, the plaintiff intended to bring an application for the postponement of the trial. However, the defendant consented to a postponement, and the matter was accordingly postponed by agreement between the parties. Having regards to the circumstances, I am of the view that it is just and equitable that each party bears its own costs in respect of the postponement.

[44] In the circumstances, I make the following order

- 1 The plaintiff's claim is dismissed with costs.
- 2 Each party is to pay own costs for the postponement on 5 November 2024.

MPAMA AJ

Appearances

For the plaintiff: JJ Grundlingh
Instructed by: Podbielski Inc., Welkom
c/o Kruger Venter Attorneys, Bloemfontein

For the defendant: S Motloung SC
Instructed by: Office of State Attorney, Bloemfontein.