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

CASE NUMBER:8812/2019

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

5 December 2025

In the matter between:

NDWANDWE STHEMBILE

PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND DEFENDANT

Heard: 14 November 2025

Heads of argument filed: 18 and 20 November 2025

Delivered: 5 December 2025

JUDGMENT

WINDELL J:**Introduction**

[1] The plaintiff instituted an action for damages against the Minister of Police and the National Director of Public Prosecutions arising from alleged unlawful arrest and detention, and malicious prosecution. The plaintiff claims damages in the amount of R1 215 000.00 for unlawful arrest and detention, and R1 115 000.00 for malicious prosecution.

[2] In matters of unlawful arrest and detention, the plaintiff is required only to establish that she was arrested and detained without a warrant; once this is shown, the onus rests upon the defendant to justify the arrest in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (“CPA”).¹

[3] The position is different in respect of the claim for malicious prosecution, where the onus throughout remains on the plaintiff to prove all the elements of the delict, including the absence of reasonable and probable cause and that the prosecution was instituted with malice.²

[4] At the commencement of the trial, the defendants applied to amend their plea by deleting paragraph 4. The amendment substituted the previous denial with an admission of the arrest and detention, coupled with reliance on statutory justification under s 40(1)(b) and s 50 of the CPA, as reflected in the Rule 28(1) notice.

¹ See *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC).

² *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA).

[5] The amendment did not introduce a new issue, nor did it cause prejudice to the plaintiff. The basis for the proposed amendment had been ventilated during pre-trial engagements, and the plaintiff was at all times aware that the lawfulness of the arrest in terms of s 40(1)(b) was the real issue for adjudication. I accordingly granted the amendment.

[6] At the pre-trial hearing – later confirmed in open court – the parties agreed that the plaintiff would lead evidence first, notwithstanding the allocation of the onus. The trial accordingly proceeded on that basis.

[7] At the close of the plaintiff's case, the second defendant applied for absolution from the instance on the claim for malicious prosecution, which application was granted. The only remaining issue for determination is whether the arrest of the plaintiff on 10 March 2016 and subsequent detention were unlawful.

Background

[8] On 8 March 2016, Mr M[...] ("the complainant"), reported an offence of rape at the Protea Glen Police Station involving his 14-year-old daughter. The minor child was taken to hospital for medical examination on the same day and a J88 form was completed by the doctor on duty. The report confirmed an old injury consistent with vaginal penetration. The following day, 9 March 2016, the complainant made a written statement, which appears as Annexure A1 in the case docket.

[9] On 10 March 2016, the plaintiff was arrested by Warrant Officer Mabunda. On 11 March 2016, the arresting officer completed the pointing-out and arrest statement (Annexure A7), and the minor child also made a written statement. The plaintiff made a

warning statement on 13 March 2016 and appeared in court for the first time on 14 March 2016.

[10] On 21 July 2016, the minor child deposed to an affidavit in which she withdrew the allegations against the plaintiff. On 25 July 2016, the prosecutor formally withdrew the charges against the plaintiff in court as a result of the minor child's withdrawal statement.

The Evidence

The Plaintiff's Evidence

[11] The plaintiff, a 33- year- old at the time, testified that on the night of 10 March 2016 she was asleep in her bedroom at her grandmother's house when she awoke to voices downstairs. Two police officers entered her room, a male officer first, followed by a female officer she knew as Refilwe. The male officer informed her that she was under arrest. When she asked for the reason, none was given. The officers spoke to one another in isiZulu. She was not handcuffed and was taken to the police station, which she estimated to be about a kilometre away.

[12] At the police station she heard the officers discussing what offence to charge her with. One suggested "rape", which was the first time she heard any indication of a charge. She became frightened. The charge office was busy, with a number of people present. From there she was taken directly to the holding cells.

[13] She was placed alone in a cell at about 22h00. The cell contained a toilet and a concrete bench. She was handed a document explaining her constitutional rights and signed it, although, according to her, no one explained its contents. It was at this point

that she learned for the first time that she was being charged with rape. This information, she said, shocked her.

[14] The plaintiff remained in custody from Thursday night until she was taken to court on Monday, 14 March 2016. Over the weekend her grandmother visited and brought her toiletries and items to wash with. There was an area in the cell where inmates could bathe. On Sunday afternoon, at around 15h00, a police officer came to take her statement. She said he smelled strongly of alcohol. She wished to raise concern about his condition but feared she might be perceived as rude and that it might affect how she was treated. According to her, the officer told her she could give her version either then or in court. He questioned her in isiZulu. The process was brief. She stated that the officer did not read the contents back to her and that she signed it without knowing what was recorded. She maintained that she did not give any of the incriminating information later reflected in the warning statement.

[15] On her first appearance at court the plaintiff was unrepresented. The magistrate explained her right to legal representation but no further questions were posed to her. On 24 March 2016 she was represented during her bail proceedings. Bail was granted, but she could not afford to pay it and was transferred to Johannesburg Prison. She remained incarcerated until 30 March 2016 when bail was eventually paid. She noticed that the charge sheet alleged that the offence occurred on 8 March 2016—a date unfamiliar to her. She later learned that the minor child alleged the incident occurred on 1 March 2016. She maintained that on both those dates (both Sundays) she had been at home, and that on Sundays she routinely attended church.

[16] The plaintiff denied that she had committed rape against the minor child. She was informed that it was the minor child who had opened the case against her. She testified that she knew the child from church at Green Village, where her family also attended. She also met the complainant once because he had come to the house on the Saturday before her arrest. He had come with Z[...], an usher from church, whom the plaintiff also knew.

[17] The plaintiff testified that neither the minor child nor the complainant were present when she was arrested. Outside the house she observed several police vehicles—about seven by her estimate—and saw a neighbour, L[...], standing in the street. She conceded that the child and complainant might have been in one of the vehicles present, but stated that she did not see them herself.

[18] In due course she learned that the minor child's first statement had been made on 11 March 2016, but she said its contents were never put to her. The plaintiff confirmed that she and the minor child were acquainted and they had known each other since about 2015. She stated that the minor child would from time to time come to her grandmother's house to assist with chores.

[19] She further testified that she became aware of a second statement made by the minor child in which the latter withdrew the allegations against her. In that statement the child recorded that she had been in a relationship with the plaintiff and that she still loved her. The plaintiff denied any such relationship.

[20] Under cross-examination the plaintiff denied ever exchanging contact numbers with the minor child or communicating with her by phone. She could not recall ever

having said that she had the child's phone number but conceded that it was possible she might have said so absentmindedly and could not remember.

[21] She maintained that she only spoke to the minor child when she came to the house and denied ever inviting her to visit. When she was confronted with her warning statement the plaintiff said that the police officer who took the statement was selective in recording the information. When it was put to her that the statement contained information such as that she and the minor child met in 2014 and referred to events in 2015, she said she could not explain how those details appeared in the statement as she did not provide them; the officer had written it himself.

[22] It was put to her that the matter only came to light when the complainant heard that alcohol had been taken to church. In his statement dated 10 March 2016 the complainant stated that he opened the case after receiving this information and making his own enquiries. He alleged that he had seen WhatsApp messages between the plaintiff and his daughter, saved under the name "My Love." When he asked his daughter who the person was, she said it was the plaintiff. He said that when he asked his daughter when the relationship began, she said 2015, and that she admitted sometimes telling her family she was going to school when she was actually going to the plaintiff's house. The complainant further alleged that his daughter said the plaintiff had bought her liquor and dagga, made her drink and smoke, and then put her finger into the minor child's vagina. He said the child told him she had not spoken out earlier because she was afraid. The plaintiff denied all of these allegations.

[23] The minor child was examined by a doctor on 8 March who completed a J88 form. He found no external injuries except for an old tear at 3'o clock. He concluded that the clinical genital findings were consistent with old vaginal penetration.

Evidence of Warrant Officer Mabunda

[24] Warrant Officer Mabunda testified for the defendants. She is a member of the South African Police Service, with 21 years' service. She is attached to the Family Violence, Child Protection and Sexual Offences Unit, where she has served for 19 years.

[25] She explained that on 10 March 2016 she was on duty performing suspect raiding duties. Members of her unit would assemble at the beginning of a shift, receive a list of outstanding suspects to be traced, and be issued with the relevant dockets for those suspects. Her duty was to locate and arrest the persons identified in those dockets.

[26] On that day, at about 9:00, she reported for duty and was issued with a docket numbered Protea Glen CAS 187/02/2016, which related to an alleged rape involving a 14 ear-old-girl. The suspect identified in the docket was a female, and the complainant was the child's father.

[27] According to Warrant Officer Mabunda, when she received the docket it already contained the complainant's statement, a completed J88 medical report, and a form authorising the medical examination. From the statement, she gathered that the child had been involved in a relationship with an older woman and that the matter was

reported after the family learned that alcohol had been brought to church and that the child had been visiting the suspect's home.

[28] She testified that she first proceeded to the complainant's address where she interviewed both the complainant and the minor child. After she confirmed the rape allegations with the minor child, she went to the plaintiff's address together with other officers. The complainant and the minor child accompanied her to the plaintiff's house.

[29] At the plaintiff's house they found her asleep. They introduced themselves to the plaintiff. The minor child pointed the plaintiff out as the perpetrator. She informed the plaintiff that she was under arrest for rape of a minor child and took her to the police station. She denied that any improper conduct occurred during the arrest.

[30] According to her, the plaintiff was later detained and processed in accordance with procedure. She confirmed that the plaintiff was detained over the weekend and appeared in court on the first court day. She was later released on bail. She was not directly involved in the taking of the plaintiff's warning statement and could not comment on what transpired during that process. She stated that she understood her role to be locating and apprehending the suspect, and that she believed there were reasonable grounds to arrest based on the contents of the docket.

[31] Under cross-examination, she maintained that she acted within her powers and in good faith. She acknowledged that the minor child's written statement was only taken after the arrest and that she was not the one that took down the written statement. She was therefore not aware of its contents at the time of the arrest. She persisted that she

acted on the docket information available to her and that she regarded it as sufficient to justify the arrest.

[32] When questioned about her interview with the minor child prior to the arrest, Warrant Officer Mabunda explained that she told the child that her father had laid a complaint and asked her to explain, in her own words, what had happened. The child told her that she knew the plaintiff through church and that they had exchanged phone numbers and begun communicating. She further stated that the plaintiff had invited her to her home. Once there, they sat and watched a movie, and at some point the plaintiff paused the movie and said they needed to talk. The plaintiff then started kissing her and inserted her finger in the child's vagina. This happened a few times on different days. One day she was visiting the plaintiff as usual and she did not want to have sex. The plaintiff then forcefully undressed her and inserted her finger in her vagina.

[33] The witness was asked why she interviewed the minor child before the arrest. She explained that at that stage the docket contained only the complainant's statement and the medical documents, but no statement from the minor child herself. She therefore spoke to the child to obtain her version.

[34] During the interview, the child confirmed what the complainant had told the police — namely, that the plaintiff sometimes bought her alcohol and dagga. On the strength of that information, Warrant Officer Mabunda said she was satisfied that a crime had been committed. She described the child as scared and unsettled, although she could not say whether this was because of the incident itself or fear of the suspect.

[35] She explained that after the arrest she took the complainant and minor child home. She asked the complainant to return with the child the following day after school so that a formal statement could be taken. After she dropped them off she made her own written statement in the early hours of the morning. She accepted that the statement was brief and that it did not record everything she has now testified to. She said she did not anticipate litigation at the time and focused on noting the pointing-out by the child and the fact that she had effected the arrest, knowing she might be required to testify. In the end she was not called as a witness in the criminal case.

[36] She further testified that she did not apply for a warrant of arrest as a police officer is empowered to arrest without one in terms of the CPA. After speaking to the complainant and the minor child, and in view of the doctor's report and Form 308 (in which the minor child gave a version to the doctor before she was examined), she was satisfied that a crime had been committed and that an arrest was justified.

The Applicable Legal Principles

[37] Section 40(1)(b) of the CPA permits a peace officer to arrest without a warrant any person reasonably suspected of having committed a Schedule 1 offence. Rape is such an offence. The jurisdictional requirements, as summarised in *Duncan v Minister of Law and Order*³ are: (a) the arrestor must be a peace officer; (b) he or she must entertain a suspicion; (c) that the suspect committed a Schedule 1 offence; and (d) the suspicion must be based on reasonable grounds.

³ 1986 (2) SA 805 (A).

[38] The test is objective. In *Mabona and Another v Minister of Law and Order*⁴, the court stressed that the suspicion must rest on “solid grounds” and not be “flighty or arbitrary”. The Constitutional Court in *Sekhoto*⁵ confirmed that the discretion to arrest must still be exercised rationally and in a manner consistent with the Bill of Rights, but emphasised that once the jurisdictional facts exist, the arrest is lawful and the court will not impose extraneous constraints.

Evaluation

[39] It is common cause that the plaintiff was arrested on 10 March 2016, without a warrant, on a charge of rape. On the arresting officer’s evidence, the following information was available to her prior to effecting the arrest: the complainant had reported allegations involving his 14-year-old daughter (statutory rape as well as sexual assault); the SAPS 308 form reflected multiple prior incidents; the J88 recorded genital findings consistent with penetration; a specific incident was said to have occurred on 1 March 2016; and the minor child herself reported the rape to her and identified the plaintiff as the perpetrator.

[40] Mr Lebea, appearing for the plaintiff, argued that at the time of arrest neither the minor child’s formal statement nor the complainant’s statement had yet been commissioned, and that the mother of the minor child had not been interviewed. That is correct as a matter of chronology. However, the absence of sworn statements or further interviews at that stage is not dispositive. The law does not require the police to complete their investigation or to possess statements under oath before arresting a

⁴ 1988 (2) SA 654 (SE)

⁵ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

suspect. The enquiry is whether, on the information then available, the arresting officer held a reasonable suspicion that the plaintiff had committed a Schedule 1 offence. A suspicion need not be based on evidence that would sustain a conviction; it must merely be grounded in objectively verifiable facts capable of inducing such suspicion in a reasonable officer.

[41] When the information available to the arresting officer is viewed cumulatively, it amounted to what *Mabona v Minister of Law and Order*⁶ describes as “solid grounds” for suspicion. The allegations involved a 14-year-old child, the SAPS 308 reflected multiple prior incidents, the J88 supported concern of possible sexual misconduct, and the minor child pointed out the plaintiff as the person involved. No reasonable officer would have dismissed allegations of this nature. The suspicion held was therefore objectively reasonable.

[42] Counsel for the plaintiff submitted that a less intrusive method, such as a summons or warrant, ought to have been used. Section 40(1)(b) of the CPA, however, authorises arrest without a warrant where a reasonable suspicion exists. The Supreme Court of Appeal in *Sekhoto*⁷ confirmed that the availability of alternative means of securing attendance does not render an arrest unlawful where the statutory requirements are met. The allegations concerned sexual misconduct against a minor — a grave offence involving urgency and vulnerability. In those circumstances, the decision to arrest without a warrant was within the bounds of lawful discretion.

Conclusion

⁶ 1988 (2) SA 654 (SE) at 658.

⁷ 2011 (1) SACR 315 (SCA).

[43] I am satisfied that the first defendant has discharged the onus of establishing that the jurisdictional facts for a lawful arrest under section 40(1)(b) existed. The arresting officer had multiple, corroborating sources of information pointing to repeated sexual conduct with a minor; she obtained identification of the plaintiff at the scene; and she acted within both the statute and the constitutional framework.

[44] The plaintiff has therefore failed to establish that her arrest and detention were wrongful or unlawful.

Costs

[45] The general rule that costs follow the result applies. The plaintiff has been unsuccessful in her remaining claim. However, I need to place the following on record.

[46] The State did not fully comply with the directive previously issued by this Court regarding the preparation and filing of certain documentation. They also failed to attend a further pre-trial ordered by Court. Although this did not affect the outcome, it contributed to some procedural inefficiency and resulted in additional work for the plaintiff's legal team. In these circumstances, and to avoid adding unnecessary harshness to the result, it would not be just to impose a punitive or elevated cost burden on the plaintiff.

[47] Taking these factors into account, the most equitable order remains that costs follow the result, but with the express acknowledgment that nothing in this judgment reflects adversely on the manner in which the plaintiff's attorney advanced the case.

[48] In the result the following order is made:

1. The action is dismissed with costs on Scale B.

L WINDELL

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 5 December 2025.

Appearances

For the plaintiff: M Lebea

Instructed by: Mohale Lebea Attorneys

For the respondents: M. Nduli

Instructed by: The State Attorneys,
Johannesburg

Date of Hearing: 14 November 2025

Date of Judgment: 5 December 2025