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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, GQEBERHA)**

CASE NO: 2660/2023

In the matter between:

OYAMA JIJANA

Plaintiff

and

MINISTER OF POLICE

1st Defendant

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

2nd Defendant

JUDGMENT

MAKAULA J:

A. Introduction

- [1] The plaintiff issued summons against the defendants suing for three heads of damages. However, he withdrew the claim for malicious prosecution against the second defendant. I shall refer to the first defendant as the defendant. The two remaining claims pertain to firstly, his arrest and detention from 9 January 2022 till 11 January 2022, when he appeared in court and secondly his further detention by the court from 11 January 2022 until his release on bail on 21 January 2022. The plaintiff was arrested by members of the defendant on a charge of rape. The public prosecutor eventually withdrew the charge. On the Plaintiff issued summons on 11 August 2023.

B. Background Facts.

- [2] The defendant, as it bore the onus to establish the lawfulness of the arrest, called three witnesses namely, Miss N[...] S[...] (the complainant), Mr Dinilesizwe Jijana (Dinilesizwe) the boyfriend of the complainant, and Captain Madubedube.(I shall use Dinilesizwe and boyfriend interchangeably). The plaintiff led his evidence only. He is the elder brother of Dinilesizwe.

Miss N[...] S[...].

- [3] The complainant testified that at the time of the incident she was cohabiting with Dinilesizwe at his home, 3[...] J[...] Street, New Brighton, Gqeberha. They occupied an outside room situated in a flat behind the main house while the plaintiff lived in the main house. On 16 December 2021, she was at her place of abode with friends, the plaintiff, and family members of Dinilesizwe having a braai and partaking of liquor. The plaintiff was also present. They continued to drink until 21h00 when she, Dinilizwe, and the plaintiff went to Mtsiki's tavern where they continued to drink alcohol. The complainant and Dinilesizwe left the tavern for home at midnight leaving the plaintiff behind. They were drunk.
- [4] They proceeded to their room. They had sexual intercourse and fell asleep thereafter. She was woken up by a male person who was on top of her. The male person had his penis inside her vagina. He was raping her. When she looked closely at the person she realised that it was the plaintiff. She grabbed

the plaintiff and they grappled. She screamed and shouted at the plaintiff. A scuffle ensued between them and she was assaulting him. The plaintiff tried to hold her arms as a result of which she sustained bruises in her upper arms. Her boyfriend was asleep as he had passed out due to drunkenness. He eventually woke up during the scuffle. He enquired as to what was happening and no one responded. The plaintiff broke loose and ran into the house. Dinilesizwe followed him to the house and later came back and enquired about what was happening. She told him that the plaintiff was raping her. At the time she was crying. Her boyfriend went back to the house and brought the plaintiff back to their room and asked him what had happened. The plaintiff did not respond. He assaulted the plaintiff.

- [5] On 17 December 2021 she went to the police station and opened a case of rape against the plaintiff. A statement was obtained from her, and she was referred to Thuthuzela Care Center. She was examined by a health practitioner who filled a medical report referred to as a J88. The nurse noted on the J88 that the injuries on her arms and that the signs of physical assault were consistent with the given history. On another day, she met Captain Madubedube at New Brighton Police station. He asked if she wanted to add anything to her statement to which she responded none. She informed him that the plaintiff had since the day of the incident left their home and his whereabouts were not known.
- [6] On 9 January 2022, she received a telephone call from her boyfriend who informed her that the plaintiff was at his home. She phoned Captain Madubedube to say that the plaintiff was at his home. Indeed, Captain Madubedube and other police arrived and arrested him.
- [7] She was asked about the withdrawal statement dated 8 February 2023 that Captain Madubedube allegedly obtained from her. She denied having made and signed a withdrawal statement. She only received an SMS notifying her that her case had been withdrawn. She immediately called Mr. Khuboni, whom she was advised was the investigator of her case, to enquire about the message. Mr. Khuboni promised to come back to her. He never did until she lost her work and had to go back to her home in Queenstown. She

subsequently made a statement confirming that she did not withdraw the case and requested that her matter be re-instated.

Dinilesizwe Jijana.

- [8] He confirmed the evidence of the complainant in material respects as regards to what took place on 16 December 2021 during the day and up until they went to sleep. He woke up to a scuffle between the plaintiff, and the complainant. He testified this. 'When I woke up my elder brother then went out and ran into the house and I wondered why he was in fact, running away because we had been having an enjoyable time all together. When I inquired from him as to what had happened or what was happening, he did not give me a straight answer.... I then went back to N[...]. N[...] then informed me that my elder brother had just raped her.... I lost control over my anger and I went to fight with my brother... I hit him... very much.' (sic).
- [9] He testified that his brother left after he was assaulted by him. He saw him again on 9 January 2022 at his home. They had gathered as a family celebrating their late father's birthday as they normally do each year. He had informed his girlfriend that the plaintiff would attend the celebrations and would alert her of his presence. Indeed, after they had visited his father's grave, he called the complainant his girlfriend and told her that the plaintiff was present. They had planned that because the police had been looking for him. Indeed, after a while the police arrived and arrested the plaintiff.

Captain Madubedube.

- [10] He testified that he was a member of the South African Police Service (SAPS) working as a group commander for Family Violence and Child Protection Unit in Motherwell police station. His primary duty was to go through the dockets, give written instructions, and distribute them to various investigating officers. On 21 December 2021, he received a docket in connection with this matter. The docket contained two statements, that of the complainant and her boyfriend, and the J88.
- [11] On 22 December 2021, he met with complainant to verify if her statement captured everything. She confirmed it as correct. She informed him that the

plaintiff ran away, and they do not know his whereabouts. The docket was assigned to Warrant Officer(W/O) Khuboni to investigate the matter further.

- [12] On 9 January 2021, he received a telephone call from the complainant informing him that the plaintiff was at his home. He was off duty. He took his car and went to the plaintiff's house having called back up to come and assist him. The complainant pointed out the plaintiff. He approached the plaintiff, introduced himself, and told him that he was under arrest. He explained his legal rights in presence of the other members and why he was arresting him. They took the plaintiff to the charge office and further explained his constitutional rights before detaining him. On 10 January 2022, he charged him. The plaintiff appeared in court the following day.
- [13] He stated that he arrested the plaintiff without a warrant of arrest because he had committed an offence of rape which was a serious offence. He stated that section 40(1)(b) of the Criminal Procedure Act¹ permitted him to arrest the plaintiff without a warrant of arrest. He did not play any further role thereafter in the matter. The investigating officer took over the investigations.
- [14] He testified under cross examination that he filled in what they called the bail form. It is a roneo form that contains information that would assist the prosecutor in determining whether bail should be allowed. He filled in the information he got from the plaintiff, the complainant, his boyfriend, and people he found at his home. He verified his address from all of them. The plaintiff told him that he was on bail in respect of an offence, but he failed to record what it was. He recorded that he had no children because that was what he told him. He reflected that the plaintiff had once escaped from custody because his whereabouts were not known for days after the incident. He regarded that as being escaping because he knew he had committed an offence. He should have handed himself over to the police like others do. He, however, conceded that no such entry was made in the investigation diary reflecting efforts made to trace the plaintiff. It was only the complainant who informed him that the plaintiff is 'at large' as they do not know his whereabouts.

¹ Act 51 of 1977

- [15] He testified that at the time he was inspecting the docket involving the plaintiff, he gave an instruction to W/O Khuboni to arrest him. So, it was at that time that he decided that he be arrested and not at the time he effected the arrest. He said he did not consider applying for search warrant of arrest because he was not the investigating officer.
- [16] He stated that he only knew the plaintiff to be residing at 3[...] J[...] street. He was neither aware nor told that the plaintiff resided at 6[...] T[...] street during 16 December 2021 until 9 January 2022. He denied that the plaintiff gave the latter as his address when he was charging him and that being the reason the prosecutor sought verification of an alternate address. It was put to him that had he verified this address on 11 January 2022; the plaintiff would have been granted bail. Bail was refused because verification of this address was outstanding, so it was put to him. His response was that the matter would have been postponed either way because the results of the profiling of the plaintiff were still outstanding and the verification of the address was still part of it. However, he deferred to the investigating officer as the person who was tasked by the prosecutor to verify the address who was better placed to answer what was put to him.
- [17] Captain Madubedube was quizzed at length about how he made the decision to arrest the plaintiff based on the statements of the complainant and Dinilesizwe. His attention was drawn to the assertion by the complainant that her 'boyfriend beat him up and then he admitted to his brother that he raped me.' It was put to him that her boyfriend did not mention that on his statement. He conceded that he did not notice that when he read the statements. He further agreed that her boyfriend did not mention that he assaulted the plaintiff. He said had he picked up these two differences; he would have given instructions that further statements be obtained to clarify these differences.
- [18] The J88 as aforementioned revealed that the plaintiff had a bruise on her left arm. He confirmed that on the statements of both witnesses, there is no evidence that explained how the bruise could have been sustained because there is no evidence that the plaintiff assaulted the complainant. He was questioned about the noncommittal finding about rape in the J88. The

conclusion by the medical practitioner was that “no genital injuries seen, absence of positive findings does not exclude the alleged vaginal penetration.” It was put to him that this finding established that there was no evidence that supported rape in the J88. His response was, “So when I am reading the J88 there where it says it cannot be excluded that there was penetration to the vagina. Because both had penetrated her, Dinilesizwe, as well as Oyama.... In far as the rape itself is concerned, M’Lord it is mentioned in the J88 that vaginal penetration cannot be excluded” (sic).

- [19] Captain Madubedube mentioned that the statement re-instating the matter was obtained on his instructions because the complainant changed her mind and stated that she wanted the case to be re-instated. He stated that he was taken aback by complainant’s turnaround.
- [20] He said he was not at court when the matter was postponed to 21 January 2022 by agreement between the state and the legal representative of the plaintiff. However, the entry in the investigation diary reveals that the matter was postponed for bail profiling and bail application. He stated that his decision to arrest the plaintiff was informed by the statement of the complainant, that of her boyfriend, J88, and the fact that the plaintiff was not at the given address. The defense did not call further evidence.

Oyama Jijana.

- [21] The plaintiff confirmed that the complainant was his brother’s girlfriend. He testified that he was a widower and had three children with his late wife. He testified that he obtained grade 12 and thereafter proceeded to Peninsula Technikon where he obtained a Fashion Designing diploma. He was self-employed at the time of his arrest. He was arrested by Captain Madubedube and two other police officers who were in a marked police van at 3[...] J[...] Steet which is home address. There were people around when he was placed in the police van. His neighbor was standing in front of his house at the time. He cooperated with the police. He was told of the reason for his arrest. He was detained in the police cells. He confirmed that he was familiar with what is contained in his warning statement. He furnished 3[...] J[...] as his home address. However, he informed Captain Madubedube that he was resident at

6[...] T[...] street as he was still nursing his injuries. He denied that he was evading the police. He never received a phone call from the police.

[22] He was detained with six other detainees in the police cells. The conditions were bad. They shared one toilet which was not working. On 10 January 2022, Captain Madubedube arrived, obtained a statement, and took DNA samples from him.

[23] He appeared in court on 11 January 2022. At court, the matter was postponed for the verification of address and the DNA results. He was transferred to St Albans Prison where the living conditions were horrible. He was cramped into one cell with between thirty and fifty awaiting prisoners. The detainees would rob them of their food, clothes, and anything capable of being forcefully taken from them.

[24] He denied that he raped the complainant let alone assaulting her. He stated that the police had no reason to arrest him based on the statements and J88.

C. Analysis.

[25] Section 12(1) of the Constitution of the Republic of South Africa² and the line of decisions by our courts³ guarantee the right to freedom and security of a person which includes the right not to be deprived of freedom arbitrarily and without just cause.

[26] The defendant relied on the provisions of section 40 (1) (b) of the Criminal Procedure Act⁴ (the CPA). Section 40(1)(b) provides: '**40 Arrest by peace officer without warrant**

(1) A peace officer may without a 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 lawful custody;'

² The Constitution of the Republic of South Africa, 1996

³ S v Coetzee 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC).

⁴ Act 51 of 1997

- [27] The jurisdictional facts for a section 40(1)(b) defense are that (i) the arrest must be by a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offense referred to in Schedule 1; and the suspicion must rest on reasonable grounds⁵. Once the jurisdictional factors have been established the duty to arrest arises.⁶
- [28] It is common cause that Captain Madubedube is a peace officer and that rape is a Schedule 6 offence and more serious than Schedule 1 offences. The contentious issue is whether Captain Madubedube had reasonable grounds to suspect that the plaintiff committed the offence and based on the information before him, he acted reasonably in arresting the plaintiff.
- [29] The attack on the lawfulness of the arrest is premised on various fronts starting on the alleged conflict in the evidence of both Captain Madubedube and the complainant regarding her statement. The criticism is that the complaint disavowed her statement by stating that it was not read back to her after it was taken by Captain Madubedube, something which the latter denied. Further, regarding her statement, it was at odds with that of her boyfriend and her evidence in court. The first issue taken in this regard is that the complainant mentioned in her statement that the plaintiff admitted to Dinilesizwe that he raped her. However, that did not appear in Dinilesizwe's statement or mentioned by her in her evidence. The other aspect is that she alleged that the plaintiff had assaulted her boyfriend, something which did not appear in her statement nor that of Dinilesizwe. The argument therefore is that a reasonable police officer in the position of Captain Madubedube based on these anomalies, would not have entertained a reasonable suspicion which would have led to his arrest and detention.
- [30] I disagree with these submissions. To nit pick at this stage these 'anomalies' amount to being wise after the event. At the time of arrest the complainant's statement was not an issue. On its own, it was sufficient for him to have opined that an offence had been committed. The discrepancy between the

⁵ Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 818G-H.

⁶ Minister of Safety and Security v Sekhoto and Anothoer 2011 (1) SACR 315 (SCA) at paras 6 and 28

complainant's and Dinilesizwe's statements could not be material such that it could be argued that Captain Madubedube did not exercise his discretion to arrest reasonably. Similarly, whether the plaintiff was naked and assaulted by Dinilesizwe when he woke up, is not a factor that may have influenced the arresting officer not to exercise a discretion to arrest. To view it that way would be to adopt an armchair approach. Even viewing these factors cumulatively, I do not find that Captain Madubedube acted unreasonably in the arresting the plaintiff. The criticism is unfounded.

[31] The arrest is assailed as unlawful because Captain Madubedube should have realised that the rape allegation is not supported by the J88 and even complainant's statement is silent on how the bruise reflected in the J88 was sustained. The plaintiff contended that the conclusion that there was assault on the complainant is 'somewhat spurious and this much the good Captain had to accept'. The aspect of the J88 cannot be a factor determinant of whether the arrest should not have been effected. The J88 did not exclude the possibility that rape did occur. This issue, because of the conclusion reached by the medical practitioner, should not be held to be a factor which should have influenced or tainted the discretion vested in Captain Madubedube in favour of not arresting the plaintiff. Even taken in conjunction with the factors adumbrated above, it cannot be said that based on it, he should not have formulated a reasonable opinion to arrest the plaintiff. This, to me was a neutral factor left for the court to decide whether rape did take place or not.

[32] In his Heads of Argument, the plaintiff placed emphasis on the contradictions or inconsistencies between the evidence of the complainant and her boyfriend in court. This criticism eludes me as regards its relevance pertaining to the decision to arrest. Further, the plaintiff argued that had Captain Madubedube considered the content of Dinilesizwe's statement, he would have seen fit to interview Siyanda Jijana (Mr Jijana), an independent person, who is mentioned in his statement as being present at the scene. I do not agree with this conclusion. The reason being that at the time of the alleged rape, they were the only three people in the room albeit that Dinilesizwe had passed out due to over- indulgence. Mr Jijana would not have witnessed the rape

incident. He could only shed light regarding the assault which is not disputed by Dinilesizwe.

- [33] The plaintiff took issue with the fact that the alleged rape took place in the same bed Dinilesizwe was sleeping in with the complainant. He regarded that as 'a bizzer nature of allegation' (sic). This characterisation of events, which should have influenced the arrest, loses sight of the fact that the evidence at the time was that the complainant and Dinilesizwe had been drinking throughout the day until midnight and were both drunk. They had sexual intercourse and Dinilesizwe thereafter passed out. He only woke up during the scuffle. Those are the circumstances under which the alleged offence took place. It is probable that the plaintiff, who was also drinking with them throughout and noticed their level of intoxication, took advantage of that. This submission with respect, cannot hold water. As reflected in preceding paragraphs, especially in his evidence, Captain Madubedube states the reasons that led him to arrest the plaintiff. To me those reasons are reasonable and justified the arrest of the plaintiff.
- [34] The plaintiff argued that the contention by the defendant that its members played no role in the further detention of the plaintiff's after his post is first appearance is bad in fact and in law. This argument is based on what appears from the investigation diary that the prosecutor gave instructions to verify the alternate address of the plaintiff. The criticism is that, had the alternative address been investigated prior to the arrest of the plaintiff, his further detention would not have been necessary. The evidence shows that the plaintiff, in his warning statement, gave Captain Madubedube his home address as 3[...] J[...] Street and no other address. It is further his evidence that the plaintiff never mentioned to him that he also resided at 6[...] T[...] Street. Even the plaintiff himself did not say he informed Dinilesizwe and the complainant that he was temporarily residing at his sister's house. That is why Dinilesizwe and the plaintiff hatched a plan to notify the police once he attended the celebration in honour of their late father's birthday. Therefore, 6[...] T[...] Street was never an issue or mentioned prior to the arrest of the plaintiff. The police would not have been able to verify an address of which they were not aware. Having regard to the evidence before me, the calling of

the investigating officer would not have assisted in this regard because he was not involved in the arrest of the plaintiff and therefore would not have had to verify the address anyway before the first appearance of the plaintiff.

[35] Criticism has been levelled against the defendant for having introduced in discovery the issue of the withdrawal statement which was obtained by Captain Madubedube. The plaintiff contended that such evidence destroyed the credibility of the complainant and Captain Madubedube. The issue at play is that the complainant denied having made the withdrawal statement whereas Captain Madubedube said she did. There are problems with the evidence of both witnesses. The withdrawal statement though commissioned is not signed by the complainant. That discrepancy is not explained meaningfully, especially in the backdrop of the denial by her. However, what transpired from the evidence is that she accepted that there were discussions between her, the plaintiff's family and even the public prosecutor where the issue was mooted. Having met the public prosecutor, they parted in the note that she was going to consider the issue of withdrawing the charges. That never happened as explained above. To me, with this background, I do not find that to be fatal to the case of the defendant. The contradiction does not give credence to the argument by the plaintiff that this has led to failure by the defendant to discharge its onus of establishing that the arrest was lawful. The arrest had taken place at that stage, and the matter was pending in court.

[36] The plaintiff submitted that the police had an opportunity to secure a warrant of arrest against the plaintiff because they had ample time to do so. This argument loses sight of the fact that even though the plaintiff was arrested on the 23rd day after the commission of the offence, the plaintiff was at large. The police did not know where to find him. That is clear from the evidence. Captain Madubedube had to act swiftly upon being advised that he had been seen by the complainant. He had to place himself on duty as he was off that day to an extent that he used his personal motor vehicle. The exigency of the situation caused him to act immediately when he received the information. It must be borne in mind that the investigating officer was not available at that moment, and the situation required him to act immediately. I do not agree with the submission that Captain Madubedube was found 'wanting hopelessly' in

this regard. His explanation is plausible. It is further unfair to characterise his evidence about the plaintiff being at large as a 'concocted' assertion. As previously stated, both the complainant and Dinilesizwe testified about this fact and how it they led to the arrest of the plaintiff. The insinuation by the plaintiff that he had a vested interest in the matter is rather unfortunate.

[37] Based on the facts of this matter, I am unable to find that Captain Madubedube did not assess or analyse the information he had at the time of arresting the plaintiff 'flighty or arbitrarily' and on an unreasonable suspicion.⁷ Running the risk of repetition, he satisfied himself by consulting with the plaintiff to verify the veracity of her statement, read the docket thoroughly before the arrest and other factors alluded to previously. I find nothing irrational or arbitrary in his exercise of the discretion vested in him as a peace officer in the circumstances.

[38] The other contention by the plaintiff is that the defendant is responsible for his further detention from the period after his first appearance. This is primarily because the prosecutor sought the verification of the plaintiff's physical address. The argument is that the failure by the police to verify/ignore/ refusal to seek out that information is 'foundational principle to malice and or recklessness. I have dealt with these aspects above when dealing with evidence. I need not repeat all what I have said about them.

[39] The complainant and Dinilesizwe were not aware that the plaintiff was at their sister's place, nor did he inform anyone of that fact. The issue of an alternate address came only when the prosecutor considered bail presumably because the statements revealed that they resided in the same address and particularly the warning statement. Furthermore, there is no evidence that the police opposed the granting of bail.

[40] There is no evidence that the docket got lost at some point. Captain Madubedube amply explained that he merely deals with the inspection of dockets once they are brought from court by the investigators. In this case, nothing suggests that the plaintiff languished in prison because of the

⁷ See *Mabona & Another v Minister of Law and Order & Others* 1988 (2) SA 654 (SE) para 654E-

unavailability of the docket. Nothing hinged on it. I therefore find no role or influence played by the members of the defendant in the further detention of the plaintiff.

D. Costs.

[41] The defendant has incurred costs in defending the action brought against it. It has been successful in doing so. There is no reason that I should depart from the norm that cost should follow the results.

[42] Consequently, I make the following order:

The action is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff : Mr Magqabi

Instructed by : **MAGQABI SETH ZITHA ATTORNEYS**

For the Defendant : Adv Jiba

Instructed by: : **STATE ATTORNEYS**

Date heard : 05 September 2025

Judgment delivered : 28 April 2026

