IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

....
DATE SIGNATURE

CASE NO: 4885/2018

In the matter between:

JOHN LINDA SHONGWE Plaintiff

and

MINISTER OF POLICE 1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2nd Defendant

JUDGMENT

Mia AJ

[1] The plaintiff was arrested and detained on a charge of rape of a minor child on 14 March 2017 and appeared in the Regional Court Roodepoort on 16 March 2017. He was subsequently detained at Krugersdorp Prison pending a schedule 6 bail application in terms of

the relevant provisions of the Criminal Procedure Act 51 of 1977. The plaintiff was granted bail in the amount of R4000 on 18 May 2017 which he only paid on 29 June 2017. On 1 September 2017 the charges were withdrawn against the plaintiff. The plaintiff now claims damages from the first and second defendants, alleging the arrest and detention was unlawful and the prosecution was malicious. The parties agreed at the pre-trial meeting held on 31 May 2019 that the merits and quantum would be separated. The matter proceeded on the merits.

[2] The facts on which the plaintiff was arraigned were as follows. Ms F M (Ms M), was a […] of plaintiff. On the 11 March 2017 Ms M sent her child to ask the plaintiff if there was space on his washing line to hang her washing. The plaintiff said he had no space on his line. On the same day, the child reported to her mother that when she approached the plaintiff, he took her into his bedroom, closed the door, undressed her and placed her on the bed. The child reported to her mother the plaintiff inserted his penis inside her vagina. He then told her not to tell anyone or he would kill her. The matter was reported to the police and a case of rape was opened.

[3] On 14 March 2017 the defendant drove past his home when he saw a group of people throwing stones at his house and went to Dobsonville police station. He was afraid they would burn down the house or damage the vehicle. The group were toy – toying and throwing stones at the windows of the property.

[4] At the police station he encountered Warrant Officer Matsapola (Mr Matsapola), who asked him to be seated. Whilst he was seated, Ms M arrived and pointed at him and said “this is the one”. Mr Matsapola went to an office accompanied by Ms M. Mr Matsapola approached

him after some time had elapsed and informed two police officers to detain him.

[5] The plaintiff's arrest and detention was admitted in the pre-trial minute dated 6 May 2019, consequently the first defendant bore the onus of proving that the arrest and detention was lawful. The issues for determination as put forward by the plaintiff are thus:

5.1 Whether the first defendant's arrest and detention of the plaintiff was justified? Or rephrased whether the arrest and detention was unlawful?

5.2 Whether there was probable cause to believe on objective grounds that there were reasons to prosecute the plaintiff and that the prosecution was not malicious?

5.3 Whether the lawfulness of the further detention was justified?

[6] The defence called four witnesses: Ms Tshepiso Koloti, the Regional Court prosecutor; Sergeant Grace Mabungu, the investigating officer; Mr Mothibi, the Regional Control prosecutor; and Warrant Officer Maropeng Johannes Matsapola. The plaintiff testified.

[7] Ms Koloti received the docket from the control prosecutor to place on her roll on 16 March 2017. After reading the docket and considering the evidence on the docket she was satisfied that there was a *prima facie* case. She enrolled the matter for prosecution and gave instructions to the investigating officer. She based her decision upon the child's statement in the docket and in view of the identity of the plaintiff being well known to the child as they stayed in the same neighbourhood. Ms Koloti considered that the child repeated to a number of witnesses that she had been sexually violated by the plaintiff.

[8] Ms Koloti's further evidence was that the plaintiff was not granted bail on 16 March 2017 as the offence was a schedule 6 offence and the onus rested on the plaintiff to show that exceptional circumstances existed to permit his release on bail. The question of bail was referred to another court for determination and she was therefore unable to respond to the question posed to her why there was no opposition to bail despite there being an uproar from the community and despite it being a serious offence.

[9] There were apparent contradictions put to Ms Koloti that she ought to have applied her mind to, which included the doctor's conclusion that the child's hymen was intact where a 59 year old was alleged to have penetrated a 9 year old female child. It was also put to Ms Koloti that the interference referred to by the district surgeon was the examination conducted by Ms M' s friend to determine whether the child's hymen was intact. It was further put to Ms Koloti that there was no indication in the J88 that the child had clefts suggesting healed injuries as a result of penetration.

[10] Ms Koloti's response addressed the above contradictions satisfactorily indicating that the slightest penetration was sufficient for a rape charge and penetration need not be completed for penetration to be proved. The intention to penetrate the child was sufficient. With regard to a sexual violation Ms Koloti responded that it was sufficient that an alleged offender touched the vagina with the head of the penis. In respect of the contradiction relating to the numerous rapes Ms Koloti responded that one instance of rape was sufficient to enrol the matter and the child witness was usually consulted within 21 days of the matter being enrolled. Whilst she could not recall the reason for the withdrawal she indicated that each Magistrate made their own notes on the record and it was not dictated by the State. The legal representatives also explained to their clients the consequences of a withdrawal. The withdrawal did not mean the matter could not be re-enrolled or that the criminal prosecution stopped. The matter could be

re-enrolled and matters that were withdrawn were usually diarised to be reconsidered after a period of time. A prosecution only stopped when it was marked *"nolle prosequi".*

[11] Mr Mothibi, the third defence witness corroborated Ms Koloti's evidence. He is the Regional Court control prosecutor and has 10 years' experience. He perused the docket and based on the statements in the docket he found that there was a link between the statements contained in the docket and the offence. He considered the statements and concluded that the prosecution had evidence that could put up a case that required a defence in a court of law. He decided later to withdraw the case but could not recall the reasons for the withdrawal as a portion of the docket was missing.

[12] He also indicated that the reason for the withdrawal is not usually communicated to the court and there is no obligation to communicate the reason for the withdrawal to the court. It was however usually to allow the investigating officer to complete an investigation. He stated that the withdrawal of the matter is not a verdict. A matter may be reinstated at a later date. A case is only not reinstated when a decision is taken not to prosecute and endorsed accordingly as "nolle prosequi". The docket in the present matter was not marked thus. When the investigating officer has completed her investigation the matter will be brought back for the prosecution to decide whether to prosecute the matter or not. There was no exact period to decide not to prosecute a matter. His evidence was consistent with that of Ms Koloti on all of the above aspects

[13] Sergeant Mabungu, a police officer with 15 years experience and a detective dealing with sexual offence cases in the Family violence, Child violence and Sexual offences unit, received the docket on 14 March 2017 with the CAS number which contained a statement from the child's mother and the child. The statement indicated the child was violated on 11 March 2017 by the plaintiff who inserted his penis

('totolozi') into the child's vagina *('mphambili')*. Sergeant Mabungu requested the child to show her what she meant by *mphambili* and the child pointed to her vagina and stated that a *totolozi* is a penis. She took the child to the district surgeon for examination and filed the medical report. Thereafter she presented the docket to the Control Prosecutor, Mr Mothibi.

[14] She explained that she furnished a written statement in respect of the bail application instead of testifying as the decision to grant bail was a decision for the court to make and not her decision. She also confirmed in her evidence that the child confirmed to her that she had been sexually violated in response to the contradictions regarding interference and penetration referred to in the J88.

[15] Sergeant Mabungu explained that the prosecutor requested the child be brought for a consultation. The mother of the child refused to co-operate when she discovered that the plaintiff had been released on bail. According to sergeant Mabungu, the complainant was angry and despite several attempts to secure the child's attendance at a consultation with the prosecutor the consultation did not occur. The child and mother of the child moved away from the area. Due to the lack of consultation and unavailability of the witnesses the case was withdrawn to allow her to trace the complainant.

[16] Mr Maropeng Johannes Matsapola, a warrant officer with 20' years' experience as a police officer was the officer who ordered the arrest of the plaintiff. He was on duty and the officer in charge when the plaintiff arrived at the charge office at 20h00 on the evening of 14 March 2017. The plaintiff informed him that he was afraid of a mob outside his home who wanted to kill him. He was with the plaintiff when Ms M, entered the charge office. She pointed at the plaintiff and said he was a rapist and furnished a CAS number 336/3/2017. She had a piece of paper which showed the CAS. He then arrested the plaintiff based on the pointing out.

[17] The ring leader of the mob came inside to ask whether the person had been arrested and he showed him that the plaintiff had been arrested. Plaintiff handed his car keys to him fearing it may be burned by the mob and requested he park it in the SAPS yard. Plaintiff's wife arrived later to visit him and he requested Mr Matsapola to drive his vehicle to his home and to hand the keys to his wife. Mr Matsapola did so. Mr Matsapola testified that he explained to the plaintiff that he was arrested for rape and informed him about his constitutional rights. He informed him that he could contact his lawyer and his family to request them to bring any medication he required. He testified that they provided a phone to facilitate contact, if necessary.

[18] The plaintiff was the only witness. He testified that on 14 March 2017 he went to Carletonville where he sold health products. He received a call informing him that there were a group of people congregating at his house. On arriving near his home, he saw a group of people at his house. He drove straight to the police station fearing he would be harmed. He approached Mr Matsapola and requested they send police to investigate why the crowd was at his home. Mr Matsapola told him to take a seat while they sent a patrol to investigate. Whilst seated a lady, Ms M and a man, Mr Zungu entered. Ms M said "he is the one". The plaintiff enquired what he had done. Mr Matsapola went to the office to find out. After a lapse of time he returned with two officers and requested the officers to take him into custody. Mr Matsapola offered to park his vehicle on the SAPS premises to avoid damage to the vehicle by the angry mob.

[19] Plaintiff testified that he was informed of his rights only the following morning. He was requested to make a statement and informed that he could elect to make a statement in court. He slept at the police station on Sunday and was taken to court on Monday. The matter was remanded and he was detained at Krugersdorp Correctional Facility thereafter. He initially furnished the Dobsonville address and he was

informed that bail would be opposed. His wife spoke to her brother and he offered his brother in law's address as an alternative address which he could reside at upon his release. The matter was postponed to confirm this address as he furnished an address in Orange Farm. This was not his usual address. The plaintiff testified that he was granted bail and paid the following day. However the record and evidence reflects that he was granted bail on18 May 2017 and his bail was only paid on 29 June 2017 sometime after the bail amount was determined. On 1 September 2017 he appeared again. The magistrate informed him that he was free to go. There was no case against him. His attorney informed him to open a case against Ms M and Mr Zungu for taking his property.

[20] The first issue to be considered is whether the plaintiff's arrest and detention was unlawful. In considering the issue, the evidence is considered in light of section 40(1)(b) of the Criminal Procedure Act 51 of 1977(CPA), which provides:

> "(1) A peace officer may without warrant arrest any person-
>
> ……;
>
> *(b)* whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

[21] In establishing their defence the defendants are required to establish certain facts to justify the arrest of the plaintiff. The jurisdictional facts required to be proved are referred to in the established case in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) which set out the jurisdictional facts for a s 40(1)*(b)* defence at 818H – J as follows:- (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. (See also *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA)).

[22] Once the aforementioned jurisdictional facts are present the discretion whether or not to arrest arises. The police officer is not obliged to effect an arrest. This was made clear in relation to section 43 in *Groenewald v Minister of Justice* 1973 (3) SA 877 (A). The police officer may exercise a discretion to arrest the person. In *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA) Harms DP notes at paragraph [29] that the police officer has a discretion whether to exercise the power to arrest and that the power must be properly exercised. He notes further in the same paragraph.

> "No doubt the discretion must be properly exercised. **But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed…..**" (my emphasis)

[23] The exercise of the discretion is important and must be proper. In *Minister of Safety and Security v Sekhoto and another,* (*above)* paragraph [32], Harms DP refers to three questions to be posed in exercising the discretion upon arrest. These are as follows:

> "the three *Castorina* questions formulated for determining the legality of an arrest without a warrant by Woolf LJ:30 *(a)* did the arresting officer suspect that the person arrested was guilty of the offence; *(b)* were there reasonable grounds for that suspicion; and *(c)* did the officer exercise his discretion to make the arrest in accordance with *Wednesbury* principles?"

At least two of the three questions are similar to three of the four jurisdictional facts to be proved by the defence as set out in *Duncan* above. Of relevance is whether the discretion was exercised in accordance with the *Wednesbury* principles[1]'. This in essence entails that where a matter is left to the discretion of a public officer and

[1] This is a reference to the judgment of Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) ([1947] 2 All ER 680)

where his/her judgment has been exercised in a *bona fide* manner, a Court will not interfere with the result, unless such an officer acted *mala fide* or from ulterior and improper motive.

[24] Once the jurisdictional requirements are met the peace office may exercise a discretion whether or not to arrest. This power to arrest must be exercised properly and must meet the requirement that it is rationally related to the purpose for which the power was given. This calls for an objective enquiry[2]. It cannot be exercised out of malice, to punish a detainee or to deprive the detainee of his/her freedom or to influence the arrestee's conduct. *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA)

[25] In the present matter Ms Mahlangu submitted that in terms of schedule 40(1)(b) of the CPA an arrest without a warrant is permissible in respect of an offence for which punishment exceeding 6 months imprisonment without an option of a fine may be imposed. Schedule 1 of the CPA includes a charge of rape. She argued that the punishment for a charge of rape exceeded 6 months without the option of a fine. Mr Matsapola is a peace officer, the rape of a minor falls under a schedule one offence. The defendant was required thus to show that Mr Matsapola entertained a suspicion and that the suspicion rested on reasonable grounds. In this regard she argued that the victim's mother had laid a charge of rape with a CAS number which was verified when Mr Matsapola checked on the system. The victim's mother pointed out the plaintiff as the suspect and positively identified him. He was well known to the family.

[2] This was held by Chaskalson P. in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC). "'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.

[26] In considering Mr Matsapola' s arrest of the plaintiff, Ms Mahlangu argued that he exercised his discretion properly in arresting the plaintiff in light of the jurisdictional requirements. Mr Matsapola is police officer and therefore 'a peace officer'. His evidence indicated that he arrested the plaintiff based on the pointing out of the plaintiff by Ms M who produced a CAS number and ascertained that the plaintiff was suspected of rape, an offence which is contained in schedule one. Having regard to the pointing out by Ms M, Mr Matsapola formed the objective view that the complainant was the suspect in a serious criminal offence and that he posed a danger and was to be arrested. He detained the plaintiff, read his rights, assisted with safeguarding his property and later, when his wife visited, took the trouble of taking the plaintiff's vehicle home. Accordingly, Ms Mahlangu argued that the jurisdictional requirements were met.

[27] Ms Chabalala, appearing for the plaintiff, referred to Section 40 (1) (b) of the Criminal Procedure Act and the *Duncan* case, which listed the jurisdictional factors and conceded that it was not in dispute that Mr Matsapola was a peace officer and that he entertained a suspicion when effecting the arrest. She argued however that the plaintiff placed in dispute that the suspicion was reasonable and based on reasonable grounds to justify the arrest as there were no objective grounds at the time of the arrest which enabled the arresting officer to conclude that the plaintiff committed the offence. She referred to *Mabona and another v Minister of Law and Order and, Others* 1988 (2) SA 654 (SE) at 658 which held that information upon which the reasonable suspicion was based must be at the police officers disposal at the time of the arrest.

[28] In considering whether Mr Matsapola exercised his discretion properly, I have had regard to the questions posed in *Duncan*. Ms Chabalala conceded that there was no issue with the first two questions which are answered in the affirmative. There are two remaining questions namely whether Mr Matsapola entertained a suspicion in respect of a schedule

1 offence and whether the suspicion rested on reasonable grounds. Ms Chabalala argued that there were no grounds upon which Mr Matsapola could rely and that he acted on an unreasonable suspicion. This test she submitted was an objective test. He ought to have investigated further to enable him to exercise his discretion in a proper manner. She argued that the discretion accorded to police officers cannot be abused it must be exercised on reasonable objective grounds.

[29] The offence in question is a charge of rape and this is covered by schedule one and is answered in the affirmative. The only question that remains is whether the suspicion formed rested on reasonable grounds. To determine this one needs to look at the facts. The mother of the victim laid a charge of rape. The statement of the child and of the mother indicated the child was sexually violated by the plaintiff. There was no indication that there were problems between Ms M and the plaintiff and there is no reason why a complaint would be laid without good reason. The CAS was registered on the plaintiff's SAPS system. This constituted sufficient information to form an objective view and a reasonable suspicion which would enable the police officer to exercise his discretion without *mala fides.* Having considered the facts I am of the view that the police officer exercised his discretion reasonably in the circumstances in terms of section 40 of the Criminal Procedure Act 51 of 1977.

[30] The second issue for determination was whether the plaintiff was maliciously prosecuted by the second defendant. In *Minister of Safety and Security v Sekhoto and another, (above)* Harms DP at para [42] states:

> "While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending

> on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court."

[31] Once the plaintiff was brought to court on a schedule 6 offence the onus rested on the plaintiff to bring an application to court to show reasons why the interests of justice permitted that he be released. The plaintiff was legally represented during this period according to his evidence. It appears that initially his release was opposed in the event he intended returning to the same address. He thus arranged for an alternative address. The matter was postponed to verify the address. He was then released on bail.

[32] The plaintiff contends that there were contradictory statements and a failure to consult with the witnesses and therefore the prosecution was malicious. Ms Chabalala argued that the case was withdrawn because the witnesses were not available. She argued further that because the reason for the withdrawal is not known and was not communicated this points to a failed prosecution and malice on the part of the prosecution.

[33] When Ms Koloti placed the matter on her roll there was sufficient evidence to her mind to for a prima facie case of rape or sexual assault on a minor child. She explained that penetration need not be full penetration as was usually understood but that once there was an intention to penetrate this was sufficient. The statement of the victim was clear that she had been sexually violated. The medical report did not rule out interference. The basis of the complaint and enrolment was the victim's statement and this could be ignored. She also explained that a withdrawal did not equate to a decision not to prosecute or a decision on the merits.

[34] This view was corroborated by Mr Mothibi the Regional Control prosecutor who reiterated that the record of the magistrate was not dictated by the prosecution and neither was the prosecution obliged to place on record the reasons for a withdrawal. He testified however that often matters were withdrawn to allow for investigations to be completed. In the present matter he could not confirm what the reasons for the withdrawal were as the withdrawal diary in the docket had disappeared. He testified that matters withdrawn could be re-enrolled at a later date. On the above aspects I found the evidence to clear consistent and satisfactory in every respect.

[35] The investigator Sergeant Mabungu testified that she did not go to court to oppose bail as she provided a written statement and left the decision in the hands of the court to determine bail. In this regard the investigating officer is clear in the role she plays in assisting the court to make a determination in the bail application. She explained further that when she requested the mother to take the minor child to consult with the prosecutor the mother of the child refused to co-operate and was angry as the plaintiff was released on bail. She believed that the mother felt betrayed and left the area. She was unable to locate the mother after she left the area.

[36] It is not unheard of that a complainant in a sexual offence matter returns later to resume proceedings. From the above it is evident that the matter may have been withdrawn to enable the investigating officer to trace the complainant and state witnesses. In view of the possibility of the complainant returning to resume the prosecution after the prosecution has had an opportunity to properly consult with the complainant the matter may well be re-enrolled and the prosecution may well continue. Both Ms Koloti and Mr Mothibi testified to this possibility.

[37 The indication from the plaintiff that the magistrate informed him that there was no evidence against him appears to be without a basis. Without the benefit of having insight into the docket and without his attorney having the benefit of further information regarding the contents of either the docket or the reasons for the withdrawal, the plaintiff's reasons for the withdrawal amount to speculation at this stage. The court record makes no reference to the reason for the withdrawal. It is apparent that the investigation was not complete. The mother of the victim was angry and not co-operating upon discovering the plaintiff had been released on bail after he had sexually violated her daughter. As a lay person she may have misunderstood the legal process and not believed in the process and the failure to consult with the prosecutor exacerbated the situation. I am unable to conclude that there was a malicious prosecution on the part of the second defendant herein.

[38] Having considered all the facts and the submissions made by counsel in the matter, I am of the view that the police acted reasonably in the circumstances in terms of section 40 of the Criminal Procedure Act 51 of 1977 and the first defendant cannot be held liable. Further I am unable to find that the second defendant acted with malice in prosecuting the plaintiff in the matter under CAS 336/03/2017.

[39] Counsel for the plaintiff argued that the defendant be liable for the wasted costs as the matter was set down for two days. The pre-trial was held on 31 May 2019 when the defendant agreed to the dates. On the 6th the key witness was not available due to exams and another witness was ill. The medical certificate was produced. It is entirely foreseeable that the defendants would have been able to proceed had the one of the witnesses not fallen ill. Illness is not predictable. A good part of the day was utilised to present evidence consequently I am not

inclined to grant an order against the first and second defendants for wasted costs under the circumstances where a witness was ill.

ORDER

[40] In view of the above the following order is made:

1. The plaintiff's claims: (A) that the first defendant is liable for the unlawful arrest and detention of the plaintiff and (B) that the second defendant is liable for the malicious prosecution of the plaintiff are dismissed with costs.

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S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LOCAL GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv. Chabalala
Instructed by	:	Ndou Attorneys
On behalf of the respondent	:	Adv. E Mahlangu
Instructed by	:	The State Attorney
Date of hearing	:	6, 7, 14 June, 9 July 2019
Date of judgment	:	___ July 2019