REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***12th September 2023*** Signature:

CASE NO: 36733/2019

DATE: 12TH SEPTEMBER 2023

In the matter between:

SENTI, FUMANEKILE Plaintiff

and

THE MINISTER OF POLICE First Defendant

THE NATIONAL PROSECUTION AUTHORITY Second Defendant

Neutral Citation: *Senti v Minister of Police and Another (36733/2019)* **[2023] ZAGPJHC ----** (12 September 2023)

Coram: Adams J

Heard: 30 and 31 May, 1, 2, 5 and 6 June 2023 – on 30 May 2023 the matter was heard 'virtually' as a videoconference of *Microsoft Teams*. On the other days, the trial was conducted in open court.

Delivered: 12 September 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII.

The date and time for hand-down is deemed to be 10:00 on 12 September 2023.

Summary: Criminal law and procedure – Criminal Procedure Act 51 of 1977 – sections 40(1)(b) – unlawful arrest and detention – whether the plaintiff's arrest and detention were lawful in terms of ss 40(1)(b) of the Criminal Procedure Act 51 of 1977 – arrest and detention justified – plaintiff's claim dismissed

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ORDER

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(1) The plaintiff's claim is dismissed with costs.

JUDGMENT

Adams J:

[1]. During August 2015, the complainant in a criminal case ('the complainant'), whose date of birth is 13 February 2006 and who was nine years old at the time, was raped at her place of residence in Vosloorus. Approximately one week later she was again raped by the same person. Later that year, during or about September 2015, the complainant told her fourteen-year-old sister what had happened to her and she explained that she had been raped by the plaintiff, who told her not to tell anyone about the assault. The sister, in turn, told their mother during December 2015 of the complainant's ordeal and their mother strangely opted to do nothing about what had been reported to her by her daughters.

[2]. Things came to a head during January 2016, when a neighbour, on her return from her December holidays, noticed that the children – namely the complainant, her sister and two other younger siblings – were all by themselves at their place of residence, with no adult supervision. At that time, these children were living with an aunt, her husband and the plaintiff, and the children were sleeping on makeshift beds in the dining room of the house, which was owned

by the aunt. The neighbour, who deposed to an affidavit on 24 February 2016, which formed the basis of the arrest and the subsequent detention of the plaintiff, enquired from the children as to why they were all by themselves and why they were not at school. The response from the eldest sister was to the effect that the complainant had been raped by the plaintiff. The neighbour thereupon took the girls to a medical doctor, who confirmed that the complainant had in fact been raped. On making specific enquiries from the complainant after their visit to the doctor as to who had raped her, the neighbour was advised by the complainant that the plaintiff is the one who raped her.

[3]. This triggered the laying of a charge of rape by the neighbour against the plaintiff with the South African Police Service. As already indicated, the neighbour deposed to an affidavit on 24 February 2016, confirming that she had been told by the eldest sister of the complainant that the latter had been raped, which was confirmed by their visit to the doctor.

[4]. In the meantime, the plaintiff had gotten word that he was being accused of the rape of the minor child and that the community was baying for his blood and threatening him with 'mob justice'. He thereupon left the area and went to stay overnight at his sister's place of residence in Rondebult. Early the next morning on 25 February 2016, he handed himself over to the Police and he was arrested and processed on a charge of rape of a nine-year old girl. He was refused bail and remained in detention until he was discharged in terms of s 174 of the Criminal Procedure Act[1] ('the CPA') and acquitted on 02 August 2019, that is for a period of about three years and seven months.

[5]. All of the aforegoing facts are common cause. Importantly, when the plaintiff was arrested by the members of the South African Police Services on 25 February 2016, they were in possession of an affidavit, confirming all of these facts, the most notable of which is that the nine-year-old complainant had by then consistently reported to no less than three persons that she had been raped by the plaintiff. It bears emphasising that by the time the plaintiff arrived at the Katlehong Police Station on Thursday, 25 February 2016, to hand himself

[1] Criminal Procedure Act, Act 51 of 1977;

over to the police, they had at their disposal information, in the form of an affidavit by the neighbour, as well as reports from the complainant and her sister of the rape by the plaintiff, which persuasively implicated the plaintiff in this hideous crime. The rhetorical question to be asked is whether the SAPS was to ignore this information and to simply release the plaintiff without arresting him. I think not. All of this would no doubt have aroused the Police's suspicion that the plaintiff had committed the crime of rape of a minor child.

[6]. In this action, the plaintiff claims delictual damages for unlawful arrest and detention, as well as for malicious prosecution, from the first defendant (the National Minister of Police ('the Minister')), and from the second defendant (the National Prosecuting Authority ('the NPA')). Needless to say, the plaintiff sets great store to the fact that the Palm Ridge Regional Court had discharged him in terms of s 174 of the Criminal Procedure Act, which confirms, so the plaintiff avers, that the State had no case against him and should never have arrested and prosecuted him.

[7]. The defendants deny liability for the claims of the plaintiff. Their case is that the arrest and the detention were lawful in that the plaintiff was suspected – reasonably so – of having committed the crime of rape of a minor child.

[8]. The issues to be considered in this action are therefore whether, all things considered, the arrest of the plaintiff and his subsequent detention were lawful, and whether his prosecution by the National Prosecuting Authority was malicious. Put another way, the issues to be decided in this matter is whether the arresting officers had reasonable grounds to arrest the plaintiff and whether they had reasonable grounds thereafter to detain him. Additionally, I am required to decide whether the prosecution of the plaintiff was, in the circumstances of this matter, malicious.

[9]. These issues can and should be decided, in my view, against the backdrop of those facts, which are common cause and which are set out in the paragraphs which follow. In my view, there is no need to decide any factual disputes either way, in order to arrive at a resolution of the legal disputes between the parties. I reiterate that the disputes can be resolved and

adjudicated upon simply by having regard to those facts which are common cause between the parties and which are not seriously challenged by the plaintiff.

[10]. Before dealing with the facts in the matter, it may be apposite to traverse and consider firstly the applicable legislative framework and the applicable legal principles.

[11]. An arrest or detention is *prima facie* wrongful. Once the arrest and detention are admitted, as is the case *in casu*, the onus shifts onto the State to prove the lawfulness thereof and it is for the defendants to allege and prove the lawfulness of the arrest and detention. So, for example, it was held by the Supreme Court of Appeal as follows in *Zealand v Minister of Justice & Constitutional Development & Another*[2]:

'This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.'

[12]. Section 40(1)(b) of the CPA confers the power on a police officer, without warrant, to arrest a person reasonably suspected of having committed a schedule 1 offence, which includes '[a]ny sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively'. Section 50(1)(a) requires that such arrested person be brought, as soon as possible, to a police station, and be there detained; and section 50(1)(b) provides that he or she, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

[13]. It is not required for a successful invocation by a peace officer of Section 40(1)(b) of the CPA, that the offence was actually committed, the question is whether the arresting police officer had reasonable grounds for suspecting that such a crime had been committed. This requires only that the arresting officer should have formed a suspicion that must rest on reasonable grounds. It is not

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2 *Zealand v Minister of Justice & Constitutional Development & Another* 2008 (4) SA 458 (SCA) at para 25;

necessary to establish as a fact that the crime had been committed[3]. 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee[4].

[14]. In cases such as *Duncan v Minister of Law and Order*[5], *Minister of Law and Order v Kader*[6], *Powell NO and Others v Van der Merwe NO and Others*[7], the Supreme Court of Appeal has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect, but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.'

[15]. The question, whether the suspicion by the police officer effecting the arrest is reasonable, as envisaged by s 40(1)(b), must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. The information before the arresting officers must be such as to demonstrate an actual suspicion, founded upon reasonable grounds, that a schedule 1 offence had been committed by the person or persons to be arrested.

[16]. That then brings me back to the facts in the matter, as elicited from the evidence led during the trial. In that regard, the plaintiff himself, as his only witness, gave evidence in support of his case. He testified that that, on hearing that he was suspected of having raped a minor child, he resolved to hand himself over to the police, which he did early in the morning on the 25th of February 2016. He denied that he had committed the offence of which he was accused. His innocence, so he contended, was confirmed by the fact that, after the close of the State's case in the criminal matter, he was discharged in terms

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3 *R v Jones* 1952 (1) SA 327 (E) at 332;

4 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I – 820B;

5 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I;

6 *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) ([1990] ZASCA 111) at 50H – I;

7 *Powell NO and Others v Van der Merwe NO and Others* 2005 (1) SACR 317 (SCA) (2005 (5) SA 62; 2005 (7) BCLR 675; [2005] 1 All SA 149) para 36;

of s 174 of the CPA. He understood that the discharge resulted from the fact that there were a number of discrepancies in the evidence of the State. So, for example, the complainant had contradicted herself by alleging, at one stage, that she had been raped on two occasions by the plaintiff, and on another occasion, she stated that the rape occurred only once. The transcript of the criminal court proceedings was not placed before the court in this action and the reasons for the discharge are not altogether clear.

[17]. The plaintiff's evidence was furthermore to the effect that, if the police had done their work properly and investigated the matter more thoroughly, they would have picked up these shortcomings in the State's case, which, in turn, would have led them to the conclusion that the case against him is weak. They unreasonably failed to do so, which resulted in him being prosecuted without just cause. This also, so his evidence went, resulted in him being refused bail when he applied for same.

[18]. For the defendants, the investigating officer (F/Sergeant Dladla) and the prosecutor in the criminal case (Mr Shirinda) gave evidence. Sergeant Dladla gave evidence that she also assisted the arresting officer in the processing of the plaintiff on 25 February 2016. At the time of the plaintiff's arrest, so Sergeant Dladla confirmed, the statement of the 24th of February 2016 by the neighbour, as alluded to above, was already on the docket. During the course of the day on 25 February 2016, the statements by the complainant and her older sister were also obtained. The statement by the complainant of that date, in the relevant part, reads as follows: -

‘ **Victim Statement**

(1) I am an African female minor born in 2006-02-13 and I am 10 years old, residing at no [… …], with no contact number and I am a Zulu speaking person.

(2) I know the difference between the truth and a lie and what I am about to state is true.

(3) On unknown date in 2015, I was sleeping with my younger brother, […], who was two years old. It was at night. We were sleeping with the sponge in the dining room. During the night, [the plaintiff], who also resides in the house with us, came and woke me up and took me to his bedroom where it was only me and him.

(4) Inside there, [the plaintiff], who was an adult, then undressed me of my panty, then inserted his penis … into my vagina …. I felt pains on my vagina and I cried. Then [the plaintiff] stopped. He then told me not to tell anyone what had happened.

(5) After a long time this had happened, I decided to tell my sister, […] (15 years old), about what [the plaintiff] did to me. I also told my mother, […]. who stays in Rustenburg about this matter.

(6) … …'.

[19] The sister's statement also dated the 25th of February 2016, reads as follows:

'(1) I am [the complainant's sister], 15 years old, residing at […] with no contact number […].

(2) During the year 2014, while I was still staying at No […], I was asleep at the room with my three other siblings. The owner of the house, […], came into my room and asked me to come into his room to have …, but I refused and he went back and never come back again.

(3) I was staying there because my mother left us there since January 2010, and came to see us sometimes and my younger sister, [the complainant], 10 years old, told me that she was raped by [the plaintiff], who stays at the same house with us.

(4) I was never raped by anybody.

(5) … …'.

[20] The aforegoing paint the picture, as vividly as it can get, which the members of the South African Police Service had, when they arrested the plaintiff. It bears emphasising that this ten-year-old little girl had fingered the plaintiff as the one who had raped her. And by the time the plaintiff's arrest was being finalised, she had, according to what was before the arresting police officers, told the same story on at least three occasions. The question is what were the police supposed to do with this information. In my view, the police officers cannot be faulted for their actions in arresting the plaintiff. Everything pointed to him having committed the offence of the rape of a child and that is so, despite the plaintiff's denial.

[21] There can be no doubt that the arresting officers manifestly harboured a suspicion that the plaintiff had committed the said offence. They, in my view, had sufficient evidence to support their suspicion, which was reasonable if regard is had to the statements by the neighbour, the complainant and her sister. I do not accept the contention on behalf of the plaintiff that, faced with

this overwhelming evidence of the guilt of the plaintiff, the police officers were nevertheless required to interrogate these statement and the deponents with a view to testing the veracity of the claims. I cannot agree with the submission by the plaintiff that the police should not have accepted, without more, these damning allegations against him.

[22] The question, whether the suspicion by the arresting officer affecting the arrest is reasonable, must, as I have said, be approached objectively. Therefore, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. In my view, the defendants had established that there were reasonable grounds to suspect that the plaintiff had committed the schedule 1 offence. The arrests and subsequent detention were therefore lawful.

[23] The evidence of the prosecutor was to the effect that the prosecution had decided to oppose bail because they were confident that they had a strong case against the plaintiff. Moreover, he was charged with a Schedule 6 offence, which meant, so Mr Shirinda explained, that the plaintiff bore the onus of proving that it would be in the interest of justice for him to be granted bail. In the end, the prosecution was vindicated in their stance, as the bail application was refused on 08 April 2016. This approach also cannot be faulted. In any event, it was the presiding Magistrate who, after considering all of the evidence before her in the plaintiff's bail application, decided not to grant the plaintiff bail. The defendants simply did what was reasonably required of them and it cannot possibly be suggested that they acted unreasonably.

[24] As regards the continued prosecution of the plaintiff on the charge of the rape of the complainant, it is so, as contended by the defendants, that the prosecutors were fully justified in persisting with the charges against the plaintiff. The simple point is that the facts before them, as extracted from the statements by the witnesses and the medical report by the Doctor, in my view, translated into the conclusion that there was a reasonable suspicion that the plaintiff had committed the crime of rape, which, in turn, justified the arrest and

detention of the plaintiff, as well as their prosecution on the aforementioned charge.

[25] On the basis of the facts in this matter, there is no evidence to support a conclusion, either directly or inferentially, that the police, when arresting the plaintiff, acted unreasonably and without reasonably suspecting that he had committed the offence of rape. The arresting officers were, in my judgment, not subjectively motivated by any irrelevant personal considerations of sympathy or vengeance. They just had no reason to be so motivated. Their suspicion that the plaintiff had committed the said crime was based on reasonable grounds, notably information received from the complainant and the other witnesses.

[26] The mere fact that in the end the plaintiff was discharged in terms of s 174 of the CPA does not detract from the reasonableness of the suspicion that the crime had in fact been committed by the plaintiff. If anything, there are a myriad of reasons why the criminal case took a turn for the worse as it did. Objectively viewed, it is difficult to see on what basis the arresting officers can be said not have had a reasonable suspicion that the crime had been committed. Furthermore, the plaintiff was not unlawfully detained. His bail application was lawfully refused by a court of law.

[27] For all of these reasons, the plaintiff's claims fall to be dismissed.

Costs

[28] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[29] The plaintiff should therefore be ordered to pay the defendants' costs of the action.

Order

[30] Accordingly, I make the following order: -

(1) The plaintiff's claim is dismissed with costs.

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L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	30th and 31st May, 1st, 2nd, 5th and 6th June 2023
JUDGMENT DATE:	12th September 2023 – judgment handed down electronically
FOR THE PLAINTIFF:	Advocate R V Mudau
INSTRUCTED BY:	Lebea Incorporated Attorneys, Sandown, Sandton
FOR THE FIRST AND SECOND DEFENDANTS:	Advocate F Magano
INSTRUCTED BY:	The State Attorney, Johannesburg