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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REPUBLIC OF SOUTH AFRICA

Case No: 28547/18

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
12/03/2024	
DATE	SIGNATURE

In the matter between:

M[...] E[...] M[...]

PLAINTIFF

and

**THE MINISTER OF POLICE
DEFENDANT**

FIRST

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 11th of March 2024.

JUDGMENT

BOTSI-THULARE AJ

Introduction

[1] The plaintiff M[...] E[...] M[...], instituted a claim against the Minister of Police (first defendant) for delictual damages arising from an alleged wrongful assault, unlawful arrest and detention that led to the alleged sexual assault which took place in a holding cell. Another claim concerns malicious prosecution and further detention against the National Prosecuting Authority (second defendant).

[2] The plaintiff stated that the arrest was on the 23 April 2015 not on the 24 April 2015, this was corroborated during trial.¹ The defendants filed three special pleas in which the first was cured because of a court order condoning the plaintiff's failure to give timeous notice to the first and second defendants as envisaged in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. This was no longer an issue at trial. As far as the second special plea is concerned, the plaintiff states clearly in its summons that the first defendant is the Minister of Police, formerly known as the Minister of Safety and Security. Therefore, this plea was cured. This court was asked to pronounce itself on the merits.

Background Facts

[3] The plaintiff was arrested without warrant under case no 194/4/2015 on 23 April 2015 at approximately 12h00 in Embalenhle. She was arrested by the members

¹ Plaintiff's HOA page 024-3 para 2.

of the South African Police Service (SAPS) and detained at the Embalenhle Police Station. At the time of her arrest, she was accused of intimidation and attempted murder. At all times the members of SAPS were acting within the scope and duty of their employment.

- [4] After the arrest, she was detained in the same cell with a mentally handicapped male where an alleged sexual assault took place, in which the police opened a case against the plaintiff on behalf of the mentally handicapped male under case no: 202/ 05 /2015. She was made to appear in court on 28 April 2015 on charges of intimidation, attempted murder, attempted rape that took place while she was detained with a mentally ill male, and the discharge of a firearm in a build-up area. Thereafter, she remained in police custody pending an investigation into her residential address until she was released on her second appearance on free bail and warning on 15 May 2015.

Issues for determination

- [5] The issues to be determined by this court are as follows:
1. Whether the arrest and detention were unlawful.
 2. Whether the first defendant is vicariously liable for the alleged conduct of assault and sexual assault on the plaintiff that took place due to the unlawful arrest and detention.
 3. Whether the second defendant instituted the proceedings unreasonably without probable cause, and whether this act was malicious, including further detention of the plaintiff.

Plaintiff's testimony

- [6] The plaintiff testified that the police officers came to her residence and said they were looking for Madisa. She pointed the police officers at Madisa. The police proceeded to search the house for the firearm and never found one. During the search they were assaulting the plaintiff and Madisa and they handcuffed them. They then put the plaintiff and Madisa in the police van and drove around Embalenhle while assaulting the plaintiff (she was put in the backseat of a double cap police van, and Madisa was placed in the canopy) they drove them to a place called Extension 18 where they called some boys and asked the boys to confirm if the man riding in the police van with the plaintiff is indeed Madisa, and the boys confirmed it was him. While on their way to the police station, the police kept questioning her about the firearm, and when she said she did not know, they kept assaulting her. The plaintiff testified that she was assaulted on the face, she had a blue eye and injured wrist from the handcuffs.
- [7] They arrived at the police station between 15:00 and 16:00 in the afternoon, and she was left in the police van still being assaulted while Madisa was taken to a cell. After 20 minutes, the plaintiff was also taken to her cell where she was placed with a mentally ill male who sexually assaulted her and pulled her hair. She was scared of him hence she complied with the said male's instructions. After the ordeal the mentally ill male apologised three times. She then screamed and called out for help, and the other people in the cells heard and called the police. The plaintiff testified that she was heartbroken as to why the police officers did not protect her and allowed her to be violated in such a manner.
- [8] The plaintiff further testified that the police on arrival to rescue her apologised first and told her they would remove her from the cell and take her home, when she asked to be taken to hospital, the police officers started swearing at her and calling her names and accusing her of being mad. After the sexual assault she was not taken in for medical attention, instead she was moved to Charl Cilliers Police Station for further detention. On the following day, after speaking to

another police officer at the Charl Cilliers Police Station, she was assisted with laying charges of rape under case no: 201/05/2015 and was taken to the hospital for medical examination.

Plaintiff during cross examination

[9] During cross examination, the plaintiff testified that there were three arresting officers (i.e. two males and one female). She testified that she does not know their names and could not read their badges as she was covering her face because they were assaulting her, but she can point them out. It was put to the plaintiff that it was alleged that she was resisting arrest, and to this she responded that she did not.

[10] In terms of the sexual assault that took place in the cell, she testified that the whole sexual assault ordeal took approximately 20 minutes. Regarding the charges against her, the plaintiff testified that she did not know the complainants for the charges of intimidation. However, she knows the complainant for attempted murder because he is her neighbour. She testified that she did not know the whereabouts of her boyfriend Madisa.

Counsel for the plaintiff's submission.

[11] The plaintiff's counsel relied on section 12 of the Constitution and submitted that there was no justifiable reason for the plaintiff's arbitrarily deprivation of freedom. The plaintiff was arrested without warrant of arrest, in which in these circumstances it was required. There was no evidence which justified opening of a case against the plaintiff. There was no justification for the threats alleged by Molebohang Mathebula as there were no phone records proving that the plaintiff made a called to her.

[12] Further the alleged offence was committed on the 22 April 2015, while the statement of Moleboheng was taken on the 23 April 2015. There was no evidence of anyone in the vicinity having heard firearm shots in a build-up

area. The statement of Loads Ndlovu was taken on the 24 April 2015, while the alleged offence was committed on the 18 April 2015. On this basis, the plaintiff's counsel submitted that there was no justification for the arrest and detention, including the court appearance.

[13] Counsel further submitted that when the plaintiff was arrested there was only one statement that had been made by Molebohang with regards to intimidation as opposed to the police's allegation that at the time of arrest they were already two complaints made to them against the plaintiff.

[14] It was argued that there are some inconsistencies because on the 23 April 2015 when the plaintiff was arrested there was only one statement that has been made for the intimidation offence. The police officers claimed that during the time of arrest, they had two complaints, one for intimidation and another for attempted murder. However the statement for the attempted murder was only taken on 24 April 2015. When the police arrived at the plaintiff's residence, they proceeded to search for a weapon that they did not know exists because at that moment there was no witness for the shooting.

[15] With regards to the case of sexual assault levelled against the plaintiff, there were certain exhibits that were sent under the wrong case numbers. This resulted in a deliberate mishandling of the investigation into the case.²

[16] The charges against the plaintiff were subsequently dropped including the charge against the plaintiff for sexual assault that took place while she was detained in a holding cell with a mentally ill male.

[17] Therefore, the said members of SAPS had a legal duty of care towards the plaintiff, to ensure proper investigation of the case before arrest and to properly investigate a complaint and to consider warning the plaintiff. In contrast, the said

² Plaintiff's Heads of Arguments 102.9.

members of SAPS intentionally omitted to discharge their duty of care, and failed to comply with the legal duty of care and the failure was wrongful and unlawful, Lastly, they failed to act reasonably and as a result were grossly negligent.

- [18] Counsel for the plaintiff maintained that SAPS members failed to investigate the matter properly before effecting the arrest by claiming that they searched the plaintiff's premises for the weapon, ammunition and cartridges that was used. Upon not finding the weapon they proceeded to arrest the plaintiff without evidence to back up the intimidation and the shooting.

The first respondent 's testimony on lawful arrest

- [19] The defendants relied on the testimony of the witnesses who testified under oath on the 15, 16 and 17 of August 2023. The testimony is summarised below.

Mr Rhulani Collen Mahlale (Mr Mahlale)

- [20] Mr. Mahlale is an ex-member of the South African Police Services. He testified that he arrested the plaintiff without a warrant of arrest on 24 April 2015 under case number 194/04/15. At all times he was acting within the course and scope of his employment. Under cross examination, Mr. Mahlale testified that the arrest without a warrant was lawful, and it was carried in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act).
- [21] Mr. Mahlale testified that he knew the plaintiff before the arrest because she stayed with Madisa, whom they have been looking for in respect of another matter in connection with a murder. His statement rebutted the plaintiff's notion that she cannot remember who assaulted and arrested her. He further testified that the plaintiff was not assaulted by him or other officers who were present on the date of the arrest. His encounter with the plaintiff ended in the charge office where the plaintiff was handed to the Charge Office Commanding Officer,

Captain Nhlapo. Mr. Mahlale testified that he continued his duties, which included crime prevention campaign.

Constable Mtshali

[22] Constable Mtshali is employed at Evander Police Station. She was assigned to investigate the case of the plaintiff after the plaintiff's first hearing on intimidation and attempted murder case. Constable Mtshali testified about the various days that the plaintiff appeared for bail hearing. The investigation diary and the docket on the case no 194/04/15 was withdrawn. She testified that the mere withdrawal of the charges does not suggest the crime was not committed and confirmed that the arrest and detention was lawful as it appears from the docket.

Mr Winnie Jostinah Kgomo (Mrs Kgomo).

[23] Mrs. Kgomo is a former police member who held the rank of Constable. She was serving under the Secunda Family Violence Child Protection and Sexual Offence Unit. Her testimony is that she was assigned to two counter charges of rape between a male and female accused who were detained in the same holding cell at Embalenhle Police Station (CAS 202/04/2015 and 201/4/2015). During her testimony she confirmed the veracity of her statement. It was in her testimony that she attended to the buccal DNA sampling of the plaintiff and the results of the forensic laboratory were true and correct. She accompanied the plaintiff to forensic nurse T.C Malaza, and the results did not show any visual or physical injuries. The counter charges were ultimately declared *nolle prosequi*, reason being that there were no prospects of successful prosecution.

Second defendant's testimony on malicious prosecution

Tarene van der Merwe.

[24] Mrs Tarene Van der Merwe is a prosecutor and district court supervisor at Evander. She was the only witness representing the second defendant and she testified extensively on all 3 dockets. She testified that she worked on the docket with regards to intimidation case opened against the plaintiff. She testified that the Molebohang stated to her under oath that on 22 April 2015, the plaintiff

phoned her and threatened that she will shoot her in the head because she gave information to the police. Similarly, Mr. Ndlovu also stated under oath that when he arrived at home, his children were crying and informed him that the plaintiff took their toy car. Upon confronting the plaintiff, the plaintiff told Mr. Ndlovu that the car toy now belongs to her children, and she took out a firearm and shot between Mr. Ndlovu's legs.

[25] Mrs. Van der Merwe also testified that the case was postponed for a formal bail application. The prosecutor, Mr. Peter Masiakwala, did not object to the bail and the plaintiff was released on warning and the case was postponed for further investigation. On further postponement, the regional court control prosecutor noted on the investigation diaries that investigations are still outstanding that resulting in the case being postponed for further investigations and a regional court decision. Mrs. Van der Merwe testified that the investigation was not finalised, and the case was provisionally removed from the roll. No further investigation was done at Embalenhle, and the docket was not referred back to court and filed by the police.

[26] It was put to Mrs. Van der Merwe by plaintiff's counsel that the second defendant acted with malice, and she testified that there was never malice on the part of the second defendant as the matters were provisionally withdrawn due to incomplete investigation. She testified that there was *prima facie* case against the plaintiff, she was implicated by the first and second complainants and the case could still be enrolled if investigation continues. On the issue of counter charges Mrs. Van der Merwe told the court that it was decided not to place them on the roll since the suspect was mentally ill and the investigation was incomplete.

Counsel for the defendants' submissions.

[27] Counsel for the defendants submitted, through evidence of constable Mahlale, that there was imminent danger, and it was not necessary to wait for the magistrate to authorised warrant of the plaintiff's arrest. The safety of the

complainants was under threat. Therefore, the arrest of the plaintiff was under the parameters of the law.

[28] It was their submission further that, the plaintiff was arrested and detained by said police officers on charges of intimidation and attempted murder under the case number 194/04/15. At all reasonable times the police officers were peace officers in terms of section 40(1) of the Criminal Procedure Act. The said police officers reasonably suspected the plaintiff having committed the offences, which allows the police officer to arrest at that time. The first defendant denied the allegations of assault and sexual assault that took place during the arrest, however, there were no submissions regarding placing the persons of different genders in the same cell.

Law applicable to facts

Whether the arrest and the subsequent detention were unlawful.

[29] The first defendant admitted that they knew the plaintiff but denied that the arrest was unlawful. The first defendant also conceded that the plaintiff was a single witness in this matter.

[30] Section 208 of the Criminal Procedure Act states clearly that “an accused person may be convicted of any offence on the single evidence of any competent witness”. However, there are guidelines and principles which must be adhered to by the court if a conviction on the evidence of a single witness should follow.

[31] *In S v Webber*³ the court held that:

“A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the

³ 1981 (3) SA 172 (A) See also: S v Webber 1971 (3) SA 754 (A) at 758; R v Mokoena 1956 (3) SA 81 (A) at 85.

evidence of a single witness should also not be equated with that of several witnesses”.

[32] The correct approach to the cautionary rule was set out in *S v Sauls and Others* the court held that:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told”⁴

[33] This court can base its findings on the evidence of a single witness where such evidence is substantially satisfactory and there is corroboration which in many respects, should consist of independent evidence. Hence the plaintiff 's evidence as a single witness will be approached with careful consideration, bearing in mind the issues before this court.

[34] The main issue of contention before the court is the issue of unlawful arrest and detention. The first defendant carries the onus to prove that the arrest and further detention was lawful.⁵

[35] Section 12(1)(a) of the Constitution of the Republic of South Africa provides that every person has a right to freedom and security, this right includes the right not to be deprived of freedom arbitrarily without a just cause. On the other hand, Section 40(1) of the Criminal Procedure Act provides that a peace officer may without warrant arrest any person; (a) who commits or attempts to commit any offence in his presence; (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from

⁴ *Id* at para 180E–G

⁵ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at para 589E–F.

lawful custody; and (c) who has escaped or who attempts to escape from lawful custody”⁶

[36] Jurisdictional requirements must be present for the arrest without warrant to be effected by a police officer with regards to section 40(1)(b) of the Criminal Procedure Act. The requirements were formulated in *Duncan v Minister of Law and Order*⁷(*Duncan*) as follows:

- “(i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain the 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.”

[37] The Appellate Court in *Minister of Safety and Security v Sekhoto*⁸(*Sekhoto*) provided a good explanation of the jurisdictional requirements in *Duncan* as follows:

“Once the jurisdictional facts for an arrest, in terms of any paragraph of s 40(1) are met a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.”⁹

[38] In other words, for the defendant to succeed on the section 40(1) of the Criminal Procedure Act, it must be established that the plaintiff was arrested by the police officer who at the time of the arrest reasonably suspected the plaintiff of having

⁶ General Law Third Amendment Act 129 of 1993.

⁷ 1986 (2) SA 805 (A) at para 818G-H.

⁸.2011 (5) SA 367 (SCA) at para 28

⁹ *Id* para 28.

committed a crime. It is common cause that the plaintiff was arrested by the police officers who were on duty.

[39] The question remains whether the suspicion was on reasonable grounds. The court in *Mabona and Another v Minister of Law and Order*¹⁰ stated the following in explaining the test for determining whether the suspicion was on reasonable grounds:

“The test of whether a suspicion is reasonable is entertained within the meaning of s 40(1)(b) and it is objective (*S v Nel and Another* 1980 (4) SA 28 at 33H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty”.¹¹

[40] Mr Mahlale testified that he had a reasonable suspicion that the complainants who opened a case against the plaintiff under case number 194/04/15 were in danger, therefore an arrest had to be effected. *Sekhoto* provides a brief explanation on the legal obligations of a police officers in circumstances of making an arrest. The court opined that:

¹⁰ 1988 (2) SA 654 (SE).

¹¹ *Id* at para 658D-H.

“[I]t remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily. This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached.

This does not tell one what factors a peace officer must weigh up in exercising the discretion. An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute, read in the light of the Bill of Rights. Where the statute is silent on how they are to be exercised, that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in *Hyundai*.

In this case the legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised: that must be discovered by inference. And in construing the statute for that purpose, the section cannot be viewed in isolation, as the court below appears to have done.

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.”¹² (Emphasis added)

[41] It is important that the arresting officer’s decision to arrest must be based on the intention to bring the arrested person to justice. In other words, an arrest will be unlawful if the arrestor exercises his discretion to arrest for a purpose not contemplated by the Criminal Procedure Act.¹³ If the arresting officer has the

¹² *Sekhoto* at para 39-42

¹³ *Barnard v Minister of Police & Another* 2019 (2) SACR 362 (ECG) at para 39. See also *Minister of Police & another v Hoogendoorn* 2022 (2) SACR 36 (GP).

intention to bring the arrested person to justice, the validity of the arrest will not be affected because he had other motives as well, for example to conduct further investigation to either confirm or dispel the suspicion required in section 40(1)(b).¹⁴

[42] In my view the plaintiff's arrest was unlawful. First, the offences in which the plaintiff was charged with do not fall under schedule 1 offences as it is required by section 40(1)(b). Although the offences are not categorised in terms of schedule 1, this court is aware that a peace officer has a discretion to make an arrest where there is imminent danger. This court agrees that the extravagant threats to kill someone and to use a firearm to shoot between someone's legs are regrettably not the means to communicate if there ensued a quarrel between parties or a disagreement. However, in this matter the arresting officer did not provide substantiated evidence on the reasonable suspicion and the duty to bring the plaintiff before the court. Secondly, the arresting officers were not clear on whether they came to arrest the plaintiff or whether they were looking for a firearm which allegedly belonged to the plaintiff's boyfriend, the arresting officers went as far as moving to another location to confirm the identity of the plaintiff's boyfriend and proceeded to the police station. The intention of the plaintiff's arrest was not clear.

[43] The arresting officers further failed to investigate the matter properly before arresting the plaintiff. They proceeded to arrest the plaintiff without evidence to back up the intimidation and the shooting allegations. It is clear that the intention of the arrest was not to bring the plaintiff to justice. This was also confirmed by Mrs Van der Merwe who was the prosecutor in the intimidation case against the plaintiff. She confirmed that when the docket was handed to her for the purposes of bail hearing proceedings, the investigation was not finalised. Accordingly, the case was provisionally removed from the roll. No further investigation was done at Embalenhle. The docket was not referred back to court nor filed by the police.

¹⁴ *Sekhoto* at para 29-31

[44] Therefore, the first defendant failed to prove that the plaintiff's arrest was lawful. It follows therefore that the subsequent detention was also unlawful.¹⁵

Vicarious liability

[45] Vicarious liability is a common law principle, where an employer can be held liable for the wrongful act or omission of an employee, for as long as the wrongful act and omission was committed within the course and scope of employment, or where the employee was engaged in an activity related to the employment.¹⁶ This principle is deeply rooted in the notion that in certain circumstances a person in authority will be held liable for third party for injuries caused by a person under their authority.¹⁷ The main purpose is to afford claimants the effective means and remedy for injuries suffered.¹⁸

[46] The court in *Minister of Police v Rabie*¹⁹ formulated a test for vicarious liability as follows:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.”²⁰

¹⁵ See *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at 600G.

¹⁶ *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at para 7; and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* [2000] ZASCA 136; 2001 (1) SA 372 (SCA) at para 5.

¹⁷ *K v Minister of Safety and Security* (2005) 26 ILJ 1205 (CC) at para 24.

¹⁸ *Id* at para 21.

¹⁹ [1986] 1 All SA 361 (A).

²⁰ *Id* at para 8-9.

[47] This test was developed in *K v Minister of Safety and Security*²¹ where the court said in such circumstances, two questions arise, first whether the wrongful act and omission were done within the course and scope of employment, this question is subjective, and secondly, whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer, this is objective. The first test is purely factual because it considers the employee's state of mind, the second one is a question of fact and law, the question of law is sufficiently close to giving rise to vicarious liability. These are therefore the standard and the deviation test.²²

[48] In applying the first leg of the test to this matter, when the police officers allegedly assaulted the plaintiff and placed her in the cell with a male, they were not acting in line with their powers given to them by the employer. Nor were their actions in accordance with the furtherance of their duties. There is no evidence that points to the fact that the plaintiff was resisting arrest. However, the plaintiff was slapped across her face by the policeman. She mentioned that although she did not know the police officer's names, she can point him out. It is only normal for a victim of an assault not to look or read the name tags of the police officers who assault her. This is so because the only thing a person could do is try to cover their face using their arms, especially if they are being slapped across the face. Reasonably in that state a person cannot be expected to remember names but at least the face of the assaulter. The hospital the plaintiff was taken to only examined the sexual assault incident that took place in a cell, hence they did not examine her face to ascertain that she was indeed assaulted.

[49] With regard to sexual assault, it happened because the plaintiff was placed with a male in the same cell by the police officers. Section 13(b) of the Standing

²¹ See *K v Minister of Safety and Security* above at para 32.

²² *F v Minister of Safety and Security* (2012) 33 ILJ 93 (CC) at para 41.

Order (General) 361 (Handling of persons in the custody of the Service from arrival at the police station) prohibits the detaining of males and females in the same cell, let alone being seen conversing with each other.²³ Further section 13(d) provides that mentally ill or mentally handicapped persons are to be detained separately to ensure safety of the person or other persons in custody.²⁴

[50] This court must determine whether the police officers were pursuing their own purposes when they put the plaintiff, who is a female, in the same cell with a male person and whether there is a sufficient close connection between their act and the course and scope of first defendant. To begin with the police officers effecting the arrest and detention at that time all bore a statutory and constitutional duty to prevent crime and protect the detained persons in terms of the Standing Order. That duty is a duty which also rests on their employer. Therefore, the police officers were under their employer's obligation to perform.

[51] Secondly, in addition the police in this matter put the plaintiff in a holding cell with a mentally ill person. In so doing, they put the life of the mentally ill person and the plaintiff in danger. One of the purposes of putting persons in custody although they may have committed offences is also to keep them safe, hence the rules for separation should be adhered to, to ensure that no one is injured.

[52] The court already took note that the plaintiff was detained in the same cell with the mentally ill male where the sexual assault took place. It also must be noted that although the first defendant submits that there were no injuries, the J88 form does confirm that there was penetration. Sexual assault is an act of "sexual violation" of another person, or inspiring a belief that sexual violation will occur; (b) without the consent of the latter person; (c) unlawfulness; and (d) intention. The purpose this is to criminalise sexual acts that fall short of penetration. Whereas on the other hand rape is defined as a non- consensual sexual

²³ Standing Order 361.

²⁴ *Id*

penetration of the male penis into the vagina or the anus of another person.²⁵ The submission that there were no injuries does not mean that the rape did not take place, the penetration alone suffices. As far as the counter charges are concerned this court cannot entertain that since it is to be further investigated given that the victim is mentally ill and there was no substantial evidence from the first defendant's witness in terms of the alleged rape.

[53] The first defendant did not lead any evidence, except the evidence of Mrs. Kgomo, to dispute the allegations made by the plaintiff. The first defendant also failed to call upon the forensic nurse who performed a buccal DNA sampling of the plaintiff to confirm the alleged forensic results stated by Mrs. Kgomo. Even in their submissions, the first defendant did not dispute the allegations of sexual assault expect to argue that the plaintiff failed to justify how the damages amount were made up.

[54] On this basis, I am of the view that the police officers were pursuing their own purposes when they put the plaintiff, who is a female, in the same cell with a male person. Had this not happened, the allegations of sexual assault would have been avoided. There was no valid reason for them to detain the plaintiff with a male detainee, who happens to be mentally ill. In fact, their conduct was irresponsible and in contravention of their statutory duty which they are performing on behalf of the first defendant. There is sufficient close connection between their conduct and the course and scope of first defendant. Accordingly, the first defendant is vicariously liable for the conduct of assault and sexual assault on the plaintiff that took place due to the unlawful arrest and detention. In short, the very police officers who were ought to protect the plaintiff from harm, failed to do so.

Malicious prosecution

²⁵ *Masiya v Director of Public Prosecutions (Pretoria)* 2007 8 BCLR 827 (CC)

[55] The claim for malicious prosecution is against the second defendant. To succeed with a claim for malicious prosecution the plaintiff must prove that the second defendant (i) set the law in motion, instigated and instituted the proceedings; (ii) acted without reasonable and probable cause; (iii) acted with malice, and (iv) failed in the prosecution of the plaintiff.²⁶ The plaintiff must prove all of the above for her to succeed with this claim.

[56] The plaintiff's claim of malicious prosecution against the second defendant should fail. The evidence demonstrate that the second defendant did not set the law in motion, instigated and instituted the proceedings against the plaintiff. It is clear from the evidence that at the time the plaintiff was released on warning, the second defendant had not yet decided whether to prosecute the plaintiff or not. In fact, Mrs Van der Merwe confirmed that when the docket was handed to her for the purposes of bail hearing proceedings, the police investigation was not finalised. There was no malice on the part of the second defendant as the matters were provisionally withdrawn due to incomplete investigation. No further investigation was done at Embalenhle Police Station. The docket was not referred back to court nor filed by the police.

[57] Accordingly, the plaintiff's claim of malicious prosecution against the second defendant must fail. Consequently, the second defendant cannot be held vicariously liable for the damages suffered by the plaintiff.

Reasons for the judgment

[58] There are a plethora of unlawful arrest and detention cases flooding the courts currently. An arrest without the intention to bring the accused to justice is unlawful and deprivation of freedom cannot be taken so lightly by the courts especially in situations similar as the case before the court. A person cannot be arrest for any other motive other than to bring them to justice and it is important

²⁶ *Minister for Justice & Constitutional Development v Moleko* [2008] ZASCA 43 at para 8.

that the arrest must be effected according to the applicable law, even in detention the accuser continues to be protected from harm hence there are measures and protocols to be followed.

[59] It is noted that an arresting officer must have a reasonable suspicion before effecting the arrest, through conducting thorough investigation before the arrest, to confirm or dispel the suspicions. The law needs a reasonable suspicion not certainly.

[60] The plaintiff was not informed why she was arrested. The arresting officer asked the plaintiff about a firearm which the plaintiff answered she knew nothing about. Along the way she was asked about same while being assaulted. The only time the plaintiff found out what she was arrested for was when she appeared in court. It is on this basis that I find the arrest and detention to be unlawful. The police did not perform their duties diligently. The arrest was not made in good faith.

[61] On careful consideration of the plaintiff's evidence, there was no deviation or contradiction. The plaintiff gave substantiated and clear evidence. On the other hand, the first defendant failed to merely give plausible evidence why the plaintiff was arrested and detained in the same cell with a mentally ill male. For these reasons, the plaintiff's arrest and detention was unlawful and the first defendant is found to be vicariously liable for the acts that took place during arrest and detention of the plaintiff.

Order

[62] In the result, I make the following order:

1. The first defendant is to pay the plaintiff any such amount, as the plaintiff might be able to prove, as compensation for damages to her person and *dignitas* caused through her unlawful arrest and detention by the first defendant.

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2. The first defendant shall pay the plaintiff's costs on a High Court scale such costs to be on an attorney and client scale.



MD BOTSI-THULARE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES

For the Plaintiff: Miss E Z Makula
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For the Defendants: Adv ML Ndou
Instructed by: State Attorneys Pretoria.

Dates of Hearing: 15, 16 & 17 August 2023

Date of correspondences: 12 December 2023

Date of Judgment: 12 March 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 12 MARCH 2024.