



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

Case no: 3571/2022

In the matter between:

**THINA DUKADA**

Plaintiff

and

**MINISTER OF POLICE**

Defendant

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**JUDGMENT**

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**DAWOOD ADJP:**

*Introduction*

[1] The plaintiff herein sued the defendant for damages arising out of an alleged unlawful arrest and detention on a charge of rape.

[2] It is common cause that the plaintiff was arrested without a warrant and accordingly the *onus* rests upon the defendant to establish that the arrest was lawful.

### *Defendant's case*

[3] The defendant called the arresting officer *Xolisa Ginya* as its only witness to testify. His testimony was *inter alia* briefly as follows:

- (i) that a case of rape was opened by the victim's mother at the charge office.
- (ii) He was given the docket and was present when a statement was taken from the victim and at a later stage from her friend.
- (iii) That the victim identified the alleged perpetrator to them, and she had identified him to her friend and mother as well.
- (iv) In the J88 however when the doctor recounted what was told to him, he recorded that the alleged perpetrator is an unknown black male.
- (v) The victim told him she knew where the perpetrator resided and took them to the plaintiff's residence and pointed him out to them.
- (vi) The victim and the alleged perpetrator (being the plaintiff herein) knew each other as the alleged perpetrator was her teacher.
- (vii) The victim did not report the incident immediately as she stated that she was fearing for her life and was scared to report this because the perpetrator was a teacher. It was only when she attempted to commit suicide that she told her mother about the incident which resulted in the report being made.
- (viii) The plaintiff was apparently uncooperative when they arrived at his place and only cooperated after they had sought the intervention of his brother.
- (ix) The plaintiff asked the complainant whether she was the one that had laid charges against him, and they intervened as he was abusing the victim at that stage. They informed him that she was the one, but he must not say anything to the victim.
- (x) The accused was warned of his rights and was taken to the police cells and charged so that he could appear in court the next day.
- (xi) The accused was taken to court the following day and released from custody, with a note on the file reflecting no prospects of a successful prosecution.

- (xii) According to him, the J88 confirmed penetration, and he was satisfied regarding the identification of the alleged perpetrator who was pointed out to him by the victim.
- (xiii) Under cross-examination he was questioned regarding the J88 where there was no mention made of the word 'penetration' by the doctor himself. The J88 reflects that the vagina was intact but that the hymen was perforated, and the doctor also reflected that he was unable to examine the cervix.
- (xiv) The J88 also reflects that she was sexually assaulted by an unknown person who pushed the door whilst she was in the bathroom. He stated that he did not know how that happened as the victim's statement was taken prior to the J88 being completed and she had identified her assailant.
- (xv) It was also put to him that the friend's version was different from the complainant. Paragraph 4 of the friend's statement stated that "she was called by the man and told that they must get into the toilet, they both entered the toilet" whereas the victim's statement was that she went alone the toilet while she was relieving herself the plaintiff arrived.
- (xvi) His response was that both statements confirm that it occurred without her consent despite the differences.
- (xvii) He denied that it was necessary for him to approach the Senior Public Prosecutor for a decision or obtain a warrant in the circumstances as he had enough evidence to arrest and was satisfied that he had sufficient evidence that constituted a reasonable basis for him to arrest.
- (xviii) Under re-exam he confirmed that the victim and her friend indicated that the sexual assault took place without the consent of the victim.
- (xix) That concluded the defendant's case.

#### *Plaintiff's case*

[4] The plaintiff thereafter testified *inter alia*:

- (a) That he is 28 years of age.
- (b) That he studied Bachelor of Education at Walter Sisulu University and that he is currently unemployed.

- (c) That on the date of the alleged incident, 16 December 2021 he was at a function at a friend's home from 4pm until very late. He saw the victim and her friends there as well.
- (d) The victim was a student of his, so they were known to each other.
- (e) She and her friends had merely greeted him, but they had not spoken to each other.
- (f) He was arrested on the 22 June 2022, and it was suggested that he had committed rape, and he was taken to a vehicle. The child (the victim) was dropped off first and he was then taken to the police station.
- (g) He was charged and his fingerprints and saliva taken and he was placed in a cell with many people. There were no beds to sleep on and the cells smelt, there were people smoking in the cells and there were lice. The cell was 15 X 15 m<sup>2</sup> and there were in total about 55 people detained in that cell.
- (h) He managed being given a corner in that cell and he slept in that corner, he thereafter changed his evidence to say he sat there. He did not eat breakfast and there were only 2 blankets there. He was sitting on the floor.
- (i) He was taken to court the next day and stayed in the cells at court until 3 or 4 pm whereafter he was called and told to go home. He was not sure if he could be arrested again, and this emotionally abused him.
- (j) The people in the locality see him as a rapist and he cannot even apply for a job because his fingerprints are there, and they tell him that that is a bad thing saying he has a criminal record when he tried to apply for an assistant teacher's post.
- (k) He wanted the court to clear his fingerprints so that he does not have a bad criminal record and that he be compensated because he has this hard time that he does not have work.
- (l) Under cross-examination:
  - (i) he confirmed that he knew the complainant as a grade 8 student in his class as she was part of the noisy corner although he did not know her name.
  - (ii) he conceded that he had seen her amongst her classmates at the function on the day of the alleged incident.

- (iii) he testified that he did not talk to them.
  - (iv) he conceded that there were no disagreements between them.
  - (v) he denied the complainant's version that he had raped her.
  - (vi) he initially stated that the police did not ask him to make a statement despite the arresting officer saying that he had asked him if he wanted to make a statement, and he refused. He then stated that he could not recall.
  - (vii) He stated that the arresting officer had asked him if he wanted an attorney, and he called his brother.
  - (viii) He stated that he did tell the police that he did not know what had happened and he was confused and that is why he was confused when it was put to him that he did not dispute the allegations in the presence of the victim when he arrived at the vehicle.
- (m) That concluded the plaintiff's case.

#### *Issue for determination*

[5] The only issue to be determined is the lawfulness or otherwise of the arrest and detention of the plaintiff.

[6] Legal position

(a) The provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ('CPA') is relevant in this case. A peace officer may arrest a person without a warrant where the officer reasonably suspects that the person in question has committed an offence in terms of Schedule 1 of the Criminal Procedure Act. Before an officer can exercise such a power, however, the necessary jurisdictional facts must exist.<sup>1</sup>

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<sup>1</sup> *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA).

The court referring to *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H restated:

"The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds."

(b) The meaning of ‘*reasonable grounds*’ was considered in *R v Van Heerden*,<sup>2</sup> where Galgut AJ held that the term must be interpreted objectively, and the grounds must be those that would induce a reasonable person to have a suspicion.

(c) This was explored further in *Mabona and another v Minister of Law and Order and others*,<sup>3</sup> where Jones J confirmed that the test for whether a suspicion is reasonably entertained is objective. He stated as follows:

‘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 authorizes drastic police action. It authorizes 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. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’<sup>4</sup>

(d) In *Biyela v Minister of Police*,<sup>5</sup> the Supreme Court of Appeal, per Musi AJA, held as follows:

“The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasized that the suspicion need not be based on information that would subsequently be admissible in a court of law.

The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed, based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting

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<sup>2</sup> [1958] 3 All SA 125 (T).

<sup>3</sup> [1988] 3 All SA 408 (SE).

<sup>4</sup> Ibid at 410-11. The court also referred to *S v Nel and another* 1980 (4) SA 28 (E).

<sup>5</sup> 2023 (1) SACR 235 (SCA) at paras 33-5.

officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

(e) In *Sekhoto*,<sup>6</sup> the Supreme Court of Appeal, per Harms DP, observed that the officer is entitled to exercise such a discretion as he or she deems fit, provided that he or she stays within the bounds of rationality. The court at paragraph 44 remarked as follows:

‘While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court... The purpose of the arrest is no more than to bring the suspect before the court... so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court... Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime- and those listed in Schedule 1 are serious, not only because the Legislature thought so- a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand, there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.’

#### *Evaluation of the evidence presented*

[7] It is evident from the testimony of the arresting officer particularly during cross-examination by the plaintiff’s counsel that there were discrepancies between the J88, the victim’s statement and that of her friend. However, both the victim and her friend identified the plaintiff. The plaintiff himself not only confirmed that he was known to the victim but that he was at the same function as the victim until late on the night of the incident. The plaintiff was well known to the victim as he was her teacher.

[8] The question is whether despite these discrepancies a reasonable officer in the position of the arresting officer would nonetheless have formed a reasonable suspicion that the plaintiff had committed the offence. The reasonable officer would analyse and assess the quality of the information at his disposal, and he will not lightly accept it without checking it when 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. While the section requires suspicion and not real evidence, it is required that the suspicion be

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<sup>6</sup> *Sekhoto* (note 1 above) at para 44.

based on a solid ground. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.

[9] In this case it is evident:

- (a) That the victim identified the plaintiff as the perpetrator in the arresting officer's presence.
- (b) That her friend also informed them in his presence that the victim had identified the plaintiff as the perpetrator to her.
- (c) That the complainant, being the mother in her statement had indicated that the victim had told her that the plaintiff was the perpetrator.
- (d) The victim pointed out the plaintiff as the perpetrator.
- (e) The plaintiff confirmed that the victim knew him and that she had pointed him out to the police and was present with the police when he was arrested.
- (f) The J88 is the only document where it is recorded that the perpetrator is unknown.

[10] The discrepancy would not in itself detract from the suspicion being considered a reasonable one in circumstances where the victim without hesitation points out the perpetrator when called upon to do so and makes the statement identifying the plaintiff as the perpetrator prior to the J88 being taken and subsequently points out the plaintiff as the perpetrator after the J88 is taken. The discrepancy should have been queried but the fact that the arresting officer did not do so prior to the plaintiff's arrest does not render his arrest unlawful nor does it negate the identification of the plaintiff by the victim as the perpetrator. The discrepancy between the victim and her friend also does not detract from the fact that both confirm that it was not consensual. These issues could have been dealt with in the course of further investigations by consulting with the doctor and perhaps the prosecutor could have spoken to the victim and questioned her about the discrepancies.

[11] These discrepancies would not lead to a reasonable officer doubting that a crime had been perpetrated by the plaintiff, nor would it detract from him forming a reasonable suspicion that the plaintiff had committed an offence particularly not in the face of the victim pointing out the perpetrator and confirming how she knew him. She not only knew him but knew where he lived, and the plaintiff confirmed he knew her and even spoke to her when he was arrested.



[12] The arresting officer would have been remiss in his duties, as he stated, if he did not in those circumstances arrest and detain the plaintiff, particularly for such a serious offence as rape in circumstances where the victim was suicidal and unequivocally identified the perpetrator who was someone that was known to her.

[13] Objectively viewed, another officer in the position of the arresting officer would indeed have arrested the plaintiff in circumstances where there was a positive identification by the victim of the plaintiff and a pointing out of the plaintiff as the perpetrator. The purpose of the arrest by the arresting officer was clearly to bring the plaintiff to court which he did the very next day. It was for the court to determine what was to happen to the plaintiff thereafter.

[14] The defendant has accordingly established that the arrest and detention by the arresting officer was lawful. His decision to arrest was, as illustrated, based on rational grounds and was justified in the circumstances. He was a frank and honest witness. He is found to be credible and good witness whose version is accepted as the correct one where there are discrepancies between his version and that of the plaintiff.

[15] The plaintiff was not frivolous in pursuing his claim based on an alleged infringement of his constitutionally entrenched rights. The *Biowatch*<sup>7</sup> principle regarding costs is applicable in this case which provides in essence that the plaintiff in such circumstances should not be liable for costs. It would be unjust in the circumstances of this case to allow costs to follow the result by mulcting the plaintiff with costs.

[16] In the circumstances the following order is made:

- (i) The plaintiff's claim is dismissed.**
- (ii) There is no order as to costs.**

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<sup>7</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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**FBA DAWOOD**

**ACTING DEPUTY JUDGE PRESIDENT**

**Appearances**

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Date heard

26 November 2024

Date delivered`

27 February 2025