

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO:39197/2011

DATE: 22 OCTOBER 2014

In the matter between:

LEKHULENI VELAPHI VICTOR

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MOLOPA-SETHOSA J

[1] The Plaintiff in this matter, Victor Velaphi Lekhuleni (“Plaintiff”) has instituted an action against the Minister of Police (“Defendant”) for damages for alleged unlawful arrest and detention on 10 November 2010 at Kwa-Mhlanga by members of the South African Police Service (“SAPS”).

[2] The defendant admitted having arrested the plaintiff without a warrant but denied that the arrest was wrongful and unlawful as it was effected in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended (“the CPA”), which provides as follows:

“40 Arrest by a piece officer without a warrant

(1) *A peace officer may without warrant arrest any person-*

(a)...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than (the offence of escaping from lawful custody;... ”

The defendant thus had the onus and duty to begin adducing evidence.

[3] The defendant led the evidence of **Zimkhona Patricia Mahlangu (“Mahlangu”)**. She testified that she is a sergeant in the South African Police Service; and that from 2003 to 2012 she was stationed at the Kwa-Mhlanga family violence, child protection and sexual offences unit (“FCS”); and that she was the investigating officer in this matter. That at the time of giving evidence she was the communications officer, i.e. spokesperson for the police at the station.

[4] She testified that a case of alleged rape was opened at the charge office at Kwa- Mhlanga police station on 7 November 2010, after the Community Policing Forum had phoned to report that two children aged eight (8) and twelve (12) years old respectively (“the victims”), had been raped at their home in an area called Moloto, at approximately 23h00 on 6 November 2010. That after the case was opened their unit, the FCS was phoned to inform them of the rape case involving the said young girls. That they/police then proceeded to Kwa -Mhlanga police station to fetch the docket and to investigate.

[5] She further testified that on her arrival at the police station she found the two victims’ sister, one M[...]/the complainant in this matter, (“M[...]”), who had come to the police station with the two victims allegedly raped by the Plaintiff. That she spoke to M[...] and the latter told her that she had come to open a case of rape against the plaintiff who was the father of her child, because the plaintiff had raped her two sisters (“the victims”) mentioned above. That she spoke to both M[...] and the victims who explained to her what had happened.

[6] That they [M[...] and the victims] informed her that the perpetrator was an older man called ‘Nkosi’, meaning chief. That he/Plaintiff is also known to the complainants because he sometimes visited their 18 year old sister (‘M[...]) with whom he had a child, and would give them money for food and rent. That M[...]’s child was two (2) to three (3) years old.

[7] She testified that she was informed by M[...] that the plaintiff was married and was a chief; also that he/plaintiff resided in Mamelodi. That she/Mahlangu was given a photo of the plaintiff by M[...]. Further that she then went looking the same day (Sunday 7 November 2010) for the plaintiff. She was accompanied by her colleagues and M[...]. That it was easy to find the plaintiff because when his photo was produced, people recognised him.

[8] She testified that when they/police arrived at the plaintiffs residence in Mamelodi plaintiff was not home. They found his wife and explained to her the purpose of their visit. That plaintiffs wife phoned plaintiff but

he did not respond; and they (the police) also phoned the plaintiff and he told them that he wasn't nearby, but did not tell them where exactly he was.

[9] She testified that the Plaintiffs wife told them to go and look for her husband/the Plaintiff at one of his girlfriend's place. She gave them directions to the girlfriend's place. That the wife further informed them (the police) that plaintiffs said girlfriend was a minor, was 15 years old, and was pregnant.

[10] She testified that they tried to phone plaintiff again but his/plaintiffs phone was off. That the police proceeded to the 15 year old girlfriend's place. They did not find the plaintiff; the 15 year old girlfriend informed them that she did not know where the plaintiff was, plaintiff did not tell her where he was going. Noticing that they could not find Plaintiff they left their contact details with the plaintiffs wife, requesting her to pass the message to plaintiff that they/police were looking for him and to tell him of the reason they were looking for him, i.e. for a rape charge.

[11] She testified that on Tuesday 09 November 2010 the plaintiff phoned them/police; he first spoke to her colleague, one constable Rankapole, who then referred him/plaintiff to her/Mahlangu as she was the person handling the case. That he/plaintiff told them that at the time they/police phoned him [looking for him] he was at a meeting and that is the reason why his phone was off.

[12] She testified that she explained to the plaintiff the reason why they were looking for him, i.e. for a rape charge. Further, that she asked him if he knew M[...] and that he/Plaintiff confirmed that he knows M[...] and said that M[...] was the mother of his child. Plaintiff then informed her/Mahlangu that he would attend the police station with his attorney. That plaintiffs attorney also phoned her later during the day to confirm the arrangements.

[13] She testified that the following morning, on Wednesday 10 November 2010, she met with the plaintiff and his attorney, Mr De Klerk ("De Klerk") at the Kwa Mhlanga police station. That she went with them to the crime office where they/police do their administration. Further that she explained to De Klerk that there is a case of rape of minor children opened against plaintiff, and that she explained to De Klerk that she was going to arrest the plaintiff but would not detain him in the cell because he/plaintiff was trustworthy, that she was only going to do her administration work like taking plaintiffs finger prints, filling the necessary documents and that thereafter plaintiff would proceed to court. That they [she, the plaintiff and his attorney/De Klerk] agreed.

[14] She testified that she then explained to the plaintiff his rights in the presence of his attorney/De Klerk; De klerk asked if they could arrange bail for the plaintiff and she/Mahlangu replied that bail can be arranged at court with the prosecutor.

[15] She further testified that Plaintiffs fingerprints were taken and she entered plaintiffs particulars into the SAPS registers, i.e. completed the SAP 10 and SAP 14 registers, handed in as exhibit A. That the SAP 14 is used to register all suspects, whether they are going to the cells or going directly to court.

[16] She testified further that after doing her administration set out above she personally took the plaintiff to court; that plaintiff was never placed/taken to the cells at the police station. That she further informed his attorney, in the presence of the accused, that she/Mahlangu would explain her case to the prosecutor, and would arrange with the prosecutor to give plaintiff bail. That the plaintiff tried to give her money but she told him that he/plaintiff was not going to pay bail to her but would give the money to court after bail had been arranged. That his attorney also confirmed to him/plaintiff that bail will be arranged at court.

[17] She testified that on arrival at court she went to the prosecutor and informed the prosecutor to consider granting bail to the plaintiff as he (the plaintiff) was trustworthy, his address had been verified, he was well known and he would not interfere with witnesses as he stayed far from them. That the prosecutor stated that he will present the case to the magistrate.

[18] That when the plaintiff s case was called the prosecutor presented the case together with De Klerk, that the prosecutor also informed the magistrate that she/Mahlangu, the investigating officer, was not opposing bail. That the magistrate said that they will bring a formal bail application as it was a rape case involving minors, and he/the magistrate remanded the plaintiff in custody. The case was postponed until Friday 12 November 2010.

[19] She testified that her interaction with the plaintiff ended on 10 November 2010 when she took plaintiff to court.

[20] Mahlangu testified that the arrest of the plaintiff was lawful, that a serious case which involved rape of minor children was opened against the plaintiff; that the plaintiffs girlfriend, M[...] was a minor of 15 years old when she fell pregnant by the plaintiff; and also that at the address where the plaintiffs wife had sent them to plaintiffs other 15 year old girlfriend to check for the plaintiff, they/police noticed that the latter 15 year old girl was pregnant. That they/police reacted to the case of rape that had been opened.

[21] She testified that the plaintiff was not taken to the cells at Kwa-Mhlanga police station. That after completing her administration, i.e. taking plaintiffs fingerprints and entering his details in the SAP 10 and SAP 14, She/Mahlangu personally took plaintiff to court immediately. That thereafter, when the matter was postponed at court and the plaintiff remanded in custody, it no longer had anything to do with her; her duty as an arresting officer was to make sure that she brings the accused before court. That what happens in court is above the scope of her duties; once the court decides she is no longer involved.

[22] She testified that when she took the plaintiff to court she at no stage handcuffed him; he was free to speak to his attorney, he was free to move around; at no stage did she handcuff him.

[23] She testified that they work as a team in these cases; that the arrest of the plaintiff was done in terms of section 40 (1) (b) of the CPA.

[24] Under cross examination she reiterated that M[...] had opened a case of rape against the plaintiff. That her/M[...]’s statement was in the docket, she saw and read it. That as she was reading it M[...] was present and she asked her questions.

[25] She stated that the two victims each deposed to statements, and that she/Mahlangu is the one that took down the victims’ statements. Further that the two victims were taken to the doctor by police officers on duty at the charge office, and that in the docket, besides M[...]’s statement, there were two completed J88 forms in respect of each of the victims, and that she personally saw the said two J88.

[26] She stated that normally the charge office opens a case and thereafter they call their unit [the family violence, child protection and sexual offence unit FCS, and on their arrival at the police station they would then be handed over the case/docket for investigation. That the FCS offices are outside the Kwa-Mhlanga police station, and are a bit far from the main police station.

[27] She stated that in both the two J88 in respect of the victims, there were conclusions by the Doctor who examined the victims. That the Doctor filled in the J88 that the victims had bruises and scratches on their genital parts/vagina, and the Doctor added that something has happened to the vagina. She stated that after studying the two J88 there was a suspicion.

[28] She stated that the plaintiff did not give her his version when she told her of the rape case against him, that plaintiff and his attorney told her that he/plaintiff will talk at court.

[29] She stated that when they/police went to plaintiffs house they did not find. Asked if she asked plaintiffs wife about plaintiffs whereabouts on Saturday, 6 November 2010 she stated that plaintiffs wife was emotional, she/wife informed them/police that plaintiff troubles her, that he comes and goes as he wishes and that he never tells her where he is going. Further that they/police informed plaintiffs wife that it was alleged that plaintiff had raped young children the previous night.

[30] It was put to Mahlangu that it was improbable that the wife would have told them that Mahlangu says she told them because plaintiff got married to the said wife Mahlangu said she spoke to, i.e. the wife referred to above. Mahlangu replied that the said plaintiffs wife did not tell them that she got married to the plaintiff the previous day [06/11/2010].

[31] Asked if she enquired from the plaintiff and his attorney about his whereabouts on 06 November 2010 and if she could take plaintiff's statement, she reiterated that plaintiff and his attorney told her that plaintiff didn't want to give a statement and indicated, through his attorney, that he/plaintiff will give a statement in court.

[32] Asked whether she regarded the plaintiff as a flight risk she stated that she didn't think he would disappear because he came to the police station on his own. She stated that she would not have opposed bail because plaintiff stayed far from the victims.

[33] She stated that she did not have a discretion whether to arrest the suspect or not in a serious case of this nature.

[34] She disputed that plaintiff and his attorney wanted to give her a statement. Put to her that plaintiff's wife was also present at the police station corridor to make an affidavit, she disputed that plaintiff's wife was present at the police station, stating that plaintiff and his attorney came being only two, and that when they went to court they were only three [herself, plaintiff and his attorney].

[35] She further stated that De Klerk did not at any stage on 10 November 2010 tell her that plaintiff was at his marriage ceremony on 06 November 2010, stating that De Klerk's main concern on the day was more on getting bail for the plaintiff.

[36] She stated that plaintiff could not have been given summons to come to court because a docket had been opened; that they had to charge him, and she, on the day, had to do her administration as alluded to above, before taking plaintiff to court. That after doing her administration plaintiff was taken to court immediately.

[37] She disputed that she arrested plaintiff maliciously, stating that there was a rape case opened against the plaintiff, that they/police did investigations and from what came out in their investigation there were suspicions and that because of the seriousness of the complaint, an alleged rape of two young children that took place, the plaintiff was arrested after investigations were made.

[38] She disputed that she was not present in court during the plaintiff's bail application. She denied that she had gone to check the SAP69.

[39] The next witness was **Kgereu Peter Rankapole** ("Ramkapole"). He testified that he is a constable in the South African Police Service, ("SAPS") stationed at the Kwa-Mhlanga family violence, child protection and sexual offences unit ("FCS"). That he had eight (8) years' service with SAPS.

[40] He testified that on the day in question he, together with Mahlangu and Warrant Officer Thutse

(“Thutse”) received reports of a rape complaint. That on reading the contents of the docket it was established that the suspect is chief Lekhuleni (the plaintiff). That on perusal of the docket, there were complainant statements and two J88 in respect of the victims.

[41] He testified that he cannot remember the names of the complainants. He testified that the docket has gone missing.

[42] He further testified that at the police station they met with M[...] and the two minor children who were the victims in this rape case; and that Mahlangu interviewed the aforesaid children. That his colleague Mahlangu was the investigating officer in this case and he/Rankapole assisted Mahlangu to trace the suspect.

[43] He testified that he and Thutse visited the plaintiffs residence the first time around but did not find him/plaintiff. That they again returned the following day accompanied by Mahlangu; and that they/police explained to plaintiffs wife the nature of their visit at her house and informed her that they were looking for her husband/ plaintiff as there was a rape case opened against him. That plaintiff s wife told them that she does not know plaintiffs whereabouts.

[44] He testified that she/plaintiff s wife had a confrontation with M[...] and that she/plaintiffs wife was crying, telling the police that plaintiff had a tendency of having affairs/relationships with young/minor children, and further told them that there was another young girl in Mamelodi aged 15 years old that plaintiff had impregnated. He testified that plaintiffs wife gave them directions to the young girl’s place, for them to go check if they could not find the plaintiff there. They went there but could not find plaintiff. That plaintiffs alleged 15 years’ old girlfriend informed them that she also did not know Plaintiffs whereabouts and that they should go check him in Soshanguve at his other girlfriends place. That they/police noticed that the young girl was indeed pregnant.

[45] He testified that he/Rankapole then phoned the plaintiff on the numbers given to him by plaintiffs wife; that plaintiff told him on the phone that he was in Nelspruit attending a meeting of traditional leaders. That plaintiffs wife stated that she did not believe that plaintiff had gone to the meeting of chiefs because when he goes there he normally tells her.

[46] He testified that the plaintiff phoned him/Rankapole he thinks it was on Tuesday 8th November 2010.

[47] He testified that he/Rankapole, after speaking to plaintiff, who had informed him that he would be coming to the police station with his lawyer, he then gave his phone to Mahlangu [the 10] who continued to speak to the plaintiff.

[48] He further testified that the Plaintiff came to the police station in the morning, that he is not sure whether

it was on Tuesday or Wednesday. That Plaintiff came with his attorney; that they were two, i.e. plaintiff and his attorney. That Mahlangu welcomed them, he/Rankapole was present. That Mahlangu talked to them and they then all proceeded to the crime office where they did their administration. That he assisted Mahlangu to take plaintiffs fingerprints.

[49] He testified that the reason why the plaintiff was arrested was because there was a sound suspicion that the plaintiff might have committed a crime. That looking at statements and information in the docket, if on such information the police assess a case and find that there is a link to crime by the information in the docket (*sic*) and the suspect, they then arrest such suspect, but would endeavour to interview the suspect to get his/her version.

[50] Under cross examination he stated that M[...]’s statement was taken by the charge office members. Further that the two victims’ statements were also eventually taken.

[51] Asked if he asked the plaintiffs alleged 15 year old pregnant girlfriend how old she was, he stated that they/the police asked at her home and it was confirmed that she was 15 years old.

[52] He stated that on the morning in question, i.e. Wednesday 10 November 2010, when they wanted plaintiff to explain his whereabouts on Saturday 06 November 2010 in the evening, plaintiff refused to make a statement, and that plaintiff and his attorney informed the police, Rankapole included, that plaintiff will give his statement at court. That at no stage did plaintiff and/or his attorney mention anything about plaintiff having been at ‘his wedding ceremony at 23H00 on Saturday 06 November 2010’. He/Rankapole stated that plaintiff only informed him over the phone after he/Rankapole had called him, that he is in a meeting in Nelspruit, that he is very far. He/Rankapole stated that plaintiffs wife did not know of any meeting, and that he/plaintiff never informed them of any wedding. That thereafter plaintiffs phone went off, and was off when he tried to call him again; therefore he could not speak to plaintiff further;

[53] He stated that the next time he spoke to plaintiff was on the day plaintiff phoned him and told him he was coming to the police station with his attorney. He reiterated that plaintiff and his attorney informed the police, Rankapole included, that plaintiff will give his statement/explanation at court.

[54] Put to him that they/police arrested the plaintiff because plaintiff did not want to give them a statement, he disputed this. He stated that the reason they arrested the plaintiff was because the complainant/M[...], the plaintiff and the two victims knew each other; that plaintiff usually visited their [M[...] and victims’] place, and that in their statements they [M[...] and victims’] stated that the plaintiff is the person that came to their home and raped the two young girls/victims.

[55] Put to him that Plaintiff said that he spoke to him/Rankapole on Sunday 07 November 2010 in the

evening and informed him that he was in Nelspruit attending a meeting of traditional leaders starting on Monday morning, he/Rankapole stated that he spoke to the plaintiff during the day, and that the plaintiff did not tell him when is the meeting starting; that plaintiff told him that he is at the meeting of traditional leaders.

[56] That concluded the evidence on behalf of the defendant.

[57] For the plaintiff, **Velaphi Victor Lekhuleni**, the plaintiff himself, testified.

[58] He testified that he is 44 years old, having been born on 23 October 1967. That he is customarily married, and that on Saturday 06 November 2010 he was at a wedding at Khalambazo, Mamelodi, at his in law's place; he was getting married to one Angela Mogale ("Mogale").

[59] He testified that when he got married he was staying at house no. 10598 Lekhuleni Street, Mamelodi East.

[60] He testified that he knows the complainant/M[...]/T[...] as well as the two victims. That the complainant/M[...] was his ex-girlfriend, and that the two victims were M[...]’s sisters. He testified that the case against him was withdrawn. Further that he was never involved in the rape of the two victims.

[61] He testified that on 06 November 2010 at around 05H30 his uncles/elders, who were going to pay lobola for him, came to his house. They left in his vehicle at around 05H45 and proceeded to the bride to be/in laws home to pay the balance of **R13000.00** lobola. That the lobola ceremony was intended to start at 08H00, but only started at 08H30. Further that the ceremony took 2 days. That he were to stay at his in laws. That they were supposed to finish on Saturday, then the following day to go to his place. He testified that his residence was 5 Streets from his in law's place; and the distance from his home to M[...]’s home is about 1 hour's drive with a motor vehicle.

[62] He further testified that he spent the night of 06 November 2010 in the company of his newly wed wife, at his in-laws' residence. Further that at 23H00, on 06 November 2010 he was at his in laws together with his newly wed wife.

[63] He disputed that Rankapole came to his home on Saturday 06 November 2010 and spoke to his wife.

[64] He testified that on Sunday 07 November 2010 during the course of the afternoon he was at his home. He disputed that Rankapole spoke to him on Sunday 07 during the course of the day, stating that Rankapole only spoke to him on Monday. He testified that he/plaintiff left for Nelspruit on Sunday 07 November 2010 at around 14H00 after completing the ceremony at his home. That the purpose of going to Nelspruit was that he had to attend a meeting of traditional leaders on Monday morning.

[65] He testified that he spoke to Rankapole on Monday at around 10h30; that he told Rankapole that he was at a meeting and that he Rankapole should call him later, he then switched off his phone, Rankapole couldn't tell him what he wanted.

[66] He testified that he subsequently spoke to Rankapole on Tuesday morning; that he told Rankapole that he was on his way home because people at his home phoned him and told him that police were looking for him.

[67] He testified that on Wednesday, 10 November 2010, accompanied by his attorney he went to the police station at Kwa-Mhlanga, and was met by Mahlangu and Rankapole. That he was informed about the rape case against him; Rankapole took his fingerprints; his attorney tried to speak to them but they did not want to talk to his/attomey.

[68] He testified that he was willing to tell the police where he was on Saturday 06 November 2010, and his attorney informed the police that he/plaintiff was willing to talk to them and to make a statement, but they/police did not agree. He testified that his wife was sitting in front of the police station on the stoep. That she/wife wanted to give evidence that he/plaintiff was with her.

[69] He further testified that after taking his fingerprints he was detained and was then handcuffed with another man who was also going to court and that together they were taken to the court cells, where the handcuffs were removed. That it took about an hour before he appeared in court, during which time he was detained in the cell with 8 other men. That there is no place to sit down in the cells; it is just cement and a toilet.

[70] He testified that when he appeared for the first time in court the investigating officer, Mahlangu was not present. That when he appeared there were no outstanding/pending cases against him, or previous convictions. That after his first appearance, after the matter was postponed he was taken back to Kwa-Mhlanga police station and was detained until Friday 12 November 2010 when he was released on bail.

[71] He testified that his cell was 10 meter long and 5 meter wide. That it was divided into two parts, the one part had a roof and the other part did not have a roof. That the part that did not have a roof was open until 16H00, and at 16H00 they are locked in the roofed part. That theyd receive 21litre water bottles; the toilets were not working well; there were no mattresses, they slept on 4cm carpets. That he was given one blanket but it was so dirty, he couldn't sleep with it. That he caught his sleep while seated.

They were given porridge and cabbage in the afternoon, and in the morning they were given tea.

[72] He testified that he feared for his life, for his own personal safety. That he was robbed of his wrist

watch. That it was scary to come across people he didn't know.

[73] He testified that the fact that he was arrested for rape affected him a lot because he is a well known person, he deals with initiation schools for girls and boys, and his arrest became known to his community, he felt belittled and his community was affected as well.

[74] Under cross examination he stated that on 06 November 2010 he was marrying his 3rd wife. That the police officers spoke to his 2nd wife Agnes Makobe who stayed at house no. 10946/1, which is the kraal where the community gathers; that that is where the police went when they were looking for him. That he/plaintiff stayed at his parental home at house no. 10598 Lekhuleni Street. That he had three places where he stayed.

[75] Put to him that in African polygamous marriages, the senior wives would be part of the ceremony in a marriage of a subsequent wife, he stated that in his culture his senior wife does not attend the ceremony, but that they are informed of the subsequent marriage by their husband.

[76] He stated that he heard the police officers testifying about his wife Agnes, and how she reacted stating to the police that she did not know his whereabouts. He stated that Agnes knew where he was and that she was informed that he/plaintiff was getting married. Asked why Agnes would have behaved/reacted as testified by the police officer, he stated that Agnes' behaviour [to the police] was normal, that he does not know what the police are talking about. That Agnes told him that he never cried; that she was just shocked when the police told her that he had raped someone. Further that he took Angela (not Agnes) to the police station because she was with him, that Agnes was not with him on the night in question herein [06/11/2010].

[77] He stated that Agnes had told the police to go and look for him at his other wife/Angela's place, his in law's place, which is about 5 streets from his home.

[78] Put to him that the police did go to look for him at the address of his girlfriend, given to them by Agnes, he stated that yes the police went there to look for him on Monday, and not on Sunday.

[79] Put to him that at the girlfriend's home, when they/police did not find him they were directed to go and look for him at his other place/house in Soshanguve; he stated that indeed he had a house in Soshanguve where his first wife stayed.

[80] He stated that he was not present when Agnes spoke to the police, but that she/Agnes did not tell the police what the police testified she had told them.

[81] He reiterated that on Sunday 07 November 2010 the wedding ceremony was at his homestead; that

Agnes knew this. Asked why Agnes would send the police 5 streets away to look for him, while the marriage ceremony was on, he stated that that was at his in laws place.

[82] He stated that his first wife also knew about the wedding; that he did not mention this earlier to his attorney because this did not involve her.

[83] He stated that he was phoned by Agnes on Monday 08 November 2010, and she told him that the police were looking for him. He disputed that Agnes was his only wife.

[84] He confirmed that the Tshepiso he referred to as his ex-girlfriend is the same girl the police told him about, i.e. M[...]/the complainant. He further confirmed that the police told him that M[...]'s siblings were the victims in the matter. He stated that he knew them all, that they [M[...] and the two victims] were all staying at his place; that he was supporting them, paying their rent, buying them food, and that they had been staying with him for two years. Further that he had a child with M[...].

[85] He stated that the police told him of the case on Monday 08 November when he called them, but that he told them he was in a meeting and could not talk to them, and he then dropped the phone. That he again spoke to the police in the morning of the day he was arrested, on 10 November 2010, when he told them he was on his way.

[86] He agreed that the police were correct when they testified that he visited the victims, paid rent for them, and was well known to the victims.

[87] He stated that on Wednesday 10 November 2010 he went to Kwa-Mhlanga police station with his attorney, his wife/the one he got married to on 6 November 2010.

[88] Asked why he did not take his headman as well, he stated that he did take him along. That the headman was in the car, waiting for him in the car. That he did not mention the headman because he does not take part in this matter.

[89] He reiterated that his fingerprints were taken by Rankapole; that he was handcuffed. Put to him that nowhere in his pleadings, and/or correspondence does it appear or is it stated that he was handcuffed, he stated that it is his attorney who wrote the documents, not him/plaintiff.

[90] He stated that he did not hear in court, on his first appearance, when Mahlangu stated that she was not opposed to bail being granted.

[91] Put to him that the conditions of the cells were never put to Mahlangu and Rankapole, he agreed that Mahlangu and Rankapole were never asked [about the conditions of the cells]; further that he does not

remember any mention of the cells being made in the pleadings and/or correspondence.

[92] Asked if his customary marriage was registered, he stated that it was registered, that his in laws and his messengers signed a document; that that is how they register a customary marriage. That he gave the document to his attorney, and if defendant wanted the document, his attorney would fetch it and give it to them.

[93] Put to him that the document he alleges was not discovered because there was no customary marriage; he stated that that paper is not significant, that it is just a paper that stays at home to show that he is married.

[94] Asked if he registered his marriage at Home affairs, he stated that he did not register his marriage at Home affairs, that they do not take those documents to home affairs, and that only if the people want to enter into a civil marriage would they give them the document to take to home affairs.

[95] The next witness that testified is **Vivienne DE KLERK** (“De Klerk”)

[96] He testified that he is the senior partner at De Klerk, Marais en Vennote. That he is the plaintiffs attorney. That on 10 November 2010 he accompanied the plaintiff to the Kwa-Mhlanga police station.

[97] He testified that the purpose of the visit to the Kwa-Mhlanga police station was that he received a call from his client /plaintiff who informed him that there were police officers who attended to his house while he was on honeymoon. That he/De Klerk then contacted Rankapole and informed him that he would come to the Kwa-Mhlanga police station with his client/plaintiff on 10 November 2010; which they then did, and they arrived at the Kwa-Mhlanga police station around 08H00.

[98] He further testified that when he learnt of the charges against his client at the Kwa-Mhlanga police station, he advised Mahlangu that the plaintiff was willing to assist them in the investigation of the matter, and that he had a witness present who could provide alibi.

[99] He testified that his client/plaintiff was informed that he had raped two children on 06 November 2010. That they (the defence) tried to respond to these allegations but that he was shocked by Mahlangu’s response when she arrested plaintiff. That they asked her if she was not interested in plaintiffs statement or defence, and she/Mahlangu said that his client/plaintiff can tell his story to the court.

[100] He testified that he thereafter insisted that his client/plaintiff give a full detailed statement as warning statement. That he advised Mahlangu that the plaintiffs wife is present at the police station to confirm the alibi, and that both the plaintiff and his wife are willing to make statements.

[101] He testified that his client/plaintiffs alibi was that he/plaintiff was at his customary marriage ceremony

for the entire day and at time of the alleged rape. That that morning the plaintiff married his third or fourth wife. The marriage took place from morning until the night. He testified that Mahlangu refused to take statements.

[102] He testified that his intention was to apply for bail on 10 November 2010, but that there was a huge argument between him and the state as the state did not want to place the bail application on the roll. That at the proceedings in court, later that morning, the prosecutor wanted a postponement for seven (7) days in order to have Plaintiffs address confirmed, as well as to establish any previous convictions or pending court cases against the plaintiff. But that he/De Klerk objected by placing on record that the plaintiffs address has been confirmed by the investigating officer, and that his client does not have any previous or pending cases. The matter was then postponed for two days, the plaintiff was remanded in custody until Friday 12 November 2010.

[103] He testified that on Friday 12 November 2010 the plaintiff was then granted bail.

[104] He confirmed that he rendered services to the plaintiff.

[105] He testified that the plaintiff presented him with his marriage certificate in respect of the marriage of 06 November 2010.

[106] Under cross examination he stated that the plaintiff was handcuffed and taken to the court orderly.

[107] He stated that he did not write the letter, page 1-3 of exhibit C; that the letter was written by one Louise Dalton, an attorney of his firm. That he knew nothing about the said letter as he had not seen it, he had not perused it; that therefore he cannot comment on the contents of the said letter.

[108] He stated that the alibi witness he had was both a male and a female. That plaintiff informed him that he left his wife for an hour or half an hour, and in that time he was accompanied by a friend of his, hence the reason why both the witnesses were present at the police station on 10 November 2010. That he offered both witnesses, as well as statements of his client and of any of his witnesses but Mahlangu was not interested in hearing anything of the witnesses.

[109] He further stated that the plaintiff was informed of his constitutional rights; that they were intending to remove the veil of the right to remain silent because they were there to put everything in front of the police prior to plaintiff being arrested. That when the police asked him for a warning statement they/defence actually gave a full detailed warning statement to Mahlangu.

[110] He stated that after the arrest of the plaintiff Mahlangu had no choice but to take a full statement from

his client as a warning statement.

[111] Put to him that in his evidence in chief he stated that Mahlangu refused to take statements, contrary to what he just said above that Mahlangu took detailed statement, he stated that after plaintiffs arrest Mahlangu had no option other than to take the warning statement.

[112] He further stated that plaintiff phoned him from his honeymoon and informed him that he was on his honeymoon when the police visited his house.

[113] He stated that plaintiff gave his marriage certificate, that he took it to the police station. Asked why did he not discover it he stated that he is not the attorney that runs/in charge of this civil matter.

[114] He stated that he did not bring an urgent application that his client not be detained because his client did not have funds to go to the High court. Further that he could not advise his client of legal aid because the matter was only postponed late in the afternoon; and that he knew that legal aid would not be granted for a High court urgent application, it would have been a futile exercise.

[115] That concluded the evidence for the plaintiff, and the evidence pertaining to the whole case.

[116] The defendant contends that the arrest and detention of the plaintiff was lawful and that it was effected in terms of section 40 (1) (b) of the CPA. On the other hand the plaintiff contends that Mahlangu, the arresting officer had no reasonable grounds for her suspicion leading to the arrest of the plaintiff.

[117] It is trite law that the onus of proving the lawfulness of the arrest and detention rest with the Defendant; refer **Matlou v Makhubedu 1978 (1) SA 946 (A); Botha v Lues 1983 (4) SA 496 (A) at 502; Brand v Minister of justice 1959 (4) SA 712 (A) 714; Lombo v African National Congress 2002 (5) SA 668 (SCA) par 32; Minister of Law and Order 1986 (3) SA 568 (A) 587 - 589; and Minister of Law and Order v Hurley 1986 (3) SA (A) at 589 E-F.**

[118] The jurisdictional facts required by a police officer to effect an arrest without a warrant are set out in section 40 (1) (b) of the CPA which provides as follows:

“40 Arrest by a piece officer without a warrant

(1) A peace officer may without warrant arrest any person-

(a)...

(b) whom he reasonably suspects of having committed an offence referred to in

Schedule 1 other than (the offence of escaping from lawful custody;... ” (my underlining).

[119] The jurisdictional facts being present, the arresting officer must exercise his/her discretion whether or not to arrest the suspect, properly and *bona fide* and for purposes as contemplated within the meaning of the above provisions; refer **Duncan v Minister of Law and Order, 1986 (2) SA 805 (A), Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA)**.

[120] In **Duncan v minister of law and order 1986(2) SA 805 (A) at 818F-H**

The court listed the jurisdictional facts in terms of section 40 (1) (b) as follows:

- The arresting officer must be a peace officer;
- The arresting officer must entertain a suspicion
- It must be suspicion that the arrestee committed a Schedule 1 offence (other than escaping); and
- That the suspicion must rest in reasonable grounds.

[121] The fourth requirements that the suspicion must rest on reasonable grounds is objectively justiciable: “...*The test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion* ” [at 814d-e]

It is **common cause** that

- the plaintiff was arrested on the 10th November 2010 at approximately 09h00 by sergeant Z P Mahlangu, a member of the South African Police Service, stationed in the Kwa-Mhlanga family violence, child protection and sexual offences unit(The FCS). The arrest took place at the Kwa Mhlanga Police station.
- a charge of rape of two young girls was laid/opened against the plaintiff at the Kwa Mhlanga Police station on 07 November 2010.
- the plaintiff was arrested without a warrant of arrest, in terms of section 40 (1) (b) of the CP
- all charges against the plaintiff (pertaining to his arrest and detention) were subsequently withdrawn.

[122] From the evidence of the defendant witnesses it is appears that the criminal case against the plaintiff emanated from charges of rape of two young children/victims laid by Mina, the complainant herein.

[123] When M[...] opened the case herein she made a statement which was in the docket. The two children also made statements. The statements of the two children/victims were taken by Mahlangu self.

[124] The victims were taken for medical examination on 07 November 2010 by officers at the charge office. When Mahlangu was allocated the docket, it already had Mina's statement and the two J88 in respect of the two victims. On the basis of these Mahlangu and her team started with investigations. They went to plaintiffs home in Mamelodi, they did not find him. His wife did not know where he was. They informed plaintiffs wife that the reason why they were looking for him was because there was a case of rape where it was alleged that plaintiff raped two young girls, who happened to be his girlfriend M[...]’ younger sisters. His wife cried and informed the police that plaintiff likes having relationships with young girls, and that he/plaintiff had impregnated a 15 year old girlfriend. It transpired also on information given to the police that M[...] was also impregnated by the plaintiff at the age of 15 years. At no stage during the cross examination of Mahlangu and Rankapole was it disputed by plaintiffs counsel that M[...] was impregnated by the plaintiff at the age of 15 years. In 2010, at the age of about 18 years M[...] had a child of about 3 years old. In his evidence plaintiff confirmed that he had a child with M [...], and that M[...] was his (ex-) girlfriend.

[125] The complaint of rape involves two young girls aged 12 years and 8 years old. Mahlangu's unit, the FCS is tasked to, amongst others, deal with cases of sexual offences/abuse on children. It cannot be said to be unreasonable for Mahlangu, armed with the information she had, coupled with the statements of M[...] and the two victims, as well as the J88 indicating that something untoward had happened to the young children's genitalia, creating reasonable suspicion of rape, to form a reasonable suspicion that the plaintiff had committed a schedule 1 offence, rape of the two young children, and thus arrested the plaintiff.

[126] It is so that copies of the statements and the J88 which were in the docket were not given to legal teams. This does not mean however, that there were no statements and the two J88 in the docket.

[127] From the evidence before this court, it is clear that Mahlangu acted reasonably in arresting the Plaintiff. She fully explained to the court that on the day of the arrest [10/11/2010], the Plaintiff arrived with his attorney, she had to follow a process of doing her administration with regards the arrest herein, e.g. taking Plaintiffs fingerprints, filling in the necessary forms [SAPS 14 and SAPS 10] prior to taking the plaintiff t court. This, she explained, was done in the crime office at the Kwa-Mhlanga police station in the presence of the Plaintiffs attorney; and this crime office, she explained, was the office they used to do their administration. It surely cannot be expected that the process done by Mahlangu would have been done anywhere else other than at the police station in the crime office.

[128] A charge had been laid by the complainants with the help of the community policing forum. The charge is of a very serious nature, i.e. rape of two minor girls aged 12 and 8 years old. As already stated

above, Mahlangu testified that on her arrival at the police station after she had been called from the office of FCS, she was given a docket in which there was a statement by the two minor children's sister, namely Mina, laying a charge of rape of the two minor children against the Plaintiff, as well as two J88's in which the Dr on examination of the two minor children found that something untoward had happened to the genitalia of the two victims, creating reasonable suspicion of rape.

[129] She further stated in her testimony that she herself personally took down the statements from the two minor children in which they alleged that they were raped by the Plaintiff; and that on the basis of the statements as well as the J88 she formed a reasonable suspicion that the Plaintiff had committed a schedule 1 offence; and that coupled with what the Plaintiffs wife had told the police that the plaintiff has the tendency of engaging in sexual conduct with young girls confirmed her suspicion and thus she arrested and/or laid charges of rape against the Plaintiff, lawfully so, in terms of Section 40 (1) (b) of the Criminal Procedure Act. Rankapole testified that the docket was lost and/or disappeared.

[130] Rankapole corroborated Mahlangu in material respects. There were almost no contradictions in their evidence. Where there were contradictions they were not material.

[131] Both Mahlangu and Rankapole came out as honest witnesses. They both withstood extensive cross examination by a seasoned counsel, especially Mahlangu.

[132] Confronted with the allegations of rape, the Plaintiff and his attorney, according to Mahlangu, informed Mahlangu that he/Plaintiff will talk at court. He/plaintiff basically exercised his constitutional right to remain silent, he through his attorney stated that he will give his statement at court.

[133] As to where he was on the day of the alleged offence [06/11/2010, at around 23H00], there is a material discrepancy between plaintiffs version and that of his attorney. He told Mahlangu and Rankapole that he was attending a meeting at Mpumalanga; his attorney stated that he was at a honeymoon. It is highly improbable that the Plaintiffs wife would not have mentioned anything about a marriage involving the Plaintiff on the particular weekend/Saturday in issue. There is no confirmation of such alleged marriage by anyone on the side of the Plaintiff. On the totality of the evidence before this court there seems to be no truth in either version (of the Plaintiff or his attorney). The story about the alleged marriage seems more like a fabrication in my view. It is interesting to note that it was put to Mahlangu that the woman they/police spoke to on 07 November 2010 at plaintiffs house (who plaintiff said was Agnes) was the lady that got married to the plaintiff the previous day on 06 November 2010.

[134] Plaintiff on his own version, asked by his counsel the reason why he went to Mpumalanga, he stated that he went there to attend the traditional leaders' meeting. At no stage did plaintiff testify that he had gone

to Mpumalanga for honeymoon as alleged by his attorney.

[135] Plaintiff seems to have given his legal representatives misleading and contradicting versions. His evidence was that he was marrying his 3rd wife Angela; that the wife the police spoke to is Agnes, his 2 wife. Further that Agnes knew of the marriage the previous day(06/11/2010).

He does not dispute that indeed the police, including Mahlangu and Rankapole spoke to Agnes on 07 November 2010. He in fact testified that it was Agnes who called him and informed him that the police were looking for him on charges of rape. It is thus highly improbable that if indeed there was a marriage the previous day, i.e. the day of the alleged rape, which Agnes knew about, she would not have informed the police of such marriage ceremony, especially having been informed of such serious allegations against her husband/plaintiff. Instead she cried out that plaintiff likes engaging in sexual activities with young girls, fuelling the suspicions on the part of the police.

[136] As already stated above, Mahlangu came out as an honest witness; she conceded where she had to, her demeanour impressed the court. The same cannot be said of the Plaintiff. He did not come forward as an honest witness; his demeanour was not impressive at all. In his evidence he came with versions which were not even put to the defendant's witnesses. His version differed in material respects to that of his witness, his own attorney; as for example, he testified that he went to Mpumalanga to attend a meeting of traditional leaders, whereas his attorney testified that he went to honeymoon, which plaintiff at no stage mentioned.

[137] He/plaintiff testified that he went to the police station with his new wife, that his headman waited for him in the car because the case did not involve him/the headman. His attorney only under cross examination stated that they went to Kwa-Mhlanga police station with plaintiff's wife and his male friend who would confirm that he was with plaintiff for an hour or half on the evening of 6/11/2010 when plaintiff left his new wife for about an hour.

[138] The Plaintiff's attorney, De Klerk, as to the events of the day of the arrest, differs with Mahlangu as to what transpired. It was never disputed that at all material time Mahlangu communicated to both the Plaintiff and his attorney her intention to have the Plaintiff released on bail on the same day at court i.e. not to oppose bail; there is no reason on the facts before this court to disbelieve that she conveyed this to the prosecutor. After the matter came before the court it was no longer in her hands and/or power to decide the process. Plaintiff's detention thereafter cannot be put at the door of the defendant.

[139] Plaintiff's attorney did not seem to play open cards with the court. He did not come out as an objective witness as would have been expected of an officer of court. The bulk of his evidence on crucial aspects was not even put to the defendant's witnesses [Mahlangu and Rankapole].

[140] In his evidence in chief he testified that Mahlangu refused to take the plaintiff and his wife's statements saying that they will give their statements at court.

[141] In examination in chief he stated that Mahlangu took down plaintiffs detailed warning statement. That after plaintiffs arrest Mahlangu had no choice but to take plaintiffs detailed warning statement. This was never at any stage put to Mahlangu. De Klerk has been an attorney since 1996 from what he informed the court. He is not a lay person he surely knows the importance of putting disputed versions to a witness.

[142] He/De Klerk also under cross-examination contrary to his evidence in chief stated that he went to the Kwa-Mhlanga police station with plaintiff, his now wife, and his male friend. That the male friend was supposed to confirm or give a statement to Mahlangu that on 6 November 2010, on the day of the alleged rape, which plaintiff alleges was his wedding ceremony, he (male friend) was in the presence of plaintiff after plaintiff had left his now wife for about an hour or half an hour that evening (06/11/2010). This was not even put to Mahlangu and/or Rankapole. This is in any event is contrary to plaintiffs evidence who only testified that they went to the police station with his wife to give a statement and that his headman just sat in the car waiting for him as this case had nothing to do with him/the headman.

[143] I have already dealt with the contradiction between plaintiff and his attorney pertaining to where accused was on 07 November 2010 when the police were looking for him. Plaintiff saying he was attending meeting of traditional leaders in Mpumalanga, his attorney saying he was on honeymoon.

[144] Plaintiff and his attorney were not impressive witnesses at all. The version they put before this court seem more like a fabrication. It is so that plaintiffs attorney get instructions from his client, however, he did not come out as an objective impressive witness.

[145] It is clear to this court that Mahlangu in fact treated the Plaintiff with dignity and respect. The fact that a person is alleged to be a chief does not mean that where such a person is reasonably suspected of having committed an offence, the police and/or the court should invent procedures not applicable to all other suspects or citizens of the Republic of South Africa.

[146] Mahlangu, corroborated by Rankapole, was clear on what transpired on the day of the arrest. Plaintiff and his attorney on the other hand gave conflicting versions which were not even put to the police witnesses.

[147] In my considered view, it would have been a dereliction of duty on any police officer like Mahlangu not to arrest a suspect on such allegations made by the complainants together with the J88 she found in the docket.

It may be so that Mahlangu did not give the Defendant's and/or the Plaintiffs legal representative copies of

the docket including the complainant's statements and the J88. This however cannot mean these documents did not exist, as submitted by the Plaintiffs counsel.

[148] I may state that this is a civil claim and not a criminal matter; on a balance of probabilities the police officer [Mahlangu] would not have preferred charges/arrested the Plaintiff for no apparent reason, without the statements and the J88 in the docket. The test is not whether the Plaintiff is indeed guilty or not, or whether there was a strong case against the Plaintiff. That would have been for the criminal court to determine. The test here is whether there was a reasonable suspicion that the suspect/Plaintiff had committed a schedule 1 offence; and on the facts before this court there was. Mahlangu, in my view acted lawfully in arresting the Plaintiff on 10 April 2010.

[149] Accordingly, in my view, because of the fact that the test to be applied is whether the information taken into account by the arresting officer justifying arrest without a warrant is objective, and that the information must have been within the knowledge of the arresting officer prior to the arrest, no information obtained subsequent to the arrest can be, or could have been considered.

[150] Withdrawal of the charges against the plaintiff does not invalidate the arrest and/or render the arrest unlawful. It is surely not the decision of the arresting officer to withdraw charges. From page 1, exhibit B; it appears that the regional prosecutor gave instructions to the public prosecutor to withdraw charges against the plaintiff. No reasons for the withdrawal appears on the papers before court; and such reasons are in any event not relevant for the determination of the issues before this court.

[151] Accordingly, when the relevant information within the knowledge of Sergeant Mahlangu is objectively considered, in my view there cannot be any doubt, whatsoever, that a reasonable suspicion indeed existed that the plaintiff raped the two victims. Mahlangu was entitled to consider all the information, even based on hearsay, and did not have to be convinced that there was in fact evidence proving the guilt of the arrestee/plaintiff beyond reasonable doubt. The latter issue was for the prosecutor, and perhaps later for the trial court, to decide about. The identity of the plaintiff was never an issue. There is no doubt that Sergeant Mahlangu; in arresting the appellant, had the intention to bring him before a court of law, which she did.

[152] Mahlangu testified that rape is a schedule 1 offence, she exercised her discretion in terms of section 40(1)(b) of the Act, which, as already stated above, provides that a peace officer may, without a warrant arrest any person-

.....

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1...;

As stated above, it has been held in **Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H** that the jurisdictional facts for a section 40(1) (b) defence are that:-

- the arrestor must be a peace officer;
- the arrestor must entertain a suspicion
- the suspicion must be that the suspect (arrestee) [the Plaintiff in this case] committed an offence referred to;

[153] From all the facts set out herein it is clear that Mahlangu satisfies the jurisdictional facts aforesaid. she/Mahlangu is a police officer; she entertained a suspicion; M[...] with the assistance of the community policing forum, had laid a charge of rape against the plaintiff and had even made a statement pertaining thereto; the two young victims had also made statements implicating the Plaintiff. There were two J88 in respect of the two victims completed by a Doctor, raising suspicions of rape.

[154] There is no shred of evidence by the Plaintiff in my view which indicates in anyway that in arresting him Mahlangu acted unreasonably and unlawfully when she arrested him.

[155] Objectively, looking at all the facts and on the totality of the evidence before this court, together with the cases referred to by the parties, which I have considered, I am satisfied that the Defendant has proved, on a balance of probabilities that the arrest and the detention of the Plaintiff on 10 November 2010 was lawful and reasonable under the circumstances.

[156] In the result the Plaintiffs claim is dismissed with costs.

L M MOLOPA - SETHOSA J

JUDGE OF THE HIGH COURT