**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 842/2017

In the matter between:

**MINISTER OF POLICE** **FIRST APPELLANT**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** **SECOND APPELLANT**

and

**SIPHO ZWENI** **RESPONDENT**

**Neutral citation:** *Minister of Police and another v Zweni* (842/2017) [2018] ZASCA 97 (1 June 2018)

**Coram:** Ponnan, Willis and Mbha JJA and Makgoka and Hughes AJJA

**Heard:** 23 May 2018

**Delivered:** 01 June 2018

**Summary:** Delictual claim – unlawful arrest and detention – whether detention after lawful arrest but before first court appearance unlawful – whether further detention after first court appearance unlawful.

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**ORDER**

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**On appeal from:** The Eastern Cape Division of the High Court, Port Elizabeth (Malusi AJ sitting as court of first instance):

1. The appeal succeeds with costs, including the costs of two counsel.
2. Paragraph 1 of the order of the high court is set aside and substituted with an order in the following terms:

‘a) The plaintiff’s claim is dismissed with costs.’

3. The cross-appeal is dismissed with costs, such costs to include the costs of two counsel.

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**JUDGMENT**

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**Hughes AJA (Ponnan, Willis and Mbha JJA and Makgoka AJA concurring):**

[1] The respondent, Sipho Zweni, instituted an action against the appellants, the Minister of Police and the National Director of Public Prosecutions, claiming damages for: (a) unlawful arrest; (b) unlawful detention from the date of his arrest, namely 23 September 2010 until his first appearance in court on 27 September 2010; (c) unlawful detention from his first court appearance until his acquittal on 14 February 2012; and (d) malicious prosecution.

[2] The court a quo (Malusi J) dismissed all of the respondent’s claims, save for (a) and awarded him damages in respect of that claim in the amount of R100 000. With the leave of this court, the appellants appeal against the high court’s order on that score and the respondent cross-appeals against the dismissal of his claim (c).

[3] The facts giving rise to the respondent’s claims were these: A female child aged 11, alleged that she was raped on 20 September 2010 by the respondent, who was then 47 years old, in the bedroom of his home. Constable Gregory Harry, who was stationed at the Motherwell police station, was the officer who effected the arrest

of the respondent on 23 September 2010. He testified that the complainant, her mother and another female arrived at the police station to report the incident. Thereafter, he proceeded to the home of the respondent together with the trio, where the complainant identified the respondent as her rapist. He thereafter effected the arrest of the respondent.

[4] The respondent was taken to the Motherwell police station, processed and detained. His first court appearance was on 27 September 2010 and thereafter he was detained at St Alban's prison. On 7 October 2010 the respondent's first formal bail hearing commenced, which he abandoned on 11 October 2011. He made a second application for bail on 2 March 2010, which failed. He thereafter remained in custody until his acquittal on 14 February 2012.

[5] In finding for the respondent in respect of (a) the high court stated:
'The initial detention of the plaintiff is on an entirely different footing. It was foreshadowed in the particulars of claim that the plaintiff asserted his initial detention to be unlawful. Despite this *the defendant led no evidence whatsoever to justify the plaintiff's initial detention*. The justification for detention after an arrest until the first appearance in court continues to rest on the police.' [My emphasis]

[6] I do not agree with the court a quo that the appellants produced no evidence whatsoever to justify the respondent's initial detention. Harry testified:
'…Well, firstly it's a Schedule 6 offence, a very serious offence. And I don't have the authority or the mandate to give a suspect a warning to appear in court that would only be the court's decision. Secondly, the suspect was positively identified by the victim as the person that raped her. And thirdly the distance between…the close proximity between the suspect and the victim was also a major concern for us.'

[7] It came to be accepted during argument on appeal that the respondent's arrest was lawful. It must follow that his initial detention must also have been lawful.[1] And,

[1] *Minister of Safety and Security v Magagula* (991/2016) [2017] ZASCA 103 (6 September 2017) para 15.

as Van Heerden JA explained in *Duncan v Minster of Law and Order* 1986 (2) SA 805 (A) at 821B-C:

'…It is only when a policeman…has subsequent to the arrest, but whilst the arrestee is still lawfully detained, reached the conclusion that *prima facie* proof of the arrested person's guilt is unlikely to be discovered by further investigation that it is his duty to release him from custody…'

Here, there was no such evidence.

[8] Turning to the cross-appeal: The respondent was charged with rape, which is a Schedule 1 and 6 offence in terms of the Criminal Procedure Act 51 of 1977 (the Act). In *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) at paras 42 and 43 Harms DP stated:

'[42] 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 has been exhausted. The authority to detain the suspect further is then within the discretion of the court.*

[43] *The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging – and in some cases stringent – statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstance*…' [My emphasis]

[9] The respondent's release from custody after his arrest was subject, as the court a quo pointed out, to section 60(11)(a) of the Act. That provision reads:

'Notwithstanding any provision of the Act, where an accused is charged with an offence referred to –

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release;'

[10] The respondent's detention after his first appearance in court is dependent upon the lawfulness of the magistrate's orders. There is no evidence that any of

the magistrates who presided in the respondent's criminal case behaved in an unlawful manner. In any event, a magistrate is not a servant of, and no liability can be attributed to the first appellant for such conduct.[2] Moreover, in both the aborted, first and the failed, second application for bail, the respondent would hardly have been able to satisfy the court that there were exceptional circumstances present that justified his release, particularly since the respondent already had a previous conviction for the rape of a minor child. That factor he would have been obliged to disclose to the court seized with the bail application. It follows that in finding that his continued detention was not unlawful, the high court cannot be faulted. In the result the cross-appeal must fail.

[11] Accordingly, the following order is made:

1. The appeal succeeds with costs, including the costs of two counsel.
2. Paragraph 1 of the order of the high court is set aside and substituted with an order in the following terms:

'a) The plaintiff's claim is dismissed with costs.'

3. The cross-appeal is dismissed with costs, such costs to include the costs of two counsel.

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W Hughes

Acting Judge of Appeal

[2] *Minister of Safety and Security v Magagula* para 16.

APPEARANCES

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| For the Appellant: | A Beyleveld SC (with him B Naran) |
| Instructed by: | State Attorney, Port Elizabeth |
| | State Attorneys, Bloemfontein |
| For the Respondent: | B Dyke SC (with him E Dyer) |
| Instructed by: | O'Brien Incorporated, Port Elizabeth |
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