



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **1582/2019**

In the matter between:

M D M

Plaintiff

And

MINISTER OF POLICE: REPUBLIC OF SOUTH AFRICA

First Defendant

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS:
(NDPP)**

Second Defendant

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 13 JUNE 2022

DELIVERED ON: 13 DECEMBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h30 on 13 DECEMBER 2022.

[1] On 09 April 2019 Mr M D M (the plaintiff) instituted action for unlawful arrest and detention, and malicious prosecution against the Minister of Police (first defendant) and National Director of Public Prosecutions (second defendant, "NDPP"), claiming an amount of R2 500 000.00 (jointly and severally) being

damages in respect of *contumelia*, embarrassment, impairment of his dignity, reputation and humiliation.

- [2] In the matter at hand the first defendant admitted to the arrest and subsequent detention of the plaintiff, but pleaded that it was justified because the arresting officer had a reasonable suspicion that plaintiffs had made themselves guilty of an offence as referred to in Schedule 1 Act 51 of 1977, namely rape of a minor girl child.
- [3] The plaintiff claims damages within two categories. In the first category plaintiff alleges in his particulars of claim that he was wrongfully and unlawfully arrested on a charge of rape (without any reasonable grounds) and detained on 18 May 2017 without a warrant by the arresting officer, a member of Tweeling South African Police Service acting within the course and scope of his employment as an employee of the first defendant. Plaintiff remained so detained at the Frankfort Correctional Services until his acquittal on 05 September 2018.
- [4] The second category relates to a claim for damages for malicious prosecution in that the defendants wrongfully and maliciously set the law in motion by detaining and charging the plaintiff on a charge of rape, in circumstances where there was lack of a reasonable and probable cause.
- [5] The matter was placed before me for adjudication in respect of the merits of the case only at this stage, with the determination of quantum to stand over for later adjudication in the event that the court finds in favour of the plaintiff.
- [6] The first defendant disputed the unlawfulness of both the arrest and subsequent detention. More specifically, reliance is placed on s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) [which stipulates that a peace officer may without a warrant arrest any person "*whom he reasonably suspects of having committed an offence referred to in Schedule 1 ...*"].
- [7] First defendant pleaded that:

- “6.1 The arresting officer was a peace officer as defined in Act 51 of 1977.
- 6.2 On or about 2 May 2017 a case of rape under CAS 07/05/2017 was opened at Tweeling Police Station.
- 6.3 During preliminary investigations the members of the first defendant discovered that the plaintiff had fled to Soweto in Gauteng.
- 6.4 The plaintiff was traced and on or about 18 May 2017 the plaintiff was lawfully arrested and detained for the above offence.
- 6.5 The plaintiff was lawfully detained at the Mafube Police Station from approximately 14h30pm on the 18 May 2017 until approximately 7h40am on the 19 May 2017 when he was taken to the Frankfort Magistrate Court.
- 6.6 The plaintiff first appeared in the Frankfort Magistrate Court on the 19 May 2017.”

[8] In its plea the second defendant denied that the prosecution of the plaintiff was malicious and wrongful, and pleaded as follow:

- “14.1 A criminal case of rape (of a minor) was opened against the plaintiff.
- 14.2 The statement of the complainant linked the plaintiff to the rape; the plaintiff was the uncle of the complainant.
- 14.3 The decision to prosecute the plaintiff was taken in good faith in that there existed a reasonable possibility and belief that the plaintiff might be found guilty of rape.
- 14.4 There was therefore reasonable and probable cause to prosecute the plaintiff for rape.
- 14.5 The members of the second defendant did not act with malice or *animus iniuriandi* or with the intention to defame the plaintiff.
- 14.6 The members of the second defendant carried out their duties as imposed on them with the necessary skill and diligence as required.
- 14.7 The second defendant admits that the plaintiff was acquitted of the charges against him.”

[9] The first defendant bore the onus of proving that the said arrests were lawful. In **Duncan v Minister of Law and Order**¹ it was held that:

“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.

¹ 1986 (2) SA 805 (A)

(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.”

[10] Langa CJ in **Zealand v Minister of Justice and Constitutional Development and Another**² stated as follows:

“The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom... the respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

[11] In **Duncan supra** reference was made to **Ingram v Minister of Justice**³ where the test to be applied was stated as follows:

“The words, “reasonable suspicion” in s 40 may tend to indicate some subjective test to be applied; however, that is not so; the test as to whether “reasonable suspicion” could have existed and did exist, is it to be determined by an objective standard, namely that of the reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer.”

[12] The crucial question to be asked is stated as follows in **Mabona and Another v Minister of Law and Order and Others**⁴:

“Would a reasonable man in the second defendant’s position and possessed with 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 be stolen? The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept 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 the information at his disposal must be of sufficiently high quality and cogency to engender in him conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds.”

² 2008 (4) SA 458 (CC)

³ 1962 (3) SA 225 (W) at 229 G-230A

⁴ 1988 (2) SA 654 (SE) at 658 E-G

and further⁵

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 is objective.

[13] In **Nxomani v Minister of Police**⁶ it was held that:

“reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion. The arrester’s grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a “reasonable” suspicion before the peace officer arrests.”

[14] Moreover, the quality and source of the arresting officer’s information is to be considered critically.⁷

[15] When instituting a claim against the National Director of Public Prosecution for malicious prosecution, a plaintiff must convince the court on a balance of probabilities that the NDPA prosecuted a plaintiff without reasonable and probable cause.

[16] In **Minister of Constitutional Development and Others v Moleko**⁸ the requirements to succeed with such a claim, which must exist cumulatively, was set out:

- a. that the defendants set the law in motion (instigated or instituted the proceedings);
- b. that the defendant acted without reasonable and probable cause;
- c. that the defendant acted with malice (or *animo iniuriandi*); and
- d. that the prosecution has failed.”

It was common cause between the parties that the first and fourth requirements existed, thus the dispute centred around the second and third requirement.

⁵ Ibid 656 B-D

⁶ (123/2017) [2020] ZAECBHC 27 (13 October 2020) at [109]

⁷ **De Klerk v Minister of Police** at paragraph 11; **Mvu v Minister of Safety and Security** 2009 (6) SA 82 (GSJ) at 90A

⁸ 2009 (2) SACR 585 (SCA) at para [8]

- [17] The test to be applied by prosecutor before instigating prosecution against an accused, namely reasonable and probable cause, is set out in **Patel v National Director of Public Prosecutions and Others**.⁹

“A prosecutor exercises discretion on the basis of the information before him or her. In **S v Lubaxa** this Court said the following:

“Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”

- [18] The plaintiff personally testified and the defendant called the arresting officer (Sergeant BE Nakane) and the prosecutor (Me AM De Beer). In respect of the plaintiff’s evidence it might be noted that he denied any involvement in the commission of the crimes instituted in the regional court and it was common cause that he was arrested on 08 May 2017, later tried and acquitted. His evidence did not suggest any altercations before the arrest with Mr Nakane nor with Me De Beer who made the decision to proceed with the prosecution.
- [19] Mr Nakane confirmed that he arrested the plaintiff. Before the arrest he did not know the plaintiff and he arrested the plaintiff simply because he was executing his lawful duty. He arrested the plaintiff without a warrant but did so in terms of s 40(1)(b) of the CPA which authorises a peace officer to arrest any person when the peace officer reasonably suspects such a person of having committed an offence in terms of Schedule 1. In **MR v Minister of Safety and Security and Another**¹⁰ it was held that the section confers a discretion upon the arresting officer. The court noted that it is “neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the

⁹ 2018 (2) SACR 420 (KZD) at para [23]

¹⁰ (CCT151/15) [2016] ZACC 24; 2016 (2) SACR 540 (CC) at para [42]

unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime”.

[20] Mr Nakane, before arresting the plaintiff, had in his possession the statement of the complainant identifying the plaintiff as the perpetrator. In particular, he obtained the J88 report by Dr GJ dated 03 May 2017 and which indicated in para [5] thereof that the complainant was sexually assaulted and sodomised. The report therefore corroborated the complainant’s version that she was sodomised. That this information was in his possession could not be disputed or at least seriously disputed. Sgt Nakane testified that he considered the available evidence and realised that it was a serious offence. An additional factor in the sergeant’s mind was that the plaintiff knew from 02 May 2017 that the police was looking for him but not only failed to present himself, but left his abode. He traced the plaintiff and in those circumstances decided to arrest the plaintiff. In as far as the arrest therefore is concerned the sergeant was satisfied that he was entitled to arrest the plaintiff in view of the authority granted to the sergeant in terms of s 40(1)(b). Having listened to these evidence and in the absence of any other evidence I cannot find that the arrest was either unlawful or malicious.

[21] Very much the same may be said about the evidence of M d B. There was no suggestion that she had any personal vendetta with the plaintiff. Her testimony was that she carefully considered the versions of the witness’ statements and her decision to prosecute was solely based on the evidence available in the police docket. She applied her mind and came to the conclusion that the prosecution should proceed. In *casu* the onus rested on the plaintiff to convince me on a balance of probabilities that the second defendant had no reasonable or probable cause for the prosecution or at least no such cause to continue with the prosecution and/or that the second defendant did not have any reasonable belief in the truth of the information at her disposal. The evidence tendered by second defendant rather convinces me otherwise.

[22] It therefore follows that the plaintiff’s claim against neither of the defendants can be sustained in my view.

[23] Wherefore I make the following order:

1. The plaintiff's claims against the defendants are dismissed with costs.

C REINDERS, AJDP

On behalf of the plaintiff:

Adv ID Masako
Instructed by:
Matlho Attorneys
BLOEMFONTEIN

On behalf of the 1st and 2nd defendants:

Adv ND Khokho
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