IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNSEBURG

CASE NO. A5064/19

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the matter between:

MINISTER OF POLICE	First Appellant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Appellant

and

MZOKHULAYO MTEMBU	Respondent

Coram: Wepener et Kuny JJ et Msibi AJ

Date of hearing: 5th October 2022

Date of Judgment: 31 October 2022

JUDGMENT

MSIBI, AJ:

BACKGROUND

[1] In this matter the respondent, Mr Mtembu, instituted a civil claim against the Minister of Police, pursuant to his arrest on the 16th of February 2016. The allegations against the respondent were that he raped his 18 years old step daughter. On the 17th of February 2016 the respondent appeared in the Palm Ridge Magistrate Court. He remained in custody without bail until the matter was withdrawn by the prosecutor on the 11th of May 2016.

[2] The respondent then instituted a civil claim for unlawful arrest, detention and malicious prosecution against the appellants.

THE TRIAL COURT'S DECISION

[3] The civil claim was heard in the High Court which delivered judgment on 11th of June 2019, as per para 36 of the judgment as follows:

'1) The arrest and detention of the plaintiff on the 16th of February 2016 up to his release on the 11th of May 2016 is wrongful and unlawful:

2) The first defendant is liable for the arrest and detention of the plaintiff from 16 February to the 17th February 2016;

3) The first defendant is liable to pay damages to the plaintiff in the sum of R100 000-00 within 30 days from the date of this order;

4) The first defendant is liable to pay interest on the said sum of R100 000-00 at the rate of 9% per annum from date of summons to the date of payment;

5) The second defendant is liable for the detention of the plaintiff from 17th of February 2016 to 11th of May 2016 (excluding the 4 days postponements which were occasioned by the attorney for the plaintiff);

6) The second defendant is liable to pay damages to the plaintiff in the sum of R650 000-00 within 30 day from the date of this order;

7) The second defendant is liable to pay interest at the rate of 9% per annum on the said sum of R650 000-00 from the date of summons until the date of payment;

8) The first and second defendant are liable, jointly and severally the one paying the other to be absolved, for the costs of the action, on a party and party scale.'

[4] The plaintiff's claim for malicious prosecution was dismissed by the trial court.

[5] The appellants noted leave to appeal the judgment and order, and were granted leave to appeal to the full bench of this court. Leave to cross appeal was also granted to the respondent to pursue the claim for malicious prosecution.

THE ISSUES

[6] At issue in this appeal is:

6.1. Whether the respondent's arrest was unlawful or not. It is clear from the plaintiff's particulars of claim that the unlawfulness stems from an allegation that he was not informed of the charge against him nor of his constitutional rights.

6.2. Whether the servants of the first appellant and the National Director Of Public Prosecutions (the NDPP), acted unlawfully by enrolling the rape case against the respondent on the court roll and not granting him bail on his first appearance in court.

6.3. Based on the respondent's cross appeal to the dismissal of their claim for malicious prosecution, the court has to determine whether the servants of the NDPP instigated the prosecution against the respondent and if so, whether such prosecution was malicious.

THE ARREST AND CONTINUED DETENTION

[7] The facts leading to the arrest of the respondent were presented to the trial court by Captain Shezi. On the 16th of February 2016, he was in the charge office when the complainant and her cousin made a report to him that the complainant had been raped by her step-father, the respondent, in January 2016. The complainant stated that she failed to report the incident shortly after if happened due to the fact that the respondent threatened to kill her if she told anyone. Captain Shezi was accompanied by the complainant and her cousin to her home which she shared with the respondent. The residence, which was a shack, was pointed out by the complainant and the respondent was found at home. Captain Shezi informed him of the charge against him and arrested him. He thereafter informed him of his constitutional rights, and detained him. The respondent refused to sign the notice of rights after it was read and explained to him. Captain Shezi further stated that he had grounds to arrest the respondent due to the serious nature of the charge and the fact that he had made threats against the complainant's life. During cross examination by the respondent's legal representative, the following emerged:

> ‘MR MTHOMBENI: The plaintiff will come and testify that he was never ever explained his rights and this document was never ever placed before him for signature.
>
> MR SHEZI: It has been handed over to him after it was duly explained to him but handing it over to him Your Worship, he refused to sign the document.
>
> MR MTHOMBENI: **He will testify that he said he wants to sign in front of his lawyer**.
>
> MR SHEZI: Ja, he said that anything whatever he sign before his, during the presence of his lawyer.
>
> MR MTHOMBENI: But as the . . . police officer who explained his rights do you agree that you should be the witness [indistinct] ?
>
> INTERPRETER: sorry?
>
> MR MTHOMBENI: You should be a witness of him signing the document. You co-sign in front of each other, you sign, he signs.
>
> MR SHEZI: Ja, that is his rights yes he can sign’

[8] Advocate Ngcobo was the control prosecutor who enrolled the matter on the 17th February 2016, the day of the respondent’s first appearance. His evidence was that the statements obtained from the complainant and her cousin, together with the J88 form, established a prima facie case which justified the enrolment of the matter on the court roll. He held the view that there were reasonable prospects of a successful prosecution in the matter. He still does not share the view held by his subordinate prosecutor who withdrew the matter on the 11th of May 2016.

[9] Warrant Officer Vilakazi was the investigating officer in this matter. She received the case docket on the 23rd of February 2016, seven days after the arrest of the respondent. She was instructed, amongst others, to verify the respondent’s alternative residential address. After two failed attempts, she managed to get hold of the landlord on her third visit. He confirmed that alternative accommodation can be availed to the respondent. On the 10th of May 2016 she was instructed by the prosecutor to bring the complainant for consultation, which she did. The matter was withdrawn the next day by the prosecutor, who was of the view that there was a lack of evidence against the respondent.

10] The respondent testified that he was at home when police officers arrived at his shack, established his identity and arrested and handcuffed him. He was not told the reason for his arrest but only told that he accused of being a rapist. He saw the complainant and her cousin outside the house while he was escorted to the police vehicle.

Neither his constitutional rights were explained to him nor was he given any document to sign. He was afraid to enquire about the reason for his arrest since he feared that the police would shoot him. In the same breath he stated that when he asked Captain Shezi the reason for his arrest he was told that he is a rapist.

[11] There is also undisputed evidence to the effect that the respondent, before leaving his residence, was afforded an opportunity to fetch his medication and a cell phone. As rightly pointed out by counsel for the appellant in their heads of argument the respondent's version in this regard is contradictory. In his own words, he knew the reason for his arrest. If Captain Shezi was prepared to afford him the opportunity to fetch his medication and a cell phone, it is highly unlikely that he would refrain from informing him the reason for his arrest or neglect to explain his constitutional rights. In fact, this contradicts his version that he was afraid to enquire the reason for his arrest, fearing that the police would shoot him. If he was indeed afraid, he would not have asked and been afforded this right.

[12] The respondent's version put by his counsel during cross-examination of Captain Shezi, that he wanted to sign the notice of rights furnished to him in front of his lawyer, confirms Captain Shezi's version. It contradicts the respondent's evidence that he was not explained his rights. Having regard to this, the respondent's evidence that he was not read his rights cannot be accepted. I accordingly disagree with the trial court's finding on this aspect. This was the only basis upon which the court *a quo* found that the respondent's arrest was unlawful. In my view, it must be concluded from the evidence that the respondent was explained his rights soon after he was arrested. Accordingly, his arrest was lawful.

[13] Section 50(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act) provides that:

> 'Any person who is arrested with or without a warrant of arrest for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant. A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her rights to institute bail proceeding'

[14] The respondent in this case was facing a Schedule 5 offence. The onus rested on him in terms of s 60(11)(b) of the Act to satisfy the magistrate that the interests of justice permit his release on bail. From the magistrate's court proceedings as reflected in the

charge sheet, on the 2nd of March 2016 the prosecutor indicated to the court that the respondent's residential address had been verified. The matter was then postponed to 4th of March 2016 for legal aid assistance. On the 4th of March the legal aid attorney was absent. It was established and brought to the attention of the court on the 8th of March after consultation between the respondent and his attorney that he shared the same residence with the complainant. On 23rd of March warrant officer Vilakazi received the instruction to verify an alternate residential address for the respondent. There is no evidence on record that the prosecution frustrated his attempts to apply for bail. On the contrary, the prosecutor indicated that he would not oppose the respondent's application for bail.

[15] It was also in the interests of justice to establish an alternative address for the respondent, to avoid him sharing the same residence with the complainant, having regard to her age and vulnerability and the serious accusations she had levelled against the respondent. There is also no evidence on record to show that the respondent's legal aid attorney's application for bail was not entertained, either by the magistrate or the prosecutor. It is probable that the defence did not apply for bail since they knew that it was likely that the respondent would be admitted to bail once an alternative address had been verified. From her evidence, warrant officer Vilakazi received the case docket for the first time on the 23rd of February 2016 with the prosecutor's instruction to establish an alternative residential address for the respondent. She finally established this on her third visit, on the 20th of April 2016.The matter was ultimately withdrawn by the prosecutor on the 11th of May 2016 after consultation with the complainant.

[16] From the abovementioned facts the respondent's detention after his first appearance is normally what would be expected in a case where the accused had been charged with a Schedule 5 offence.

[17] The prosecution was proactive in making its stand known to the court as far as bail is concerned; knowing that bail will not be denied, making it easy for the defence to navigate the proceedings. The respondent's continued detention was no longer in the hands of the police, nor the prosecution but by operation of the law.

MAILICOUS PROSECUTION

[18] In his argument in respect of the cross appeal, counsel for the respondent submitted that the court *a quo* erred in dismissing the respondent's claim for malicious prosecution

against the servants of the NDPP. As illustrated by the conduct of NDPP after the respondent's first appearance in court , the intention of the control prosecutor in enrolling the matter was to successfully prosecute the charge against the respondent. Ngcobo's evidence was that even without the form J88 he believed that there was a reasonable prosect of a successful prosecution against the respondent. As a result he was of the opinion that the matter should not have been withdrawn. Vilakazi attributed the withdrawal of the case against the respondent to the inexperience of the prosecutor who was dealing with the matter on 11 May 2016.

THE LAW

[19] In *De Klerk v Minister of Police*[1] the appellant was arrested by a police officer on a charge of assault with intent to cause grievous bodily harm. He was taken to Randburg Magistrates Court holding cells. He was not afforded an opportunity to apply for bail despite the fact that the police officer recommended bail at the amount of R1000-00. The matter was postponed and the magistrate ordered that he remained in custody until his next appearance, which was the date of his release on the 28th of December 2012. It was held that the arrest and detention of the appellant was unlawful, as such he was awarded damages.

[20] In the abovementioned matter Mr De Klerk had been arrested on a Schedule 1 offence. The law empowers the arresting officer to issue him with a written notice to appear in court or to recommend bail. The facts in this matter are different in that in casu the respondent had been arrested on a Schedule 5 offence. His arrest and detention was governed by s 60(11)(b) of the Act which provides as follows:

> 'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to.-
>
> (b) in Schedule 5, but not 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 the reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.'

This legislation is peremptory; it does not bestow a discretion on the SAPS, NDPP or the presiding officer to grant bail. I agree with counsel for the NDPP that the arrest was lawful. The same applies to his continued detention.

[1] [2019] ZACC 32.

[21] In *Patel v National Director of Public Prosecutions*[2] the court considered the test in a claim for malicious prosecution against the NDPP and its servants. The requirements to prove malicious prosecution as discussed in *Minister of Justice and Constitutional Development v Moleko*[3] were applied in *Patel*[4] as follows:

> 'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-
>
> (a) that the defendants set the law in motion (instigated or instituted the proceedings);
>
> (b) that the defendants acted without reasonable and probable cause;
>
> (c) that the defendants acted with malice(or animo injuriandi) and
>
> (d) that the prosecution has failed.'

[22] The prosecution against the respondent was triggered by the charge of rape that was initiated by the complainant. Thus it cannot be said that the appellants instigated or instituted proceedings against the respondent. They proceeded with the prosecution of respondent as they were required to do in accordance with the provisions of the law. In my view, in doing so the NDPP acted with reasonable and probable cause. There is no evidence of *animus injuriandi*, that can be deduced from their conduct. Ngcobo evidence was that that there was a prima facie case against the respondent and that there was a reasonable prospect of securing a conviction. Vilakazi supported his evidence by testifying that she was not satisfied with the withdrawal of the prosecution of the respondent.

[23] It is therefore, my considered view that the respondent's claim for malicious prosecution does not meet the requirements discussed in *Patel.*[5]

CONCLUSION

[24] Having considered the evidence presented to the court *a quo*, its subsequent judgment and submissions made before this court on appeal, I make the following finding;

1. that the respondent's arrest was lawful;
2. that the respondent's continued detention was lawful;
3. that there is no improper motive or malice on the part of the appellants.

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[2] (434/15)[2018] ZAKZDHC17(13 June 2018).
[3] [2008] (3) ALL SA 47 217 (SCA).
[4] Supra.
[5] Supra.

ORDER

[25] In the result the following order is made:

1. The appeal is upheld with costs
2. The cross appeal is dismissed;
3. The order of the court *a quo* is set aside and replaced with the following: ‘The plaintiff’s claim is dismissed with costs’

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S. MSIBI

Acting Judge of the High Court

I agree.

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W. L. WEPENER

Judge of the High Court

I agree.

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S. KUNY

Judge of the High Court

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