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



Case number: 27069/2014

Date:

8/12/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHERS JUDGES: YES/ NO
(3) REVISED

8/12/2017


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SIGNATURE

In the matter between:

ANDILE MBIZA

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) The plaintiff instituted an action for damages pursuant to an alleged

unlawful arrest and detention, as well as malicious prosecution. The defendant denied any liability in the plea and alleged that its actions were lawful.

THE PARTIES:

- (2) The plaintiff is an adult male, a 46 year old construction worker.
- (3) The defendant is the Minister of Police, in his official capacity as the Minister of the South African Police Service.

THE FACTS:

- (4) At the outset, before any evidence was lead, the defendant conceded that the arrest and detention had been unlawful but denied malicious prosecution. This court has to consider and determine the quantum of damages, as well.
- (5) The action is based on an incident which occurred on 14 May 2012 at 01h00 at the plaintiff's residence in Klerksdorp. The plaintiff was confronted by members of the South African Police Service ("SAPS") in his home and arrested without a warrant of arrest. He was subsequently detained at the Klerksdorp Police Station on allegations of "*Dealing in diamonds and possession of ammunition*". He remained

in custody at the police station and appeared in court on 16 May 2012 in Klerksdorp. The case was postponed on more than one occasion for a bail application. The plaintiff was only granted bail of R500 on 7 June 2012. On 26 June 2013 the Senior Prosecutor declined to prosecute the plaintiff and the case against the plaintiff was withdrawn.

- (6) The plaintiff, Mr Andile Mbiza testified that on 14 May 2012 he was at home with his wife and his baby son. He noticed suspicious activity from his balcony on the first floor and saw persons, in private clothing and wearing balaclavas. He contacted the SAPS and reported the matter. These men then broke down his front door and 6 or 7 men entered his house without identifying themselves. They tied him up with cable ties and assaulted him by beating him. During the search of the house a magazine with rounds were found and he was questioned as to the whereabouts of the firearm. It later transpired that he had a licence for the firearm. Two uniformed police officers arrived at the scene, but did not assist him.
- (7) He was transported to the Klerksdorp Police Station. He only realized at the police station that the people in civilian dress wearing balaclavas were policemen.
- (8) These policemen wanted to take him to Johannesburg, but a police officer, in uniform, decided that he was not to accompany these

individuals to Johannesburg. He was then detained, after one of the policemen removed certain gemstones from his pockets, which had been found in the plaintiff's house. He denied that these stones were diamonds and informed them that it was from Mozambique.

- (9) He remained in the Klerksdorp police cells and was taken to court on 16 May 2012. The case was remanded until 23 May 2012 for a bail application. He appeared in person on this first occasion. He was then detained at the Potchefstroom prison. He was legally represented when appearing in court on 23 May 2012, but the case was once more postponed, for a formal bail application, to 6 June 2012. On 6 June 2012 it was once more postponed to 7 June 2012. On 7 June 2012 bail was granted in the amount of R500. The final withdrawal of the case against him, only took place on 26 June 2013.
- (10) The plaintiff, during cross-examination, admitted that he had not instituted proceedings against the policemen who had assaulted him, as he was scared of the police due to his treatment by the police.
- (11) After the plaintiff had closed his case the defendant's counsel called Reservist Constable Lerite, who was on duty on the evening the plaintiff was arrested. He was a member of the back-up team at the plaintiff's residence. According to him a warrant of arrest and a warrant to search the premises had been shown to the plaintiff. This

version was not put to the plaintiff. According to him they found a scale, a magazine with rounds of ammunition and "shiny stones". He did not take part in the search, but was only an observer. After the plaintiff had been taken to the police station he had no further contact with the plaintiff.

(12) He only deposed to a statement during September 2012 and not, as he had originally testified, on 15 May 2012. He made the statement after the investigating officer had requested him to do so. His further concessions were that he had not read the warrants, had not found any of the items himself and that he did not know the so-called "crime intelligence members", or where they had come from. His was the only evidence for the defendant and due to the concession of the unlawful arrest by the defendant, could take the matter no further.

(13) Counsel for the defendant argued that when the magistrate enquired from the plaintiff on 16 May 2012 whether he had any application at that stage, the answer was "no". However, this must be dealt with in the applicable context as this whole section, which was explained to the plaintiff, dealt with legal representation and had nothing whatsoever to do with bail. There was no indication at all that bail was mentioned on 16 May 2012. It is clear from the record from the magistrates court that the matter was postponed to 6 June 2012 for a bail application and then again to 7 June 2012. On 15 May 2012

Warrant Officer Voges completed a form with information for the prosecutor where he indicated "*should bail be opposed*" and indicated "yes" and mentioned the name of the person who was going to oppose bail.

- (14) I find that the first opportunity the plaintiff had to apply for bail was 7 June 2012. He was thus in custody for 25 days. The only issue, according to counsel for the defendant, is that the defendant submits that he was only in custody from 14 to 16 May 2012 and that it was through his own inaction, by not applying for bail, that he was in custody for such a length of time. Unfortunately for defendant the record of proceedings in the magistrate's court and the plaintiff's evidence do not sustain such a contention. The defendant failed to provide any evidence and the court finds that the plaintiff appeared to be an honest witness, who gave his evidence in a clear and calm manner.

- (15) I must agree that the plaintiff was arrested with an ulterior motive, as his evidence was that the police member, dressed in private clothing, wanted to take him to Johannesburg, although he had been arrested for crimes committed in Klerksdorp. There is no explanation from the defendant as to why none of the individuals, who affected the arrest, could come to court and testify. The court has the evidence of the plaintiff, which I accept in this regard. The evidence of Reservist

Constable Lerite takes the matter no further in regards to malicious prosecution.

- (16) To determine whether a claim for malicious prosecution can succeed the plaintiff has to prove that the defendant had set the law in motion by instituting a prosecution without reasonable or probable cause, as was the case here, as the unlawful arrest had been conceded. In the present instance it is clear that the defendant's actions were actuated by malice or *animo inuriandi*. See **Minister of Justice v Moleko**¹. It is clear that on 1 June 2012 Warrant Officer Louwrens set out in the Investigation Diary: "Skakel weer Kpt Mokobi 0714813123 ivm die borg aansoek. Hy oorhandig die foon aan Kst Motswana wat die OB is in OR Tambo CAS 38/05/2012. Kst Motswana lig my in dat hy nog besig is met die ondersoek. Sy kontak nommer 0714813811 en beloof om my terug te skakel met 'n rede hoekom ek borg moet opponeer vir hulle". There is no explanation from the defendant for this entry, which makes it clear that there was no reason to oppose bail in the case the plaintiff had been arrested for and that instructions would be forthcoming as to why bail should be opposed from another branch of the police. This is a clear indication that the investigating officer did not consider all the facts at his disposal and opposed bail on spurious grounds, at the instance of another branch of the police.

¹ [2008]3 All SA 47 (SCA) at paragraph 8 and 64

- (17) In Minister of Police and Another v Du Plessis² Navsa ADP held:

[18] In respect of Du Plessis' claim against the police, we are faced with a position where it is accepted that a basis existed for the arrest, but it is contended that a most cursory investigation by the police immediately thereafter would have resulted in them becoming aware of his innocence, and that this ought to have led to his release. In short, Du Plessis pleaded that the police owed him a legal duty and that in breach of that duty they failed to cause even the most perfunctory enquiries to have been made, which would have resulted in his release. The state contends that after his initial lawful arrest there was no duty on the police to consider whether Du Plessis' further detention was justified."

In the present matter the State similarly denies any duty to determine whether the detention from 16 May 2012 until 7 June 2012 was justified.

- (18) Section 12(1)(a) of the Constitution guarantees the right not to be deprived of freedom arbitrarily or without just cause. It is clear, not only from the concession by the defendant, that the arrest was unlawful, but also from the inscription in the Investigating Diary that the plaintiff was detained without just cause. Therefor the plaintiff has a claim for delictual damages. In Zealand v Minister of Justice and

² 2014 (1) SACR 217 (SCA) at paragraphs 18

Constitutional Development and Another³ Langa CJ held:

"This reasoning ignores the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause contained in s 12(1)(a) of the Constitution. That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not 'arbitrary or without just cause'.

This is not an appropriate case to traverse fully the complex relationship between public law duties and private law remedies. Suffice it to say the following. I can think of no reason why an unjustifiable breach of s 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention. Moreover, South Africa also bears an international obligation in this regard in terms of article 9(5) of the ICCPR, which provides that

(a)nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

(19) In **Woji v Minister of Police⁴** the Supreme Court of Appeal held:

³ 2008(4) SA 458 CC at paragraph 43 and 52

⁴ 2015(1) SACR 409 (SCA) at paragraphs 26 to 28

"The effect of the Constitutional Court's decision is that the remand orders issued by successive magistrates did not render lawful the unlawful detention of the appellant as a sentenced prisoner, when his status should have been that of an awaiting trial prisoner.

Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of s 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages."

- (20) Although the defendant had conceded that the arrest and subsequent detention from 14 May 2012 until 16 May 2012 was unlawful, there can be no doubt that the detention for the period 14 May 2012 until 7 June 2012 was unlawful, as the prosecution was initiated by members of the defendant on 15 May 2012 and was unlawful.
- (21) There is no version before court from the defendant and the plaintiff's evidence that police officers from "Crime Intelligence" attempted to take plaintiff to Johannesburg, outside the jurisdiction where the alleged crimes had been committed, must be believed. The court finds that the investigating officer wilfully and maliciously opposed bail in an attempt to obtain a J50 warrant to further detain the plaintiff. This

effort failed dismally and the plaintiff was granted bail on 7 June 2012.

Having regard to the above authorities it is clear that the right not to be deprived of his freedom had been violated.

- (22) In **Minister of Safety and Security v Tyokwana**⁵ Fourie AJA found:

"In my view the respondent has shown that the circumstances in which the appellant's employees instigated and persisted with his prosecution amounted to an unjustifiable breach of s 12(1)(a) of the Constitution. This is sufficient to establish delictual liability on the part of the appellant for the full period of the respondent's detention from 2 October 2007 to 20 July 2009."

- (23) In these circumstances, after considering the plaintiff's evidence, the facts placed before court and applying the principles set out in the above authorities, I find that the plaintiff has proved, on a balance of probability, delictual liability by the defendant, for the period from 14 May 2012 to 7 June 2012.

- (24) The plaintiff's arrest and detention was unlawful and establishes a delictual claim for damages. The plaintiff has also proven malicious prosecution on a balance of probabilities. I find the defendant to be liable towards the plaintiff for damages for unlawful arrest and

⁵ 2015 (1) SACR 597 (SCA) at paragraphs 41 and 44

detention from 14 May 2012 until 7 June 2012.

QUANTUM:

- (25) It is so that awarding damages for wrongful arrest, detention and malicious prosecution is not to enrich the plaintiff, but a mere *solatium* for his injured feelings. In **Minister of Safety and Security v Tyulu**⁶ the Supreme Court of Appeal dealt with the question of determining damages in these and similar cases. The courts were cautioned to ensure that awards made in these circumstances “reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law”.
- (26) Although the court takes cognisance of previous awards in similar situations, it cannot be bound by such awards, as each case has to be decided on its own merits and particular circumstances.
- (27) I agree with Kubushi J where she held in **Strydom v Minister of Safety and Security and Another**⁷ that time spent in detention is not the only fact to be considered.

⁶ 2009(5) SA 85 (SCA)

⁷ (31353/2007) [2014] ZAFSHC 73 (28 May 2014)

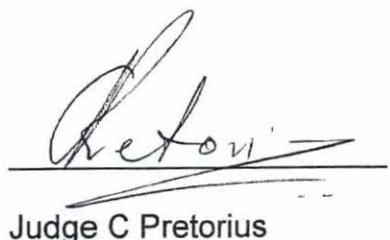
- (28) In **Masisi v Minister of Safety and Security**⁸ Makgoka J held that “where an arrest is malicious the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice”.
- (29) In **Minister of Police v Du Plessis**⁹ the facts and length of detention were, to some extent, similar to those in the present case. Du Plessis was detained for 11 days and was awarded R100 000. Here the plaintiff spent more than double that time incarcerated.
- (30) The salient facts are that the plaintiff was forcefully arrested in the middle of the night at his home where his wife and two month old baby were present. His house was forcefully entered by six to seven individuals dressed in civilian clothes. He was detained in a cell at Klerksdorp Police Station, sharing with 6 other men. The cell was dirty and not fit for humans as he did not receive a bed, nor a mattress and not even a blanket and was not able to sleep. He was scared of the other people in the cell and received no visitors. On 16 May 2012 he was transported to court and thereafter he was detained at Potchefstroom Prison. There he was housed in a communal cell with 86 other awaiting-trial inmates. He was ridiculed and accused of acting like a girl. He attended the hospital due to severe headaches suffered as a result of this ordeal. He was emotional in court when testifying about the whole incident and it was clear that he is still

⁸ 2011(2) SACR 262 (GNP)

⁹ Supra

affected by this ordeal. His personal circumstances were that he was 46 years old and self-employed in the construction industry. He is married and the father of 4 children. His income was R6 000 per month.

- (31) He was humiliated in front of his wife, incarcerated in appalling circumstances and was only granted bail after 25 days, due to the police relying on spurious allegations and not dealing with the case he had been arrested for in a professional manner.
- (32) The following order is made:
1. Judgment is granted against the defendant, in favour of the plaintiff, for the payment of the sum of R250 000 in respect of the plaintiff's unlawful detention for the period 14 May 2012 until 7 June 2012.
 2. Judgment is granted in favour of the plaintiff for payment of the amount of R40 000 for malicious prosecution.
 3. The defendant is ordered to pay interest on the sum of R290 000 at the rate of 10.25% per annum *a tempore morae* from date of demand to date of payment.
 4. The defendant is ordered to pay the plaintiff's costs of suit.



Judge C Pretorius

Case number : 27069/2014

Matter heard on : 20 November 2017

For the Plaintiff : Adv Gerber

Instructed by : Jan Ellis Attorneys

For the Respondent : Adv Modisa

Instructed by : State Attorney

Date of Judgment : 8/12/2017