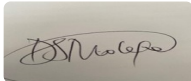




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A205/2021

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

.....23 SEPTEMBER 2022
SIGNATURE
DATE

In the matter between:

QUINTON HERMAN CROUCAMP

FIRST APPELLANT

ROBERT CROUCAMP

SECOND APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

Summary: Delict – unlawful arrest and detention – vicariously liability of the Minister of Police - malicious prosecution – appropriate amount of compensation.

JUDGMENT

MOLEFE J (Khumalo J concurring)

Introduction

[1] This appeal arises from a delictual claim for damages instituted by the appellants, Mr Quinton Herman Croucamp and Mr Robert Croucamp the plaintiffs in the court a quo, against the respondent, Minister of Police (the defendant in the court a quo) Magistrates Court, Pretoria (the trial court). The basis of the claim was that the appellants were wrongfully and unlawfully arrested without a warrant on a charge of malicious damages to property, and that they were maliciously prosecuted and that they should be awarded compensation. The claim against the respondent was on the basis of vicarious liability. The trial court found that the arrest was justified and that the prosecution was not malicious and dismissed the appellants' claims with costs. Aggrieved by the trial court's decision, the appellants sought and were granted leave to appeal to this Court by the trial court.

Background facts

[2] The circumstances leading to the appellants' arrest and detention are largely undisputed. The appellants and their neighbour Mr Singh shared a boundary line. Initially their properties in Potchefstroom were separated by a wire fence but later Mr Singh decided to build a wall separating the properties. This wall formed the subject of a dispute between the appellants and Mr Singh. The appellants' version is that the wall was built entirely on their property and although they requested Mr Singh to remove the wall, Mr Singh did not adhere to the request. The appellants then decided to remove the wall by breaking it down.

[3] The appellants were arrested by the members of the South African Police Services ('SAPS') on 13 February 2016 at 10h00 and were charged with malicious damage to property. They were detained in a police cell for a period of approximately ten (10) hours and were later released on bail. They attended court on no less than five (5) occasions and the charges were later withdrawn against them as the Public Prosecutor deemed the dispute to be of a civil rather than of a criminal nature.

[4] The appellants' case is that the wall was built exclusively on their property which excluded ownership of the wall by Mr Singh, and vested exclusive ownership in them. In the result they could have not incurred liability for damaging their own wall. It therefore stands to reason that no one should be arrested for dealing with their own exclusive property and the arrest was therefore unlawful.

Legal principles applicable to arrest without a warrant

[5] An arrest or detention without a warrant is prima facie unlawful and the onus is on the defendant to prove the lawfulness thereof. The respondent admitted that the appellants' arrest was without a warrant and pleaded that the arrest and the subsequent detention was lawful in terms of section 40(1)(b) of the Criminal Procedure¹ as amended ('the CPA').

[6] As regards the onus to prove lawfulness of an arrest, the Constitutional Court in *Mahlangu and Another v Minister of Police* said:

*"It follows that in a claim on the interference with the constitutional right not to be deprived of one's physical liberty, all the plaintiff has to establish is that the interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears the onus to prove that there was justification for the interference."*²

In this matter, the arrest was not in dispute. It was therefore common cause that the respondent had to prove the lawfulness thereof.

[7] Section 40 of the CPA provides in the relevant parts as follows:

"40 Arrest by a peace officer without a warrant

(1) 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, other than the offence of escaping from lawful custody."

[8] In *Duncan v Minister of Law and Order for the Republic of South Africa (Duncan)*³ it was held that the arrest without a warrant would be justified as envisaged in s 40(1)(b) of the CPA if the following jurisdictional facts were present:

"(i) the arrestor must be a peace officer,

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect (the arrestee), committed an offence referred to in Schedule 1 of the Act (other than once particular offence);

(iv) the suspicion must rest on reasonable grounds.

¹ Act 51 of 1977.

² *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC) at para 32.

³ *Duncan v Minister of Law and Order for the Republic of South Africa (Duncan)* [1986] 2 ALL SA 241 (A); 1986 (2) SA 805 (A) at 818 F – I.

if jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection i.e., he [or she] may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (Holgate – Mohammed v Duke [1948] 1 ALL SAER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.”

[9] I now turn to the facts. Mr Naresh Singh testified that he was the owner of the neighbouring property to the appellants and that he gave instruction to a contractor to build a wall between the two properties. The contractor was busy digging holes when the appellant instructed him to close the holes, as the wall would be on his side of the boundary line. Mr Singh informed the appellant that he will talk to the contractor to check if the wall would be in his property. The contractor informed Mr Singh that the wall will not be in the appellants' property and continued building the wall. The first appellant called Mr Singh, swore at him and told him that if he did not remove the wall he will break it down. The first and second appellants broke and damaged the wall and his employee Mr Noel Samuel summoned the police. He was later informed by the surveyor that the wall was built 0.07 meters over the boundary. After the appellants were arrested Mr Singh attended court on five occasions and was later informed by the investigating officer that the case has been withdrawn as the matter was not a criminal one but a civil one. He testified that he made a statement to the SAPS about the damage to the wall but was not present when the appellants were arrested.

[10] Constable Mentoor was indicated as the arresting officer in the police case docket. He unfortunately passed away on 17 June 2020. His evidence in the arrest statement was accepted into evidence at the trial by agreement between the parties in terms of section 3 of the Law of Evidence Amendment Act⁴ and read into evidence. The appellants argued that Constable Mentoor's arrest statement made no mention that he had in his possession a police case docket relevant to the complaint of malicious damage to property on account of which the appellants were arrested. It was agued on behalf of the appellants that the arrest statement also made no reference to Mr Singh's employee Mr Samuel and if he did, he would have noticed from the statement that there was a dispute of the positioning of the boundary wall on the property of the appellants. It was therefore submitted that considering Constable Mentoor's statement, he did not consider any information that could have led him to form a reasonable suspicion that an offence had been committed. The respondent therefore had not

⁴ Act 45 of 1988 as amended.

succeeded in proving on a preponderance of probabilities that the arrest was justified, and more so in terms of s 40(1)(b) of the Act.

[11] Mr Quinton Herman Croucamp (first appellant) testified that there was a pre-existing dispute with their neighbour Mr Singh about the wall he intended to build between their respective properties. Mr Singh however proceeded to have the wall built, approximately 0.5 to 1 metre into the appellants' property. The appellants warned Mr Singh and his employee Mr Samuel to remove the wall and when they refused the appellants demolished the wall. When the police officers arrived in large numbers and informed him of his arrest on 13 February 2016, he informed the arresting officer that the wall was built on their property, and did not belong to Mr Singh and therefore no offence was committed. The first appellant further testified that he suffered at the hands of the members of the SAPS as a result of their arrest, detention and malicious prosecution for an incident that did not constitute an offence.

[12] Mr Robert Croucamp (second appellant) corroborated the evidence of the first appellant and confirmed that the wall built by Mr Singh was entirely on their property by no less than 0.5 meters to 1 meter. He confirmed the date and time of their arrest and release and their 5 (five) court appearance as a result of their prosecution. He testified that the incident of their arrest, detention and prosecution caused damage and harm to him.

Application of the legal principles to the facts

[13] The fundamental question is whether Constable Mentoor, prior to the arrest, reasonably suspected the appellants of having committed an offence of malicious damage to property (a schedule 1 offence). The trial court found that he did. It is common cause that a complaint was lodged by Mr Singh's employee. It is however immaterial that the complainant was not called to testify because the appellants did not dispute that they indeed damaged the wall erected by Mr Singh. The appellants elected to remain silent in their warning statements to the police, which meant that the police only had the complainant's version and could also see the damaged/demolished wall. The appellants never produced any evidence to the arresting office that the wall was built on their property. The trial court was handed the original colour photographs that depicted the damage that the appellants caused to the wall.

[14] The question whether the peace officer reasonably suspects a person having committed an offence within the ambit of s 40(1)(b) is objectively justiciable.⁵ It must be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law. Whether the suspicion was reasonable under the circumstances in this case is determined objectively.

[15] On a holistic consideration of all the evidence, I agree with the trial court's conclusion that the arresting officer possessed of all the information would have reasonably suspected that the appellants have committed a schedule 1 offence. This finding is therefore dispositive on the issue that all jurisdictional factors that render an arrest without a warrant lawful are present.

[16] The next enquiry is whether or not Constable Mentoor had properly exercised a discretion prior to effecting the arrest. The discretion must be properly exercised within the bounds of rationality, with the grounds on which it can be questioned being narrowly circumscribed. In *Minister of Safety and Security v Sekhoto* it was stated:

*“The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within its range, the standard is not breached.”*⁶

[17] The discretion to arrest must be exercised properly and in good faith after taking all the prevailing circumstances into consideration. I am satisfied that Constable Mentoor properly exercised the discretion to arrest the appellants within the bounds of rationality. Furthermore, I agree with the conclusion by the trial court that the appellants were lawfully arrested.

Malicious prosecution

[18] The onus is on the appellants to prove on a balance of probabilities their malicious prosecution claim against the respondent. To succeed with a malicious prosecution claim, a claimant must allege and prove that:

18.1 the defendants set the law in motion – they investigated or instituted the proceedings;

⁵ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579H.

⁶ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at para 39.

18.2 the defendants acted without reasonable and probable cause;

18.3 the defendants acted with malice (or *animo iniuriandi*);

18.4 the prosecution has failed.⁷

[19] Counsel for the appellants submitted that at the time when the appellants were charged by the members of the SAPS there was no involvement by the employees of the National Director of Public Prosecutions (NDPP), and the basis for the malicious prosecution claim to be levelled solely against the members of the SAPS. It was further argued that the involvement of the NDPP employees at a later stage actually brought the appellants' suffering to an end when the Public Prosecutor correctly withdrew the charges that were instigated by the SAPS members by arresting and charging the appellants.

[20] Malicious prosecution consists of the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.⁸ It is common cause that prosecution in this matter failed. Counsel for the respondent submitted that the arresting officer did not mislead the prosecutor but gave fair and honest statement of the relevant facts for the prosecutor to decide whether to prosecute the appellants or not.

[21] Reasonable and probable cause in the context of a claim for malicious prosecution means an honest belief founded on reasonable grounds that the prosecution is justified.⁹ The concept therefore involves a subjective and objective element. *Animus iniuriandi* must be proved before the defendant can be held liable for malicious prosecution as *injuria*.¹⁰

[22] I agree with the conclusion made by the trial court that there was no evidence before the court that the arresting officer *in casu* acted with malice to prosecute the appellant. There was honest belief founded on reasonable grounds that the appellants should be prosecuted even if the prosecution failed.

[23] Therefore, this appeal ought to be dismissed and there is no reason why costs should not follow the result. There is also no need to determine quantum.

⁷ *Minister of Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA).

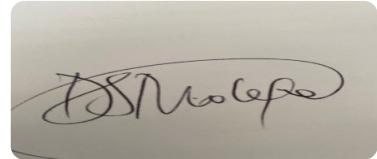
⁸ *Relyant Trading (Pty) Ltd v Shongwe and Another* (472/05) [2006] ZASCA 162.

⁹ *Minister of Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 SCA.

¹⁰ *Relyant Trading (Pty) Ltd v Shongwe* at para 14.

[24] I accordingly make the following order:

1. The appeal is dismissed with costs.



D S MOLEFE
JUDGE OF THE HIGH COURT

I agree and it is ordered.



N KHUMALO
JUDGE OF THE HIGH COURT

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 23 September 2022.

APPEARANCES:

FOR THE APPELLANT: ADV. C ZIETSMAN
INSTRUCTED BY: JAN ELLIS ATTORNEYS
 C/O LOUBSER VAN WYK INC

FOR THE RESPONDENT: ADV. N MAKHANI
INSTRUCTED BY: THE OFFICE OF THE STATE ATTORNEY

DATE OF HEARING: 21 APRIL 2022
DATE OF JUDGMENT: 23 SEPTEMBER 2022