

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 63675/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
04 MAY 2022

DATE

SIGNATURE

In the matter between:

NTOKOZO BONGOKWAKHE KUBEKA

PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS
DEFENDANT**

SECOND

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 04 MAY 2022.

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present matter the Plaintiff has instituted action proceedings against the First and Second Defendants claiming delictual damages arising from his unlawful arrest and detention (Claim 1) and malicious prosecution (Claim 2), by members of the South African Police Services.

[2] The alleged arrest was carried out by members of the SAPS, the First Defendant, without a warrant on 17 April 2015. It is alleged that at the time of the incident the members in question were all acting within the course and scope of their employment with the First Defendant.

[3] Prior to the commencement of the proceedings the Plaintiff withdrew its claim against the Second Defendant and as such the matter only proceeded against the First Defendant.

[4] As per the Amended Plea of the First Defendant, it was pleaded that:

4.1 The Plaintiff was arrested by members of the South African Police at the time, stationed at the Newcastle Police Station;

4.2 that the arrest took place on 17 April 2015 without a warrant;

4.3 that the Plaintiff was lawfully arrested in terms of section 40(1)(b) of the Criminal Procedure Act, Act 51 of 1977 on charges of robbery and assault with intention to do grievous bodily harm;

4.4 the arresting officers at the time of the Plaintiff's arrest, had a reasonable suspicion that the Plaintiff had committed the offences of robbery and assault to do grievous bodily harm;

4.5 that pursuant to the arrest the Plaintiff was detained at the Newcastle Police station from 17 April 2015 until his first appearance in court on 20 August 2015. On this day, the Plaintiff was remanded in custody to 28 April 2015 for a formal bail application. It is on this day that the prosecution withdrew the charges against the Plaintiff and he was released from custody;

4.6. the First Defendant specifically pleaded that the Plaintiff was arrested after the complainant had made a statement on 12 April 2015 confirming that he would be able to point out the suspects '*if he can see them*' and had thereafter pointed the Plaintiff out to members of the SAPS as one of the suspects who had robbed and assaulted him.

ISSUES

[5] In the present matter this court was called upon to decide the following issues:

5.1 The lawfulness of the arrest and detention;

5.2 the lawfulness of the Plaintiff's prosecution and proceedings instituted against him by members of the South African Police Service;

5.3 the period of detention of the Plaintiff;

5.4 the quantum of damages to be awarded to the Plaintiff.

ONUS

[6] As to the lawfulness of the arrest and detention, the First Defendant carried the onus, and in respect of the malicious prosecution and the delictual damages suffered the Plaintiff carries the onus.¹

EVIDENCE

[7] Mr Ntokhoza Khubeka testified, that on 17 April 2015, he was accompanied by this friend, Mr Mtshali, travelling in a taxi from his home to the Newcastle Mall to finally alight at the Central Business District. As they arrived at the Newcastle Mall some passengers got out of the taxi

¹ Zealand v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC); Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)

and others got into the taxi. He remained seated at the back of the taxi and at no point did he alight from the taxi, until so ordered to do so by a member of the South African Police Service. The police van first pulled up at the back of the taxi, approached the driver, spoke to the driver and then pointed at him to get out of the taxi. At this point he was summarily arrested outside the taxi and ordered to enter a police van. At that time, there was already one other unknown occupant on the inside the police van, whom the police later alleged was his accomplice. He further testified that he co-operated with the police officer's instruction albeit that he was not informed about the reason for his arrest. He was also not handcuffed when placed inside the police van.

[8] It was his testimony that the arrest was carried out by a police reservist, Mr Mazibuko, who failed to explain to him the reason for his arrest. He further testified that save for the two police officers escorting him into the police van and the occupant already in the back of the police van, there was no one else in their presence. Mr Khubeka denied that the complainant was present at the taxi or that he was pointed out by the complainant. He further denied, that the complainant travelled with them in the police van to the police station. At the police station, he was provided with a Notice of Rights form but that this however was not done by any of the two police officers who were present during his arrest at the taxi. It was at this point that he was informed that he was suspected of

having committed common robbery. He was then detained and taken to court on 20 April 2015.

[9] On the day of his first court appearance his matter was remanded to 24 April 2015 for a formal bail application and he was further detained in custody. On this latter date, his matter was again postponed to 28 April 2015. On both occasions that he appeared in court there was no police officer at court. On 28 April 2015, the charges were subsequently withdrawn against him and he was released from custody. Mr Khubeka testified that at no point did he ever receive any explanation or apology from the SAPS members for what had happened to him from the day that he was arrested to the day of his release.

[10] He described his conditions of detention as deplorable. He occupied the cell with his alleged "accomplice". The cell was only fitted with sponges to sleep on and dusty blankets. The floor surface was wet, and it was fitted with a toilet. The only food given to him during the duration of his stay was soft porridge in the morning and rice and beans during the day. After his first appearance in Court and when his matter was remanded, he was thereafter taken to a facility of the Correctional Department until his next court appearance when charges were withdrawn against him. He was not informed of the reasons for the withdrawal of the charges. The whole experience disturbed him as he was not involved in the commission of this offence.

[11] During cross-examination, Mr Khubeka maintained that he was neither aware of the complainant's identity nor did he have knowledge that the complainant had opened a case of Robbery and Assault with intent to commit grievous bodily harm against his assailants, which incident allegedly was committed on 12 April 2015. When confronted with the version of the police officers, he could not refute their version save to confirm that when he was placed inside the police van, that the other arrested person was already inside the police van. Mr Khubeka was adamant that the complainant was not on the scene on the day that he was arrested. During cross-examination, the Plaintiff further confirmed that on 28 April 2015 he was released from incarceration after the complainant had made a statement confirming that he was only able to identify one of the suspects who had robbed him.

[12] Mr Sifiso Mtshali was the witness called to testify by the Plaintiff. It was his evidence that on the day of the Plaintiff's arrest he was travelling with the Plaintiff from home in a taxi destined for the Newcastle town. Prior to reaching the town, the taxi first stopped at the Newcastle Mall at which point some occupants alighted from the taxi. On the said day they were both seated at the back of the taxi and neither of them alighted at the Newcastle Mall prior to the taxi being stopped by the Police. At this point the police officers first spoke to the driver of the taxi, opened the door of the taxi and pointed at the Plaintiff and ordered him to alight from

the taxi. They both alighted. The witness testified that no other person was in the presence of the two police officers at the taxi rank or at the time when the police van departed for the police station save for one person detained in the back of the police van. At the police station he then made enquiries as to the reason for the Plaintiff's arrest. He was informed by an unknown police officer that the Plaintiff had committed a crime and then called the family of the Plaintiff to inform them of his arrest.

[12] During cross-examination, Mr Mtshali reiterated that on the day of the Plaintiff's arrest that they were on their way to town to intending drink liquor, and that they were not going to the shopping mall. He refuted the version of the police officers that the Plaintiff was pointed out by the complainant as he was getting inside the taxi at the shopping mall as it was his testimony that the Plaintiff never alighted the taxi, prior to being ordered by the police officers to do so. During cross-examination, he also conceded that he first noticed that another person was inside the back of the police van when they eventually arrived at the police station when the Plaintiff was taken to the cells and that this person also appeared with the Plaintiff in Court when the Plaintiff made his appearance in Court. Furthermore, he conceded that at no stage did he deem it necessary to make a statement to the Police in support of the Plaintiff's case that he was in the company of the Plaintiff on the morning of 17 April 2015.

[13] This then the totality of the evidence presented by the Plaintiff.

[14] On behalf of the Defendant the first witness to testify was Mr Praisegod Mazibuko. He testified that he arrested the Plaintiff on 17 April 2015 and at the time he was employed by the South African Police Service as a police reservist. On the said day, he was conducting patrol duties when via radio control he together with his crew member (Constable Zikhalala) received a complaint that they should attend the Newcastle Mall. The gist of the report received was that there was a person at the Newcastle Mall who recognised a suspect relating to an earlier incident. They then made their way to the mall and upon arrival they met Mr. Zondi ('the complainant'), who pointed a suspect to them. At that point they approached this person and arrested him. This person was identified by the complainant as one of the suspects who had robbed him during an earlier incident.

[15] He continued his evidence that on the way to place this suspect inside the police van, the complainant then pointed out the Plaintiff as the other suspect as he was entering a taxi. He then decided to follow the taxi and ordered it to come to a standstill. He approached the driver of the taxi and thereafter proceeded to open the taxi door. Mazibuko then ordered the Plaintiff to alight from the taxi and arrested him. He took the Plaintiff to the police van and asked the complainant to confirm if he had pointed him out. The complainant confirmed to him that he was able to clearly see

the Plaintiff inside the police van. The Plaintiff together with the other suspect was then arrested and taken to the police station and placed inside a holding cell. The complainant accompanied them to the police station. At the station, the complainant provided them with the Police Case Docket reference number, which reference number they then used to processed their paperwork, which included making his arrest statement. Prior to the day of the arrest, the Plaintiff was unknown to him and the day he effected the arrest, it was the last occasion that he had seen the Plaintiff. He was not responsible to investigate the complaint opened by the complainant.

[16] During cross-examination, the witness conceded that when they were contacted by Radio Control on 17 April 2015, that no information about the allegations by the complainant which resulted in the opening of Police Case Docket 202/04/2015 were provided to them. He also conceded that they were not referred to any content of the Police Case Docket when they were contacted by Radio Control. Furthermore, that prior to the arrest that they did not interview or obtain any further information from the complainant in relation to the robbery which occurred on the 12 April 2015. The witness also conceded that the Plaintiff was arrested purely on a pointing out made by the complainant on the day of the arrest.

[17] During further cross-examination, the witness conceded that he was permitted to arrest a person on a mere pointing out as long as there was

an investigation pending at the time and that after affecting the arrest that he no longer had any involvement to investigate the matter. He further conceded that the purpose of arrest was not to bring the Plaintiff before a Court, as is the requirement.

[18] Constable Doctor Zikhalala was the next witness called on behalf of the First Defendant. It was his evidence that on the day of the incident he was the crew member who accompanied Mr. Mazibuko. To a large extent he corroborated the evidence of Mr Mazibuko as to how the arrest of the Plaintiff was carried out and confirmed that the Plaintiff was confirmed as one of the suspects by the complainant when he was returned and placed inside the police van. It was his testimony that he was not at the taxi, when the complainant had pointed out the Plaintiff at the taxi. During cross-examination, the witness confirmed that upon them returning to the police station no further statement was taken from the complainant, in relation to his pointing out and arrest of the Plaintiff.

[19] The last witness to testify on behalf of the defendant was Mr Faizel Mdumisi. He gave evidence that on 12 April 2015, he was on duty at the Newcastle Police Station and responsible to take down the statement of the complainant in relation to this incident. It was his testimony that the complainant made his statement in Zulu and that he was responsible for recording it in English and further, that prior to the complainant signing the statement he first confirmed the contents of the statement. The said

statement by agreement with the Plaintiff was handed into the record as Exhibit 'A' albeit that the veracity of the contents of the statement remains contested.²

[20] This then was the totality of the evidence presented on behalf of the First Defendant.

APPLICABLE LEGAL PRINCIPLES ³

[21] It is trite that an arrest or detention is *prima facie* wrongful. It is for the defendant to allege and prove the lawfulness of the arrest or detention.⁴ When the arrest and detention is admitted, the onus of proving lawfulness is on the State. This is the position in the present instance.

[22] The Criminal Procedure Act, 51 of 1977, provides for the arrest of any person without a warrant in a number of clearly circumscribed circumstances. In this regard, Section 40(1)(b) provides 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.

² Documents Index 003-7 to 003-13.

³ See Harms, LCT. 'Ambler's Precedents of Pleadings', 8th ed, LexisNexis, 43 for an exposition of the legal principles and supporting case law.

⁴ *Lombo v African National Congress* 2002 (5) SA 668 (SCA).

[23] The jurisdictional facts for successful reliance on s 40(1)(b) as clearly set out in *Duncan v Minister of Law and Order*⁵ are that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect has committed an offence referred to in Schedule 1; and the suspicion must rest on reasonable grounds. The main issue for determination in the present matter is whether the arresting officer entertained a reasonable suspicion based on reasonable grounds. In *Mabona and Another v Minister of Law and Order and Others*,⁶ Jones J stated:

'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Net and Another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of 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 have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it 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 that the information at his disposal must be of

⁵ 1986 (2) SA 805 (A) at 81BG-H.

⁶ 1988 (2) SA 654 (SE) at 658E-H.

sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

[24] In the present matter it is common cause that the arrest of the Plaintiff was carried out by Mr Mazibuko. The latter save for being a peace officer at the time (a police reservist), he did not qualify for any of the remaining requirements. On his own evidence, Mr Mazibuko had no knowledge of the details of the complaint or the case allegedly opened by the complainant a few days earlier as at the time when he arrested the Plaintiff. On his own evidence he formed no suspicion, let alone a reasonable suspicion, that the Plaintiff had committed a Schedule 1 offence. He only arrested the Plaintiff on the day, based on a mere pointing out made by the complainant and nothing more. It is further telling that Mr Mazibuko on the day, did not even attempt to investigate the allegations made by the complainant at least to some extent,⁷ nor did he deem it necessary to gain some knowledge of the incident itself. On his own evidence he failed to critically assess the information given to him by the complainant and failed to check such information given to him when he had an opportunity to do so.

[25] In these circumstances it cannot be said that he formed a reasonable suspicion to justify the arrest of the Plaintiff and it is on this basis that I

⁷ De Klerk v Minister of Police 2018 JDR 0544 (SCA); 2018 (2) SACR 28 (SCA).

conclude that the First Defendant had failed to discharge the onus carried by it.

[26] In addition, the arrest of the Plaintiff was not carried out to secure his attendance at court and for the Plaintiff to be brought to prosecution.⁸ In the words of the arresting officer, he arrested the Plaintiff purely on a pointing out made by the complainant and that it was for the investigating officer to investigate the case opened by the complainant.⁹ This points to an additional reason of lack of a reasonable suspicion having been formed by the arresting officer.

[27] In the present matter it is further significant that the complainant was not called by the First Defendant as a witness to testify to the report having been made by the complainant and to shed some light on the identity of the perpetrators and the circumstances of the incident. As to the failure to present this evidence, the First Defendant gave no explanation to this Court. In *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC) at paragraph 112, Pillay J held that:

“[112] The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima

⁸ *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) at 17.

⁹ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at [30].

facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify.”

[28] In my view the calling of the complainant would have assisted this Court to determine whether Mr Mazibuko had formed a reasonable suspicion on the day before he effected the arrest, and in the absence thereof, such reasonable suspicion can only be assessed against the evidence of the arrestor alone. As mentioned earlier, the First Defendant failed to discharged this onus.

[29] In my view, I therefore concluded that this case meets the criteria set out by the Constitutional Court in the decision *De Klerk v Minister of Police*¹⁰ to hold the defendant liable for damages suffered for the whole period for which the Plaintiff was detained.

[30] In addition to the Plaintiff’s claim for unlawful arrest and detention the Plaintiff also has a claim malicious prosecution. To succeed with a claim for malicious prosecution a claimant must allege and prove that (i) the defendants set the law in motion, they instigated and instituted the

¹⁰ 2020 (1) SACR 1 (CC).

proceedings; (ii) they acted without reasonable and probable cause; (iii) they acted with malice, and (iv) the prosecution failed.

[31] It is not every prosecution that is concluded in the favour of the accused person that necessarily leads to a successful claim for malicious prosecution. Professor MC Okpaluba warned that:

'the requirement of reasonable and probable cause in proving malicious prosecution tends sometimes to be confused with the requirement of reasonable ground to suspect that an offence has been committed in order for a peace officer to arrest a person without a warrant.'¹¹

[32] It is common cause that the criminal charges against the Plaintiff were withdrawn on 28 April 2015. The Plaintiff testified that no reason was given to him when the matter was withdrawn and before this Court no evidence was presented as to the reasons why the charges were withdrawn. It is the Plaintiff's pleaded case that members of the Newcastle SAPS wrongfully and maliciously set the law in motion by arresting, charging and detaining him.

¹¹ Okpaluba, C. 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions' *PERIPELJ* 2013 (16)1 241- 279.

[33] As previously mentioned, the Plaintiff elected to withdraw its case as against the Second Defendant. It is this defendant who is tasked by legislation to decide what charges is to be brought against the Plaintiff and similarly, the decision to withdraw any charges was likewise also taken by the Second Defendant. Furthermore, there was no evidence presented before this Court that the members of the Newcastle SAPS acted with malice or that they failed to perform their duty, powers and function in good faith when the case docket was first opened against the Plaintiff. To find otherwise would be contrary to the pleaded case of the plaintiff and against the common evidence presented before this court that the arrest of the plaintiff was preceded on a pointing out made by the complainant.

[34] In order to succeed with a claim for malicious prosecution, a plaintiff must prove all four elements listed in paragraph 30 above. The plaintiff did not succeed in proving malice or the *animus iniuriandi* on the part of members of the Newcastle SAPS. In *Minister of Justice and Constitutional Development v Moleko*¹² the court held that negligence on the part of the defendant, even gross negligence, will not suffice.

¹² [2008] 3 All SA 47 (SCA) at para (64). See also *Relyant Trading (Pty) Ltd v Shongwe and Another* (2007) 1 All SA 375 (SCA) at para [5]; *Hash v Minister of Safety & Security* [2011] ZAECPHC 34 (2 August 2011) at paras [78-80] and [85].

[35] There is no indication on the evidence presented that the members of the Newcastle SAPS were moved by any intention other than to have the plaintiff stand trial for the charges raised against him and to bring him to justice. On the evidence presented before this Court, a Case docket was already opened prior to the day that the Plaintiff was arrested and that the arrest had taken place upon a pointing out having been made by the complainant of the Plaintiff in the presence of the police. As such it cannot convincingly be argued that the police acted with malice and without reasonable and probable cause. As a consequence, it is for this reason that I conclude, that the Plaintiff did not discharge the onus resting on him regarding the claim for malicious prosecution against the First Defendant and as such the Plaintiff fails in this claim.

[36] As to an appropriate award to be made to the Plaintiff in respect of his deprivation of freedom, he gave evidence as to his status in the community, his age, the period of detention and the condition under which he was detained. In the decision *Latakomo v Minister of Safety and Security*¹³ a full bench of the Gauteng Division pointed out that sec 12(1)(a) and (b) of the Bill of Rights provides that:

“everyone has the right to freedom and security of the person,
which

includes rights -

¹³ 2016 JDR 1601 (GP).

- (a) Not to be deprived of freedom arbitrarily or without just cause;
- (b) Not to be detained without trial...”

This Court remains mindful of these rights.

[37] In addition our Courts places a premium on personal liberty and this has been repeated in the decision *Olivier v Minister of Safety and Security and Another*¹⁴ where Horn J held:

“Personal liberty weighs heavily with the Courts. A balance has to be found between the right to individual liberty on the one hand and the avoidance of unnecessary restriction of the authority of the police in the exercise of their duties on the other hand. There is no doubt that when these factors are evenly balanced, the scales in a democratic constitutional society would fall on the side of individual liberty”

[38] In total the Plaintiff was detained for a period of eleven (11) days before the charges were ultimately withdrawn against him. It matters not as to whether on his second appearance in Court that the prosecutor was unavailable. The undisputed and objective evidence placed before this Court is that bail was formally opposed by the State and this prolonged his stay in incarceration.

¹⁴ *Olivier v Minister of Safety and Security and Another* 2008 (2) SACR 387 (WLD) as quoted in *Emordi v FBS Security Services* [2021] JOL 50866 (WCC) at 53.

[39] In the present matter, the Plaintiff should be adequately compensated for the deprivation of his *contumelia*, embarrassment suffered and emotional stress which he endured.

[40] A court in considering an appropriate quantum of damages will merely be guided by previous decisions and comparable awards made in similar cases. In this regard, this court is guided by the decision of *De Klerk v Minister of Police 2018 (2) SACR 28 (SCA) and 2020 (1) SACR 1 (CC)*, which was heard in the Supreme Court of Appeal and thereafter in the Constitutional Court, the issue of quantum of damages was specifically dealt with. The Constitutional Court was in agreement with the Supreme Court of Appeal that an award for damages in the amount of R300 000.00 for approximately seven (7) days' detention was fair and reasonable.

[41] Against this decision, I am of the opinion that an award of R 400 000,00 would be appropriate compensation under the circumstances.

COSTS

[42] As the plaintiff is the successful party before this court, the costs should follow the result and as such costs should include the costs previously reserved on 7 June 2019.

ORDER

[43] In the result the following order is made against the First Defendant:

In respect of Claim 1:

43.1 The Plaintiff is awarded R 400 000.00 (Four Hundred Thousand Rands only) plus interest at the prevailing interest rate a *tempore morae* to date of final payment.

43.2 Costs of suit on a High Court scale, including costs of counsel.

43.3 The reserved costs of 7 June 2019.

43.4 The reasonable travel- and accommodation costs of the Plaintiff and Sifiso Mtshale from Madadeni, Kwazulu-Natal as necessary witnesses on 4 and 5 August 2021.

43.5 The Plaintiff's Claim in respect of Claim 2 is dismissed with costs.



C. COLLIS
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff	: Adv. C. Zietsman
Attorney for the Plaintiff	: Loubser Van Wyk Incorporated

Counsel for the First Defendant : Adv. M. Botma
Attorney for the First Defendant : Office of the State Attorneys:
Pretoria
Date of Hearing : 06 August 2021 & 28 October 2021
Date of Judgment : 04 May 2022

Judgment transmitted electronically