



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

Case No.: 60522/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

11 March 2024

DATE SIGNATURE

In the matter between:

PRAYER MOKONOPI MABASA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

DIRECTOR OF PUBLIC PROSECUTION

Second Defendant

This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to Caselines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 11 March 2024.

JUDGMENT

BHENGU AJ

Introduction

- [1] This is an action for damages against the first defendant for unlawful arrest and detention. The claim against the second defendant is for malicious prosecution. Both defendants defended the claim. By agreement between the parties, the issue of liability and quantum is separated in terms of Rule 33(4). The matter is therefore proceeding on the aspect of liability only.
- [2] The Plaintiff, (Mr Mabasa) was arrested by Warrant Officer Du Plessis, a peace officer, on 24 November 2015 without a warrant on a charge of robbery while using a knife. He remained in custody until he was discharged in terms of section 174 of the Criminal Procedure Act No. 51 of 1977 as amended (CPA) on 24 May 2017. Mr Mabasa spent a total of 18 months in custody before his release.
- [3] The defendants in their plea admitted the date, time and place of the arrest but denied that the arrest and subsequent detention was unlawful. In their defence on the claim for unlawful arrest and detention, the defendants averred that Warrant Officer Du Plessis reasonably suspected the Plaintiff to have committed an offence of robbery in compliance with section 40(1)(b) and section 40(1)(e) of the CPA. In respect of the claim for malicious prosecution, the defendants averred that the prosecutor, after considering all the evidence in the police docket, reasonably believed that there was a prima facie case for the plaintiff to answer.

Plaintiff's evidence

- [4] In summary, Mr Mabasa testified that in the morning of 24 November 2015, he was standing under a tree smoking a cigarette that he had just bought from a nearby spaza shop. Whilst he was smoking, a young man

(later identified as “the Complainant” in the criminal case) called him from across the street. Mr Mabasa and the Complainant were staying on the same street and knew each other well. The Complainant informed Mr Mabasa that he had just been robbed of his cellular phone by two males at knife point. The Complainant pointed out the two alleged robbers who were walking down the road and asked Mr Mabasa for help. Mr Mabasa advised the Complainant to go back and seek for help while he followed the two alleged robbers to see where they end up.

- [5] Mr Mabasa then followed the two males whose identity was unknown to him at a distance of approximately 10 metres . Whilst following them, he noticed them trying to sell the phone to a lady who was selling chicken feet on the street. The lady advised the two males that she did not have money as it was still in the morning. After the two males had a conversation with the street vendor, Mr Mabasa then approached them and told them that he knew someone who was looking for the phone.
- [6] Mr Mabasa alleged that while he was talking to the two males, a police vehicle approached them. Two policemen, Warrant Officer Du Plessis and his crew member, Sergeant Modisha, told them to lie down. They were all handcuffed and searched. The police explained to them that the clothes worn by Mr Mabasa and the two males fitted the description given by the Complainant, of the people who robbed him of a cellular phone at knife point. At the time Mr Mabasa was wearing a red shirt and the other two males were wearing a blue and grey shirt respectively. They were all arrested and taken to Silverton police station where they were charged. Mr Mabasa maintained that the police found nothing on him.
- [7] Under cross examination, Mr Mabasa denied that he was involved in any way in the robbery and averred that he was trying to assist the Complainant to get his phone back from the robbers. He also confirmed

that during the search, a Blackberry cellular phone was found on one male suspect and a knife was found on the other male suspect. Mr Mabasa admitted that he refused to give his name to the police and also refused to sign the notice of rights (SAPS14A). According to Mr Mabasa, his refusal was because the notice of rights was written armed robbery, and he did not rob anyone. He also conceded that he abandoned his application for bail on 18 January 2016 as there was no one who could pay bail for him.

Defendants' Case – Evidence of arresting officer

[8] The defendant called Warrant Officer Du Plessis, the arresting officer. In summary he testified that he joined the South African Police Service in 1993. He works for the K9 (dog unit). On 24 November 2015, he was with his crew member, Constable Modisha doing patrol duties in the Nelmapius area driving an unmarked police vehicle. At about 09h00am, they were flagged down by the Complainant who reported that he had just been robbed of his red BlackBerry cellular phone by 3 men armed with a knife. The Complainant further reported that the three men who robbed him were wearing a red shirt, a blue shirt and a grey shirt respectively. They advised the Complainant to go and report the case at the police station.

[9] Warrant Officer Du Plessis and Constable Madisha proceeded to look for the suspects. In not more than 10 minutes they noticed three males fitting the description given by the Complainant. Mr Mabasa was wearing a red shirt, and the other two males were wearing a blue and grey shirt respectively. They ordered the three (3) men to lie down and secured them with cuffs as standard procedure.

[10] They informed the suspects of the reason for their arrest and that their clothing fitted the description given by the Complainant of the males who robbed him of his cellular phone. He searched the tall suspect wearing a red shirt (Mr Mabasa) and found a red Blackberry (8520 model) cellular phone that he was carrying on his right hand. Upon searching a man with a blue shirt, Sergeant Modisha found a knife with a black and red handle. The items were seized as evidence. They informed the suspects of their rights, and they were arrested.

[11] According to Mr Du Plessis, Mr Mabasa refused to give his name at the time of the arrest. He also refused to sign the notice of rights. He testified that he only got to know the identity of the Mr Mabasa when he was greeted by a guard at the police cells as "Prayer". The guard advised them to check the cell register for the past day or two for Mr Mabasa's full details. They indeed checked the police cells register and found Mr Mabasa's full names.

[12] Under cross examination, Mr Du Plessis was confronted with a version contained in the Complainant's written statement that he was robbed by two men. Warrant Officer Du Plessis was adamant that the Complainant told him that he was robbed by three men. He disputed the Plaintiff's version that the red BlackBerry cellular phone was not found on him. He insisted that he found the phone in the Plaintiff's possession on his right hand.

Evidence of Seargeant Modisha

[13] The defendants called their second witness, Sergeant Modisha who was a crew member working with Warrant Officer Du Plessis at the time of the arrest. In most respects, Mr Modisha corroborated the testimony of the arresting officer. Of importance, he confirmed that the BlackBerry Phone was found in the Plaintiff's possession by Warrant Officer Du Plessis and

that he, Sergeant Modisha, found a knife with black and red handles from the pocket of the suspect wearing a blue shirt.

[14] Under cross examination he conceded that he is the one who took a statement from the Complainant at the police station on 24 November 2015. He also conceded that although the Complainant told them initially that he was robbed by three men, in his written statement, he stated that he was robbed by two males, one wearing a blue shirt and another wearing a grey shirt.

Evidence of Ms Mpho Monyane – Prosecutor

[15] Ms Monyane testified that her experience as prosecutor spans for over 13 years. Ms Monyane stated that before she could proceed with prosecution of the accused, she had to first satisfy herself that she had grounds to proceed with the prosecution. In the case of Mr Mabasa, when she received the police docket, a decision to prosecute was already taken and her job was to proceed with the prosecution. She however, testified even though a decision was already taken, she still had a duty to assess the evidence. She had a discretion to abandon the prosecution if she was of the view that there was no prima facie case against the accused.

[16] When she perused the docket it contained a statement of the Complainant, statements of the arresting officers, an unsigned notice of rights, a copy of SAPS 13 register showing a red BlackBerry cellular phone and a knife which was used in the commission of the offence as exhibits. She noted from the statement of the complainant that Mr Mabasa had refused to help the Complainant when he approached him and that later on, he was found in possession of the robbed phone and in the company of the two robbers. Ms Monyane noted that Mr Mabasa

knew that the robbers were carrying a knife, *“Was he not scared of the knife”*.

[17] She stated that after considering all the factors mentioned above, she concluded that Mr Mabasa was involved in the robbery and that he had a case to answer. It was at that point that she decided to charge Mr Mabasa with common purpose because she believed that he was acting in collusion with the robbers.

Claim 1 - Unlawful arrest and detention

[18] Section 40(1)(b) and (e) of the CPA provides that:

“(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 lawfully custody;

and

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing”

[19] In *Minister of Safety and Security v Sekhoto*¹, the Court held that, in order for the defendants to successfully rely on the defence in terms of Section 40(1)(b), the following jurisdictional facts must be present:- (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

Analysis

¹ *Minister of Safety and Security v Sekhoto* (2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10.

[20] It is not in dispute that Mr Mabasa was arrested and detained by Warrant Officer Du Plessis who is a peace officer on suspicion of having committed an offence of robbery with a weapon which offence falls under schedule 1. In my view, the first three jurisdictional facts in terms of Sekhoto are present. Regarding the fourth jurisdictional fact, the issue is whether Warrant Officer Du Plessis' suspicion rested on reasonable grounds. It is trite that the onus to justify the lawfulness of the arrest and detention rests on the defendant in terms of the provisions of section 12(1) of the Constitution.

[21] Counsel for the defendants argued that the evidence of Warrant Officer Du Plessis proved that he was entertaining a reasonable suspicion at the time of the arrest. He referred the Court to a decision in *Mabona and Another v Minister of Law and Order and Others*² where Jones J held that:-

"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 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."

[22] The Plaintiff in its particulars of claim alleged that the arresting officer "failed to investigate the allegations levelled against the Plaintiff before arresting him". Plaintiff's counsel's argument on the unlawfulness of the arrest was mainly based on the statement of the Complainant made to the police, that he was robbed by two males. He contended that there was no reason to arrest Mr Mabasa as he was not part of the robbery.

² *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658F-H

[23] In his evidence, Mr Du Plessis was adamant that the Complainant told him that he was robbed by three males fitting the description of the 3 arrested males. Even if we are to accept that the Complainant may have said he was robbed by two males, Warrant Officer Du Plessis would not have been in a position to determine which of the two suspects robbed the Complainant in the absence of the Complainant and when Mr Mabasa was the one in possession of the robbed phone. Although Mr Mabasa denied that he was found in possession of the phone, he however, was able to correctly describe the colour and make of the phone. This would not have been possible to do from a distance of 10 metres as alleged during his evidence. I find that Mr Du Plessis was a reliable witness. His evidence, as far as it related to where the cellular phone was found was corroborated by his crew member, Mr Modisha. The fact that the Plaintiff was found in possession of the stolen cellular phone on his right hand entitled Warrant Officer Du Plessis to arrest him in terms of section 40(1)(e)³ for possession of a suspected stolen property.

[24] According to the information on the SAPS cell register, Mr Mabasa was detained at 09h55 in the morning of 24 November 2015 and brought before Court on the morning of the 26 November 2015 which was within the prescribed 48 hours in terms of section 50(1)(c) of the Act. Accordingly, I find that the first Defendant discharged its onus to prove, on a balance of probabilities, that the arrest of the Plaintiff and his subsequent detention until 26 November 2015 was lawful.

Claim 2 - Malicious Prosecution

³ S40(1) A peace officer may without warrant arrest any person- (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing

[25] In *Minister of Justice and Constitutional Development and Others v Moleko*⁴ the court held that to succeed with a claim for malicious prosecution the Plaintiff must prove that:-

1. *“the defendants set the law in motion (instigated or instituted the proceedings);*
2. *the defendants acted without reasonable and probable cause;*
3. *the defendants acted with ‘malice’ (or animus injuriandi); and*
4. *that the prosecution has failed”.*

[26] It is the case of the Plaintiff that the prosecutor laid false charges of armed robbery against Mr Mabasa and continued with the prosecution of the Plaintiff until he was discharged on 24 May 2017. It is further alleged that the prosecutor charged the Plaintiff without a probable cause and acted with *animus injuriandi*.

[27] The Plaintiff’s counsel in his heads of argument referred the court to a decision in *State v Lubaxa*⁵ where the Court found that:-

‘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.’

[28] The second defendant in paragraph 4.2 of its plea averred the following:

“... the prosecutor reasonably acted (indicted the Plaintiff) having had regard to the evidence contained in the docket”.

⁴ *Minister of Justice and Constitutional Development and Others v Moleko* (131/07) [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8

⁵ *State v Lubaxa* 2001 (2) SACR 703 (SCA) para 19

[29] It is common cause in this matter that the second defendant instituted the prosecution of the Plaintiff, and that the Plaintiff was discharged on 24 May 2017 in terms of Section 174. At issue is whether the prosecutor had reasonable and probable cause to prosecute the Plaintiff. In *Moleko*⁶ Van Heerden JA held that:-

“Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore, involves both a subjective and an objective element”.

[30] To determine this question, the Court has to consider all the information that was at the prosecutor’s disposal at the time when the decision to prosecute was made. Ms Monyane testified that the police docket contained a statement of the complainant, statements of the two policemen, SAP13 register indicating the two exhibits, a Blackberry Phone and a knife which was used in the commission of the crime and an unsigned notice of rights.

[31] Regarding the involvement of Mr Mabasa, the statement of the Complainant provided that:-

*“...Few steps away there was an African male I knew his face because we stay at the same street but I don’t know his name...I called him to help me with those guys cause I don’t know them and he told me that he does not know them and he does not want to get involved...he told me to call other people to help me and I did as he said. When I got people to help me, he was nowhere to be found. We started asking people and they said they saw him with those guys who robbed me...”*⁷

⁶ Moleko referred to above para 20

⁷ Statement of Complainant, CaseLines page 011-57

[32] Whilst it is clear from the Complainant's statement that the Plaintiff did not participate in the actual robbery, Ms Monyane testified that in addition to the Complainant's statement, she also considered all the evidence at her disposal and concluded that the Plaintiff was working in concert with the two robbers. In arriving at the decision to charge Mr Mabasa with common purpose, Ms Monyane stated that she considered the evidence of the two arresting officers who found Mr Mabasa in the company of the two robbers carrying the robbed cellular phone in his right hand. She could not reconcile how could the Plaintiff refuse to help, sent the Complainant away to look for help elsewhere but, in turn, he was able to approach the robbers knowing them to be armed with a knife. She believed that Mr Mabasa could have decided not to be involved in the robbery because he knew that the Complainant knows him and decided to join his friends later. Ms Monyane stated that she also took into consideration that the Plaintiff failed to co-operate with the police by refusing to give his name, refusing to sign the notice of rights and refusing to tell the police his side of the story.

[33] The accused person's right not to be compelled to give self-incriminating evidence is protected in section 35(3)(j) of our constitution. In this regard Mr Mabasa did not have to provide a warning statement to the police. However, what this meant was that the prosecutor only had one side of the story and did not have the benefit of the Plaintiff's version.

Doctrine of Common Purpose

[34] Ms Monyane was asked under cross examination why she did not charge the Plaintiff with possession of a stolen Blackberry cellular phone, she responded as follows:-

"Because in a case of robbery with a knife, it is the responsibility of the Magistrate to inform the accused of competent verdicts in terms of the Criminal Law Amendment

Act, which may be theft, receiving or being in possession in terms of section 37. The accused was also charged with common purpose with the other 2 suspects. The Charge sheet does not contain alternative charges in that alternative charges must be read out by the Magistrate at the commencement of the trial.”

[35] In *Thebus and Another v S*⁸ The Constitutional Court stated the following regarding the doctrine of common purpose:-

“The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social “need to control crime committed in the course of joint enterprises”. The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual”.

[36] In order to determine whether the prosecutor was correct in finding that there was a prima facie case for the Plaintiff to answer based on the doctrine of common purpose, the Court took note of the evidence of the Plaintiff which was inconsistent in many respects. It was the evidence of the Plaintiff that he was following the robbers at approximately 10 metres to see where they end up. However, he was able to tell the court that the robbed phone was a Blackberry phone which was red or pinkish in colour. He was able to recite the conversation between the robbers and the street vendor which occurred before he approached the two males. He stated that:-

“Dumisani, was the one who tried to sell the phone to the lady. The lady told him that she did not have any money as it was still in the morning, and she had not yet sold anything. Dumisani then said to the lady that they will come back later”.

⁸ *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 34

[37] Despite the Plaintiff denying that he was found in possession of the phone he was able to describe the colour and make of the phone with no difficulty. The fact that he had told the Complainant to go back and look for help and that he was found in the company of the robbers walking in the opposite direction does not support his evidence that he was assisting the Complainant. Even though he claimed not to know the other two suspects, he was able to approach them alone while knowing that they are armed with a knife. Under cross examination, he was referring to the 2 suspects by name as Terrence and Dumisani.

[38] Having regard to the above factors, I am satisfied that there was prima facie evidence available to the prosecutor to charge the Plaintiff using the doctrine of common purpose. It is trite that a defendant will not be held liable if she had a genuine belief that is founded on reasonable grounds in the plaintiff's guilt. The standard of proof in a criminal trial is beyond a reasonable doubt. It is important to note that the higher standard is not required for a decision to prosecute. The fact that the prosecutor failed to prove the Plaintiff's guilt at trial and that the Plaintiff was discharged does not necessary mean that the prosecution was malicious unless it can be shown objectively that the prosecutor did not have minimum evidence that reasonably led her to believe that there is a prima facie case for the Plaintiff to answer. The Plaintiff failed to make out a case for malicious prosecution.

Detention from 26 November 2015 to 24 May 2017

[39] It is noted that the Plaintiff was kept in custody for 18 months before his discharge. It is the evidence of the prosecutor which was confirmed by the Plaintiff that he abandoned his bail application on 18 January 2016. This led to him remaining in custody until he was discharged.

[40] Regarding the accused's right to be released on bail, she testified that an offence of robbery while armed with a knife falls under schedule 1. For purposes of bail proceedings, she needed to check whether the suspect had any previous convictions or pending cases. She checked Mr Mabasa's profile on SAPS 69 (Criminal Records) and noted that Mr Mabasa had previous convictions of theft and housebreaking. He also had a pending case of possession of drugs. She mentioned that due to his previous convictions and pending case, his offence was changed from schedule 1 to schedule 5. She explained that for schedule 5 offence, an accused must do a formal bail application.

[41] The chronology of events according to the prosecutor is that:-

The Plaintiff appeared before the Regional Court, Pretoria on 26 November 2015. The matter was postponed to 03 December 2015 for the hearing. On 03 December 2015 Mr Mabasa requested Legal Aid. The matter was postponed to 09 December 2015. On this date the magistrate was not available. The matter was then postponed to 11 December 2015. Because as of 11 December 2015 the office of the Legal Aid was already closed, the matter could not proceed. Mr Mabasa was remanded in custody until 18 January 2016 for a formal bail hearing.

On 18 January 2016, the Plaintiff abandoned his bail application. He then remained in custody whilst his case was tried until he was discharged after the close of the state's case in terms of section 174 on 24 May 2017.

[42] The second defendant in paragraph 13 of its plea denied that the Plaintiff was held in custody for 18 months as a result of the conduct of the prosecutor. They averred that the Plaintiff remained in custody because his legal representative chose to abandon his bail application.

[43] The Plaintiff during his testimony confirmed that he abandoned his bail application on 18 January 2016. According to the Plaintiff, he abandoned his bail hearing because there was no one to pay bail money for him. It is

important to note that the Plaintiff was charged with a schedule 5 offense due to the previous convictions and pending cases. Section 60 of the CPA prescribed that Mr Mabasa had to do a formal bail hearing and satisfy the requirements thereto in order to be released on bail. In the absence of an application for bail, the Court would not have been in a position to release the Plaintiff on bail as it would have been in contravention of the Act. Further, the Plaintiff was represented at the time of the bail hearing and his legal representative would have been in a position to advise him of his constitutional right to apply to be released on bail. The Plaintiff failed to put forward the grounds upon which the second defendant may be held liable for unlawful detention after the Plaintiff had abandoned his bail hearing.

7. In the result, I make the following order:

1. The Plaintiff's claim against the first and second defendant is dismissed with costs on a party and party scale.

JL BHENGU
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION (PRETORIA)

For the Plaintiff: Adv TT Tshivhase briefed by Tshuketana Attorneys

For the Defendant: Adv BF Gededger briefed by State Attorney, Pretoria

Date of Judgment: 11 March 2024