

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 41135/09

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
04/04/2012	
DATE	SIGNATURE

In the matter between:

CACOURIS AMIRAS

Plaintiff

AND

CONSTABLE LEMMETJIES

1st Defendant

MINISTER OF SAFETY AND SECURITY

2nd Defendant

J U D G M E N T

MPHAHLELE AJ

- [1] The plaintiff instituted action against the first and second defendants alleging that he was arrested by constable C A Lemmetjies, on Friday, 26 September 2008 at the Sandton police station without a warrant. After the arrest, he was maliciously and unlawfully detained from approximately 19h00 on 26 September 2008 until approximately 11h00

on 29 September 2008 when he was granted bail at the Wynberg Magistrate's Court.

- [2] The defendants conceded the merits of the matter before the commencement of the trial. The defendants conceded the wrongfulness of the plaintiff's arrest and subsequent detention.
- [3] The plaintiff as well as his attorney, Mr. Phillip Pritchard testified. The defendants closed their cases without calling any witnesses.
- [4] The plaintiff's evidence is briefly as follows: On 26 September 2008 he was arrested and charged with possession of a stolen motor-vehicle. This charge is in respect of a trailer that the plaintiff sold to one Mr. Fryer in 2002 for R6 000-00. On 26 September 2008, while the plaintiff was with his mother on the way to see a movie, Mr. Fryer requested him to come to the Sandton police station to help identify the trailer. A driver of Mr. Fryer was arrested whilst in possession of the trailer. Mr. Fryer had also summoned his attorney, Mr. Pritchard to the police station for legal assistance.
- [5] Despite being placed in possession of the relevant documents by the plaintiff, Mr. Fryer did not change the details of ownership of the trailer with the relevant authorities. The plaintiff positively identified the trailer. Constable Lemmetjies then informed the plaintiff that the trailer was reported stolen in 2007 and he was going to charge him for being in possession of a stolen motor-vehicle and then released Mr. Fryer's driver. The plaintiff reacted by stating that constable Lemmetjies was mad as the trailer was already sold to Mr. Fryer in 2007. Constable Lemmetjies proceeded to charge him in front of his mother and Mr. Pritchard. The plaintiff there and then appointed Pritchard as his attorney. Constable Lemmetjies estimated the value of the trailer to be R20 000-00 notwithstanding the available details of the purchase price in the documents.

- [6] This, plaintiff was advised, was done to make it difficult for him to secure police bail. Further bail could not be secured for him as constable Lemmetjies left with the docket and he could not be found. He was detained at the Sandton police station in a small cell together with six other people. They had no access to water and drank water from the shower during the day. The toilet was out of order. He was given a blanket infested with fleas. The food was horrible and he refused to eat.
- [7] On 29 September 2008 the plaintiff and approximately forty other people were taken by a police van to Wynberg Magistrate's Court. There was not enough space in the police van and they were crammed in. Some of the people in the van were smoking. Constable Lemmetjies has misled the plaintiff by saying that he was going to appear at the Randburg Magistrate's Court. His attorney made a bail application at Wynberg and he was accordingly released. The matter was subsequently struck from the trial roll on 20 January 2009.
- [8] The plaintiff was 55 years old and a business broker at the time of his arrest. His business partner had to cancel his business meeting which was scheduled to take place on 27 September 2008. His business partner had to disclose the reason for the cancellation of the meeting to his prospective clients and, as a result his arrest was widely publicized. The arrest humiliated him and his business was affected detrimentally.
- [9] Mr. Pritchard testified that Mr. Fryer instructed him to assist his driver who had been arrested and detained at the Sandton police station. Upon his arrest, the plaintiff appointed Mr. Pritchard who was already at the police station to act as his attorney. Mr. Pritchard corroborated the evidence of the plaintiff regarding the events that led to the plaintiff's arrest and subsequent detention. He testified that he pleaded with constable Lemmetjies not to arrest the plaintiff, but without success. Constable Lemmetjies declined the plaintiff's application for a

police bail on the basis of the value of the trailer. He then looked for the duty officer to consider the bail application.

- [10] In the process constable Lemmetjies left the police station with the case docket. When he tried to contact him on his cell phone, constable Lemmetjies did not respond. He could not proceed with the application in the absence of the case docket and the investigating officer. He met constable Lemmetjies again on Sunday, 28 September 2008 at the police station. Despite being in possession of the certificate indicating the plaintiff was the owner of the trailer, constable Lemmetjies refused to release the plaintiff.
- [11] On Monday, 29 September 2008 Mr. Pritchard attended at the Randburg Magistrate's Court to make a bail application for the plaintiff. On realizing that the matter was not enrolled there, he proceeded to the Wynberg Magistrate's Court where he managed to secure bail for the plaintiff. He could not recall who informed him that plaintiff would appear at the Randburg Magistrate's Court. His account for services rendered in this matter was submitted to Mr. Fryer's business, Cadplan, and it was settled in full.
- [12] It was the plaintiff's submission that, from the evidence, it is clear that the arrest, detention and the subsequent prosecution were not only unlawful but also malicious. The plaintiff indicated at the beginning of the hearing of this matter that he intended to amend his claim to separate his claim for malicious arrest from the one for malicious prosecution. The court allowed the amendment of the plaintiff's claim and in the end the plaintiff's claim was as follows: R100 000-00 for malicious arrest; R225 000-00 for malicious prosecution and R11 000-00 for legal costs incurred. The plaintiff submitted that his claims for malicious arrest and for malicious prosecution are two separate causes of action and each claim should receive a separate award for damages.

- [13] Ms. Sikhakhane, counsel for the defendants, submitted that there is no evidence of malice in arresting the plaintiff as constable Lemmetjies arrested the plaintiff pursuant to a complaint of stolen property. Bail was refused because the plaintiff was held in custody in respect of an offence referred to in part II of schedule II of the Criminal Procedure Act 51 of 1977.
- [14] Ms. Sikhakhane further submitted that the claim for malicious prosecution lies against the office of the public prosecutor and that the plaintiff has failed to join the relevant department. Regard must be had to the requirements that must be met for the plaintiff to succeed with an action on the ground of malicious prosecution. The requirements are the following:
- 14.1 the defendant must have instigated the proceedings;
 - 14.2 the defendant must have acted without reasonable or probable cause;
 - 14.3 the defendant must have acted *animo iniurandi*; and
 - 14.4 the prosecution must have failed.
- [15] Regard being had to the requirements as mentioned in paragraph 14 above, the argument by Ms. Sikhakhane that claims for malicious prosecution lies against the public prosecution cannot be true and therefore falls to be rejected.
- [16] Mr. Snoyman, counsel for the plaintiff, submitted that the charge laid against the plaintiff was wrongly formulated as a trailer cannot be classified as a motor-vehicle. Therefore the submission made by counsel for the defendants that bail was refused because the plaintiff was in custody in respect of an offence referred to in part II of schedule II of the Criminal Procedure Act cannot be correct. This reason for his arrest was never communicated to the plaintiff and his attorney. Constable Lemmetjies left the police station with the docket and could not be contacted whilst knowing very well that Pritchard was trying to arrange bail for the plaintiff.

- [17] Mr. Snoyman also submitted that an amount of R160 000-00 should be awarded for the damages in respect of malicious arrest and R120 000-00 for malicious prosecution. Ms. Sikhakhane, on the other hand, submitted that an amount of R80 000-00 would be reasonable under the circumstances.
- [18] I now turn to the issue of quantum. It is trite law that the trial judge has a discretion to award what, in the circumstances, is considered to be a fair and adequate compensation to the injured party for the *sequelae* of his or her injuries. The courts have given direction on the approach to be followed. In ***Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at paragraph [17], Nugent JA*** stated that “the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.” In ***Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at paragraph 26, Bosielo AJA*** (as he was then known) stated that “the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings.”
- [19] In determining the amount for damages to be awarded to the plaintiff, the factors of importance would be the age, sex and social standing of the plaintiff, the nature and duration of the detention, whether or not the arrest was for an improper motive, the nature and duration of the prosecution.
- [20] The plaintiff was charged for being in possession of a stolen motor-vehicle even though the trailer was found in the possession of a third party. The trailer was alleged to have been stolen six years after the plaintiff had sold it to Mr. Fryer. The plaintiff was detained for approximately sixty-four hours despite the available information that the

trailer was registered in the plaintiff's name. Constable Lemmetjies had in his possession an official e-natis certificate indicating that the plaintiff was the registered owner of the trailer. The plaintiff attended at the police station at the request of Mr. Fryer. There is no evidence that there was reason to believe that the plaintiff would have absconded or failed to appear in court if a summons to appear in court was obtained.

- [21] After the charge was laid, constable Lemmetjies failed to consider other available means to bring the plaintiff before court other than an immediate detention. Constable Lemmetjies seemed to have been further incensed by the plaintiff's reaction upon his arrest. Pritchard's plea to constable Lemmetjies not to arrest and detain plaintiff fell on deaf ears. Constable Lemmetjies further denied the plaintiff an opportunity to apply for a police bail. From the evidence I cannot find any basis for the arrest and detention especially since the defendants failed to call constable Lemmetjies as a witness.
- [22] I find the circumstances of the plaintiff's arrest and the conditions under which he was detained unacceptable. I find that constable Lemmetjies knew or ought to have reasonably known that it was impossible for the plaintiff to be guilty of the offence as charged. Constable Lemmetjies could not have reasonably believed in the validity of the charges on the basis of the information available to him. Constable Lemmetjies further abused the court process by intentionally and wrongfully setting the law in motion by initiating a criminal charge against the plaintiff. Constable Lemmetjies was therefore instrumental in making and prosecuting the charge against the plaintiff.
- [23] The criminal prosecution lasted for four months which included two court appearances. I therefore find that the actions of constable Lemmetjies were malicious and without any reasonable and probable cause. The plaintiff has established malice on the part of constable Lemmetjies. I therefore find that the arrest and detention as well as the subsequent prosecution of the plaintiff to be malicious.

- [24] It is clear from the evidence that the plaintiff suffered humiliation by reason of the arrest. The humiliation and appalling conditions of the detention did have a negative emotional impact that may endure, although there is no evidence that the plaintiff received any treatment after he was discharged. The news of the plaintiff's arrest was publicized by his business partner and his mother. The business partner disclosed the reason for the cancellation of the meeting to the plaintiff's prospective clients. It is the plaintiff's submission that the publications were justified. The plaintiff submits that the arrest affected his business negatively but he failed to provide evidence on the extent of the negative impact. It is clear from the evidence that the plaintiff suffered considerable indignity during the detention.
- [25] Mr. Soyman referred me to the Seymour matter where, he submitted, the plaintiff was arrested and detained in similar circumstances. A 63 year old small scale farmer was unlawfully arrested and detained for five days. He felt ill the morning after the arrest and experienced pains in his chest. The Supreme Court of Appeal reduced the award for general damages from R500 00-00 to R90 000-00.
- [26] In *Greenberg v De Beer and another*, Masipa J awarded R90 000-00 for the wrongful arrest and detention that lasted for three days. The plaintiff was employed in the computer industry and a high profile member of the Jewish community. He was incarcerated with criminals under unhygienic conditions. The court found that malice was established on the part of the first defendant, the arrestor.
- [27] Having regard to the circumstances of this matter, an appropriate award for general damages in respect of malicious arrest would be R90 000-00 and R60 000-00 in respect of malicious prosecution.
- [28] The account of R11 00-00 in respect of legal costs was rendered to Cadac and it was settled in full. No evidence was led on how the

plaintiff acquired the right to sue for the R11 000-00. It follows that this claim cannot succeed.

[29] I therefore make the following order:

1. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiff a sum of R150 000-00 together with interest at the rate of 15.5% per annum *a tempore morae* from 25 May 2009 to the date of payment.
2. The defendants are ordered to pay the plaintiff's costs.



MPHAHLELE AJ

Acting Judge of the South Gauteng
High Court, Johannesburg

Appearances:

For the Plaintiff : Adv C Snoyman
instructed by : Larry Marks Attorneys

For the Defendant : Adv Sikhakhane
instructed by : The State Attorney

Date of hearing : 09 November 2011
Date of Judgment : 04 April 2012