



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 8192/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
31/01/2018	
DATE	SIGNATURE

6/2/18

In the matter between:

MAPHOPHE, MANTSENA FRANCIS

Plaintiff

And

**MINISTER OF POLICE
THE NATIONAL PROSECUTING AUTHORITY**

**1st Defendant
2nd Defendant**

JUDGEMENT

SENYATSI AJ

INTRODUCTION

1. This is a claim for wrongful arrest and malicious prosecution by the first and the second defendants respectively.
2. The claim arises following a shooting incident on 21 August 2014 in Johannesburg during which one Mogale Lesufi ("Lesufi") who, subsequently, turned the gun on himself shot the Plaintiff's wife at a point blank range.
3. The Plaintiff was arrested and charged with illegal possession of a firearm and defeating the ends of justice.

FACTS

4. The Plaintiff and his wife were estranged as at 21 August 2014 and lived in separate residences. On weekends, they would get together and spend time at the Plaintiff's residence. They were working for the same employer, being Mutual and Federal Insurance Company.
5. On the 21 August 2014, the Plaintiff and his wife left work after 17h00 together to her residence in order to go and fetch her car, a Ford Fiesta. The vehicle was parked in the basement parking of her residence. Upon arrival at the basement parking, both of them climbed into the vehicle, the Plaintiff in the driver's seat and his wife in the passenger seat.
6. As the Plaintiff was about to reverse the car, he had a knock on the glass of the left front passenger door. He looked to his left and recognised the person known to him as Lesufi who was also their colleague at Mutual and Federal Insurance Company. His wife climbed out of the vehicle, closed the door and engaged in a conversation with Lesufi. It appeared that his wife was not happy and he observed that due to the manner they were both talking to each other.

7. Lesufi had a plastic bag with him. Lesufi reached the inside of the bag and took out a red t-shirt. He unwrapped t-shirt and took out a firearm. He then pointed the gun at his wife's head, pulled the trigger and shot her point- blank where after he turned the gun on himself. They both fell.
8. After his wife was shot, frightened as he was, the Plaintiff climbed out of the car, ran around and tried to look for help. The first help that he tried to engage was a motor car coming into the basement, but the occupants thereof ignored him and drove away. He ran to the top of the basement and called 911. The operator explained to him that an ambulance and the police would be dispatched to the scene of the shooting.
9. He went back to the basement to check on his wife and saw that she was still alive. He wanted to put her inside the vehicle to take her to the top of the basement to be in a position to assist the ambulance staff to get his wife to hospital as soon as possible.
10. Before doing so, he took the gun from Lesufi, as he did not know whether Lesufi was still alive or not. He was afraid that should Lesufi still be alive, he could wake up and maybe shoot at him or his wife.
11. He took hold of the gun by using the red t-shirt, wrapped the gun in the t-shirt again, and placed it in the back of the Fort Fiesta in the rear passenger part. He then put his wife inside the car and proceeded to the top of the basement to wait for the ambulance and the South African Police Services ("SAPS").
12. Upon arrival of the ambulance and the SAPS, his wife was attended to whilst he was kept away from the scene. He explained to the police officers Mabunda and Manganyi, who attended to the scene, as to what happened. He explained that he was not the shooter and the circumstances under which the shooting incident happened. He also pointed out the gun to them in the car where after the police took possession thereof.

13. He then took them down to the basement and showed them the deceased. An investigating officer who had arrived at the scene was once again explained the full circumstances as highlighted above then accompanied him.
14. His wife was taken to the hospital, but he was not allowed to accompany her, as the investigation had to be finalized on the scene. His hands were swiped to test for gunshot residue. Police then escorted him to the hospital. On the way to hospital, the plaintiff was in the police car and a second police official drove in the Ford Fiesta.
15. At the hospital, the police managed to interview his wife who was fully awake. She corroborated the Plaintiff's evidence. This evidence was also not contested by the Defendants in cross-examination.
16. The police took down a statement from the Plaintiff being Exhibit 26 ("A2") of the police case docket on the 21 August 2014 and were in possession of all facts contained therein at that time.
17. After the police, officials had visited the hospital and confirmed the facts surrounding the shooting they left the Plaintiff with his wife. The Plaintiff returned home that night leaving his wife in hospital for further treatment.
18. The Plaintiff was phoned by a police official on 24 August 2014 and asked to present himself at the Johannesburg Central Police Station the following morning. On 25 August 2014, the Plaintiff presented himself as agreed to the Police Station prior to going to work.
19. Upon arrival at the police station, he was subjected to further interrogation by the investigating officer; Mr Selate ("Selate"). A second statement was demanded from him in the form of a warning statement. He was then arrested for the crime of possession of an illegal firearm and defeating the ends of justice.

20. At the time of effecting arrest, Selate relied only on the affidavit of the Plaintiff. The affidavits of the two fellow police officers who went to the scene of the shooting were only commissioned on the 26 August 2014. Before the arrest, Selate had obtained information from the police officers at the scene through their statements that the Plaintiff had come into possession of the firearm by taking the firearm from the deceased.
21. Selate did not know the requirements for arrest under the Firearms Control Act or defeating the ends of justice. He does not know the difference between defeating the ends of justice and obstructing the ends of justice. This was clearly demonstrated during cross-examination.
22. Selate is of the view that when a person disarms another who is endangering the lives of third parties that it would constitute an offence, which would justify an arrest, and that such person is in unlawful possession of a firearm.
23. The arrest was effected on the 25th August 2014. There is contradiction in this regard in that Selate alleges that the arrest only took place on 26th August 2014 and that the Plaintiff did not spend any time in prison prior to his appearance in Court. The evidence of the Plaintiff was not challenged under cross-examination that the arrest took place on 25th August 2014. Selate's version that the arrest was effected on 26th August 2014 was never put to the Plaintiff during his evidence in cross-examination. It is therefore accepted by this Court that the arrest was effected on 25th August 2014.
24. After his arrest, the Plaintiff was placed in a holding cell and taken to Court on 26 August 2014. Before his appearance in Court, the Case docket was given to the Chief Control Prosecutor, Mr Masimula ("Masimula") at the Johannesburg Regional Court who was called as a second witness for the Defendants.
25. At the time when he took a decision on behalf of the Second Defendant to prosecute the Plaintiff on the crimes in the case docket, Masimula had before

him the affidavit of the Plaintiff and the affidavits of the three police officials, being Exhibits 5-11 and 12-27. From these statements, it is clear that no offence had been committed as the facts highlighted by the Plaintiff are corroborated in all other affidavits by the police officers. Objectively considered, it is clear that the affidavits do not show the committal of any offence as contemplated in the Firearms Control Act or defeating the ends of justice.

26. Selate argued that he was in possession of evidence objectively suggesting the commitment of a crime by the Plaintiff. The basis of his conclusion on behalf of the Defendants was that it would not be possible for a person who had turned the gun on himself to be alive. He concluded that the Plaintiff should therefore have known that the assailant was dead and therefore had no reason to fear for his life and remove the firearm. No objective evidence was adduced suggesting that the Lesufi was dead at the time when the Plaintiff removed the firearm from him.
27. The Plaintiff appeared in Court on 26 August 2014 and the case was remanded to 5 September 2014. He was remanded in custody and was given bail on 5 September 2014. The case was remanded to 15 October 2014 and thereafter to 27 October 2014 when all charges were withdrawn against the Plaintiff and a *nolle prosequi* certificate was issued on the basis that there were no reasonable prospect of successful prosecution.
28. In his plea, First Defendant pleaded that the Plaintiff was arrested without a warrant in accordance with the provisions of **section 40(1) (6) of the Criminal Procedure Act 51 of 1977** based on Selate's reasonable suspicion that the Plaintiff had committed an offence contemplated in Schedule 1 of the Act relating to unlawful possession of firearm defeating the ends of justice.
29. The Second Defendant pleaded that the decision to institute the criminal charges was based on the statements contained in the docket and that the institution of such proceedings was prima facie lawful.

30. As already stated, the First Defendant called Selate to testify on its behalf. Selate investigated whether the Plaintiff had a firearm licence or not. He conducted the search by checking the Central Firearm Register using the Plaintiff's identity number for possible firearm licence.
31. The outcome of the investigation confirmed that the Plaintiff did not have a licence to possess a firearm. It was on that basis that when the Plaintiff came to the police station, he was arrested and charged as herein before stated.
32. Masimula testified that he is the Regional Court Control Prosecutor responsible for taking decisions on whether to institute proceedings or not. He was given the case docket and considered the statements therein. He arrived at a conclusion that the Plaintiff had charges to answer. He was cross-examined on whether under the circumstances he thought the Plaintiff intended to possess the firearm for his benefit. It was also put to him during cross-examination that if the cross-examiner were to disarm the witness who was shooting at a crowd, would the cross-examiner then be in illegal possession of the firearm to which Masimula answered in the affirmative.

ISSUES FOR DETERMINATION

33. The issues for determination can be summarised as follows:-
 - 33.1. Whether the arrest and detention of the Plaintiff were justified;
 - 33.2. Whether the institution of criminal proceedings by the Second Defendant was prima facie lawful.

LEGAL PRINCIPLES

34. In order to succeed with a claim for unlawful arrest and detention the Plaintiff must prove wrongfulness and *animus iniuriandi* against the First Defendant.
35. Concerning wrongfulness, it is trite law that an arrest or detention is *prima facie* wrongful and unlawful. It is not necessary therefore to allege or prove wrongfulness or unlawfulness. It is for the first defendant to allege and prove the lawfulness of the arrest and detention.¹
36. In the instant matter, the onus is on the First Defendant to prove that the arrest was a result of the commission of a crime in the presence of the peace officer.²
37. **Section 40(1) (b) of the Criminal Procedure Act 51 of 1977** 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”. Counsel for the First and Second Defendants, Mr Gxogxa, submitted that the First Defendant relied on this section to effect the arrest. For reasons that will be provided later, I do not find any factual support for reliance on the section to justify the arrest of the Plaintiff.
38. It is trite law that personal liberty weighs heavily with our 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.³

¹ See *Brand v Minister of Justice* 1959(4) SA 712 (A) at 714; *Minister of Law and Order v Hirley* 1986 (3) SA 568 (A) at 587-10 589; *Minister of Law and Order v Matshaba* 1990 (1) SA 280 (A).

² See *R v Henkins* 1954(3) SA 560(c); *R v Folkus* 1954(3) SA 442 (SWA); *Tsose v Minister of Justice and Others* 1951(3) SA 10 (A) at 18.

³ See *Olivier v Minister of Safety and Security and Another* 2009(3) SA 434(WLD)

39. In **Minister of Safety and Security v Glisson**⁴ it was held that when the factors are taken into an account to effect a balancing act, the scales in a democratic constitutional society would fall on the side of individual liberty.

40. In determining whether the police officer had reasonable grounds to suspect that a suspect has committed an offence, Jones J held as follows in **Mabona and Other v Minister of Law and Order**.⁵:-

“Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were 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 this information a reasonable man would be 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, i.e. 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 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 on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

41. The suspicion must be realistic and well founded, having regard to the circumstances of the particular case.⁶

42. Having regard to the circumstances of this case, I am not persuaded that Selate had reasonable suspicion that an offence had been committed.

⁴ 2007(3) SA 78(E)

⁵ 1988(2) SA (E) 654 at 658E.

⁶ See **Mabona and Another v Minister of Law and Order** *supra*.

The Plaintiff did not hide the firearm. He told Mabunda and Manganyi, the two police officers upon their arrival at the scene of the shooting, that he had removed the firearm from the deceased. He explained fully the genuine fear for his life and the life of his wife who had just been shot on the head point blank. He pointed out the firearm to the two police officers. After they had verified the statement by the Plaintiff from his wife at hospital, the two officers were satisfied that no offence had been committed. This is the reason they did not arrest the Plaintiff. In my view, there was a reasonable explanation as to why the Plaintiff took possession of the firearm. Any reasonable police officer would not decide to arrest the Plaintiff under those circumstances let alone charge him.

43. I find the explanation by Selate that the removal of the firearm from the deceased amounted to illegal possession of a firearm and defeating the ends of justice to be unreasonable and without legal and factual basis. He was therefore not protected by Section 40(1)(b) of the Criminal Procedure Act of 1977. In my view, he abused his authority and failed to realize the difficult circumstance the Plaintiff found himself. The traumatic experience of observing his wife been shot.
44. The fact that the Plaintiff did not have a firearm licence was irrelevant because even if he had one, that licence would not have been for the firearm used in the shooting. The inquiry into whether or not the Plaintiff had a firearm licence had no bearing whatsoever to the decision to charge the Plaintiff. To charge a man with the crimes Selate did, whilst his wife was lying in hospital due to injuries sustained by her shooting by the deceased, defies logic and the inescapable conclusion is that the arrest was wrongful.
45. One of the requirements for success in the claim of wrongful arrest is an intention to injure or an awareness of unlawfulness. The decision to arrest the Plaintiff was taken by Selate the day he received the case docket.

46. In dealing with the intention to injure as a requirement, Hoexter JA made the following remark in **Minister of Justice v Hofmeyr**⁷:-

“The possibility that in the case of certain forms of injuries involving wrongful constraints on personal liberty the wrongdoer’s legal liability might exist even in the absence of his appreciation of the wrongful nature of his injurious act has been explicitly recognised by this Court. In **Ramsay v Minister van Polisie en Andere 1981(4) SA 802(A)** Botha AJA (with whom the remaining members of the Court concurred) agreed with the order appearing at the end of the judgement of Jansen JA but was at pains to dissociate himself from certain observations in regard to *aminus injuriandi* in the judgement of Jansen JA At 818E-H Botha AJA said the following:

‘Hy aanvaar, na aanleiding van die posissie by laster, dat *aminus injuriandi*, wat onregmatigheid bewussyn verg; in die algemeen ‘n element is van alle inbreuke op die persoonlikheid wat injuria gemerk word. Ek aanvaar dit nie. Ek laat die moonlikheid oop dat daar a bepaalde vorme van injuria die eise van regsbeleid aanspreeklikheid kan bestaan in die afwesigheid kan onregmatigheid bewyssyn by die dader. In die waarheid word my benadering onderskraag deur die huidige stand van die regspraak. Dit val nie te betwyfel nie dat daar in die regspraak, veral in die Transvaal, oor in tydperk van jare met betrekking to sekere vorms van *injuria* ‘n stand punt ingeburger is wat beteken dat by sekere *injuria* onregmatigheids bewassyn by die dader geen voorvereiste vir annspreeklikheid is nie. Ek hoef nie daaroor op besonderhede in te gaan nie.’

47. It is also trite law that an honest belief in the legality of the arrest or detention is also no defence.⁸ Since no submission has been made for the First Defendant that Selate had honestly believed that the Plaintiff had committed an offence, I will not make any determination safe to say that the First

⁷ 1993(3) SA 131(“A”) AT 154j-155a.

⁸ **Tsose v Minister of Justice 1951(3) SA 10(A) AT 18; Ramsay v Minister of Police 1981(4) SA 802(A)** at 818.

Defendant would in all probabilities not have been able to persuade this Court had that argument been brought forward.

48. As regards the malicious prosecution by the Second Defendant, in order to succeed with the claim of malicious prosecution, a claimant must allege and prove that:-⁹

- a) the Defendant set the law in motion (instigated or instituted the proceedings);
- b) the Defendant acted with reasonable and probable cause;
- c) the Defendant acted with malice or (*animus injuriandi*); and
- d) the prosecution has failed.

49. It is common cause that the decision to prosecute was taken by Masimula, as a Regional Control Prosecutor for the Second Defendant. It is also common cause that the prosecution was not persisted with and that a *nolle prosequi* certificate was issued on 27 October 2014 stating that there was no reasonable prospect of success where after all charges were withdrawn.

50. In Waterhouse v Shield¹⁰ Gardiner J defined the reasonable and probable cause as follows:-

"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of existence of the state of circumstances, which, assuming them to be true, would reasonably lead to an ordinary prudent and cautious men, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."

51. Reasonable and probable cause in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the

⁹ See **Minister of Justice Constitutional Development v Moleko 2008(3) ALL SAR47SCA**

¹⁰ 1924 CPD 155 at 162.

institution of proceedings is justified. The context involves both a subjective and an objective element.

52. Not only must the Defendant have subjectively had an honest belief in the guilt of the Plaintiff, but also his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.¹¹
53. In the instant case, the Plaintiff was charged with two crimes of illegal possession of firearm and defeating the ends of justice. In all the charges, the intention by the Plaintiff ought to have been considered on the face of the sworn statements by the police officers at the scene and the Plaintiff. In light of the fact that the Plaintiff had clearly explained the reasons for the removal of the firearm from the deceased and disclosed that information to the two police officers who attend the scene of shooting and pointed out the firearm to them clearly, he could not have intended to unlawfully possess the firearm. He did not remove the firearm from the deceased Lesufi to keep it for himself. He removed it with the intention of ensuring his personal safety and that of his wife who had just been shot. That ought to have been clear to Masimula if he had properly applied his mind to the statements in the docket before him.
54. The offence of defeating the ends of justice presumes that had the Plaintiff not moved the firearm from the deceased, the Second Defendant would have charged him with crime. The question is what crime the Plaintiff would have been charged for and convicted. The answer is clearly no charge would have been preferred against the Plaintiff. Therefore, the charge of defeating the ends of justice had no probable cause to be preferred against the Plaintiff.
55. When Masimula testified on behalf of the Second Defendant and his failed dismally to explain to this Court how he came to charge the Plaintiff with the two charges. He simply stated in his evidence that when he read the statements, and was satisfied that a *prima facie* case had been made for

¹¹ See LAWSA par 449

charges to be pressed. Masimula was evasive and rude to counsel for the Plaintiff. He refused to answer some of the questions put to him and had to be reminded that he was not only a witness but also an officer of this Court who ought to know better, what is expected of a witness. He clearly overplayed his role as a Regional Control Prosecutor as he made a comment that in his view "law is law" and that is why decided to charge the Plaintiff with the offences that form the subject of this action.

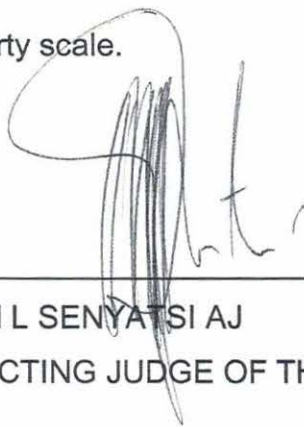
56. It became clear during Masimula's evidence that he did not apply himself properly to the statements contained in the case docket in front of him. He offered no reasonable explanation for his decision to prosecute. Absent of such explanation, I am left with no option but to find that his decision was done with the intention to injure the Plaintiff.
57. If Masimula had applied his mind reasonably to the statements before him in the case docket, he would have been aware that the Plaintiff's wife was in hospital being treated for gunshot injuries to her head. He would have become alive to the fact that the Plaintiff removed the gun from the deceased in an honest belief that the deceased may wake up and shoot him or his wife. Masimula would have realised that there was no intention from the Plaintiff to appropriate the firearm for himself and that the proposed charges were factually and legally without merit.
58. I have considered in full the circumstances of this case and I am satisfied the Plaintiff has made out a case against the First and Second Defendants.
59. I now consider the quantum of damages suffered by Plaintiff.
60. It is clear to me that Masimula's decision to prosecute was based on the discussion he had with Selate. Both of them failed to appreciate the statements by the Plaintiff and the two police officers who attended the scene of the shooting. They were both insensitive to the fact that the Plaintiff's wife

was lying in hospital fighting for her live and needing the support of the Plaintiff.

61. In the instant case, I am satisfied that the Plaintiff has clearly proven *animus injuriandi* on the part of both Defendants.
62. The award of damages is a matter of discretion by this Court. In awarding the damages, I have considered the time spent in custody and the fact that the Plaintiff was denied his personal right not to be subjected to unlawful arrest and denied freedom of liberty. I am alive to the fact that the damages award will be paid out of the State coffer. Consequently, the quantum on the award, which I consider to make, is what I deem to be appropriate in the circumstances of the instant case.

ORDER

63. In the circumstances, the following order is made:
- a) Judgment is entered in favour of the Plaintiff for R180 000 against both Defendants jointly and severally, the one paying the other to be absolved.
 - b) Interest on the aforesaid amount at the rate of 9% per annum calculated from the date of judgement to date of payment.
 - c) Costs of suit on a party and party scale.



M L SENYATSI AJ
ACTING JUDGE OF THE HIGH COURT

FOR PLAINTIFF:

Mr. B BOOT
INSTRUCTED BY
ADAMS & ADAMS, PRETORIA

FOR FIRST & SECOND
DEFENDANTS:

Mr. A GXOGXA
STATE ATTORNEY, PRETORIA