

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, PORT ELIZABETH)

CASE NO: 669/04

IN THE MATTER BETWEEN:

PHAKAMILE SIKHUNANA

PLAINTIFF

AND

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

Coram: Lowe J

Date Heard: 12 February 2013

Date Delivered: 18 February 2013

Nature of matter: Delict - claim for damages – arising from wrongful and unlawful detention and the preferring of criminal charges; special pleas first, whether the order of court, sanitised what might otherwise be found in due course to have been a wrongful and unlawful arrest without warrant – second special prescription

Order: The first and second special pleas raised by defendant are to be decided separately in terms of rule 33 (4) these being separated from the remainder of the cause of action accordingly; the first special plea succeeds, plaintiffs claim in respect of his detention for the period 1 September 2000 to the date of his release being dismissed; The defendant's second special plea succeeds, plaintiffs claim in respect of his arrest and detention prior to 12 March 2001 being dismissed; and plaintiff is to pay defendants cost of suit relevant to the first and second plea.

JUDGMENT

LOWE, J:

INTRODUCTION

[1] The plaintiff in this matter issued summons out of the above honourable court based upon what was alleged to be a wrongful and unlawful detention at the instance of the SAPS he being thereafter held at St Albans prison from the plaintiffs arrest on 31 August 2000 until his release on 12 March 2003.

[2] The precise nature of the cause of action is somewhat difficult to discern from the pleadings but the balance of the particulars of claim would appear to have been aimed not directly at unlawful arrest but at wrongful and unlawful detention and the preferring of criminal charges, as a result of what is alleged to have been the policeman's unlawful and wrongful conduct. The exact nature of which is not set out or specified.

[3] Summons was issue in March 2004 and served on 12 March 2004 on the defendant.

[4] In due course the defendant filed its plea containing two special pleas and a plea over on the merits.

[5] The arrest complained of was an arrest without warrant the defendant pleading over that the arrest was lawful in terms of the provisions of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977.

[6] The first special plea alleged that plaintiff claimed that the arrest was wrongful and unlawful, averred that plaintiff brought an application for bail on 1 September 2000, the magistrate dismissing same and thereafter the plaintiff appearing from time to time before the magistrate, on each occasion being further remanded on a lawful warrant of detention issued by the magistrate by due process of law.

[7] It is thus contended that plaintiffs detention from 1 September 2000 (he having being arrested on 31 August 2000) to date of his final release was lawful and in terms of a magistrates warrant. The prayer sought dismissal of the claim for all but the first day the lawfulness of which would depend on whether the arrest itself was lawful.

[8] The second special plea raises prescription relevant to the period from the date of plaintiffs arrest on 31 August 2000 to 12 March 2001. It is alleged that the cause of action arose on the date of arrest (being a claim for damages) constituting a debt as envisaged in section 10 of the Prescription Act 68 of 1969 (“the Prescription Act”) and that the claim prior to 12 March 2001 thus became unenforceable. Defendant sought an order accordingly and in effect by way of the two special pleas sought dismissal of the entire claim. Effectively the first special plea dealt with the period from 1 September 2000, and the second special plea with the period 31 August 2000 to 12 March 2001.

[9] Put otherwise if the first special plea is successful this would require plaintiffs claim to be dismissed save for the first day of his arrest. If the second special plea is successful the claim for the first day of arrest would have prescribed even if the arrest was an unlawful arrest.

[10] When the matter came before me, plaintiff and defendants legal teams had agreed that all I would be asked to do would be to adjudicate the first and second special pleas which should be separated for hearing in terms of rule 33 (4), applying for an order to that effect.

[11] Being satisfied that this was appropriate in the circumstances such an order issues herewith.

[12] Plaintiff and defendants counsel informed me from the bar that by agreement the matter was to be determined on the pleadings, as read with the rule 37 minute and the handwritten statements in volume two of the bundle before me, as also the entire criminal record admitted by agreement, neither party intending to adduce any evidence.

[13] In argument however neither counsel referred to volume two of the bundle and the record, save to say that the facts which were common cause appeared therefrom.

[14] It was common cause that:

14.1 Plaintiff was arrested 31 August 2000;

14.2 Plaintiff appeared before the Humansdorp magistrate on 1 September 2000, where he was represented by attorney Ah-Sheen, bringing a bail application which was refused;

14.3 Plaintiff was thereafter remanded in custody by order of the court and detained in custody in terms of orders issued by magistrate on each occasion through to his discharge at the end of his criminal proceedings;

14.5 He was released by order of the magistrate on 12 March 2002;

14.6 He was discharged at the end of the state's case.

THE CAUSE OF ACTION

[15] The cause of action in respect of unlawful arrest and detention is the *actio iniuriarum*. This consists in the wrongful deprivation of a person's liberty and requires neither fault nor awareness of the wrongfulness of the arrestors conduct.

[16] An arrest is malicious when the defendant makes improper use of the legal process to deprive the plaintiff of his or her liberty.

[17] An arrest is *prima facie* wrongful and it is not necessary to either allege or prove wrongfulness. **Lombo v African National Congress 2002 (5) SA 668 (SCA) para 32.**

[18] Despite the nature of the action (unlawful arrest and detention) plaintiff need not allege the presence of *animus iniuriandi* (being the intention to injure or an

awareness of unlawfulness). **Minister of Justice v Hoffmeyr 1993 (3) SA 131 (a) 154 – 157; Tödt v Ipsr 1993 (3) SA 577 (A) at 586 G – I.**

[19] Malicious proceedings, on the other hand, (whilst also the *actio iniuriarum*) requires of a plaintiff to allege and prove that:

19.1 The defendant set the law in motion (instituted the proceedings);

19.2 The defendant acted without reasonable and probable cause;

19.3 The defendant acted with malice (or *animo iniuriandi*);

19.4 The prosecution failed.

See **Minister of Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA).**

[20] It is important to note that malice is the *animus* requirement and is not a separate element in malicious proceedings claims.

[21] It is thus clear that the two separate causes of action, although based in the same area of delict, have separate requirements the most important difference being that in the one it is unnecessary to allege *animus*, whilst in the other it is essential to do so. **Tödt (supra) at 586 E – G.**

[22] In **Isaacs v Minister Van Wet en Order 1996 (1) SACR 3140 (A)** the court dealt with a matter in which the plaintiffs causes of action were malicious (or in the alternative unlawful) arrest and detention as well as alleged malicious prosecution. Plaintiff succeeded in proving that he had been unlawfully arrested and detained and on appeal appellant challenged the decision on the basis that the period of his unlawful detention was longer than the period the *court a quo* had found it to be. In respect of this ground the court on appeal found, on the question when the unlawful detention had ceased, that this been when the magistrate issued the detention order in terms of section 50 (1) of the Criminal Procedure Act.

[23] Put otherwise, the magistrates order for ongoing detention sanitised the otherwise unlawful arrest, the unlawfulness ceasing at that moment.

[24] In considering the pleadings in matters where it is alleged that there has been an unlawful detention one must bear in mind the judgement of **Langa CJ in Zealand v Minister of Justice and Constitutional Development 2008 (4) SA 458 (cc) at 467 – 469.** Here the Constitutional Court made it clear that the Constitution enshrines the right to freedom and security of person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. The court held in the context of that matter that it was sufficient for the plaintiff simply to plead that he was “unlawfully detained”. The court pointed out that this is not something new in our law and it had always been firmly established that every interference with physical liberty was *prima facie* unlawful.

[25] In **Minister Van Wet and Order v Matshoba 1990 (1) SA 280 (A)** the Supreme Court of Appeal considered exactly what must be averred by plaintiff complaining of unlawful detention. The court concluded that it is sufficient for a plaintiff who is in detention simply to plead that he or she is been held by the defendant. Justification then rests upon the defendant.

[26] In this matter plaintiff makes sufficient allegations to raise a cause of action based on the deprivation of his liberty.

[27] I do not understand however **Zealand** to indicate that such an allegations is sufficient to found a claim for malicious proceedings or that it is no longer necessary to plead and prove malice (*animus iniuriandi*).

[28] That being so, the high water mark of plaintiffs claim in this matter goes to deprivation of his liberty and not to malicious proceedings. The claim is solely against defendant and the Department of Justice has not been joined

[29] Indeed in argument plaintiff's counsel did not contend the contrary.

THE SPECIAL PLEAS

[30] It is against this background that two special pleas must be considered.

[31] The central question in the deprivation of liberty argument in respect of the first special plea is whether the order of the magistrate dismissing the bail application

and detaining the plaintiff by order of court, sanitised what might otherwise be found in due course to have been a wrongful and unlawful arrest without warrant.

[32] Counsel made it clear in argument that I need not deal with the first day of the arrest in respect of the first special plea but only with the issue concerning the effect of the magistrates order on that claim arising from deprivation of liberty. As appears from **Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA) at 383** the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest being only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within forty eight hours, depending on the court hours. Once that has been done, the authority to detain that is inherent in the power to arrest is exhausted. The authority to detain the suspect further is then within the discretion of the court.

[33] The discretion of the court to order the release or further detention of the suspect the court pointed out, is subject to why wide ranging, and in some cases stringent statutory directions. The Criminal Procedure Act said the court required a judicial evaluation to determine whether it is in the interests of justice to grant bail. Whilst the purpose of arrest is to bring the suspect to trial the arrestor, said the court, had a limited role in that process and was not called upon to determine whether the suspect ought to be detained pending the trial. That is the role of the court once the arrestee is brought to court.

[34] Applying these principles and those in **Isaacs (supra)** I am bound to find that upon the magistrate refusing bail and ordering the further detention of the plaintiff,

any unlawfulness in the arrest (which may or may not be shown to exist in due course) becomes irrelevant and the unlawful detention (if same existed) ceases. Counsel could refer me to no more recent authority overtaking Isaacs case and I could find none.

[35] Of course, this would not deprive a plaintiff, where a matter has been suitably pleaded, to a cause of action arising in malicious proceedings if the appropriate defendant could be shown to have satisfied the requirements thereof, in particular, acting without reasonable and probable cause with malice.

[36] As I understand it, in those circumstances the magistrates order does not deprive the plaintiff of a claim against the relevant defendants.

[37] As I have already concluded in this matter, that the high water mark of plaintiffs claim is a claim of deprivation of liberty, and does not extend to malicious proceedings, the first special plea must inevitably be upheld, plaintiffs claim for the period 1 September 2000 to the date of his release being accordingly lawful and in terms of a warrant issued by the magistrate from time to time.

[38] This leaves the second special plea for adjudication which in the light of my finding in the first instance, remains relevant only to the first day of the detention. Alternatively if my finding on the first special plea is incorrect, the second special plea is applicable to the period from the first day of detention to 12 March 2001.

[39] Chapter 3 of the Prescription Act applies to the prescription of debts for which organs of state are liable ("debts") there being no distinction in respect of chapter III

of the Prescription Act between these kind of debts and other debts, with regard to when prescription begins to run, the period of prescription, delay in completion, and interruption of prescription. **Act 40 of 2002 section 2; Minister of Finance v Gore NO 2007 (1) SA 111 (SCA).**

[40] It is trite that such a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state relevant and the facts that gave rise to the debt. A creditor is regarded as having acquired this knowledge as soon as it could have been acquired through the exercise of reasonable care unless the organ of state wilfully prevented the creditor from acquiring such knowledge. **Sibiya v Premier of the Province of Kwazulu-Natal [2008] 1 All SA 2950).**

[41] It is clear from the pleadings and minute, that the debt in this matter from the point of view of prescription would have arisen at the moment of arrest as the plaintiff would have known of the alleged wrongfulness thereof immediately and of course of the identity of the intended defendant.

[42] The only question is whether there is any delay in completion or the interruption of prescription.

[43] Having regard to the second special plea, and the fact that the dates of the cause of action arising and the issue and service of summons of common cause, the only issue relevant is delay or interruption of prescription alternatively some other cause which would have saved the plaintiff within the period referred to.

[44] Whilst plaintiff's counsel contended from the bar that there was such a circumstance arising from the unlawful arrest and the fact that plaintiff had been detained for the period alleged, being either as I understood it an inability to proceed, or being psychologically prevented from doing so.

[45] None of this was raised in replication to the second special plea, no replication being filed. Defendants counsel correctly pointed out that this constituted a failure to plead the necessary, and to which defendants counsel at all times timously objected.

[46] In the light hereof and plaintiff having made no attempt to introduce any replication I am bound to adjudicate the matter on the pleadings as they stand.

[47] Not only is there nothing before me relevant to plaintiffs attempted argument in this regard, nothing in this regard was pleaded and there is nothing on the facts placed before me in argument to suggest that plaintiff was prevented by superior force from proceeding, justifying any arguable delay in the completion of prescription as set out in section 13 (1) of the Prescription Act. Counsel for the plaintiffs referred to no authority in this regard save **Van Zijl v Hooggenout 2005 (2) SA 93 (SCA)** to which he referred very briefly. I should point out that plaintiff's counsel did not contend or point me to anything in the record to substantiate this – referring only to the pleadings and the fact that plaintiff had been held in custody. No facts relevant were pleaded in replication. The kind of situation referred to in **Lombo** finds no factual basis or substantiation on the pleadings in this matter and apart from referring to paragraph 3.2 of the particulars of claim, plaintiff's counsel refers to none. The plaintiff's

incarceration alone is insufficient to support such argument and nothing beyond this is pleaded.

THE ORDER

[48] In the result, I find that both special pleas succeed and I make the following order:

48.1 The first and second special pleas raised by defendant are to be decided separately in terms of rule 33 (4) these being separated from the remainder of the cause of action accordingly;

48.2 The first special plea succeeds, plaintiffs claim in respect of his detention for the period 1 September 2000 to the date of his release being dismissed;

48.3 The defendant's second special plea succeeds, plaintiffs claim in respect of his arrest and detention prior to 12 March 2001 being dismissed;

48.4 Plaintiff is to pay defendants cost of suit relevant to the first and second plea.

M.J. LOWE
JUDGE OF THE HIGH COURT

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