



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 12720/2016

In the matter between

THOBELANI RAYMOND SHAZI

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

ORDER

The following order shall issue:

1. The Plaintiff's claim for the unlawful arrest and detention from 7 October 2013 to 20 February 2014 is dismissed.
2. The Plaintiff's claim for the unlawful arrest and detention from 20 to 27 February 2014 is dismissed.
3. The Plaintiff's claim for malicious prosecution is dismissed.
4. The Plaintiff's claim for assault and torture is successful. The Defendant is liable to compensate the Plaintiff for the damages in an amount to be determined at quantum stage.
5. Costs reserved for determination by the Court hearing the issue of quantum.

JUDGMENT

Hadebe AJ

Introduction

[1] In this matter the Plaintiff has instituted an action against the Defendant claiming delictual damages for an alleged unlawful arrest, unlawful detention, assault and malicious prosecution.

[2] The Plaintiff was allegedly arrested on 7 October 2013 by the members of the Defendant without a warrant of arrest. He was allegedly detained at Port Shepstone Police Station from 7 October 2013 until he was released from custody on 20 February 2014 when the charges against him were withdrawn due to insufficient evidence. Immediately after the charges had been withdrawn he was re-arrested on the same day for the same offence in respect of the charges that had been withdrawn. He was thereafter released on bail on 27 February 2014.

[3] The Plaintiff was allegedly tortured and assaulted by members of the Defendant on 22 October 2013. As a result of the aforesaid the Plaintiff suffered bodily injuries and received medical treatment at the Port Shepstone Regional Hospital.

[4] It is further alleged that members of the Defendant wrongfully and maliciously set the law in motion by laying false charges of murder against the Plaintiff on 7 October 2013.

[5] The Defendant pleaded as follows in its amended plea:

- (a) The special plea was raised for non-compliance with the provisions of s 3 of the Institution of Legal proceedings Against Certain Organs of State Act 40 of 2002.
- (b) The Plaintiff was arrested and detained for a schedule 6 offence.

- (c) The warrant of arrest was issued on 7 October 2013, and the Plaintiff was handed over to the members of the Defendant by his attorney.
- (d) The Defendant admits that the charges against the Plaintiff were withdrawn on 20 February 2014 but denies that they were withdrawn due to insufficient evidence.
- (e) The Defendant denies the re-arrest of the Plaintiff as alleged in the Plaintiff's particulars of claim.
- (f) The Defendant denies that the Plaintiff was assaulted by its members as alleged in the particulars of claim.
- (g) The Defendant denies the claim of malicious prosecution as pleaded in the particulars of claim.

[6] Before the commencement of the hearing, the Defendant withdrew its special plea. The parties agreed that the trial was to proceed only on the issue of liability, with quantum to stand over.

Issues

- [7] The court was called upon to decide on the following issues:
- (a) the lawfulness of the arrest and detention that allegedly occurred on 7 October 2013 (claim 1);
 - (b) the lawfulness of the re-arrest and detention that allegedly occurred on 20 February 2014 (claim 1);
 - (c) the torture and assault that allegedly occurred on 22 October 2013 (claim 2);
 - (d) the lawfulness of the prosecution of the Plaintiff and proceedings instituted against him by members of the Defendant which occurred on 20 February 2014 (claim 3).

Onus

- [8] The parties agreed as follows:
- (a) The Defendant carried the onus in respect to the lawfulness of arrest and detention that allegedly occurred on 7 October 2013 as well as the claim for malicious prosecution.

- (b) The Plaintiff carried the onus in respect to his claim for assault and torture that allegedly occurred on 22 October 2013 as well as the claim for re-arrest and detention that allegedly occurred on 20 February 2014.

Evidence

[9] The Plaintiff testified as follows:

- (a) On 11 February 2013, he was in his car at the taxi rank next to his home. He was called by a police officer by the name of Mr Mbanjwa who told him to report to the Port Shepstone Police Station on the following day at 07h00.
- (b) On the following day, he reported at the police station with his attorney, Mr Phoswa.
- (c) At the police station, he met Mbanjwa who introduced him to Captain Bosman. Bosman interviewed him regarding the death of Derick Lushaba ("the deceased"). His attorney was present during the interview.
- (d) After the interview, he left his cell phone number for Bosman to contact him should the need arise.
- (e) In October 2013, he received a call from his sister telling him that members of the Defendant were looking for him. At that time, he was in Standerton to collect the body of his late brother.
- (f) On 7 October 2013, he reported at the police station accompanied by his attorney (Mr Phoswa). He was then arrested and appeared in court on 9 October 2013.
- (g) The Plaintiff brought an application for bail which was refused. He thereafter remained in custody. He could not remember the date when the bail application was made.
- (h) On 22 October 2013, he was called by a police officer, Mr Ndlovu, whilst he was in the holding cells.
- (i) He was taken by three police officers to Bosman's office. The police officers were Messrs Shintsha Cele, Cele and Kruger. The ranks of these police officers are unknown to the Plaintiff.
- (j) When he arrived at Bosman's office there was another police officer whose details are unknown to him. Bosman told the Plaintiff that he wanted the firearms that were at his home. The Plaintiff told Bosman that he did not have any firearms.

- (k) He was then taken by Shintsha, Cele and Kruger to the mortuary where he saw people who were operating dead bodies. The mortuary had a bad smell and bodies were all over the place. He did not know why he was taken to the mortuary.
- (l) They then left the SAPS premises. Kruger was driving a Ford Focus with the Plaintiff seated at the backseat of the vehicle. They were followed by Cele and the other police officer whose name is unknown to him.
- (m) Cele and the unknown police officer were travelling in a double cab bakkie.
- (n) He was transported to the forest and he noticed a number of firearm cartridges on the ground.
- (o) He was instructed to get out of the motor vehicle. His legs and hands were tied with handcuffs.
- (p) They inserted newspapers under the handcuffs on his legs and hands.
- (q) He was then lifted to the back panel of the double cab and lay with his back facing up.
- (r) They covered his head with a hard plastic, which was pepper sprayed. He could not breathe and move as there was someone sitting on top of him.
- (s) He became unconscious and woke up when they were pouring water on his body.
- (t) When he woke up he noticed that he had messed himself. He then requested the police officers to take him home so he could show them the firearms. He realised that he was not safe and he wanted someone to see his condition.
- (u) There was a police kombi that followed them. He did not identify the names of the occupants.
- (v) When he arrived at his home, he called his niece to give him water. At the time, he was still wet and had handcuffs on his hands and legs.
- (w) He told the police that the firearms were in the toilet pit. Some of the police officers went to dig in the toilet pit. Whilst they were digging Kruger received a call and he then instructed the police officers to stop digging. The Plaintiff assumed that the call was from his attorney.
- (x) When they returned to the police station, Ndlovu, noticing his condition, enquired from the Plaintiff if he was okay. He replied in the negative. Ndlovu told the police officers to take the Plaintiff to hospital for treatment but they just left him.

- (y) Ndlovu called the ambulance for the Plaintiff. The ambulance crew assessed the Plaintiff and told him that he will need to be examined by a Doctor. They were unable to transport him to hospital as he was under police custody.
- (z) The Plaintiff was transported to the Port Shepstone Provincial Hospital with a police van. He alleged that the van was travelling very fast and it was uncomfortable as he was seated at the back of the van.
- (aa) At the hospital, he used a wheelchair as he could not walk.
- (bb) He was treated by a Doctor who gave him an injection for pain. After receiving treatment he fell asleep. When he woke up, he was discharged and was given pain tablets.
- (cc) After being discharged he was transported back to the police station on the same day.
- (dd) He was released on 20 February 2014 when the charges against him were withdrawn at court.
- (ee) When the court adjourned, the SAPS members re-arrested him at court on the same date. He was arrested by the same crew members, namely; Shintsha Cele, Kruger and another Cele.
- (ff) He was taken back to Port Shepstone Police Station and appeared in court on the following day.
- (gg) The Presiding Magistrate enquired from the Prosecutor as to what had happened as the charges were withdrawn. The Prosecutor handed up a piece of paper which was read by the Magistrate. The Magistrate then recused himself and stepped out. They had to wait for another Magistrate to preside over the matter.
- (hh) The new Presiding Magistrate enquired whether the Plaintiff wanted to apply for bail or not. The Prosecutor indicated that bail was being opposed. The matter was then adjourned to another date for a formal bail application. The Plaintiff remained in custody.
- (ii) On the next appearance date the Plaintiff was released on bail as bail was unopposed.
- (jj) The matter was then transferred to Ramsgate Circuit High Court. In the High Court, the trial proceeded and the Plaintiff was found not guilty. He did not testify at the hearing.

(kk) When he was arrested on both occasions, no warrant of arrest had been issued. There was only a document that was read to him with his rights.

[10] During cross-examination, the following transpired:

- (a) The Plaintiff was asked about the complaint of assault that he laid against the members of the Defendant. He confirmed that he did lay a complaint but he did not know the outcome.
- (b) It was put to him that the Senior Public Prosecutor declined prosecution as the complaint did not have merit. He had no comment on what was put to him.
- (c) He was asked as to why he requested to be taken to his home. He responded that he wanted his family members to see how he was being mistreated.
- (d) He was not aware whether the neighbours noticed that he had messed himself or not.
- (e) When he was asked whether he was assaulted in the presence of his nephew, Ntokozo, he said that he was not assaulted but was pushed by one of the police officers.
- (f) He indicated that his injuries were visible and were seen by Ndlovu, hence Ndlovu called the ambulance and he was eventually transported to hospital for medical treatment.
- (g) He knew Simanga Nkosi who implicated him but not in person. He only heard his name when he was called as a witness during the trial.
- (h) He knew Doda Mbutho, Sthembiso Ngcobo and Six Yard.
- (i) It was put to him that Simanga Nkosi and Thamsanqa Mwandla implicated him. He responded by stating that he had no comment as he was not aware but he was aware that the State witnesses failed to attend court when they were called to testify.
- (j) It was put to him that the witnesses were intimidated. He said he was not going to comment as he was not aware.
- (k) It was further put to him that there was a dispute between him and the deceased in relation to the elections for the community trust. This was not disputed by the Plaintiff.

[11] The Plaintiff responded as follows to the Court's questions:

- (a) The arresting officer read the rights of the Plaintiff when he was arrested and he was informed about the reasons for his arrest. At the time, his attorney was present.
- (b) He was in custody from 7 October 2013 until 20 February 2014 when the charges were withdrawn.
- (c) He was re-arrested on 20 February 2014 and detained until 27 February 2014 when he was released on bail.
- (d) The trial proceeded in the High Court and he was found not guilty due to insufficient evidence. He does not remember when he was discharged/acquitted.
- (e) He did not have documentary evidence to support his claim for his re-arrest on 20 February 2014.
- (f) The visible injuries that he sustained were scratches on his wrist.

[12] The Defendant's counsel put the following to the Plaintiff:

- (a) that there was no second arrest as there is no documentary evidence reflecting the second arrest;
- (b) the first arrest was lawful as there was a warrant of arrest and he was handed over by his attorney. His attorney would not have allowed the arrest to take place without the warrant; and
- (c) the Plaintiff did not dispute what was put to him.

[13] The Plaintiff closed his case without calling further witnesses.

[14] The Defendant called Captain Bosman as a witness. The summary of his evidence is as follows:

- (a) He has been in the police service since 1987.
- (b) During the year 2013, he was requested to assist in a murder case by a "war room".
- (c) During the course of the investigation, they obtained information that the reason for the death of the deceased was a dispute about the monies of the community trust. At the time, Plaintiff was the chairperson of the community trust.

- (d) There were three members that were working with him on the case. He was only assisting by managing the docket in the office and taking statements from the different witnesses. The ground work was done by the other three members.
- (e) During the investigation there were various witnesses who implicated the Plaintiff. As a result, he approached the court to issue a warrant of arrest against the Plaintiff.
- (f) The following witnesses are amongst other who implicated the Plaintiff:
 - (i) Simanga Nkosi; and
 - (ii) Mwandla.
- (g) Statements of the above-mentioned witnesses were attached to the application for the warrant of arrest.
- (h) It was discovered that the Plaintiff was the instigator, funded the process and used his motor-vehicle when the crime was committed.
- (i) When the Plaintiff was arrested he was accompanied by his attorney and he was shown the warrant of arrest that had been issued.
- (j) At some stage after the arrest, the Plaintiff was booked out for the purpose of investigations at his house. The police did not find the firearms when they raided his house.
- (k) He has no knowledge about the physical assault but he is aware that a criminal case was opened by the Plaintiff for the assault.
- (l) The following documents were handed up and marked as exhibits:
 - (i) Exhibit "A"- Statement by S Nkosi;
 - (ii) Exhibit "B"- Statement by T Mwandla;
 - (iii) Exhibit "C"- Statement by Bosman; and
 - (iv) Exhibit "D"- Warrant of Arrest.

[15] Under cross-examination, the following was recorded:

- (a) Bosman confirmed that he was not an investigating officer in the matter but was assisting.
- (b) He indicated that the arresting officer was Constable Cele.
- (c) He was questioned as to why he did not include statements of the eye witnesses when he applied for the warrant of arrest. He indicated that there

was no need as the statements of Nkosi and Mwandla were sufficient to support his application.

- (d) He could not remember whether the identification parade was done or not.
- (e) It was suggested to him that the warning statement should have been taken from the Plaintiff before issuing warrant of arrest. He disagreed with the suggestion.
- (f) He was requested to explain as to why he wrote the statements of Nkosi and Mwandla and signed as a Commissioner of Oaths. His response was that there was nothing wrong about his conduct as he was a Commissioner of Oaths.
- (g) He was not involved in the confession process. Captain Rannier was involved in the confession process of Nkosi. He is not aware of what transpired during the confession process. He stated that he only interviewed the Plaintiff when he was arrested in the presence of his attorney, Mr Phoswa.
- (h) He did not receive a report of the assault but is aware that the Plaintiff did lay a charge of assault against police members. He has never seen the J88 form and hospital records.
- (i) He was unaware that the Plaintiff was re-arrested after the charges had been withdrawn.
- (j) It was put to him that there were no reasonable grounds for suspicion justifying the arrest of the Plaintiff. He disagreed with that suggestion.
- (k) It was also put to him that the investigations were not properly done. He conceded and stated that the Director of Public Prosecutions allocated a trial date before the finalization of the investigations.
- (l) It was put to him that the case received special treatment because the deceased was an ex-police member. He disagreed with the suggestion.
- (m) Plaintiff's discovery was handed up and marked Exhibit "E".

[16] Under re-examination, the following was recorded:

- (a) He emphasized that he had sufficient information to apply for the issue of the warrant of arrest.
- (b) He stated that the ID Parade was not necessary as the Plaintiff had been implicated and named by the witnesses. The ID Parade would have been pointless.

[17] The Court requested clarification from Bosman with reference to Exhibit “E”. Bosman confirmed that the ambulance report confirms that the Plaintiff was examined by the ambulance crew whilst he was in the custody of SAPS; that the Plaintiff was admitted to hospital for treatment whilst he was still in the custody of the SAPS; and that he does not dispute that the Plaintiff sustained injuries as recorded in the hospital records and ambulance report whilst he was in the custody of the SAPS.

[18] The Defendant closed its case.

Summary of the documentary evidence handed up as exhibits

[19] Exhibit “A”- Statement of Simanga Nkosi. The summary of the statement is as follows:

- (a) In 2011 he was approached by the Plaintiff requesting him to assist with the killing of a man from Oshabeni, who was trying to take his place on a certain board dealing with land claims. Nothing further happened in 2011 as he did not hear from the Plaintiff.
- (b) During late 2012, the Plaintiff came to his house with Xolani (Doda) and Sthembiso Ngcobo to plan the killing of the man from Oshabeni. He was offered R200 000 for the mission and R150 000 was to be paid in advance and the balance to be paid when the mission was completed.
- (c) On the day of the killing, they woke up in the morning at about 03h00/04h00 and used “muti” in preparation for the killing. He was instructed to go to the Port Shepstone taxi rank using a Toyota conquest. He was travelling with an unknown man and Sthembiso, who was the driver. Whilst at the rank, the Plaintiff and Xolani arrived with a bag and came to their vehicle (Toyota Conquest). In the bag, there was an AK47 rifle and two .38 Revolvers. Xolani was carrying a 9mm pistol and the unknown man was carrying the 45 pistol. He was given the 9mm pistol.
- (d) The Plaintiff told them that the target person would be driving a silver Toyota Corolla with NPS registration number plates.
- (e) The driver dropped them before they reached the road along which the victim was going to come. As he was walking up and down, he heard shots going off

from the automatic rifle. He noticed Xolani carrying an AK 47 next to the victim's car. Xolani gave them a sign that the victim was dead and they must put away their firearms. The Plaintiff was also closer to the victim's car. The other unknown man fired two or three shots to the victim. They all ran to the Toyota Conquest and left the scene. He was then dropped at Port Shepstone, closer to the taxi rank. The Plaintiff gave him R100 for a taxi fare.

[20] Exhibit "B"- Statement by Thamsanqa Mwandla. The summary of this statement is as follows:

- (a) He was approached by the Plaintiff's brother, Las Shazi who advised him that he had been instructed by the Plaintiff to discuss with them about the job to kill someone.
- (b) At the time, he was with Andile (Six Yard), Sthembiso and Doda Mbutho. The Plaintiff offered them R60 000 which was rejected. Eventually, they agreed on R150 000.
- (c) There were a few attempts to kill the deceased with no success. Later, he heard that the deceased was killed and that an AK 47 was used. He then came to the conclusion that the Plaintiff succeeded with his plans.

[21] Exhibit "C"- Statement by Bosman: The summary of his statement is as follows:

- (a) He took statements from three individuals in which the names of the persons involved and the firearms used were mentioned.
- (b) The Plaintiff was the person who ordered the hit on the deceased. The Plaintiff hired the following people to kill the deceased and also supplied the firearms and vehicle:
 - (i) Sthembiso Ngcobo;
 - (ii) Bheki Doda Mbutho;
 - (iii) Thamsanqa Mwandla;
 - (iv) Simanga Nkosi; and
 - (v) An unknown person from Umthwalume.
- (c) A confession statement was also obtained from a person who was directly involved in the killing.

[22] Exhibit “D”- Warrant of Arrest:

- (a) The application for the warrant of arrest was done by the State Prosecutor for the arrest of the Plaintiff.
- (b) The warrant of arrest was granted by the Magistrate on 3 September 2013.

Rule 37 minutes

[23] The parties held Pre-Trial conferences on 7 February 2020 and 3 December 2020.

[24] The following recordings in the minutes are important to note:

- (a) The Plaintiff will not proceed with the claim for malicious prosecution.¹
- (b) The parties went through the minutes of Pre-Trial Conference held on 20 February 2020 and minutes were confirmed as accurate.²
- (c) The Plaintiff bore the onus of proof that he was arrested and was assaulted and/or tortured by members of the SAPS acting in the cause and scope of their employment.³
- (d) The Defendant bore the onus of proof that the arrest of the Plaintiff was lawful.
- (e) The Defendant’s team indicated that their client has no records regarding the re-arrest. In this regard they requested the Plaintiff’s team to provide more information regarding that claim.
- (f) The Defendant avers that there was a warrant of arrest and the Plaintiff was arrested in terms of such warrant. Furthermore, the Defendant’s legal representative indicated that in the discovered documents there is also a section 112 statement by Plaintiff’s co-accused who implicated the Plaintiff.

Written submissions

[25] The parties were directed to file their written submissions.

[26] The Plaintiff’s counsel made the following submissions:

¹ Page 4 of index to minutes.

² Page 7 of index to minutes.

³ Page 9 of index to minutes.

- (a) The Defendant did not plead that the arresting officer had a warrant of arrest when he arrested the Plaintiff. The evidence of the Defendant's witness in relation to the issue of the warrant of arrest should be ignored.⁴ He relied on the cases of *Minister of Safety and Security v Slabbert*⁵ and *Minister of Police v Gqamane*.⁶
- (b) The Plaintiff made submissions that the warrant of arrest is invalid on the basis that it was improperly obtained as the reasonable suspicion is coming from a confession or statements of co-accused. The Prosecutor relied on inadmissible evidence when he applied for the warrant of arrest.
- (c) It is submitted that the contents of the warrant of arrest was never read to the Plaintiff. The arrest was unlawful.
- (d) On the second arrest, it is submitted that the Defendant gave evidence that it has no knowledge of the second arrest. The evidence of the Plaintiff remains uncontradicted.
- (e) Bosman confirmed that the Plaintiff was acquitted in the High Court. This is evidence that the Plaintiff was sometime re-arrested on or after 20 February 2014.
- (f) The Plaintiff concedes that there is no documentary evidence to prove the second arrest.
- (g) In relation to the claim for assault, the Defendant did not call the police who allegedly assaulted the Plaintiff.
- (h) The Plaintiff's evidence is supported by medical records .
- (i) In relation to the malicious prosecution, the Plaintiff's charges were withdrawn on 20 February 2014 and he was re-arrested on the same charges which were withdrawn.
- (j) The Police officers set the law in motion by arresting and charging the Plaintiff despite the charges having been withdrawn.
- (k) The Defendant had neither evidence nor reason to believe that the Plaintiff had committed any offence. In doing so the police acted with malice.
- (l) The Plaintiff was subsequently discharged.

⁴ Plaintiff's heads or argument page 11.

⁵ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA).

⁶ *Minister of Police v Gqamane* (226/2022) [2023] ZASCA 61 (3 May 2023).

[27] The summary of the Defendant's submissions is as follows:

- (a) The arrest of the Plaintiff on 7 October 2013 was lawful and justified. The arrest was effected on the strength of warrant of arrest issued on 9 September 2013.
- (b) The warrant of arrest was issued pursuant to the receipt of statements from three witnesses who implicated the Plaintiff.
- (c) The Prosecutor was also satisfied that there were sufficient reasons to apply for the warrant of arrest.
- (d) Bosman and his team properly exercised their discretion in deciding to arrest the Plaintiff. Not arresting the Plaintiff under the circumstances would have undermined the justice system and made a mockery of the police. The Defendant's counsel relied on the cases of *Theobald v Minister of Safety and Security and Others*⁷ and *National Commissioner of Police and Another v Coetzee*.⁸
- (e) In relation to the arrest that allegedly occurred on the 20 February 2014, it is submitted that the Defendant denies the arrest and the Plaintiff bears the onus of proof.
- (f) The Plaintiff has failed to discharge the onus which rested on him. There is no evidence that he was kept in custody from 20–27 February 2014.
- (g) In relation to the malicious prosecution claim, the Plaintiff abandoned the claim as recorded in the Rule 37 minutes dated 7 February 2020 and 3 December 2020. In any event, the Plaintiff has not proven any malice on the part of the Defendant.
- (h) On the issue of the assault, it is submitted that the injuries sustained are consistent with the strain caused by the handcuffs and leg iron which then are worn too tight and over a long period of time. The assault is disputed as alleged by the Plaintiff.

Applicable legal principles

⁷ *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ).

⁸ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA) para 14.

[28] It is trite that the onus to prove the lawfulness of detention rests on the Defendant.⁹ In *Mahlangu and Another v Minister of Police*¹⁰ the Constitutional Court held that:

‘It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s physical liberty, all that the Plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful, and the defendant bears an onus to prove that there was justification for the interference.’

In this matter, the arrest was not in dispute; it was therefore, common cause that the Respondent bore the onus to prove the lawfulness thereof.

[29] In this present case, it is common cause that the Plaintiff was arrested on 7 October 2013 by members of the Defendant at Port Shepstone Police Station. The parties also agreed that the onus of proving the lawfulness of detention rests on the Defendant.

[30] In his submission Plaintiff’s counsel argued that the Defendant did not plead that the arresting officer had a warrant of arrest when he arrested the Plaintiff; and that the evidence of the Defendant’s witness in relation to the issue of the warrant of arrest should be ignored. Clearly, these submissions are incorrect as the Defendant has pleaded this at paragraph 5.2 of its amended plea dated 6 August 2020. In addition, it is recorded in the Rule 37 minutes that there was a warrant of arrest and that the Plaintiff was arrested in terms of the warrant of arrest.

[31] It is trite that a warrant of arrest in the proper form and issued by a duly authorized official would provide the arresting officer with a complete defence.¹¹ A warrant of arrest which has been marked Exhibit “D” in these proceedings, was applied for by the Prosecutor and issued by a Magistrate. There is no dispute about the authenticity of the document, save for the argument by the Plaintiff’s counsel that the warrant was improperly sought. This is not substantiated by any evidence.

⁹ *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk); *Manqalaza v MEC for Safety and Security, Eastern Cape* [2001] 3 All SA 255 (Tk); *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC).

¹⁰ *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC) para 32.

¹¹ *Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A); *Prinsloo and Another v Newman* 1975 (1) SA 481 (A).

Bosman in his evidence, clearly articulated the entire process that was followed for the issuing of the warrant of arrest. There has been no challenge of this by the Plaintiff.

[32] It is also trite that if the arrest took place pursuant to a warrant, the onus of proving the wrongfulness of the arrest by showing that the warrant was irregular rests on the Plaintiff.¹² There is no evidence presented before me that the warrant was irregular.

[33] It is noteworthy that when the arrest was effected the Plaintiff's legal representative, Mr Phoswa, was present. Bosman, in his evidence indicated that the warrant of arrest was presented to the Plaintiff in the presence of his legal representative. Under the circumstances, it cannot be said that the warrant of arrest was irregular and improperly sought and executed.

[34] In relation to the arrest that allegedly occurred on 20 February 2014, the Plaintiff's evidence is not supported by any documentary evidence. Counsel for the Plaintiff submitted that the Plaintiff's evidence is uncontradicted and should be accepted. He also submitted that the charge sheet confirms that the charges were withdrawn on 20 February 2023. This is an error as it is a common cause that the charges were withdrawn on 20 February 2014. I must mention that the charge sheet¹³ does not record that the charges were withdrawn. Instead the following is recorded: *"The matter before court for indictment- further proceedings mech recorded (sic)"*.

[35] According to the charge sheet referred to above, it appears that there were four accused, including the Plaintiff, and that they were all legally represented. In my view, the calling of the co-accused and/or legal representatives of the co-accused would have assisted the Plaintiff to prove that he was indeed arrested on 20 February 2014. The Plaintiff has failed to discharge his onus to prove the second arrest, and the unlawfulness thereof.

¹² *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, SA Polisie, Noord-Transvaal* 1972 (1) SA 376 (A).

¹³ Page 23 of the index to the Defendant's Discovery bundle (Exhibit "E").

[36] Regarding the claim of malicious prosecution, at the commencement of the hearing I was made to understand that the Plaintiff is not pursuing this claim. However, it appears from the Plaintiff's submissions that the Plaintiff is pursuing the claim. On the other hand, the Defendant's counsel submits that it should not be considered as it was abandoned, relying on the Rule 37 minutes.

[37] For purposes of completeness, I will deal with this claim based on the evidence and arguments presented before me. The onus to prove malicious prosecution rests with the Plaintiff. To this end, the Plaintiff must prove that:

- (a) the Defendant set the law in motion (instigated or instituted the proceedings);
- (b) the Defendant acted without reasonable and probable cause;
- (c) the Defendant acted with 'malice' (or *animo inuriandi*); and
- (d) that the prosecution has failed.

These requirements were laid out in *Minister for Justice and Constitutional Development and Others v Moleko*.¹⁴

[38] The fact that the Plaintiff was not convicted does not necessarily mean that his claim for malicious prosecution should succeed. Professor MC Okpaluba warned that:¹⁵

'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.'

[39] In this case there was no evidence presented before this Court that the members of the Defendant acted with malice or that they failed to perform their duties in good faith when the case docket was first opened against the Plaintiff. On the contrary, the evidence presented before this Court is that the arrest of the Plaintiff on 7 October 2013 was preceded by statements made by the co-accused of the Plaintiff, who implicated him (the Plaintiff).

[40] For the Plaintiff to succeed with a claim for malicious prosecution, he must prove all four elements as listed above in *Moleko*.

¹⁴ *Minister for Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) para 8.

¹⁵ C Okpaluba 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions' 2013 (16) 1 *PER* 241 at 243.

[41] The submissions made by Plaintiff's counsel relied on the arrest that allegedly occurred on 20 February 2014. He submitted that the police were aware that the charges were withdrawn when initiating prosecution. The Defendant's counsel submitted that the Plaintiff has not shown any malice on the part of the Defendant. I am persuaded by these submissions by the Defendant's counsel. In any event, as aforementioned, the Plaintiff has failed to prove the arrest of 20 February 2014. 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 defendant and as such the Plaintiff fails in this claim.

[42] I now turn to deal with the claim of torture and assault. The parties agreed that the onus rests on the Plaintiff to prove this claim. The Defendant's witness, Bosman, made the following material concessions in his evidence:

- (a) that the Plaintiff was booked out from the cells whilst he was in custody of the Defendant;
- (b) that he was not present when the Plaintiff was allegedly tortured and assaulted;
- (c) that the Plaintiff received medical treatment at Port Shepstone Hospital whilst he was in the custody of the Defendant;
- (d) that the injuries recorded in the hospital records were sustained by the Plaintiff whilst he was in the custody of the Defendant; and
- (e) that the Plaintiff laid criminal charges against certain members of the Defendant in respect of the torture and assaults.

[43] The Plaintiff's evidence about the occurrence of the events after his arrest, in particular on the date when he was booked out of the police station is undisputed. The Plaintiff testified that he was tortured and assaulted by members of the Defendant. There is no evidence to contradict the Plaintiff's evidence.

[44] The Defendant's counsel submitted that the Plaintiff's injuries were caused by the handcuffs and leg irons, but not assault. This submission is consistent with the Plaintiff's evidence that he sustained the injuries on his wrists when he was tortured by the members of the Defendant. This is also supported by the hospital records.

[45] Having regard to the evidence of the Plaintiff as well as of the Defendant, I am satisfied that the Plaintiff has discharged the onus carried by him, in respect of the claim based on assault and torture.

Order

[46] In the result, I make the following order:

1. The Plaintiff's claim for the unlawful arrest and detention from 7 October 2013 to 20 February 2014 is dismissed.
2. The Plaintiff's claim for the unlawful arrest and detention from 20 to 27 February 2014 is dismissed.
3. The Plaintiff's claim for malicious prosecution is dismissed.
4. The Plaintiff's claim for assault and torture is successful. The Defendant is liable to compensate the Plaintiff for the damages in an amount to be determined at quantum stage.
5. Costs reserved for determination by the Court hearing the issue of quantum.

Hadebe AJ

CASE INFORMATION

DATE OF HEARING :22 & 23 May 2023

JUDGMENT DELIVERED ON :16 August 2023

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