

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: A16/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

KHOTSO JULIUS RAMABANTA

Appellant

and

THE MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

JUDGMENT BY:

MHLAMBI J, *et* LOUBSER, J *et* CHESIWE, J

HEARD ON:

06 OCTOBER 2023

DELIVERED ON:

14 DECEMBER 2023

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- [1] This is an appeal against the whole judgment and orders of a single judge in terms of which the appellant's two claims for unlawful arrest and detention, on the one hand, and, malicious prosecution, on the other, were dismissed with costs. The appeal came before this Court on special leave granted by the

Supreme Court of Appeal.

- [2] Both the appellant and the respondent were late with their filing of the notice of appeal and heads of argument respectively. No issue was taken in this regard and the necessary condonation was granted.
- [3] The appellant stated in its particulars of claim in respect of the first claim that on 27 February 2023, he was wrongfully and unlawfully arrested and detained on a count of murder under CAS number: Mangaung 297/02/2019 and appeared in the Bloemfontein Magistrate's Court on 01 March 2023 when the case was postponed to 20 March 2023 for a formal bail application. He was kept in custody. During the bail proceedings, the prosecutor informed the court that he was withdrawing the charges against him. He was released from custody having spent 22 (twenty-two) consecutive days in custody.
- [4] The investigating officer and arresting officers were employees of the first respondent and acted within the course and scope of their employment with the first respondent. The appellant suffered damages in the amount of R1 100 000.00 as a result of such misconduct.
- [5] On or about 01 February 2019, and at the Bloemfontein Magistrate's Court, the second respondent's employees set the law in motion and initiated the prosecution against the appellant for the alleged offence of attempted murder. The bail was initially opposed by the state but eventually relinquished when the state withdrew the charge against the appellant. The appellant was deprived of his liberty before the withdrawal of the charge. The second respondent's employees acted within the course and scope of their employment with the second respondent. The appellant suffered damages as a result in the amount of R1 016 000.00.
- [6] The appeal was based on various grounds and the following findings of the court a quo were under attack:

6.1 that Constable Squire (the arresting officer) had a reasonable suspicion

that the appellant had committed an offence of attempted murder, and as such, the arresting officer was justified to arrest him;¹

6.2 that Mr De Vries (the prosecutor) in the employ of the second respondent had reasonable and probable cause to prosecute the appellant for an offence of attempted murder based on the doctrine of common purpose.²

[7] In its judgment, the court a quo, having considered various authorities to which it was referred,³ asked the question: whether a reasonable man in constable Squire's position and possessed with the same information, have considered that there were good and sufficient grounds in formulating a reasonable suspicion that the plaintiff committed the offence of attempted murder. To answer this question, the court regarded as objective facts at the disposal of Constable Squire that he was approached by the complainant who showed him a piece of paper containing a case number and police stamp; that he was shot in both legs; showed his gunshot wounds and that the perpetrators were known to him.⁴

[8] The court held the view that in the mind of the constable, the complainant was shot in common purpose and the appellant could have been part of this plan to shoot the complainant, bearing in mind that the plaintiff was walking alongside the outstanding suspects and was present when the complainant was shot. The doctrine of common purpose establishes that where two or more people agree to commit a crime, each will be responsible for the acts of the others that fall within their common purpose or design. In the present matter, constable Squire's suspicion could not be deemed unreasonable simply because the appellant did not play an active role in the shooting.⁵

[9] The court accepted that the complainant never said that he was shot by all three suspects but mentioned a firearm and that before effecting the arrest,

¹ Paras 49 and 53 of the judgment.

² Paras 70,71 and 75 of the judgment.

³ Para 43 of the judgment.

⁴ Para 44 of the judgment.

⁵ Para 49 of the judgment.

constable Squire did not further probe the complainant's account of how the shooting happened, more so that the plaintiff indicated to him that he did not shoot the complainant.⁶ According to constable Squire, the appellant freely told him that he did not shoot the complainant, an "*utterance*" that convinced him that he was indeed at the right place as the appellant confirmed the complainant's version that he was shot at by known perpetrators.⁷

[10] In *Duncan v Minister of Law and Order*,⁸ to which the court referred, a peace officer that effects an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 must entertain a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act and that suspicion must rest on reasonable grounds. In *Ingram v Minister van Justisie*,⁹ the test as to whether the words "reasonable suspicion" could have existed and did exist, is to be determined by an objective standard, namely that of the reasonable man with the knowledge and experience of a peace officer based on the facts and circumstances then known to the arresting officer. In *Mabona v Minister of Law and Order and Others*,¹⁰ the reasonable man is stated to analyse and assess the information at his disposal critically. He will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. What is required is suspicion and not certainty. However, the suspicion must be based on solid grounds.

[11] Constable Squires was accompanied by the complainant to the appellant's address where he pointed him out. The appellant admitted to knowing the complainant but denied having shot him. It is not clear in which respect did the court find that the complainant's version was corroborated materially by the appellant. The fact that a fellow traveller decides to shoot another person, does not impute his culpability to the other traveller. Consequently, the conclusion that constable Squire analysed and assessed the quality of the information at

⁶ Para 45 of the judgment.

⁷ Para 46 of the judgment.

⁸ 1986(2) SA 805 (A) at 805 G-H.

⁹ 1962 (3) SA at 229G-230A.

¹⁰ 1998 (2) SA 654 (SE) at 658E-H.

his disposal and formulated a suspicion based on reasonable grounds is incorrect.¹¹ What we have is the constable's acquiescence in the relief that he must be at the place when he heard and was convinced by the appellant's "*utterance*" that he did not shoot the complainant. What is strange is that, despite the appellant and the complainant being at the same place and giving conflicting versions, the constable failed to check these versions before effecting the arrest.

[12] I do not agree with Ms Merabe's contention that the court a quo clearly applied an objective test in assessing the reasonable suspicion harboured by constable Squire.¹² The reasonable man will analyse and assess the information at his disposal critically and will not accept it lightly. The suspicion must be based on solid grounds.¹³ Mr Mazibuko correctly pointed out that the arresting officer did not assess and analyse the information given to him by the complainant critically. Furthermore, the factual findings did not justify a conclusion that the appellant acted in common purpose with his brother.

[13] The requirements for a successful malicious prosecution are clear. It is common cause that the prosecution was initiated against the appellant and that it was terminated. The question that arises is whether the second respondent acted without reasonable and probable cause and *animo injuriandi*. In other words, was there an honest belief founded on reasonable grounds that a prosecution was justified. The court a quo was of the view that Mr De Vries, the prosecutor, had an honest belief in the guilt of the appellant when the matter was placed, based on the doctrine of common purpose.¹⁴ This view was based on the testimony of Mr De Vries, who took the ultimate decision to prosecute the appellant, that at the time he took this decision, he had access to the docket that indicated that the appellant and other suspects were part of a group of known men who shot the complainant. The appellant was present at the scene and he concluded that there was a common purpose.¹⁵ On the strength of this

¹¹ Para 53 of the judgment.

¹² Para 20-24 of the Respondents' heads of argument.

¹³ Mabona, *supra*.

¹⁴ Para 74 of the judgment.

¹⁵ Para 70 of the judgment.

information, he was clearly convinced that there was enough reasonable and probable cause to believe that the appellant acted in common purpose with the suspects at large.¹⁶

- [14] Mr Mazibuko pointed out that Mr De Vries' reasons for the withdrawal of the charges were recorded as follows in the investigation diary:

“From A1 it appears that he was shot by Rorisang and not Mahashe and this Accused is Mahashe.

-Insufficient evidence to argue common purpose.

-Insufficient evidence to proceed at this stage.

-Charges withdrawn.”

- [15] He submitted, and correctly so, that the prosecution against the appellant was initiated on insufficient evidence and on the basis of which the prosecution could not secure a conviction. The court a quo erred in concluding that the second respondent had reasonable and probable cause which entailed an honest belief founded on reasonable grounds that the institution of the proceedings was justified. I agree. In the premises, the appeal should succeed in respect of both claims.

- [16] The appellant described the terrible conditions he had to endure while he was kept in custody in both the Mangaung Police Station and the Grootvlei Prison. The cells were overcrowded, the blankets stank, as a non-smoker he was stuck in cells filled with smokers and the food was sparse. When he received food from the outside, the other inmates would fight over his food. He could not sleep properly because the place was infested with lice and parasites. As a result of his incarceration, he lost his job and the premises he rented. He is a Lesotho citizen and earned income in the amount of R300.00 fortnightly as a

¹⁶ Para 71 of the judgment.

plasterer at U-Office. He was unmarried but had a ten-year old child.

[17] Mr Mazibuko submitted that the appellant was deprived of his liberty at the hands of the first respondent for a period of forty-eight hours and twenty days for malicious prosecution at the hands of the second respondent. Even though the awards of the other courts are not binding, they served as important guidelines and he referred me to a few which were helpful.¹⁷ Having considered all these authorities and circumstances, I am satisfied that the following compensation is appropriate:

17.1 Payment of the amount of R70 000.00 in respect of claim 1 and R 650 000.00 in respect of the second.

[18] It is trite that the successful party is entitled to the costs which shall include the costs before the court a quo and the costs of appeal.

[19] The following order ensues:

Order:

19.1 The appeal succeeds.

19.2 The first and second respondents are ordered to pay compensation to the appellant as follows:

19.2.1 An amount of R70 000.00 in respect of claim 1; and

19.2.2 An amount of R650 000.00 in respect of claim 2.

19.3 The respondents are to pay the appellant's costs which shall include the costs before the court a quo and the costs of appeal.

JJ MHLAMBI, J

¹⁷ De Klerk v Minister of Police 2021 (4) SA 585 (CC); Brits v Minister of Police [2021] ZASCA 161; Motladile v Minister of Police 2023 (2) SACR 274 (SCA).

I concur.

LOUBSER, J

I concur.

CHESIWE, J

Counsel for the applicant:

Instructed by:

Adv MS Mazibuko

Mazibuko & Wesi Incorporated

Regus Business Centre

Brandwag

Bloemfontein

Counsel for the respondent:

Instructed by:

Adv. K Nhlapho-Merabe

State Attorney

Fedsure House

Bloemfontein