



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 47367/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
5.10.23	
DATE	SIGNATURE

In the matter between:

MARIUS STOFFBERG

First Plaintiff

RENTIA JORDAAN

Second Plaintiff

and

MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Defendant

ORDER

The following order is made:

1. The first and second defendants (the defendants) are jointly and severally liable to pay the plaintiff's damages arising from unlawful arrest, unlawful detention and unlawful prosecution;
2. The defendant shall pay the plaintiffs the sum of R105 000 in respect of general damages set out as follows:

(a) Unlawful arrest and detention	R70 000
(b) Wrongful and unlawful prosecution	R35 000
3. The defendants shall pay the sum of R105 000 into the Trust Account of the plaintiff's attorneys, Loubser Van Wyk Inc within 14 days of this order interest will run on the outstanding amount to be calculated at the legal interest rate per annum from date of judgment to date of final payment; and
4. The defendants to pay the plaintiff's taxed or agreed party and party and costs of preparing the plaintiff's heads of argument, such costs shall include costs attendant upon the obtaining of payment of the capital amount referred to in order 2 above.

J U D G M E N T

RAULINGA, J

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

Introduction

[1] The plaintiffs instituted a delictual claim against the defendants in the High Court of South Africa, Gauteng Division, Pretoria (High Court) for damages flowing from their arrest and detention. In addition, for malicious prosecution and, alternatively,

the failure of the second defendant to take reasonable steps to ensure that the plaintiffs were not prosecuted without sufficient evidence.

Background

[2] The facts are common cause. On 26 March 2009, the plaintiffs were arrested at Brakpan, by inspector Rikhoto, and other members of the South African Police Services (SAPS). When the said arrest was effected, it was done without a warrant of arrest. The plaintiffs were detained at Parkview Police station and released on bail on 27 March 2009. The plaintiffs were charged with fraud.

[3] On 25 November 2010, the charges against the plaintiffs were withdrawn for lack of evidence. The notice in terms of section 3 of Institution of the Legal Proceedings against Certain Organs of State Act,¹ was served on the defendants on 17 June 2011 and 20 June 2011, within seven months after the charges against them were withdrawn.

[4] The plaintiffs issued summons claiming R100 000 for general damages for *contumelia* and humiliation and R20 000 for legal fees.

[5] The defendants entered appearance to defend, and they delivered their plea within the prescribed period.

Issues

[6] The main issues for determination are whether or not the arrest of the plaintiffs by a member of the South African Police Services and the subsequent detention thereafter were unlawful, and whether the defendants are liable for damages for malicious prosecution of the plaintiffs; if so, the determination of the plaintiff's damages as a result thereof.

Evidence before the Court

[7] It was noted at the commencement of the trial that the plaintiffs had been granted condonation by this Court for non-compliance with section 3 of the Institution

¹ 40 of 2002.

of Legal Proceedings against Certain Organs of State Act,² and that this Court had the requisite jurisdiction to hear the matter. As a result, there were no impediments, statutory or otherwise, to prevent the matter from proceeding to trial before this Court.

Unlawful arrest and detention

[8] Section 12(1) of the Constitution guarantees the right to not be deprived of freedom arbitrarily or without just cause. Section 7(2) of the Constitution obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

[9] A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote.³ When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered. The plaintiffs alleged that it was this wrongful arrest that caused them harm.

[10] The plaintiff needs to prove the following when claiming damages for unlawful arrest and detention:

- (a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally.
In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;⁴
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;⁵ and
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.

² Id.

³ *Oppelt v Head: Health, Department of Health, Western Cape* [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) at para 34.

⁴ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154H-J.

⁵ *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at paras 24-5.

[11] In *Minister of Safety and Security v Sekhoto*,⁶ the Court relied on *Duncan v Minister of Law and Order* which stated the jurisdictional facts for a section 40(1)(b) as follows:

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- (d) the suspicion must rest on reasonable grounds.”⁷

[12] It is trite that the onus rests on the police to justify the arrest.⁸ The defendants rely on section 40(1)(b) of the Criminal Procedure Act,⁹ which provides for an arrest without a warrant of arrest. Furthermore, the defendants submit that Constable Rikhotso had a suspicion that a Schedule 1 offence of fraud had been committed, and this is based on the total information that he had as well as the fact that the Plaintiffs did not offer an explanation or statement of their case when he requested them to do so. As a result, he had to make the arrest.

[13] In *Mabona and Another v Minister of Law and Order and Others*,¹⁰ the court relied on *S v Nel and Another* and emphasised that the rationality test is required for the arresting officer to enquire whether a reasonable man in the position of the arresting officer and having the same information would have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of committing the crime.

[14] Therefore, a reasonable man will analyse and assess the quality of the information at his or her disposal critically, and he or she will not accept it without checking it. It is only after an examination of this kind that he or she will allow himself or herself to entertain a suspicion that will justify an arrest.

⁶ (2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10.

⁷ Id para 6.

⁸ *Minister of Law and Order v Hurley and Another* 1986(3) SA 568 (A) T 589 E – F.

⁹ 51 of 1977.

¹⁰ 1988(2) SA 654 SE at 686 E-H

[15] The plaintiffs have a constitutional right not to be deprived of liberty. The deprivation is *prima facie* unlawful, and the first defendant bears the onus to prove that there was justification for the interference. The detention of the plaintiffs occurred after the police unlawfully arrested the plaintiffs.

[16] In *Mahlangu and Another v Minister of Police*,¹¹ the Court held as follows:

“The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. They are also part of the founding values upon which the South African constitutional state is built.¹² (footnotes omitted)

Malicious prosecution

[17] A person claiming malicious prosecution must prove:

“The prosecution was instigated without reasonable and probable cause; and with “malice” or *animo iniuriarum*. The second defendant bears the onus to prove that reasonable and probable cause was present when the prosecution commenced and proceeded.”¹³

[18] In *Thompson and Another v Minister of Police and Another* it was held that:

“In a claim for damages for wrongful arrest, the delict is committed by the illegal arrest of the plaintiff without the due process of law, i.e. the injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made, and, in order to comply with the requirements of section 23 of the Police Act, 7 of 1958, the action must be commenced within [in] six months of the cause of action arising.”

¹¹ (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).

¹² *Id* at para 25.

¹³ *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) 498 H – 499 C.

"In an action for damages for malicious arrest and detention where a prosecution ensues on such arrest, however, as in the case of an action for damages for malicious prosecution, the proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury to the accused will arise until the prosecution has been determined by his discharge, whether by an initial acquittal or by his discharge after a successful appeal from a conviction."¹⁴

[19] It is required of the prosecutors to read and understand the case docket in order to establish whether there is probable cause for a person to be prosecuted. Further, the prosecutor has a duty to direct the investigations in order to obtain sufficient information, which appears to be credible. The plaintiffs' charges were withdrawn for lack of evidence.

Analyses

[20] The defendants failed to justify the arrest and the basis of their reason is rejected, because Constable Rikhotso failed to apply a rationality test required. The plaintiffs have a constitutional right not to be deprived of their liberty. As a result, the deprivation is *prima facie* unlawful.

[21] The plaintiffs proved the elements of malicious prosecution, because the law was set in motion. The prosecutor failed to evaluate whether there is probable cause for the plaintiffs to be prosecuted. Thus, ultimately after one year the charges were withdrawn for lack of evidence.

Conclusion

[22] Having considered the abovementioned factors and after hearing the matter, the plaintiffs are successful in respect of both the merits and the quantum.

Order

[23] The following order is made:

¹⁴ 1971 (1) SA 371 (E) at 373F-G.

1. The first and second defendants (the defendants) are jointly and severally liable to pay the plaintiff's damages arising from unlawful arrest, unlawful detention and unlawful prosecution;
2. The defendant shall pay the plaintiffs the sum of R105 000 in respect of general damages set out as follows:

(a) Unlawful arrest and detention	R70 000
Wrongful and unlawful prosecution	R35 000
3. The defendants shall pay the sum of R105 000 into the Trust Account of the plaintiff's attorneys, Loubser Van Wyk Inc within 14 days of this order interest will run on the outstanding amount to be calculated at the legal interest rate per annum from date of judgment to date of final payment; and
4. The defendants to pay the plaintiff's taxed or agreed party and party and costs of preparing the plaintiff's heads of argument, such costs shall include costs attendant upon the obtaining of payment of the capital amount referred to in order 2 above.


J RAULINGA
 Judge of the High Court
 Gauteng Division, Pretoria

Date of Hearing: 2 May 2023

Judgment delivered 06/10/2023

APPEARANCES:

For the Plaintiffs: ADV T W G Bester SC

Attorney for the Plaintiffs: Loubser Van Wyk Inc, Pretoria

For the Defendant:

Adv. Tsele

Attorney for the Respondent:

The State Attorney
Pretoria