

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

Case No. 342/2017

In the matter between:

KOKELA SIVUYISE YANGA SIGONYA

Plaintiff

And

MINISTER OF POLICE

1ST Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

JOLWANA J

[1] Plaintiff instituted an action for damages suffered as a result of unlawful arrest and detention against the first defendant and malicious prosecution against the second defendant. While the witness for the first defendant testified first in justification of the arrest and detention, I consider it convenient to deal with plaintiff's evidence first.

[2] In his particulars of claim plaintiff alleges that on 24 November 2015 at Walter Sisulu University, Nelson Mandela Drive, Mthatha (WSU) he was wrongfully arrested and detained by members of the South African Police Service for alleged possession of drugs. He alleges that police had no reasonable suspicion and justifiable cause and without any warrant authorising his arrest. He was detained at Central Police Station from 24 November 2015 and was granted bail on 26 November 2015.

[3] Plaintiff testified that he was a student at the University studying towards a Bachelor of Education in Humanities at the time of his arrest. He stayed at Unit 42F, Baghdad one of the student residences at WSU, having moved therein three weeks before the incident in preparation for examinations. He ordinarily resided at Mbuqe Extention in Mthatha. In that Unit he stayed with three other students, Lizalise Ngqukumba, Avuzwa Mgilane and Siphamandla Mbhele (Siphamandla).

[4] They were sleeping in their room when at about 02h00 in the early hours of the morning they were woken up by a loud knock which was as if the door was being kicked. He asked who it was and the response was that it was the police. He opened the door and saw a lot of police officers pointing guns at him. The police entered and ordered them to stand on the bed and face the wall. They were searched and police did not find anything in his person. The police did not produce any search warrant and had no name tags on them but were in uniform.

[5] Police took a Spar Supermarket plastic bag which was under the bed and had dagga in it. They asked who it belonged to and Siphamandla said it was his. One of the police officers took him outside the room, handcuffed him and asked him for information on who was dealing in drugs and how was the dealing done. He told that police officer that he did not know anything about drugs. He was then assaulted.

[6] He was taken back to the room where they were told to get dressed as they were being taken to the police station. On arrival at the police station officer Darman put on his name tag and did some paperwork. They all told Darman that they would not be making any statements and would make their statements in court. He was under police control from about 02h00 on Saturday morning when police arrived in his room until he appeared in court on 26 November 2015. During the first court appearance they all were granted bail.

[7] Under cross examination he testified that he was shocked when he was shown the plastic bag with dagga as he did not expect that there would be an illegal substance in his room. As to the presence of the dagga processing equipment like the tin and bottle heads found in the window seal by sergeant Baca, the arresting officer, he testified that Siphamandla would know about those things. He knew that Siphamandla was using dagga a lot, but on that day he did not see him smoking dagga and he was not sure when was the last time he saw Siphamandla smoking dagga.

[8] He did not know why Siphamandla had a plastic bag with a dagga plant that was not dried. When asked about sergeant Baca's testimony that she had asked them about the ownership of the dagga and the other things that were found in their room Siphamandla said that the money was his and was proceeds of dagga, he said he was relieved because he knew for a fact that he did not own any dagga. He, however, insisted that Siphamandla had owned up to the dagga as well and that Siphamandla admitted to everything to the police in their room. When they were at the back of the police van on their way to the police station Siphamandla told them that those things that the police found were his. He insisted that he personally did not know about the presence of drugs in that room and that Siphamandla had admitted to the police that the dagga was his. It was given to him by his grandfather as treatment for flu.

[9] Plaintiff also came up with a new version that was never put to sergeant Baca who testified for the first defendant and which he also did not mention in his evidence in chief. That version was that before the police went to their room they started in another room. It was in that other room where there was dagga dealing and smoking. He also said that the occupants in that room had dagga pipes and a cutting torch used in drugs which sergeant Baca testified about. The occupants of that other room later told him and his roommates that they were the ones who led the police to their room where they were arrested. He further testified that police should have done their work properly and had they done so they would have arrested the people in the other room and Siphamandla, his roommate, not him. After his evidence plaintiff closed his case.

[10] I find it strange that this new version, important as it was, was never put to sergeant Baca. It is even more strange and defies logic that he did not place this version before court when he testified in his evidence in chief.

[11] For the first defendant sergeant Baca testified that on 24 November 2015 she and her colleagues were on night duty doing patrols in Mthatha in town when they received information from their radio control that at Unit 42F, Baghdad, a residence at WSU there was drug dealing and smoking. They proceeded to that Unit and found the door slightly opened and the room was smokey. They knocked and one of the four occupants opened for them. Other occupants were lying in bed but she did not know whether they were actually sleeping or just lying there.

[12] They asked for and were granted permission to search the occupants and the room after having introduced themselves. As they were searching the occupants she noticed a Spar Supermarket plastic bag which had a plant of dagga with roots. On the window seal there was a tin container with ground or processed dagga. She asked them to whom did the items belong. They pointed at each other with some saying the plant was Siphamandla's. Siphamandla denied it saying only the money which was also in the plastic bag was his. He said he got the money from selling drugs and that his drugs were finished.

[13] In the room there was equipment normally used in processing and smoking drugs like a cutting torch, pipes and bottle heads. They decided to investigate

further. One of the young men in that room said he stayed at Northcrest Township in Mthatha. They arrested all four young men for possession and dealing in dagga and drove with them to Northcrest to conduct further investigations at the place of residence of one of the young men who said he stayed at Northcrest. However they did not find any drugs in his room save for money bags that are normally used in bunching drugs.

[14] From Northcrest they proceeded to Central Police Station. They told them their rights and the arrestees said that they would not make any statements to the police and that they would make their statements in court. Thereafter she never heard about the case nor was she subpoenaed to give evidence.

[15] Under cross examination she testified that when they received information from their police radio control they were told that the drug dealing and possession was taking place at unit 42F in Baghdad at WSU. They then proceeded straight to that room. They did not have a warrant of arrest and that at 02h00 am they could not have applied for a warrant of search. Waiting until offices opened could have resulted in the evidence disappearing. She testified that when she received information in circumstances of this case she was entitled to verify the information and if illegal activities were taking place she was entitled to effect an arrest. She did not need a warrant of arrest as their information was that crime was in progress at that time.

[16] The second defendant applied for the absolution from the instance on the basis that while plaintiff alleged in his particulars of claim all the requirements for a claim for malicious prosecution against second defendant, plaintiff failed to deal with all of them in his evidence. In *Minister of Police and Constitutional Development v Moleko* (131/07) [2008] ZASCA 43 (31 March 2008) Van Heerden JA had this to say:

“[8] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

- (a) that the defendants set the law in motion (investigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with ‘malice’ (or animus injuriandi); and
- (d) that the prosecution failed.”

[17] Mrs Qikila counsel for the second defendant argued that while plaintiff has made all the necessary allegations in his particulars of claim plaintiff failed to prove at least two of those requirements. The plaintiff, so the argument went, failed to deal with how the second defendant acted without reasonable and probable cause and he also failed to show how the second defendant dealt with the matter maliciously.

[18] I was surprised that the claim against the second defendant on the basis of malicious prosecution was even instituted. The plaintiff’s own version was that on the day of his arrest it was Saturday at about 02h00 am on 24 November 2015. He appeared in court on 26 November 2015 and at that very first court appearance he was granted bail. On his second appearance charges against him were withdrawn. Plaintiff simply did not deal with how the conduct of the second defendant in dealing with the matter could even be remotely said to have been malicious.

[19] On the evidence before me it became clear that the claim against the second defendant for malicious prosecution should not have been mounted at all. It lacked merit from the beginning and was doomed to fail. I granted second defendant's application for absolution from the instance.

[20] In this case the evidence of sergeant Baca was that they were on night duty on 24 November 2015 doing patrol in and around the town of Mthatha. They received information through their radio control that there was dagga dealing and smoking at Unit 42F Baghdad residence, WSU. They proceeded to that unit and found the door slightly opened. They knocked and were let in by one occupant. They searched the occupants and did not find anything on any of them. They, however, found a Spar Supermarket plastic bag with a dagga plant in it under the bed. They also found a tin with crushed or ground dagga on the window seal. They also found a cutting torch and bottle heads in the room which in their experience as police are used in preparing and smoking dagga.

[21] They questioned the occupants as to whom did those things belong. Siphamandla said that the money which was with the dagga plant was his. He got it from selling dagga. He, however, disavowed any knowledge about the dagga itself and nobody owned up to either the dagga or the other dagga processing equipment found in their room. For this reason they arrested all of them including the plaintiff.

[22] Plaintiff submitted that he should not have been arrested because Siphamandla had told the police that the dagga was his. I disagree. It was the plaintiff's evidence in chief that when they got to the police station they all elected not to make a statement and said they would make the statements in court. This is also what sergeant Baca said in her evidence. In this regard both plaintiff and sergeant Baca are in agreement. This is also confirmed by their warning statements signed by all four of them that very morning. In their warning statements they, including Siphamandla, elected to remain silent and to consult their legal representatives.

[23] If it is indeed true, as plaintiff wanted me to believe, that in the presence of the police in their room Siphamandla owned up to the dagga and that he repeated this admission to them alone at the back of the police van on their way to the police station and this was a relief to him, I find it strange that when they got to the police station Siphamandla did not repeat the admission. I also find it strange that plaintiff kept quiet and did not tell the police that Siphamandla had admitted to ownership of the dagga twice in his presence even though he said that he had been relieved when Siphamandla made the admission to the police in their room.

[24] This has nothing to do with the constitutional right to remain silent, which is sacrosanct. However, the version of sergeant Baca that nobody owned up to the dagga or any of the items found in that room is consistent with the arrestees' having consistently elected, as they are entitled, to remain silent as reflected in their warning statements. For the plaintiff to expect the court to accept that in the room Siphamandla exonerated them and yet at the police station all of them exercised

their right to remain silent and to consult their legal representatives is, in my view, a misguided after thought.

[25] The actions of the police were authorized in terms of section 40(1)(h) of the Criminal Procedure Act 51 of 1977 which reads as follows:

“ 40(1) A peace officer may without a warrant arrest any person-

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence – producing drugs or the possession or disposal of arms or ammunition.”

[26] This sub section requires police to have a reasonable suspicion. I can do no better than refer to the well-known and often quoted case of *Mabona and Another v Minister Law and Order and Others* 1988 (2) SA 654 (SE) in which the court explained the law on reasonable suspicion in the following terms:

“Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and 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 his information a reasonable man would bear 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, ie 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 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. 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 upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[27] This Court had occasion to deal with facts that are, in my view, on all fours with this matter. In *Minister of Police v Matroos* 2018 JDR 2065 (ECG) a judgment penned by Notshe AJ to which Lowe J concurred the court said:

“[20] I am of the view that on those facts the suspicion that the respondent was committing or committed on offence under a law governing the possession of dependence – producing drugs was reasonable. Even if Tanya had told the arresting officer that the dagga belonged to her it would not have changed the reasonableness of the suspicion.

[21] It was argued on behalf of the respondent that the information that the police had to the effect that dagga was being sold at the house and that Tanya admitted that the dagga was hers made the suspicion unreasonable. I disagree. It must be remembered that what is required is a suspicion and not certainty. The arresting officer cannot be expected to analyse the information as if he is considering to convict an arrestee.”

[28] The above legal position is trite and needs no emphasis or elaboration. It is as articulated in *Mabona & Others v Minister of Law and Order and Another* and many other cases. It seems to me that the claim against both defendants was unmeritorious from the start and therefore ill-advised. It is unfortunate that plaintiff was somehow led to believe that because he was arrested and spent some time in incarceration in conditions that are less than ideal, he was necessarily entitled to compensation. On a careful analysis of this case which should inform the decision to claim against either of the defendants, I cannot see how plaintiff could have been advised that he had a chance, even a remote one of succeeding in a claim for compensation for unlawful arrest and detention and malicious prosecution.

[29] In the result the plaintiff's claim against both defendants must fail. The following order shall issue:

1. The plaintiff's claim is dismissed with costs.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff: S.M. LUZIPO

Instructed by: MK MAJAVU & ASSOCIATES

MTHATHA

Counsel for the 1st Defendant: J.J. BEMBE

Counsel for the 2nd Defendant: C.N. QIKILA

Instructed by: STATE ATTORNEY

MTHATHA

HEARD ON: 16 MAY 2019

DELIVERED ON: 22 MAY 2019