

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

[Not Reportable]

CASE NO: 1365/14

Heard on: 14/06/19

Delivered on: 20/08/19

In the matter between:

THANDEKILE NGCELE

Plaintiff

and

MINISTER OF SAFETY & SECURITY

First Defendant

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

Second Defendant

JUDGMENT

NHLANGULELA DJP

[1] On 22 May 2014 the plaintiff instituted action proceedings against the Minister of Safety and Security and the National Director of Public Prosecutions claiming payment of R650 000,00 as damages for unlawful arrest and detention; *contumelia* and malicious prosecution. The claims are defended.

[2] To justify a claim for arrest and detention the Minister must prove that: (a) the person who arrested the plaintiff was a peace officer; (b) who entertained a suspicion (c) the plaintiff committed a Schedule 1 offence; and (d) the suspicion rests on reasonable grounds. See: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H; *Minister of Safety and Security v Sekhoto & Another* 2011 (5) SA 367 (SCA) at para 6.

[3] To succeed in a claim for malicious prosecution against the National Director of Public Prosecutions the plaintiff must prove that: (i) the NPA set the law in motion; (ii) the NPA acted without reasonable and probable cause; (iii) the NPA acted with malice; and (iv) that the prosecution has failed. See: *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8.

[4] On the behalf of plaintiff, Mrs Akhona Magwentshu, Mr Machel Mpangele and Mr Mava Mrwebi appeared in the witness box and testified. Documentary evidence was also used at the trial, namely exhibit "A" (summons); exhibit "B" (the Arrest Statement by Mr Mpangele dated 21 September 2012); exhibit "C" (written statement by Mrs Magwentshu); exhibit "D" (birth certificate of Ms M[...] M[...]); exhibit "E" (written statement of Ms M[...] M[...] dated 7 August 2012); exhibit "F" (the J88 form dated 08 August 2008); exhibit "G" (warning statement); exhibit "H" (written statement of Ms M[...] dated 10 December 2012).

[5] The admitted facts stated in the particulars of plaintiff's claim dated 22 May 2014 are that the plaintiff was a 44-year-old male person. He was employed as a Principal of a school (C[...] J[...] S[...] S[...]) and resides at

Ncambedlana Extension, Mthatha. The first defendant is the Minister of Safety and Security, Republic of South Africa who is being sued in his representative capacity for alleged wrongful arrest and detention of the plaintiff by Mr Mpangele, a Constable employed as a policeman and attached to Bityi Police Station, Mthatha. The second defendant is the National Director of Public Prosecutions who is being sued in his representative capacity for alleged malicious prosecution of the plaintiff by the DPP of Mthatha.

[6] The factual background of this case revolves, in the main, around the discovered documents as aforementioned.

[7] Mr Mpangele testified that he is the policeman who was responsible for conducting investigation in this case. He testified that on Thursday 16 August 2012 at mid-day, he effected arrest of the accused based on the criminal docket that had been opened at the instance of Mrs Magwentshu's written report that Ms M[...] had been raped by the plaintiff. After receiving that report he interviewed Ms M[...] and obtained a written statement which confirmed that she had been raped by the plaintiff. Thereafter, he referred Ms M[...] to Sinawe Referral Centre for medical examination which is reflected in the J88 form.

[8] Mr Mpangele was accompanied by Mr Ntongana, the Sergeant in the SAPS when he arrested the plaintiff at C[...] School. According to Mr Mpangele the arrest and detention rights under the Constitution were read to the plaintiff at the time and place of arrest. The plaintiff was allowed to drive his motor vehicle and follow the police van all the way to Bityi Police Station where a charge of rape was made formally, his right read to him again and thereafter detained. On 20 August 2012 the plaintiff was taken to court. It was on 21 August 2012 that the plaintiff was released on bail by the magistrate. The plaintiff's further attendances in court culminated in the withdrawal of the charge on 07 April 2014. Mr Mpangele merely confirms in his arrest statement that he arrested the plaintiff based on the rape docket that he had opened under Bityi Cas 21/08/2012.

[9] Mrs Magwentshu confirmed that her written statement formed the basis upon which the plaintiff was arrested. She stated that the source of information contained in her statement was the teacher of Ms M[...], one Mr Bayanda Nomazele, as well as Ms M[...] herself. She had first contact with Mr Nomazele in her office during July 2012, and was informed that the plaintiff was sexually abusing Ms M[...]. On her instigation she requested that Ms M[...] should be brought to her office for the purposes of confirming the teacher's version. Indeed, a meeting took place few days after the teacher's report had been received. Ms M[...] gave a report that the plaintiff had raped her; whereupon Ms M[...] was advised to lay a charge of rape against the plaintiff. It came out of that meeting that Ms M[...] had reported her ordeal to her elder sister. But she refused to report the matter to the police due to fear that the plaintiff would deny the accusation.

[10] It bears mentioning at this stage that the first defendant did not call Ms M[...] to testify. Neither were Mr Nomazele, Ms M[...]’s sister and the doctor, who examined Ms M[...], called to testify. Yet the allegation that Ms M[...] was raped by the plaintiff was evidence of a secondary nature. These shortcomings were raised with Mr Mpangele and Mrs Magwentshu when they testified under cross-examination. The reasons why those potential and necessary witnesses were not called were not given by the defendant's witnesses.

[11] Further issues emerged under cross-examination. They were that Mr Mpangele did not investigate the issues of uncertainty that were raised in the written statement of Mrs Magwentshu. Mr Mpangele could not shake-off the version put him that the reports of Mr Nomazele and Mrs Magwentshu were peddling, tantamount to a false claim that Ms M[...] had been raped. That the J88 form did not disclose of commission of rape was not disputed by the defendant's witness. The defendant's witnesses conceded the fact that Ms M[...]’s statement was not reliable to the extent that it raised a contradiction as to whether she was raped on 22 June 2012 or 22 July 2012. They conceded the fact that the information on Ms

M[...]’s statement that she was a student at Jongibandla JSS in 2012 was incorrect. They also conceded the fact that it did not make sense for Ms M[...] to say in her statement that on 25 June 2012 she reported the rape (to Mr Mpangele) that took place on 22 July 2012. Consequently, Mr Mpangele could not advance a plausible reason as to why he failed to conduct further investigations on the face of indicators in the written statements and J88 form that signalled a need for verification of the claim of rape before resorting to arresting the plaintiff.

[12] The evidence of Mr Mrwebi has a direct bearing on the plaintiff’s claim based on malicious prosecution. Indirectly, it also affects the consequent claim for damages based on *contumelia*. He testified that he was the prosecutor who was charged with the task of prosecuting the plaintiff in court. He confirmed the version of the plaintiff that prosecution commenced at Bityi Magistrates’ Court on 20 August 2012 and terminated on 07 April 2014 when Mthatha Regional Court withdrew the charge of rape due to lack of evidence. The plaintiff had already pleaded “not guilty” at the time when he charge was withdrawn. I outline herein below the number of occasions when the plaintiff made appearances in court without an effort being made by the DPP to commence the trial:

- on 20/08/2012 - first appearance and remanded in custody
- on 21/08/2012 - released on bail and remanded;
- on 08/10/2012 - appearance in regional court and remanded on on bail;
- on 13/12/2013 - matter struck from the roll;
- on 22/07/2013- re-summoned for trial at the regional court;
- on 15/08/2013- remanded on bail;
- on 07/04/2014- case withdrawn.

[13] On each of the occasions when the plaintiff appeared in court Ms M[...] was not in attendance. Infact, not a single witness was subpoenaed by the State. Mr Mrwebi testified further that the decision taken to prosecute the plaintiff is as valid today as it was when it was taken in

August 2012. He asserted that the State still intends to pursue prosecution against the plaintiff. In my view the assertion remains hollow by reason that Mr Mrwebi could not tell how and when the prosecution is intended to be revived.

[14] The evidence of Mr Mrwebi was shown during cross-examination to be preposterous. On the one hand he maintained that there was a reasonable cause to prosecute the plaintiff, and that a successful prosecution was probable. However, on the other hand, he told the court that the charge of rape was withdrawn by reasons that Ms M[...] never attended court for the purposes of trial. The State did not subpoena Ms M[...] at any stage; and he (Mrwebi) never had sight of the police docket during remand days. He conceded that he personally did not make an effort to order the investigator to submit the docket. As a result, he did not interview Ms M[...] at all. He never even met her. Strangely though, he contended that the J88 form and written statements of Mrs Magwentshu and Ms M[...], which are defective, disclosed a *prima facie* case of rape. Suffice it to say that the basis for his conclusion escapes me.

[15] The version of the plaintiff, as put to the defendants' witnesses under cross-examination as well as when he testified, is that Mr Mpangele had no reasonable grounds to arrest him because the facts in his possession at the time of arrest revealed that he supinely relied on contradicting facts contained in the written statements of Ms M[...] and Mrs Magwentshu, together with the J88 form that did not confirm the claim that rape occurred. According to the plaintiff the rape charge was trumped-up by Mr Nomazele, a rival for the post of Principalship, with the aim of influencing the Department of Education to dismiss the plaintiff from his post and appoint Mr Nomazele into the same post. In doing so Mr Nomazele used Ms M[...] to achieve his ultimate objective. However, the efforts of Mr Nomazele failed in that the disciplinary action pursued by the MEC; failed due to unavailability of witnesses, including Ms M[...], to support the charge of rape.

[16] In my view, the contradictions in the documents used by Mr Mpangele leave much to be desired. He could not explain in this Court why he chose to rely on the statements which showed that Ms M[...] was raped on 22 June 2012 and on 22 July 2012. He ignored the fact that the place where the alleged rape was committed was not disclosed in any of the discovered statements. Yet Ms M[...] was an intelligent 15-year-old scholar at the time of the alleged rape who would have been best positioned to state her case in court. He could not without conducting an investigation ascertain why it was said in one statement that Ms M[...] reported rape to her elder sister and stated in another that a report was given to her brother and sister. He did not bother to verify the claim by Mrs Magwenhu that she got to know about the alleged rape from Mr Nomazele. He did not bother to find out why the doctor dealing with a victim who was raped on 22 June 2012 decided to submit to medical examination on 08 August 2012. The medical report reads that Ms M[...]’s hymen was absent signalling a clinical feature of penetration coupled with absent vaginal and physical injuries. Such terms in the J88 form do not mean that Ms M[...] was raped. But Mr Mpangele had the audacity to conclude that rape took place without having sought medical opinion. I add herein the observations that I have already made concerning the concessions made by defendant’s witnesses during cross-examination.

[17] On the facts of this case first defendant has proved that Mr Mpangele was the arresting officer; and that he entertained a suspicion that the plaintiff committed an offence of rape as referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977. Therefore, the jurisdictional facts in (a), (b) and (c) as listed in the case of *Duncan, supra*, have been met. The same cannot be said about the fourth jurisdictional fact. For that reason, what the court is called upon to decide is, firstly, whether the suspicion held by Mr Mpangele that the plaintiff had committed the offence of rape was based on reasonable grounds.

[18] In *Mabona and Another v Minister of Law and Order And Others* 1988 (2) SA 654 (SE) at 658 E-H Jones J said the following about the test to be applied in determining the jurisdictional fact of “reasonable grounds”:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). 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 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.”

[19] On the consideration of evidence adduced in this matter, Mr Mpangele’s decision to effect arrest, objectively viewed, does not pass muster. Mr Mpangele ought to have caused him to conduct further investigations before effecting arrest. Mr Mpangele ought to have known that the power vested in him to effect a warrantless arrest depended on a reasonable suspicion on his part that rape had been committed as is envisaged in Schedule 1 of the CPA. It is stated in the case of *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA) that in an objectively doubtful situation, such as the one obtaining in this case, the arresting officer must investigate the circumstances under which the offence was allegedly committed. The following was said at para 11 of the *De Klerk* case:

“What is clear is that the arresting officer relied on the statement by the complainant and the J88 only, when she made the decision to

arrest. Clearly, seen objectively, that was insufficient. The arresting officer failed to investigate further the circumstances of the assault itself, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and the seriousness of the wound were never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible.”

[20] The issue regarding the exercise of discretion whether or not he ought to have effected arrest does not arise in this case. Much as counsel for the parties were tempted to deal with that issue, the pleadings in this case did not warrant that it be judicially determined by this Court. That much is confirmed in *Sekhoto, supra*, at paras 50 and 57.

[21] In this case the detention of the plaintiff from 16-20 August 2012 would have been lawful only if his arrest was also lawful. In this regard, it is apposite to mention the statement in *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at para 38, which read:

“To summarise, what was decided in *Isaacs* [*Isaacs v Minister van Wet en Orde*] is that the prior lawful arrest of a person is not a prerequisite to the provisions of s 50(1) of the CPA coming into effect. Put differently, it was held that the fact, that the person may have been arrested unlawfully, does not preclude him or her from being remanded lawfully in terms of s 50(1) of the CPA. However, what was not held in *Isaacs* is that an arrested person’s continued detention, by virtue of an order of court remanding him or her in custody in terms of s 50(1) of the CPA, will automatically render such continued detention lawful. This was not an issue that the court in *Isaacs* was called upon to adjudicate”.

[22] However, the subsequent detention until 21 August 2012 was lawful because it had been authorised by the court based on the submission made by the prosecutor that a trial was necessary. See: *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) where the following was stated at para 28:

“Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police’s authority to detain, inherent in the power of arrest, is exhausted. In this regard

see *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157) para 42. As pointed out by Campbell AJ in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.”

[23] Mr Mrwebi owned up the decision made to prosecute the plaintiff. He told the court that his decision was based on docket brought to him by Mr Mpangele, which contained the written statement of Ms Mqulo, the J88 form and the written statement of Mrs Magwentshu. He did not consider it as necessary to consult the doctor who produced the J88 form, Ms M[...], Mrs Magwentshu and other potential witnesses. Neither did he subpoena those persons for the purposes of trial. He contented himself with merely keeping the matter on the roll for trial despite not having made preparations for it. Strange enough he was adamant that the prosecution will be re-instated despite the fact that on 07 April 2014 the regional magistrate withdrew the charge for lack of evidence. He regarded his stand-point as being correct to the extent that his decision to re-instate the prosecution was an exercise of prosecutorial prerogative. But sadly, the attitude of Mr Mrwebi reflects misunderstanding of his obligations as expressed in *Du Plessis, supra*, at paras 30-31 as follows:

“A prosecutor exercises a discretion on the basis of the information before him or her. In *S v Lubaxa* 2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) para 19 this court said the following:

‘Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.’

Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised. See generally *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) (2009 (2) SA 277; 2009 (4) BCLR 393; [2008] 1 All SA 197) para 37. Indeed a court should be obliged to, and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated."

[24] Even when the second written statement of Ms M[...] dated 10 December 2012 was read to Mrwebi during cross-examination, in which Ms M[...] states that in truth the plaintiff never raped her, he clung obstinately to his decision to pursue the prosecution at the expense of the plaintiff's right not to be deprived of his freedom arbitrarily or without just cause as entrenched in s 12 (1) (a) of the Constitution. See: *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) where the following was said at para 52:

"I can think of no reason why an unjustifiable breach of s 12 (1) (a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of applicant's delictual action of unlawful or wrongful detention."

[25] It is my finding that the second defendant would be liable for the wrongful detention of the plaintiff on 20-21 August 2012 had a claim for unlawful detention in respect of that day been made against it.

[26] In so far as the claim for malicious prosecution is concerned, the second defendant is proved by the evidence to have been liable to damages arising from it. Mr Mrwebi instigated the prosecution of the plaintiff. The plaintiff has also succeeded to prove that Mr Mrwebi had no reasonable grounds to prosecute him. Therefore, the test laid down in the case of *Moleko, supra*, at para 64 is met. The test reads:

"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*)."

[27] Consequently, not only has the plaintiff proved that the second defendant instigated the prosecution, and that the prosecution had failed, but he has also proved that Mr Mrwebi acted without reasonable and probable cause and with malice.

[28] In summary, the first defendant is liable to pay damages arising from unlawful arrest and detention for a period of four days (16 August 2012-19 August 2012); as well as *contumelia*. The second defendant is liable to pay damages arising from malicious prosecution. What remains is the proper assessment of these damages.

[29] Regard being had to the facts of this case, the proper approach to be applied in assessing damages is to consider previously decided cases of comparable values; but without allowing the process to fetter upon the court's general discretion (*Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (AD) at pp 535H-536A). It is important for the court to reflect in the awards of damages preferred the personal liberties of the plaintiff, the degree in which such liberties have been undermined and the rising standards of living (*RAF v Marunga* 2003 (5) SA 164 (SCA) at 170F-G). Above all, "it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings" (*Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93F).

[30] There is no need to recount the personal circumstances of the plaintiff and those circumstances surrounding the manner in which his personal freedom was maliciously undermined by both Mr Mpangele and Mr Mrwebi. The prison cell condition that the plaintiff was subjected to is, generally, as appalling as are those found in most other prisons situated in the Transkei area. Filth, poor service delivery and over-crowding are the common features in those prisons.

[31] Suffice is to say that the arrest, detention and prosecution of the plaintiff lowered his esteem in the eyes of the school community of Centuli. The school enrolment dropped. The department was led to subject him to a hearing for misconduct. The motive behind the charge for rape and misconduct was an ulterior one. He has not received an apology from his accused up to this day. However, there is not proven psychological sequelae to the arrest, detention and prosecution of the plaintiff in this matter.

[32] I find helpful guidelines in the case of *Johanna Janse Van Rensburg v The Minister of Safety and Security* (ECG) unreported case no: 2344/09 of 17 March 2011 on the legal principles, already referred to, which apply to this matter. In that matter damages were fixed in the sum of R120 000,00 for unlawful police arrest and detention of a woman for two hours coupled with inhuman treatment that led to PTSD. In the case of *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) the court awarded damages in the sum of R100 000,00 for wrongful police arrest and detention for 4 days in a police cell. A sum of R400 000,00 claimed in this case will be way too high. In my view a sum of R200 000,00 is an appropriate award to be made.

[33] The damages claim for malicious prosecution for which the second defendant is held liable to make good would not reasonably be met at R200 000,00. The falsity of the charge of rape proffered against the plaintiff and the suspense that he was placed into between 20 August 2012 until the charge was withdrawn on 07 April 2014 was caused by a conduct that was so malicious on the part of the second defendant that an award of R50 000,00 made in the case of *Rudolph, supra*, in 2009 becomes negligible. I consider an amount of R100 000,00 to be an appropriate measure of damages.

[34] The success that the plaintiff has achieved in the matter entitles him to the costs of suite.

[35] In the result the following order shall issue:

1. **The first defendant be and is hereby held liable to pay damages for wrongful arrest, detention and *contumelia* in the sum of R200 000,00.**
2. **The second defendant be and is hereby held liable to pay damages for malicious prosecution in the of R100 000,00.**
3. **Both the first and second defendants to pay costs of suite jointly and severally; the one paying and the other being absolved from liability.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
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