

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO:966/2015

In the matter between:

GCINIBANDLA NELSON GABAYI

AND ANOTHER

PLAINTIFFS

AND

MINISTER OF POLICE AND ANOTHER

DEFENDANTS

JUDGMENT

DAWOOD, J:

1. The Plaintiffs herein instituted a claim for damages against the defendants.
2. The Plaintiffs alleged as against the First Defendant *inter alia*:
 - a) That Captain Mpanzela, a member of the SAPS unlawfully and wrongfully arrested the Plaintiffs and detained them from the 5 September 2014 until the 9 September 2014 when they were released on warning.
 - b) That Captain Mpanzela when he maliciously arrested the Plaintiffs on false criminal charges set the law in motion without probable cause or reason did not have reasonable belief in the truth, acted with malice and with the intention to injure the reputation and good name of the Plaintiffs.
 - c) That the Plaintiffs were assaulted by members of the SAPS.
3. The Plaintiffs alleged as against the Second Defendant *inter alia*:
 - a) That Mr Mbeleki in deciding to prosecute and conducting the criminal proceedings against the Plaintiffs did not have a reasonable belief in the truth of the criminal charges against the Plaintiffs;
 - b) He acted without reasonable and/or probable cause;
 - c) He acted with malice; and
 - d) Acted with the intention to injure the reputation and good name of the Plaintiffs.

4. The Plaintiffs claims as consolidated against the First Defendant are accordingly in respect of unlawful arrest and detention, assault and malicious prosecution.
5. The claim against the Second Defendant is for malicious prosecution.
6. The parties agreed to a separation of the issue of quantum from the merits of the matter.
7. The matter at this stage is accordingly only for adjudication of the merits.

8. Facts

- a) The First Defendant commenced its case in order to justify the arrest and detention by calling *inter alia* Captain Mpanzela and Warrant Officer Wesi.
- b) The First Plaintiff Zanele Aphindiwe Matshabane testified in support of her case.
- c) Mr Mbeleki, the prosecutor testified in defence of the second defendant case.
- d) Captain Mpanzela's testimony revealed *inter alia*:
 - i) That he did not in fact see the Second Plaintiff, Gcinibandla Nelson Gabaya (now deceased) breaking the door and entering the office, nor did he find any instrument on his person.
 - ii) He merely saw the door broken and the second plaintiff standing in front of the door.

- iii) Those persons wanting to use the toilet had to seek his permission and the plaintiffs had not asked him. That he had checked and the toilets were locked.
- iv) That he charged the First Plaintiff with malicious injury to property because she was acting in concert with the deceased because they both assaulted him knowing he was alone.
- v) He assumed that they had an instrument because an instrument was used and the deceased was standing in front of the door.
- vi) According to him he did do anything except ward off the blows when he was being assaulted by the Plaintiffs.
- vii) He initially stated that pepper spray came at a later stage when they were disturbing him then retracted this saying that no pepper spray was used and he was confused about the question.
- viii) The discrepancies between his testimony in this court and at the Magistrate's Court were put to him as follows:
 - (a) That in the Magistrate's court he had said that the deceased was inside the office whereas here is saying that the deceased was next to the office.
 - (b) That in the magistrate's court he was uncertain of the number of persons present nor could he say whether the plaintiffs were amongst the group whereas in his testimony in these proceedings he emphatically stated that the Plaintiffs

were not amongst the group and he knew the number of persons present as he had given them permission whereas he had not given the Plaintiffs permission.

(c) In the magistrates court he had stated that he had been pushed in front of the people there and they had *said “what are you doing to the police officer”* whereas here stated that the people were on the other side of the door and had not witnessed the incident and that is why he had not obtained a statement from any of them.

(d) In the Magistrate Court he had stated that the group had been brought by his colleagues whereas here stated that he had granted them permission.

(e) In the Magistrate’s Court he stated that the first plaintiff had gone to the toilet because she had come from behind him whereas here he denied that the first plaintiff had gone to the toilet when her version was put to him.

ix) He stated that the reason for the discrepancies was that the interpreter in the Magistrate’s Court had misinterpreted.

It was however noted during the course of these proceedings that he corrected the interpreter during the trial.

e) Warrant Officer Wesi stated inter alia:

- i) That the incident occurred near the door that was used by the police and it was a little bit away from office 18.
- ii) That Captain Mpanzela was pushing the plaintiffs whilst the deceased kicked him and swore him and the first plaintiff also assaulted him.
- iii) According to him there were two not 3 doors that exited the police station which were closed not locked.
- iv) Different groups had arrived at different times requesting to be accommodated at the police station.
- v) According to him Captain Mpanzela had informed him that he had noticed the deceased come out of the toilet and had confronted him by asking him why he was at the toilet because he had not asked permission and the man had replied he was unaware that he needed to ask permission.
- vi) He then added that the captain had also explained that they had broken the toilet door and the door to office 18.
- vii) That he was told by Mpanzela that the lady got involved while they were arguing about the issue of getting into the toilet and the issue of the broken door and it was at that stage that he was assaulted.

- viii) He was further told by Mpanzela that the man was walking from the direction of the toilet towards the main door.
 - ix) The toilet door was not locked prior to the incident and he does not know whether it remained unlocked after the incident.
 - x) There were 3 toilets that were unlocked and two that were locked.
 - xi) There was no procedure at the station that permission needed to be sought to use the toilet from the officer at the charge office.
 - xii) He conceded that there was nothing wrong with a person going to that toilet from the charge office and using the toilet.
- f) The first Plaintiff's testimony also had numerous inconsistencies with regard to her testimony in support of her claim. She merely denied that the transcripts were a correct reflection of her testimony when questioned with regard to the discrepancies between her testimony in the Magistrate's Court and in these proceedings.
- i) The First Plaintiff's version regarding the pepper spray incident was not put to Warrant Officer Wesi who according to her was the person who sprayed her nor was the incident of spraying in the room that they were locked in put to anyone nor the fact that they were left in a dark room.

- ii) There were no allegations of assaults made to the magistrate or prior to them being detained at central nor were any injuries recorded.
- iii) In the Magistrate's Court she stated that she could see Gabayi and Mpanzela from where she was seated whereas in these proceedings she testified that she could not see Gabayi and Mpanzela but was told by the people that the person with whom she was had committed burglary.
- iv) She insisted that her boyfriend did not commit burglary despite her not being present when the alleged act was said to have been committed and she could not see Gabayi whilst she was in the passage because she had merely shown him the toilet and returned to her seat.
- v) She initially stated that the two were shouting at each other then said that it was Gabayi who was asked by Mpanzela why did you break in here.
- vi) The doctor corroborated her testimony regarding her condition and the injuries noted. He however was unable to independently state what or who or precisely how and exactly when the injuries were caused save for what was conveyed to him by the plaintiffs when he consulted with them.

- vii) The version by the officers were that the plaintiffs were pulled away from the captain who had also been pushing them away.
- viii) Mr Mbeleki the prosecutor in his testimony inter alia:
 - a) Conceded that he ought not to have pursued with the charge of malicious injury to property against the first plaintiff and if he did that was a mistake on his part as there was no evidence that she had committed the offence
 - b) He did not know either of the plaintiffs and had no malice or intention to injure either of them.

9. Legal Position

- i) The first point to be considered is whether or not the executrix has locus to claim for damages arising out of a delictual claim.
 - a) Mr Hinana in his supplementary heads argued that it cannot be said that the plaintiffs claim constitutes a property in terms of the act¹.
 - b) However in the case relied upon by Mr Hinana that of **Lockhat's Estate v North British and Merchandile Insurance**² the following was *inter alia* said
*“the executor’s duty ... is to obtain possession of the assets of that person **including rights of action** ...”* (my emphasis)

¹ Section 3 of the Estate Duty Act 45 of 1945

² 1959 (3) SA 295 (AD) at 302 E - F

- c) The executor accordingly clearly has a right to pursue actions instituted by the deceased.
 - d) Mr Pangwa further referred the court to the provision of Rule 15 (1) of the uniform Rules of Court which provides:

15 (1) “*No proceedings shall terminate solely by the reason of death ... of any party.*”
 - e) He also referred to authorities that confirm that once *litis contestatio* has been reached the representatives of the deceased estate is entitled to proceed with the balance of the claim³.
 - f) I am in agreement with Mr Pangwa that *litis contestatio* had been reached and the executor could be substituted in respect of delictual damages in respect of the general damages but not in respect of any special damages claim.
 - g) The executrix is accordingly properly before court in respect of the deceased’s claim.
- ii) The next point to be considered is whether or not the first defendant has established that the arrest and detention was lawful and justified.

³ Sindiwala No v Road Accident Fund unreported (441/2003) ZAKZPHC45 at paragraph 13 of Moleka J’s judgment

See also Gunter v Executor of the late France Christian Gunter 2013 (4) SA 387 WCC at paragraph 23 and 24

a) Section 40 (1) (b) of the Criminal Procedure Act sets out the basis upon which an arrest may be justified where it is effected without a warrant would need to establish⁴:

- (i) That the arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect (the arrestee), committed an offence referred to in schedule 1; and
- (iv) The suspicion must rest on reasonable grounds.

iii) In **Mabana v Minister of Law and Order**⁵ Jones J held:-

“It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action.

It authorises an arrest at the strength of a suspicion and without the need to swear out a warrant , that is, something which would otherwise 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.

⁴ Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 SCA at paragraph 6

⁵ 1988 (2) SA 654 (SE)

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 a suspicion but not certainty. However the suspicion must be based on solid grounds otherwise, it will be flighty and arbitrary and not reasonable suspicion.”

iv) In this case:-

(a) Captain Mpanzela was the complainant.

(b) Captain Mpanzela was also the arresting officer

(c) Mpanzela in this case did not:

(i) see the deceased breaking the door;

(ii) find any instrument on the deceased;

(iii) find the deceased inside that room;

(iv) have any officers come in to take photographs of the scene or fingerprints;

(v) did not testify with regard to whether or not these doors were in working order prior to the deceased going in there and did not state what exactly aside from his presence in that section caused him to believe that the deceased had broken the doors and intended to steal or did steal anything from that office;

- (vi) explain why the deceased or any person needed to seek his consent to use the toilet; and
 - (vii) his suspicion accordingly in the circumstances cannot be said to be based on solid grounds.
- (d) The officer only arrested the first plaintiff for malicious injury to property because they both assaulted him and he assumed they had an instrument with them.
- (e) There were numerous discrepancies between his version in court and the version given in the magistrate's court as already pointed out.
- (f) Warrant Officer Wesi contradicted captain Mpanzela's testimony by *inter alia*:
- (i) Placing the plaintiffs away from office 18,
 - (ii) Stating that the toilet doors **were not locked**;
 - (iii) Stating that Captain Mpanzela initially told him that the suspect had come out of the toilet and he confronted him asking why he had gone there without seeking permission; and
 - (iv) That the lady had got involved whilst they were arguing about the issue of *inter alia* getting into the toilet.

- (g) His version as far as what transpired and what he had been told by Captain Mpanzela differed substantially from Mpanzela version.
- (h) Captain Mpanzela on Wesi's version was not passively standing there warding off blows but was pushing back according to him and they further assisted in pulling the suspects off Captain Mpanzela. This is in contrast to Mpanzela's testimony where he stated that he was merely warding off the blows.
- (i) Captain Mpanzela was not a credible witness having regard to the discrepancies in his testimony in the 2 courts as well as the discrepancies between his testimony and that of warrant officer Wesi.
- (j) The pitfalls of being the complainant and then having to make an objective assessment of whether to arrest and detain suspects applying detached objective criteria to assess the quality of the information at his disposal are clearly evident.
- (k) This matter ought to have been reported to his superiors immediately and officers not directly involved called in. This is in respect of all the charges as an objective assessment was necessary on the assault and other charges as well and whether the other offences would be considered schedule 1 offences on their own.

(l) Aside from this, the evidence of Mpanzela also does not demonstrate how a reasonable suspicion based on solid grounds in respect of the malicious injury to property could be formulated in this case having regard to the evidence at his disposal at the time or whether the other offences were schedule one offences warranting arrest and detention.

(m) The first defendant has in the circumstances failed to establish that the arrest and detention of the first plaintiff and deceased was warranted.

(n) The fact that the deceased did not testify does not detract from the fact that on Mpanzela's testimony itself there was sufficient basis to find that his arrest of the deceased and the first plaintiff was not justified and thus both plaintiffs are entitled to damages flowing from the unlawful arrest and detention.

10. The next issue is whether or not the plaintiffs have established their claim based on assault.

a) It was argued that despite the fact that the deceased did not testify the evidence of the first plaintiff and the doctor would be sufficient proof of the assault.

b) The doctor's testimony unfortunately was based on what he was told was the cause of the injuries as he had no direct knowledge nor did he do any independent tests to establish that the cause of the blood shot

eyes was pepper spray and why this was not mentioned or seen in court where they appeared prior to coming to him or during their detention at central.

- c) The first plaintiff's version was also fraught with discrepancies and no support can be found for the deceased claim in the first plaintiff's testimony.
- d) The second plaintiff has failed to establish the deceased claim in respect of the assault and failed to discharge the onus resting upon him in this regard.
- e) The first plaintiff was clearly not a credible witness with numerous discrepancies present in her testimony.
- f) She even went so far as to deny the correctness of the recording in the lower court when it was pointed out to her that her testimony in these proceedings differed from the testimony she gave in the Magistrate's Court despite the fact that the transcript were obtained by her attorney and used when questioning the witnesses for the first defendant.
- g) She appears to have added on incidents of having been peppered sprayed and the confinement in a darkened room which were not put to any of the witnesses and clearly aimed at bolstering her claim.
- h) Whether this was an exaggeration of what really transpired or a further creation or concoction of incidents of assaults that occurred on that day is unclear.

- i) The discrepancies impact adversely on the credibility of the first plaintiff and on the issue of whether or not her version is more probable than that of the Defendant's witnesses who allege that there was an altercation not an assault.
- j) The first plaintiff in the circumstances has not discharged the onus resting upon her on a balance of probabilities to establish that she was in fact assaulted in the manner alleged by her or at all.
- k) The first Plaintiff's claim in this regard is accordingly dismissed.

11. The final issue to be dealt with is whether or not the first plaintiff has discharged the onus resting upon her to establish that she was maliciously prosecuted by both the first and second defendant.

- a) Mr Pangwa correctly conceded that the deceased would have needed to testify to establish his claim in this regard and accordingly his claim was not pursued further.
- b) The requirements for a successful claim for malicious prosecution were set out in **Minister of Justice and Constitutional Development v Moleko** ⁶

- i) That the defendants set the law in motion (instigated or instituted proceedings);

⁶ {2008} ZASCA 43

See also Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 SCA paragraph 16.

- ii) That the defendants acted without reasonable and probable cause;
 - iii) That the defendants acted with malice (*animo injuriandi*); and
 - iv) That the prosecution has failed.
- c) In this case it is evident from the first plaintiff's version that the Captain had mentioned a burglary and that even the people there had told her that the person she was with had been suspected of a burglary by the police officer and this is what prompted her to intervene.
- d) The officer subjectively believed that the deceased presence in that area was for criminal purposes and assumed that he had broken into that office.
- e) There appears to have been an altercation whether it is as alleged by the plaintiff or the first defendant's witnesses.
- f) The officer's action although objectively viewed did not give rise to a reasonable suspicion but he nonetheless appears to have subjectively believed that an offence had been committed and further that the first plaintiff's intervention meant that she was party to the criminal activity and that is what motivated him to charge her for the malicious injury to property as well.
- g) His actions do not appear to have been actuated by malice nor with the intention to harm the plaintiffs, nor does he appear to have fabricated the charges.

- h) The first plaintiff has failed to have established that the officer's conduct in setting the law into motion was actuated by malice.
- i) There was a concession on the part of the second defendant that there was no evidence against the first plaintiff in respect of the charge of malicious injury to property.
- j) Mr Pangwa argued on the basis of the judgment in **Minister of Safety and Security NO v Schubach**⁷ that the fact that the prosecution continued in the absence of evidence to sustain a conviction on that charge that the court could find malicious prosecution in respect of that count as the decision to prosecute on that charge was without reasonable cause and was malicious.
- k) In Schubach's case the court found at paragraph 12 *"that the set of charges are discrete and have to be considered separately in determining the absence of reasonable and probable cause. Considerations pertaining to the one set of charges cannot be transposed onto the other. In other words, the fact that there was a reasonable and probable cause to prosecute on one set of charges has no effect on the outcome of the enquiry in relation to the other set of charges."*

⁷ Minister of safety and security NO and Another v Schubach (437/13) [2014] ZASCA 216 (1/12/2014)

This is so, because the question whether reasonable grounds for the prosecution exist is answered only by reference to the facts of each case.”

- l) In that case however the prosecution was persisted upon despite the DPP having given instructions to withdraw the charges with regard to the licensed firearms.
- m) In this case the prosecutor admits that he had no reasonable and probable cause to prosecute the 1st plaintiff on the charge of malicious injury to property.
- n) However he states that the fact that this charge was put to her was an error on his part and not an intentional act let alone one actuated by malice.
- o) There was nothing in the 1st plaintiff's testimony nor in cross-examining this witness that suggested that his version that this was an honest mistake on his part should be rejected.
- p) The plaintiff failed to demonstrate any malice on his part.
- q) He willingly conceded that it was a mistake for him to put the charge of malicious injury to property to the plaintiff but denied that he had the intention to injure the first plaintiff by so doing.
- r) His concession clearly demonstrates that there was no reasonable and probable cause but also demonstrates that there was no malice or

intention to injure which are necessary requirements as well in order to establish a case of malicious prosecution.

- s) He was a credible witness who readily made concessions.
- t) The first plaintiff has accordingly failed to discharge the onus resting upon her to establish malice on the part of the second defendant as well.
- u) The first plaintiff's claims in respect of malicious prosecution as against both the first and second defendant accordingly fall to be dismissed as do the deceased claims in this regard.
- v) The prosecutor however ought to have acted more diligently in the circumstances in discharging his duties. It is for this reason that despite the second defendant successfully defending the claim I am disposed to not granting any costs in the second defendant's favour.
- w) The Plaintiffs succeeded against the first defendant in respect of the unlawful arrest and detention but not that in respect of that claims pertaining to assault and malicious prosecution. In light of their partial success I am disposed to awarding them half of their costs of suit in respect of the trial on the merits.

12. In the result the following order is made.

- a) The first defendant is held liable to both the plaintiffs for their agreed or proven damages consequent upon the first plaintiff and the

deceased unlawful arrest and detention by members of the SAPS, from the 5 to the 9 September 2014.

- b) The first and second plaintiffs claim in respect of assault is dismissed as against the first defendant.
- c) The first and second plaintiff's claim in respect of malicious prosecution is dismissed against both the first and second defendant.
- d) The quantum of damages to which the plaintiffs are entitled shall be determined on a date to be arranged with the registrar of this court.
- e) The first defendant is directed to pay 50 (fifty) percent of the plaintiff's costs of suit in respect of the determination of the merits of this matter inclusive of the filing of the supplementary heads of arguments.
- f) No order as to costs is made in respect of the second defendant.

DAWOOD J

JUDGE OF THE HIGH COURT

SUPPLEMENTARY HEADS

FURNISHED BY FIRST DEF: 08 December 2017

JUDGMENT DELIVERED: 23 January 2018

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