

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

Case No. 2583/2010

In the matter between

MANDUNDU MATYALENI

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

JOLWANA J

[1] Plaintiff instituted an action for damages suffered as a result of unlawful arrest and detention, malicious prosecution, assault and unlawful search allegedly perpetrated by employees of the defendant. However, at the commencement of the proceedings Mr Pangwa who appeared for the plaintiff indicated that the plaintiff was abandoning the claim relating to the assault.

[2] Plaintiff testified that on 18 October 2008 in the morning a bakkie loaded with a number of people arrived at her homestead. They said they were looking for stolen sheep from her son, without identifying themselves. On the day in question there was a cleansing ceremony for her son, Sicelo Mpange (Sicelo) following the passing and burial of his wife, in terms of the family tradition and custom.

Because of this ceremony there were other local people at her homestead in addition to her family members.

[3] It later transpired that the people in the bakkie were people who were looking for their stolen sheep and they were with police clad in civilian attire. They were there to assist the police in identifying the stolen sheep. Sheep that were in her garden were inspected as well as the skins of the sheep that had already been slaughtered for the ceremony. She testified that those people did not identify any sheep as theirs nor did they find any skin that they identified as that of their stolen sheep.

[4] However, those people insisted on taking Sicelo with them. Members of the community intervened and refused to have Sicelo taken away by people they did not know. When community members refused with Sicelo those people left without Sicelo. They came back sometime later with a group of police officers who were clad in uniform.

[5] When the police arrived they overturned traditional beer containers, pots with meat and kicked people in the yard. She was suffocated with a plastic as a result of which she lost consciousness. When she regained her consciousness one of the police officers produced a firearm which he claimed belonged to her. She was then arrested for possession of an unlicensed firearm. She was thereafter taken to Libode police station where she was detained.

[6] The defendant called Sergeant Ngcebetsha, who is defendant's employee and is attached to the stock theft unit in Mthatha to testify. His evidence was that on 17 October 2008 he was at work with his colleagues when they were asked by Captain Ngamle to be on standby. This was because he had received information that there

was a plan to steal sheep at Mpindweni Administrative Area, Ngcolora Locality in Libode that night.

[7] Later in the evening captain Ngamle telephoned him and told him that some sheep had been stolen at Mpindweni and some shots were fired during the theft. In the morning of the 18 October 2008 he and warrant officer Pretorius were joined by the owners of the sheep and proceeded to Sicelo's home as the latter was implicated in the theft. It was necessary that the owners of the sheep be present to identify the sheep.

[8] On arrival they asked for the owner of the homestead and were directed to plaintiff's brother in law as plaintiff was widowed. They told him that they were police officers from the stock theft unit and were following leads on stolen sheep. They asked for Sicelo. They asked for permission to inspect the sheep skins that were hanging on the kraal. One of the skins was identified as belonging to one of the stolen sheep. They took the said skin and arrested Sicelo by putting him and the skin in their bakkie.

[9] Sicelo asked to speak to the complainants for purposes of reaching a settlement about compensation as he admitted having stolen the sheep. Three young men approached them and one of them said that Sicelo was not going anywhere and that he must jump out of the vehicle. He realized that one of the young men was hiding an R1 rifle under his leather overcoat. Captain Ngamle told them to retreat and call for a backup. They then drove out of the homestead and parked on the other side of the plaintiff's homestead.

[10] While they were waiting for the backup they heard gun fire from plaintiff's homestead. Warrant officer Pretorius shouted that there was a gun man shooting from underneath aloe trees very close to them. One of the complainants sustained

gunshot wounds. They asked one of the complainants to drive the police vehicle while he and his colleagues jumped to the back of the bakkie and returned fire. They ran to Libode police station where they found reinforcement contingent from the NIU who had been tasked to give backup support to them. After briefing them they all proceeded to plaintiff's homestead.

[11] He remained with the police vehicles while members of the NIU went into plaintiff's homestead. He was later called to identify Sicelo. When he got there everyone was lying on the ground, he pointed Sicelo and returned to the vehicles. His colleagues from the NIU later emerged with Sicelo, the plaintiff and one firearm that had been found in the plaintiff's homestead during a search that was conducted. Sicelo and the plaintiff were arrested and taken to Libode police station and charged with resisting arrest and possession of unlicensed firearm.

[12] The next witness for the defendant was warrant officer Thandwa Madikizela, a member of the NIU. He testified that they proceeded to plaintiff's homestead to effect the arrest and search for the firearms that had been used in attacking their colleagues attached to the stock theft unit. They were all in full uniform and on arrival at plaintiff's homestead they ordered everyone in the yard to lie down. They searched everyone in the yard. He took plaintiff to the flat which was one of the buildings in the yard and requested her permission to search the flat and the plaintiff granted permission for the search.

[13] He saw a suitcase on top of a wardrobe and on searching it he found a 9mm Z88 pistol. He asked the plaintiff for the licence for the firearm which she failed to produce. He then decided to arrest the plaintiff for possession of an unlicensed firearm.

[14] Warrant officer Madikizela disputed suffocating the plaintiff or planting the firearm that was found in a suitcase in the flat. I hasten to add that plaintiff resides with other people in her homestead. She was not asked who the actual occupant of the flat was nor she was questioned about the ownership of the suitcase in which the firearm was discovered. These questions were not asked before the search was conducted, during the search or even at the discovery of the firearm. However, more about this later.

[15] This brings me to the question of the lawfulness or otherwise of the arrest and detention. There is no need to restate the law about the fact that arrest and detention are *prima facie* unlawful, a violation of the constitutional rights and therefore the defendant bears the onus to prove that the arrest and detention were in fact lawful in the circumstances.

[16] From the plea which is unfortunately lacking in details and deficient in most material respects the defendant pleads that the arrest was justified on the basis that the plaintiff was found in possession of an unlicensed firearm. No other basis for the arrest is pleaded. However, I gleaned from defendant's heads of argument that the defence is based on section 40(1) of the Criminal Procedure Act 57 of 1977. Once again the relevant paragraph in subsection (1) on which the defendant relies for the warrantless arrest is not indicated.

[17] What flows from the totality of the evidence given by both plaintiff's and defendant's witnesses is that the police were not there to arrest the plaintiff. For instance, the shooting occurred shortly after the police had arrested Sicelo, and were preparing to leave with him and the sheep skin that was recovered. In any event it is common cause the circumstances of this matter and what transpired on the day, the shooting and one person being injured were such that it could not have been expected of the police to go and apply for a warrant and would have been

expected to search even without consent if same was refused. The police needed to act quickly to save life and limb. Mr Pangwa correctly conceded that the search was not unlawful in the circumstances.

[18] It needs to be born in mind that in her evidence which was less than satisfactory, the plaintiff said nothing about the shooting in her evidence in chief. Her evidence under cross examination was that she got into the house and that she did not hear any shots being fired. However, the credibility of her evidence is irrelevant as the onus of proving the lawfulness of the arrest and detention is solely that of the defendant. For the police to have lied in this respect they would have had to lie about the shooting, lie about retreating and calling for a backup and also lie about the need to be assisted by their colleagues from the NIU. On a balance of probabilities I accept that there was a shooting which necessitated the police from stock theft unit to seek reinforcement from the NIU. This is important because it goes to show that it could not have been expected of the police to go and apply for a warrant of arrest.

[19] However the matter does not end there. This is not any other item whose possession is unlawful. Even if it were to be said that under the Criminal Procedure Act the warrantless arrest was justified the police needed to also deal with the provisions of the Firearms Control Act 60 of 2000. Once again the plea is silent about this act in circumstances in which this act makes provisions relating to possession of firearms and the plaintiff was arrested for possession of unlicensed firearm.

[20] Section 117(2) contains these provisions, among others:

“Whenever a person is charged in terms of this Act with an offence of which the possession of a firearm or ammunition is an element and the state can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person, the following circumstances

will, in the absence of evidence to the contrary which raises reasonable doubt, be sufficient evidence of possession by that person of the firearm or ammunition where it is proved that the firearm or ammunition was found –

- (a) on residential premises and the person was, at the time –
 - (i) in control of such premises; or
 - (ii) over the age of 16 years and ordinarily resident at such premises.”

[21] This requires the examination of what happened immediately before plaintiff was arrested even at the risk of repetition. The evidence of the defendant is that after Mr Madikizela was assisted in identifying who the owner of the homestead was, he asked the plaintiff for consent to search which she granted. He then proceeded with the plaintiff to the flat for purposes of conducting a search. His other colleagues were at this point searching other buildings in the homestead while he proceeded to the flat with plaintiff. On searching the flat he, among other things, saw a suitcase on top of a wardrobe. He proceeded to open the suitcase to search it. In it he found a firearm rapped in a plastic, a Z88 pistol.

[22] He asked the plaintiff to produce a licence for the firearm which she failed to produce. He thereupon arrested the plaintiff for possession of an unlicensed firearm. There is not even a remote suggestion that there was any attempt to question the plaintiff basic questions like who owned the flat or stayed in it. In other words, having established that the plaintiff was the owner of the whole homestead it would have been necessary to establish who the actual occupant of the flat was. Furthermore, the ownership of the suitcase ought to have been important to the police at the time the search was conducted. Strangely, both the occupant of the flat as well as the owner or user of the suitcase were of no significance to the police.

[23] It is important to note that plaintiff testified that when the plastic with which she was covered was removed and she regained consciousness she saw the firearm in front of her. Whether this is true or not I do not know but the point is that it may

very well be true that after searching the suitcase and discovering a firearm Mr Madikizela dropped the firearm in front of the plaintiff and demanded a licence for the firearm. For this to happen it was not necessary for the plaintiff to have been covered with a plastic or anything else. The point I am making here is that the search was conducted in total disregard of the importance of ensuring that the evidence that was sought to be found relating to the firearms that had been used in an earlier shooting was collected in a manner that would ensure that those who possessed illegal firearms and ammunition were prosecuted and made to account for their unlawful activities including the shooting that had occurred that morning.

[24] If one looks at the facts it is clear that the manner in which the search was conducted was in total disregard of the law especially the provisions of section 117 of the Firearms Control Act. In fact it is clear that the search was done as if it was an end in itself.

[25] No submission was made at all about this act by the defence when the matter was argued and no evidence was led, if nothing else, at least to show that the police were aware of this act and it was in fact complied with even if implicitly. Even in the plea and the evidence that was led there was no attempt to rely on it in justification of the arrest and detention.

[26] The two witnesses for the defence did not make any serious effort to discharge the onus of proving that the arrest was lawful. The first witness Mr Ngcebetsha could not have been expected to deal with this aspect of the case. The reason is not far to seek. He was not there when the arrest was effected. His evidence largely related to the events that took place leading to the presence of the NIU at the plaintiff's homestead. His evidence in this regard provided a very useful background that contextualized the plaintiff's arrest.

[27] Mr Madikizela who conducted the search and discovered the firearm which led to the arrest of the plaintiff made no attempt, to explain how the arrest could have been lawful without establishing the details of who occupied the flat as well as the ownership of the suitcase in which the firearm was discovered. The submissions made by Mr Bembe, counsel for the defendant which seek to justify the arrest on the basis of the provisions of section 40 (1) are not helpful. Without the police establishing who occupied the flat and who owned the suitcase in which the firearm was found plaintiff should not have been arrested. The plaintiff must therefore succeed in her claim for unlawful arrest.

[28] Once the arrest is found to be unlawful it follows as a matter of law that the subsequent detention is unlawful. In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 at 605 para 31 SCA Fourie AJA summarised the legal position in the following terms:

“The authority of the police to detain a person is inherent in the power of arrest. Therefore, if the arrest is unlawful, the resultant detention is similarly unlawful.”

[29] This being trite law it calls for no further elaboration. The detention of the plaintiff from the 18 October 2008 to the 03 November 2008 when she was released on R1000.00 bail was unlawful. After several court appearances the charges against her were withdrawn which brings me to the claim for malicious prosecution.

[30] In his heads of argument Mr Pangwa correctly states the requirements for this claim to succeed as follows:

- (a) The defendant set the law in motion;
- (b) The defendant acted without reasonable and probable cause;
- (c) The defendant was actuated with malice (or *animus injuriandi*, and

(d) The prosecution failed.

[31] He then makes the following submission:

“The most factor which destroyed the case of the plaintiff relating to malicious prosecution, there was no evidence demonstrating investigation in order for the court to assess as to whether there was a reasonable and probable cause to cause the criminal case to be placed on the criminal court roll. As a result thereof the evidence of the plaintiff remained unchallenged.”

I have taken that reference to the plaintiff in the first line of this paragraph was meant to be to the defendant and that it was a typographical error, otherwise the sentence does not make sense.

[32] It cannot, with any seriousness be contended that the first and fourth requirements were not met and indeed it is common cause that the defendant set the law in motion. It is on the other requirements that I now turn to. It is convenient that I first deal with the fourth requirement that the plaintiff must allege and prove, that prosecution failed. The highest water mark of the defendant's defence for this requirement is that the prosecution had not failed. The reason for this contention is that while the matter was not proceeded to finality the plaintiff was not acquitted of the charges levelled against her. Furthermore, the plaintiff was remanded in custody by the court and that it was not the responsibility of the police as they completed their job when they brought the plaintiff before court.

[33] I do not understand what this submission is meant to convey as it flies in the face of the provisions of section 35 (3) (d) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which reads as follows:

“Every accused person has a right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay.”

[34] It is now almost a decade since the plaintiff was arrested and detained and nothing has happened since the charges were withdrawn and the charges have not

been reinstated. In my view this amount of excessive delay is in violation of section 35 (3) (d) of the Constitution and therefore it cannot be used against the plaintiff in her claim against the defendant for damages for malicious prosecution.

[35] Secondly, I do not understand how it can be contended that the police completed their job when they brought the plaintiff before court. Mr Madikizela, who conducted the search and arrested the plaintiff testified that he has established that the investigating officer of the case has since left the police service. It is not clear why the investigating officer was not called to testify. Without his evidence I find it difficult to understand how it can be said that police completed their job when there is no evidence of the matter having been investigated and the extent of that investigation. This is yet another clear indication of the prosecution having failed resulting in the charges being withdrawn and almost ten years later they have not been reinstated.

[36] This brings me to the two remaining requirements that the plaintiff must allege and prove. They are that the defendant acted without reasonable and probable cause and that the defendant was actuated with malice. Some of the background to the search and the arrest of the plaintiff was the shooting of the police and the people who were looking for their stolen sheep. The shooters and the people that forcibly removed Sicelo who, at the time was under arrest, were people at the plaintiff's home.

[37] There is clear evidence that police who were there in execution of their duties were attacked with firearms which may have included an R1 rifle. Police cars were riddled with bullets and some of their windows shattered. One person was injured. Police and ordinary citizens could easily have died as a result of the shooting. Section 205 (3) of the Constitution provides as follows:

“The objects of the police are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

[38] The plaintiff was not at the homestead as somebody who went there to attend the cleansing ceremony like some of the people who were there. She was at her home and the owner and therefore in control of the premises.

[39] In *Minister of Justice and Constitutional Development v Moleka* (131/07) [2008] ZASCA 43 (31 March 2008) the Supreme Court of Appeal stated the legal position on both of these requirements in the following terms:

“*Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

‘In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*’.”

[40] Van Heerden AJ went on to say at paragraph 64 of his judgment:

“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*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.”

[41] Mr Madikizela was, at worst guilty of gross negligence in proceeding to arrest the plaintiff of possession of an unlicensed firearm without establishing who used the flat and to whom did the suitcase belong. However, I am not persuaded that he acted without reasonable and probable cause or that he was actuated with malice or had *animus injuriandi*. The plaintiff’s claim for malicious prosecution must therefore fail.

[42] On the question of quantum it is instructive that I should mention that at the time of her arrest and detention plaintiff was a 63 years old permanent resident of Mhlanganisweni in the district of Libode. She is semi illiterate and widowed. On the day in question she was hosting the members of her local community as well as her in laws and other family members who had come to attend the cleansing ceremony as is normally the case in a traditional community such as that of the plaintiff.

[43] On 20 October 2008, the day of her first court appearance the matter was postponed and she was remanded in custody for formal bail application as police were opposed to her release on bail. Eventually she was released from custody on bail on 03 November 2008, some 16 days later. No explanation has been given by the defendant as to why she could not be released from custody in the interest of justice. Section 35 (1) (f) of the Constitution provides that *“everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.”*

[44] In this matter there was absolutely no reason why the plaintiff could not have been released from custody in the interests of justice much earlier. By the same token she could have been warned to present herself at Libode police station on Monday 20 October 2008 instead of taking her away from her family and her guests in circumstances in which she was a host. She was not a suspect for the theft of the sheep, she was not suspected in the shooting that took place earlier that day. Police had no reason to believe that she possibly owned the firearm that they found in the flat.

[45] When all this ill treatment and the trampling of applicant’s rights was taking place, ironically the Constitutional Court had only six months earlier, in March of 2008 handed down the judgment of *Zealand v Minister of Justice and*

Constitutional Development and Another 2008 (4) SA 458 at 468 CC in which Langa CJ had this to say:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient for this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

[46] In addition to the humiliation the plaintiff suffered as a result of the unnecessary public spectacle of her arrest at 63 years of age in circumstances in which there was a real possibility that it was Sicelo or some other person who was the culprit she was deprived of her freedom for 16 days. In the police holding cells at Libode police station she was detained in a cell whose toilet was in the cell which meant that while she was sitting there in the cell with other detainees one of them would be relieving themselves. She was sleeping on the floor as there were no beds or mattresses in the cells. In her community and her church she was labelled a thief. When asked if she had anything further to say she said that *“I was severely traumatised and demoted in my church in which I was a leader because I was regarded as a thief.”* There is no doubt that plaintiff, at her old age, suffered public humiliation and degradation of her dignity as a human being with total disregard of her Constitutional rights by the police.

[47] In the result the following order will issue:

- (1) Plaintiff’s claim in respect of unlawful search is dismissed.
- (2) Plaintiff’s claim for malicious prosecution is dismissed.
- (3) The defendant is directed to pay to the plaintiff a sum of **R320 000.00** as and for damages in respect of unlawful arrest and detention.

(4) The defendant is directed to pay interest on the amount of **R320 000.00** to be calculated at the prescribed rate of interest from a date fourteen days after the date of judgment to date of payment.

(5) The defendant is directed to pay the plaintiff's costs of suit together with interest thereon, such interest to be calculated at the prescribed rate of interest from a date fourteen (14) days after *allocatur* to date of payment.

MS JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: M PANGWA

Instructed by: CAPS PANGWA & ASSOCIATES

MTHATHA

Counsel for the Respondent: J BEMBE

Instructed by: MGWESHE NGQELENI INC

MTHATHA

Matter heard on: 17 November 2017

Judgment handed down on: 30 January 2018