

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. CA&R58/2017

In the matter between:

MCEBISI QWABA

Appellant

and

MINISTER OF SAFETY AND SECURITY

Respondent

JUDGMENT

MBENENGE JP:

Introduction

[1] This appeal, serving before this Court with the leave of the Supreme Court of Appeal after the court *a quo*¹ had dismissed the appellant's action and the resulting application for leave to appeal, concerns a claim for damages allegedly suffered consequent upon an unlawful arrest, detention and malicious prosecution of the appellant and other 5 local men whose details are of no relevance for purposes of this judgment.

[2] In a nutshell, the appellant and the 5 local men were arrested by members of the South African Police Service (the Service), one of whom was Constable Maqangwana, acting in the course and scope of their authority as members of the

¹ *Per* Mjali J.

Service, who suspected them/the arrestees of having assaulted, with intent to do one Situtwana Ntanjana (Situtwana) grievous bodily harm, on 25 December 2015. Those arrested were thereupon detained at Libode Police Station and appeared in court after the police had opened a police docket setting in motion the process of their being prosecuted on a charge of assault with intent to do grievous bodily harm. In the course of time, however, the charges were withdrawn.

The pleadings

[3] Aggrieved by the conduct of the police allegedly meted out to him, the appellant launched two separate actions before the Court *a quo* citing the Minister of Safety and Security in a nominal capacity as defendant. The one action was launched on 13 September 2010 with the appellant averring that the arrest and detention had been wrongful and unlawful, *inter alia*, in that it had been “*without reasonable suspicion and justifiable cause*”. In the same action there was also a quest for the recovery of damages for assault.² The respondent defended this action denying the assault and seeking to justify the arrest by contending that the appellant had been “*arrested and detained ... in terms of section 40 of the Criminal Procedure Act, 1977 (Act 51 of 1977).*”

[4] The appellant also launched a further action during December 2010 seeking damages for malicious prosecution.³ He couched the claim as follows:

“... the members of the South African Police Services (*sic*) whose names are unknown to the [plaintiff] wrongfully and maliciously set the law in motion against the [plaintiff] on false criminal charges of assault with intent **to do bodily injuries** (*sic*).” (The emphasis is my mine.)

[5] He further alleged that:

“In pursuit of the assault charges aforesaid members of the South African Police Services (*sic*):

² The appellant claimed that he had been kicked with booted feet on his legs and chest and all over his body, and that handcuffs were unduly tightened around his wrists.

³ An explanation was tendered at the hearing of the appeal that a separate action for malicious prosecution was issued because the charge for which the appellant had been arrested was withdrawn *after* the initial action was launched. This does not explain why a separate claim for malicious prosecution could not just have been added to the initial action and may constitute a reason why the costs of the second action should be disallowed or limited. I, however, make no pronouncement in this respect.

- 5.1 opened a police docket under case 200/12/2009;
- 5.2 placed a docket before a member of the prosecuting authority in Libode for a decision on whether or not to prosecute the plaintiff;
- 5.3 [caused] the plaintiff to [appear] before Libode Magistrate's Court on several occasions up until the said criminal charges were withdrawn on 19 October 2010."

[6] The respondent denied the allegations and pleaded, in amplification, that:

- "2.1.1 The defendant avers that on or about 24th December 2009, the late Situtwana Ntanjana ... laid a charge of assault with intent to do grievous bodily harm against his assailants one of whom happened to be the plaintiff.
- 2.1.2 The plaintiff and other local boys (assailants) were apprehended by local men, taken to the homestead of the deceased and tied with a rope.
- 2.1.3 Members of the defendant were called to the said homestead and the said suspects including the plaintiff were duly arrested, detained and subsequently appeared before the Magistrate at Libode on charges of assault.
- 2.1.4 The defendant contends that the prosecution aforesaid was with reasonable and probable cause in the circumstances.
- 2.1.5 Save as aforesaid, each and every allegation contained herein is denied as if so herein traversed and the plaintiff put to the proof thereof."

[7] By order of court granted on 24 November 2011, the two actions referred to above were consolidated and thenceforth proceeded as one action under case no. 2075/2010.

Pre-trial proceedings

[8] The consolidated action became the subject of the usual pre-trial proceedings. At a pre-trial conference held on 30 March 2015 the parties agreed that at trial stage the court would be called upon to determine the following issues:

- "1 The lawfulness or otherwise of the plaintiff's arrest on 25 December 2009 and his subsequent detention.
- 2 Whether or not the arrest and detention had the consequence contended for in paragraph 6 of the plaintiff's particulars of claims.

- 3 Whether in consequences of his arrest and detention the plaintiff suffered damages as specified in paragraph 8 of the plaintiff particulars of claim.
- 4 Whether the claim for assault was properly instituted against the defendant.
- 5 Whether plaintiff's sustained past and future and medical expenses.
- 6 Whether by reasons of the alleged conduct of the defendant, plaintiff suffered damages as stipulated 13.1 to 13.2 of the plaintiff's particulars of claim.
- 7 The defendant's liability to compensate plaintiff for damages in the amount claimed or some other amount.
- 8 Whether there was any malice on the part of the police official when the plaintiff was prosecuted."

[9] The parties further agreed to separate the issues of liability and *quantum*. They further recorded, in the relevant minutes of the conference, that there would be no dispute regarding the duty to begin and the onus of proof in relation to the issues adumbrated above. The respondent conceded that it bore the duty to adduce evidence first and the onus to justify the arrest and resulting detention, whilst the appellant conceded bearing the onus of proof and the duty to adduce evidence first in relation to the assault and malicious prosecution claims.

[10] It also came to pass that the matter became the subject of judicial case flow management which, at the opportune stage, yielded an order, issued pursuant to the parties' agreement, setting out the issues for determination as being the following:

- "1.1 That the court will be called upon to determine whether the plaintiff's arrest and detention on 25 December 2009 were justified in terms of the law.
- 1.2 The court will be called upon further to determine whether the plaintiff was assaulted or not by the members of the South African Police Services or assaulted in the presence of the members of South African Police Services.
- 1.3 Whether the claim for assault was properly instituted against the defendant.
- 1.4 That court will be called upon to determine whether the prosecution of the plaintiff by members of the South African Police Services (*sic*) was malicious or not."

The trial before the court a quo

[11] Even though it was, in terms of rule 39(13) of the Uniform Rules of Court,⁴ incumbent on the appellant to adduce evidence first, the matter proceeded on the basis that, because “*the [respondent] admits the arrest and detention of the [appellant] on the 25th of December 2009*”, it stood to reason that “*the [respondent bore] the duty to begin to justify the lawfulness of the arrest.*”⁵ Nothing, during the respondent’s opening address, was said about the assault and malicious prosecution claims.

[12] Apart from the testimony of Vuyani Ntanjana, the brother of the victim, whose testimony is immaterial for present purposes, Constable Maqangwana, the arresting officer, was called to testify in justification of the arrest and resulting detention of the appellant.

[13] Constable Maqangwana had been on duty at Libode Police Station on 25 December 2009. She and Constable Geswint were part of “*a van crew*”, attending to and receiving complaints. They received a report from Warrant Officer Bambeni that a certain adult male had been stabbed by certain young men at Moyeni location. They drove to Moyeni location and, upon arrival there, saw, next to a livestock kraal, about six young men lying on their backs, tied with ropes around their legs and wrists. The appellant was one of these young men.

[14] After they had introduced themselves as members of the Service, Vuyani Ntanjana reported that the six young men had attacked them the previous night. In the course of that they had stabbed Situtwana. The ropes on the alleged culprits were thereupon loosened at the instance of the police.

[15] Constable Maqangwana and Vuyani Ntanjana entered the house leaving Constable Geswint guarding the alleged culprits lying by the kraal. Inside the house, Situtwana reported that they had been on their way to their home when the six young men attacked and assaulted them. He (the constable) saw that Situtwana had sustained

⁴ The rule provides:

“(13) Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case...”

⁵ This is extracted from the opening address made on behalf of the respondent.

a wound above his eye. Situtwana stated that one of the assailants had remonstrated with the others stating that they should stop the assault because the victim was somebody else's father. He (Situtwana) also said he identified that voice as having been that of one of the assailants. The assailants he mentioned were "*Codesa*", "*Kuhle*" and "*a young man from the Qwaba family*". As they were leaving the house, a young man who appeared aged between 15 and 16 years old brought a knife, stating that Situtwana had been stabbed therewith and that it had been retrieved from the Qwaba residence. The police took possession of the knife.

[16] Constable Maqangwana informed the alleged culprits that Situtwana was accusing them of having attacked and stabbed him the previous night. Because none of the alleged culprits responded to the accusation, she arrested them. She thereupon explained their rights to them. She observed that the suspects' wrists were swollen, and they walked with a limp. The suspects were conveyed to the police station and detained after their details had been entered in various police registers. On the following day they were charged by Warrant Officer Dlakavu. They thereupon appeared in court and were released on bail.

[17] Under cross-examination Constable Maqangwana said she did not depose to a statement concerning what had been narrated to her as she lacked stationery. After the docket had been submitted to the prosecutor she was, according to her, no longer able to depose to any statement. She also confirmed that she arrested the plaintiff and his companions on the strength of what she saw and what she had been told. She had observed that Situtwana had been stabbed above his eye and bore a wound that was "*plus / minus three centimetres*". The arrest, she said, had also been made on the strength of Situtwana's statement. She had taken the decision to effect the arrest "*because there was a reasonable suspicion that an offence had been committed, because these people had been mentioned by Situtwana as his assailants and Situtwana also had suffered an injury...*"

[18] The sworn statement of Situtwana was handed in during Constable Maqangwana's cross-examination. Insofar as is relevant hereto, the statement reads:

“On Thursday the 24th day of December 2009 at about 22h00 I was on the way together with my brother, we met a group of a/males these adult males were 7 (seven) when we met them they talk but I didn’t heard what they said, they divide into two group the others assaulting my brother and the others come straight to me I ask them what are they doing on adult male drew a knife silver and black and stab me in the face near the eye of the right hand side. After he stab me they ran away. Kuhle Makhosonke one of the gang identify my brother and told his friends that is the father of Vuyo and they stop what done to us.

On 2009-12-25 when I wake up I sent my child to call Makhosonke, when Makhosonke arrived I asked them what they done to us and he explain the name of adult males they were going together and stab me during the night. I sent someone to call the parents together with their child, they came immediately, they point the one who stab me is Luxolo Bangani. Me and brother told them to bring the knife that they used to stab me. The knife arrive in the presence of the police officials. I want to lay a charge against Luxolo Bangani, Makhosonke Kuhle, Bangani Gwedeza, Mcebisi Qwaba, Mabhudi Magaqana and Masibulele Zondi and Nyenyani Masiwakhe (Guava) Guava ran away and he will be arrested.” Sic.

[19] Constable Maqangwana was asked why she had arrested all the alleged culprits if only Luxolo had been implicated as having been the one who had stabbed Situtwana. She said she arrested all of them because they all participated in the attack; a knife had been recovered and Situtwana had been injured. She sought to conduct further investigations so as to establish who had actually stabbed Situtwana.

[20] Asked why the arrest had been without a warrant she said:

“... in terms of section 40(1) a person can be arrested if that person had committed an offence even without a warrant... because assault GBH had been committed and injuries were inflicted and ... an offence had been committed because the victim sustained injuries... which is a serious offence in terms of Schedule 1.”

[21] The following excerpt from the transcript reveals what eventuated when questions were posed to elicit, from Constable Maqangwana, what eventually became of the assault GBH case:

“Mr Gagela: Eventually what became of the case?

Court: Does it matter?

Mr Gagela: Sorry, M’Lady?

Court: Does it matter, does it have any impact on the ... (intervention).

Mr Gagela: There is a claim of malicious prosecution here.

Court: There is a claim of malicious prosecution? I was under the impression that the defence – the defendant here is the Minister of Safety and Security ... (intervention).

Mr Gagela: As the Court pleases.

Court: And if you pursue a claim of malicious prosecution you definitely cannot pursue it against that Minister. Somebody else must come and ... (intervention).

Mr Gagela: As the – in other words, it’s a misjoinder. As the Court pleases, M’Lady.

Court: Yes, I see on the papers it’s only the Minister of Safety and Security.

Mr Gagela: That’s correct, M’Lady. That is correct.

Court: I don’t know what would happen to that claim of malicious prosecution if it is pursued.

Mr Gagela: As the Court pleases, M’Lady.

Court: I’m not saying I’m dealing away with it now, but I don’t know if the Minister of Safety and Security would be able to decide on whether to prosecute or not, whether that decision lies with him.

Mr Gagela: With the police?

Court: With the Minister of Safety and Security.

Mr Gagela: Yes, as the Court pleases, M’Lady.”

[22] Elsewhere, the transcript reads:

“Mr Nabela: So plaintiff will tell this honourable Court that the proceedings ... (intervention).

Court: Mr Gagela is up, Mr Nabela.

Mr Gagela: M’Lady, I’m having a problem with this question in the sense that when I read the pleadings there’s no citation of the National Prosecution Authority. An institute which prosecutes ... (intervention).

Court: Whatever it is worth, Mr Gagela, I was also under that impression that there’s no citation of the NPA and we also looking at the papers the claims are two here it’s unlawful arrest and unlawful detention.

Mr Gagela: As the Court pleases.

Court: Claim A and B.

Mr Gagela: As the Court pleases.

Court: And as to whether the proceedings what continued or not what happened at the time of their arrest and then what happened after the time of – the crucial time of the arrest.

Mr Gagela: As the Court pleases, M’Lady.

Court: Cannot be material to what happened at the time of the arrest”.

[23] Towards the conclusion of the trial, the following ensued:

“Mr Nabela: M’Lady, we have had discussions with my colleague.

Court: Yes?

Mr Nabela: That the issue of assault we will abandon it and we will be left with only the arrest, detention and the malicious prosecution.

Court: Malicious prosecution is it part of the summons?

Mr Nabela: It is, M’Lady. There is a case, M’Lady, case ... (intervention).

Court: Let me see. Let me see there are two claims as far as I'm concerned here. Claim A that is now unlawful arrest. Claim B detention. And it doesn't go further than that.

Mr Nabela: I understand why we are confusing, M'Lady. M'Lady, there is Case No 2609/10 which was then consolidated to Case No 2075/10. The bundle – the defendant's bundle of documents.

Court: Right?

Mr Nabela: At page 8 of it there's a ... (intervention).

Court: I seemed to have missed that one. Yes?

Mr Nabela: Yes, M'Lady. So I think ... (intervention).

Court: I seemed to have missed that one. Yes?

Mr Nabela: Yes, M'Lady. So I think ... (intervention).

Court: So you are abandoning assault?

Mr Nabela: Only the assault, M'Lady."

Order of the Court a quo and reasons therefor

[24] The parties addressed the Court *a quo* on 08 June 2016, and an order dismissing the action with costs with reasons to follow, if or when requested, was granted on 09 June 2016.

[25] In its reasons for the order the Court *a quo* pronounced that "[t]he only issue for determination was the lawfulness or otherwise of the plaintiff's arrest." It went on to state that "[a]lthough the issue of malicious prosecution was argued during trial, it was not part of the plaintiff's claim."

[26] The reasoning of the Court *a quo* in relation to the appellant's arrest and detention reads:

"Relevant for the purposes of this judgment is that assault where serious injury is sustained forms part of the offence listed under Schedule 1. The arrest without a warrant would be lawful, if at the time of the arrest, the arresting officer had a reasonable belief that the Plaintiff had committed a schedule 1 offence. The Defendant had to

show not only that the arresting officer suspected that Plaintiff of having committed an offence, but that he must have reasonably suspected Plaintiff of having committed a schedule one offence. It was evident from constable Maqangwana's evidence that having obtained the aforesaid statements wherein the plaintiff was implicated in the assault on Situtwana Ntanjana who sustained a serious injury therefrom, she then decided to arrest the plaintiff. Clearly the police were then entitled to arrest the plaintiff in terms of section 40(1)(b) of the Criminal Procedure Act No. 51 of 1977. For this reason the plaintiff's claim must be dismissed.

In the result I find that the arrest and subsequent detention of plaintiff were lawful."

The appeal

[27] At the heart of this appeal is the question whether Constable Maqangwana was entitled without a warrant to arrest the appellant who was suspected of having committed assault GBH. A further issue falling to be determined is whether the court *a quo* was correct in not pronouncing on the malicious prosecution claim and finding that the claim was not before it for determination. These issues are dealt with *seriatim*.

Was the arrest justified?

[28] It was argued, on behalf of the appellant, that assault GBH was not one of the offences contemplated in section 40(1)(b) of the Criminal Procedure Act 51 of 1977 and in respect of which it is permissible to arrest a suspect without a warrant. On behalf of the respondent it was argued that on the facts of this case there were sufficient bases for concluding that the appellant had committed an assault in which an injury had been inflicted, within the meaning and contemplation of section 40 (1)(b). In support of this contention mention was made of the fact that the wound had been inflicted above the victim's eye; it was a deep wound that bled profusely and necessitated medical intervention and suturing; and the degree of force with which it had been inflicted suggested that the intention had been to cause the victim "*a serious wound and / or grievous bodily harm*".

[29] Section 40(1)(b) around which the respondent is dancing and skirting provides that a peace officer may, without a warrant, arrest a person whom s/he reasonably

suspects as having committed an offence referred to in Schedule 1, other than the offence of escape from lawful custody. Schedule 1 makes no mention of assault with intent to do grievous bodily harm, but an “*assault when a dangerous wound is inflicted*.”

[30] The respondent’s plea refers to “*section 40*” as having been the section that was invoked by the arresting officer. Besides being not specific as to the relevant subsection, the plea makes no mention of the infliction of a dangerous wound. During her testimony, Constable Maqangwana made mention of a 3 cm wound, without stating what steps were taken, prior to the arrest, to ascertain the nature and extent of the wound. Only upon such ascertainment would she have been properly placed in a position to objectively conclude that the wound was one likely to endanger life or the use of a limb or organ.⁶

[31] The following remarks by Shongwe ADP in *De Klerk v Minister of Police*⁷ are apposite:

“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 was 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. In my view the respondent failed to establish the jurisdictional facts, in particular that the appellant committed an offence referred to in Schedule 1. I find that the appellant succeeded to prove that the discretion was exercised in an improper manner.”⁸

[32] More light on the subject at hand is shed by Rogers AJA (with Leach JA concurring in the minority judgment) in the *De Klerk* case⁹ when he says:

⁶ *R v Jones* 1952 (1) SA 327 (E) at 332 D-F

⁷ (329/17) [2018] ZASCA 45 (28 March 2018)

⁸ Compare: *Mneno v Minister of Police*, unreported decision by Hartle J (ECD Bhisho, Case No.: 647/2013 delivered on 14 June 2016); *Goliath v Minister of Police*, unreported decision by Bloem J concurred in by Schoeman J (ECD Grahamstown, Case No.: CA107/2017 delivered on 14 November 2017).

⁹ *Supra*

“... [the arresting officer] did not testify that she held the suspicion that the appellant had inflicted a “dangerous wound.” The suspicion she held was that the appellant had committed assault with intent to cause grievous bodily harm. The suspicion justifying a warrantless arrest in terms of Section 40(1)(b) is not an abstract reasonable suspicion but an actual suspicion. If the arresting officer did not hold the relevant suspicion, it is irrelevant that such suspicion – if it had been held – would have been a reasonable one.”¹⁰

[33] The remarks quoted above apply with equal force in *hoc casu*, for Constable Maqangwana did not exercise her discretion in relation to whether the victim had sustained ‘*a dangerous wound*’. She seems to have been content that the offence that the appellant had been suspected of committing fell within the purview of section 40 (1)(b) without further ado. For all we know, the wound in question might have been a superficial one posing no threat to life or the use of a limb or organ. Accordingly, she failed to establish the relevant jurisdictional factor namely, that the victim had committed a Schedule 1 offence. The finding by the court *a quo* that the victim had in fact “*sustained a serious injury*” does not find support from the evidence. The discretion to arrest the appellant was, in my view, exercised improperly. The arrest and detention claim ought to have been successful and the court *a quo* erred in not so finding.

Is there a claim for malicious prosecution?

[34] It now remains to consider the correctness or otherwise of the finding of the court *a quo* that malicious prosecution “*was not part of the plaintiff’s action*” resulting in the court’s failure to determine this claim. The record reveals, to the contrary, that the claim was properly before the court and very much extant. As already pointed out, the claim for malicious prosecution had been consolidated with the claims for unlawful arrest and detention and assault. Moreover, the pre-trial conference minutes and the relevant case flow management order defining the aspects that the parties were required to deal with upon trial also pertinently drew attention to the fact that issues arising from this claim fell to be determined as well.

¹⁰ *Supra*, para [22] (c).

[35] Nor would it have been correct for the court *a quo* to have jettisoned the malicious prosecution claim purely by reason thereof that the National Prosecuting Authority (who had self-evidently not been joined in the action) is the only appropriate functionary to sue in a malicious prosecution suit. Such reasoning would be fallacious. At the risk of stating the obvious, nothing precludes a plaintiff even from citing a mere informer (ordinarily a lay person)¹¹, as opposed to the police or prosecutor concerned “*where [the] informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken*” and in so doing “*instigates a prosecution.*”¹² In this instance the citation of the respondent as being the instigator appears to my mind to have been deliberate and cannot be eschewed on the basis of a perceived non-joinder of the National Prosecuting Authority.

[36] The malicious prosecution claim, having been not withdrawn or abandoned, was alive, and remains so. The court *a quo* erred in finding that the claim was not part of the plaintiff’s action.

[37] Counsel were *ad idem* that the outstanding malicious prosecution claim falls to be referred back to the court *a quo* for proper determination. That is indeed the proper course to follow.

Costs

[38] The appellant has been successful in the appeal. Costs ought to follow the result. The question whether costs should be on the magistrate’s court scale or not can best be determined once the court has pronounced on the *quantum* on all claims that eventually succeed. It appears to me to be convenient that *quantum* be determined by the court *a quo* together with the remaining claim of malicious prosecution to avoid a duplicity of trials. It is perhaps unfortunate that the parties agreed to a separation of quantum from merits in the first instance because evidence on *quantum* is invariably (although there are exceptions) inextricably bound up in the minutiae of a plaintiff’s

¹¹ As against public functionaries.

¹² *Madnitsky v Rosenberg* 1949 1 PH J5 (W) at 15.

entire experience of the arrest. Indeed, it is from the nuanced narrative given in this respect that one gleans the real impact to the arrestee and the offence occasioned to him or her by the delict. The parties in this instance however did not ventilate themselves on this aspect either before the court *a quo* or this court.

Order

[39] In the result, I make the following order:

39.1 The appeal is upheld with costs.

39.2 The order of the court *a quo* is set aside and replaced with one in the following terms:

- “(a) The plaintiff’s claim for wrongful arrest and detention succeeds.
- (b) Costs incurred to date shall stand over for determination at *quantum* stage.”

39.3 The action insofar as it relates to the malicious prosecution claim is referred back to the court *a quo* for determination.

S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

HARTLE J:

I agree.

B HARTLE
JUDGE OF THE HIGH COURT

KUNJU AJ:

I agree.

V KUNJU

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant : *Z Z Matebese SC (with him
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Instructed by : Mgweshe Ngqeleni Inc Attorneys
MTHATHA

Date heard : 25 May 2018

Date judgment delivered : 12 June 2018