IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 3/3/2015 SIGNATURE

CASE NO: 30007/2013

DATE: 4/3/15

IN THE MATTER BETWEEN:

SIPHO COLIN NDLOVU **PLAINTIFF**

AND

MINISTER OF POLICE **FIRST DEFENDANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND DEFENDANT**

JUDGMENT

KOLLAPEN J:

1. In this action, the plaintiff seeks the payment of eight hundred and fifty thousand Rand in damages against the respondents arising out of his arrest on the 20th of May 2010 and his subsequent detention until the 30th July 2010.

2. In the trial proceedings that ensued, the plaintiff testified in his own case while the defendants called five witnesses to testify on their behalf.

BACKGROUND FACTS

3. The plaintiff was arrested on the 20th of May 2010 at Tembisa by members of the South African Police Service, led by Warrant Officer van der Werken. He was then taken to the Sandton Police Station where he was held until his first appearance in Court on the 24th of May 2010.

4. He appeared in the Alexandra Magistrate's Court on the 24th of May 2010 and was charged with armed robbery with aggravating circumstances. The matter was initially postponed to the 31st of May 2010 for a bail application and for the plaintiff to procure the services of an attorney. However the charge sheet indicates that later on the 24th of May 2014, an attorney, Mr Dippenaar, appeared for the plaintiff and the matter was postponed to the 9th of June 2010 for a bail application.

5. There were various appearances from the 9th of June 2010 until the 30th of July 2010 when the charges against the plaintiff were withdrawn by the State, whereafter the plaintiff was released. In analysing those other appearances and the reasons why the matter was never dealt with substantially, the following also appears from the charge sheet:

   a. On the 9th of June 2010 the matter was postponed to the 11th of June 2014 as the docket was not available;
   b. On the 11th of June 2010 the matter was postponed to the 8th of July 2010. No reasons are recoded on the charge sheet;
   c. On the 8th of July 2014 the matter was postponed to the 15th of July 2010 on account of the withdrawal of the plaintiff's attorney;
   d. On the 15th of July 2010 the matter was postponed to the 16th of July 2010 for an attorney and bail;
   e. On the 16th of July 2010, Mr Dippenaar was on record for the plaintiff and the matter was postponed to the 23rd of July 2010;
   f. On the 23rd of July 2010, the charge sheet indicates there was 'no lawyer' and the matter was postponed to the 30th of July 2010;

g. On the 30th of July 2010, the Senior Public Prosecutor decided to withdraw the charges against the plaintiff.

6. Warrant Officer van der Werken was the investigating officer in a robbery where the complainants were robbed of approximately one million Rand. The complainants had drawn cash from a bank in Meyerton and then driven to Rivonia where the robbery took place. The police believed that the robbers were in the bank in Meyerton and followed the complainants to Rivonia.

7. Acting on information from his informer, Warrant Officer van der Werken interviewed two persons who were in custody at the time, only referred to as Palala and BK and also showed them photographs taken from video footage in the bank in Meyerton. They both identified the person in the photographs as one Sipho Ndlovu, also known as 'Small' and informed him that the latter was involved in the robbery and also pointed him out in another photograph at the scene of the robbery in Rivonia. Warrant Officer van der Werken also obtained information from another person he interviewed that the people involved in the Rivonia robbery included this 'Small'.

8. Working with his informer in Tembisa who knew 'Small', he finally received information on the 20th of May 2010 that 'Small' was in Tembisa. He was initially told that 'Small' was in Pretoria for a while. This then led to the arrest of the plaintiff in Tembisa on the 20th of May 2010.

9. Warrant Officer van der Werken's further evidence was that the plaintiff had told him he was aware of the robbery that was being investigated, that he was not involved in it and then he provided the names of those involved which names included one Sipho Ndlovu (also known as 'Small'). It appears that the plaintiff's stance was that there were two different Sipho Ndlovu's and that he was not the one involved in the robbery. The witness later made enquiries with

his informer about the possible existence of another Sipho Ndlovu (known as 'Small') but it appears that the informer was not aware of such a person.

10. Finally Officer van der Werken said that when the matter went to Court he intimated to the prosecutor that he wished to oppose bail *inter alia* because of the plaintiff's previous conviction for robbery, the evidence of his involvement in the offence, that he was on bail for another case of robbery and that he had no fixed address.

11. His view was that there was enough before him at the time of the arrest to constitute a reasonable suspicion of the plaintiff's involvement in the offence and that his arrest and detention was justified. In addition his stance was that when the plaintiff offered to assist by providing an affidavit relating to the involvement of others in the offence, he took the view that charges could be withdrawn which then led to the decision by the Senior Prosecutor to withdraw the charges.

12. In cross-examination he maintained that based on the information he obtained in the interview with Palala and BK as well as what the informer had told him, he was of the view that the plaintiff was involved in the robbery. In addition he followed up the suggestion by the plaintiff that there was another person with the same name and nickname as him but he was unable to find the existence of such a person.

13. During his evidence, the plaintiff steadfastly maintained his non-involvement in the matter but did allude to his knowledge of the robbery which he said he obtained while he was in the Boksburg prison where a prisoner by the name of TK had told him and others of the robbery. He denied telling Officer van der Werken that the name of the other person was Sipho Ndlovu but said he told him it was Sipho with another surname which he could no longer recall. In this regard the evidence of Officer van der Werken that the plaintiff had told him of

another person with the name Sipho Ndlovu (known as 'Small') was never challenged.

14. This is very relevant to both the reasonableness of the belief Officer van der Werken had at the time of the arrest as well as what was thereafter expected of him by way of follow-up. If he had the name of a person other than Sipho Ndlovu then it would have been expected of him to follow this up. However what he followed up was precisely what the plaintiff had told him, namely that there was another Sipho Ndlovu and his enquiries came to nothing, suggesting that there was only one Sipho Ndlovu (known as 'Small').

15. The plaintiff, in response to questions by the Court, also said that he always wore spectacles and indeed it was put to Officer van der Werken that the photograph of the person who was identified as the plaintiff shows a person without spectacles, suggesting an error was made in identification. However the Court asked the plaintiff about the information on his driver's license which indicated that his licence was issued without endorsement in respect of spectacles in August 2009, suggesting he was able to drive without spectacles. He was not able to explain the apparent discrepancy.

16. Finally it warrants mention that in his evidence the plaintiff stated that he did not know the other Small and only came to discover who he was after his release on the 30th of July 2010. However in the affidavit he deposed to on the 30th of July 2010 and while he was still in custody, he refers to those involved in the robbery as follows:

> '*He told me that he was with Palala (who I don't know), Bongani (also known as Jovus), Sipho (known as Mancane) (Small).*'

17. The manner in which he identifies Sipho clearly suggests that it is someone he knows as opposed to Palala who he expressly states he does not know. It must

then raise the question that if he did not know Sipho when he deposed to the affidavit he should have indicated that as he did in the case of Palala. This in my view must also raise concerns about this other Sipho and is linked to the evidence of Officer van der Werken on this aspect.

18. The evidence of the other witnesses all related to the workings of the prosecutorial system at the Alexandra Magistrate's Court.

19. Ms Reddy, who was the control prosecutor on the occasion of the first appearance of the plaintiff on the 24th of May 2010, said she perused the docket and after considering the arrest statement and warning statement she was satisfied about the involvement of the plaintiff in the robbery.

20. She could not recall if Officer van der Werken had told her that the plaintiff had denied any involvement in the robbery but that even if he had told her she probably would have left it to him to take the matter further by way of investigation.

21. Mr Bakana was the prosecutor in Court when the matter served on the 15th of July 2010 and then again on the 30th of July 2010. His view at that stage was that the case was not strong enough to proceed to trial but that there was enough to oppose bail. It was after discussing the matter with Officer van der Werken that they decided to approach the Senior Prosecutor to have the charges withdrawn on the basis of the plaintiff's offer to co-operate.

22. His evidence was that by the 30th of July 2010 there was insufficient evidence on which to proceed with the prosecution but that the same could not be said about the state of the matter as at the 24th of May 2010. His general view was that at some stage before the 30th of July 2010 it should have become evident that there was not a strong enough case to prosecute. He was unable to say however when this would have occurred.

23. His view was also that the prosecutors who dealt with the matter from time to time should have given written instructions in the investigation diary for an identity parade to be held. It is common cause that no such written instructions were given and that no identity parade was held in the period May 2010 to July 2010.

24. Mr Choudree was the senior prosecutor at Alexandra Magistrates Court on the 30th of July 2010 when the charges against the plaintiff were withdrawn. His evidence was that at that stage there was no evidence of a direct link between the plaintiff and the robbery. The affidavit of the plaintiff in his view demonstrated insight into what had occurred and he was of the view that the plaintiff was indeed involved in the robbery. The decision to withdraw charges in his view meant that the matter would take a different direction with the plaintiff now in a position to assist with the investigation.

25. Ms Jacqueline Letsoalo was the prosecutor in Court on the 24th May of 2010 when the matter was postponed for a bail application and again on the 16th and the 23rd of July 2010. Her evidence was that she read the docket on both occasions and was in agreement with the stance of Officer van der Werken to oppose bail. She recalls discussing with him the need to hold an identity parade but concedes that this was not recorded in the investigation diary and that when the matter came before her again on the 16th of July 2010 she did not check whether such a parade was held, although she accepts with the benefit of hindsight that it was not held.

WAS THE ARREST AND DETENTION FROM THE 20TH MAY 2010 TO THE 24TH MAY 2010 UNLAWFUL ?

26. It is trite that an arrest and detention, to the extent that it deprives the individual of liberty and freedom, is *prima facie* wrongful and it remains for the arrestor to justify the lawfulness of the arrest and detention.

(See ***LOMBO v AFRICAN NATIONAL CONGRESS* 2002 (5) SA 668 (SCA)** at paragraph 32 and ***MINISTER OF LAW AND ORDER AND OTHERS v HURLEY AND ANOTHER* 1986 (3) SA 568 (A) at** 587 to 589 E-F.)

27. It is common cause that the plaintiff was arrested without a warrant. In ***DUNCAN v MINISTER OF LAW AND ORDER* 1986 (2) SA 805 (AD)** at 818G-H VAN HEERDEN JA held that in order to enjoy protection in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, the arrestor must establish the four requirements:

1. *The arrestor must be a peace officer.*
2. *He must entertain a suspicion.*
3. *It must be a suspicion that the arrestee has committed an offence referred to in Schedule 1 of the Act (other than one particular offence).*
4. *That suspicion must rest on reasonable grounds.*

28. It is hardly is dispute in these proceedings that insofar as it relates to the arrest and detention for the period 20th to the 24th May 2010, the core issue in dispute is whether the suspicion that Warrant Officer van der Werken held regarding the involvement of the plaintiff in the robbery was one that rested on reasonable grounds. This requirement must be satisfied on an objective basis (see ***DUNCAN*** supra at 814 D-E).

29. On the evidence before this Court, the arresting officer had information from two different sources that the person who appeared in the video footage and who was involved in the robbery was Sipho Ndlovu, and he was also known as 'Small'. By enquiring from the informer Officer van der Werken used, indications were that the person in question was the plaintiff.

30. Upon the plaintiff being told of the reason for his arrest, the plaintiff informed Officer van der Werken about his knowledge of the robbery as well as the

existence of another person with the same name and nickname as his (Sipho 'Small' Ndlovu) who was involved in the robbery. While the plaintiff's explanation was meant to be exculpatory in nature, Officer van der Werken did not regard it in such a way and indeed that was understandable. Here he was being confronted by a person who was implicated by others as being involved in the robbery and whose response was that he knew about the robbery and that there was another person with an identical name, surname and nickname as his who was involved.

31. The information available to Officer van der Werken would, in my view, have been sufficient to ground, objectively speaking, a reasonable suspicion of the involvement of the plaintiff in the robbery. Under those circumstances I must conclude that the arrest and detention of the plaintiff from the 20th of May 2010 until the 24th of May 2010 was lawful.

WAS THE DETENTION OF THE PLAINTIFF FROM THE 24TH OF MAY 2010 OR ANY TIME THEREAFTER UNTIL HIS RELEASE ON THE 30TH OF JULY 2010 UNLAWFUL?

32. In the case of ***MINISTER OF POLICE AND ANOTHER v DU PLESSIS* 2014 (1) SACR 217 (SCA)** at paragraph 28, the Court, discussing the role and obligations of prosecutors, said (at 225i to 226a):

> '*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)...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.'*

33. Dealing with a prosecutor's discretion, the Court in ***DU PLESSIS*** (supra) stated the following (at 226g to 227a):

> *'A prosecutor exercises discretion on the basis of the information before him or her. In S v LUBAXA 2001 (2) SACR 703 (SCA) 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.'*

34. In ***DU PLESSIS***, the Supreme Court of Appeal opined (at 227b) that:

> *'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 scrutiny of a court which can intervene where such a discretion is improperly exercised.'*

35. There is thus the overall duty of the Court to exercise the necessary level of scrutiny over the manner in which prosecutorial authority is exercised whilst

being mindful at the same time of not unduly limiting the discretion which must necessarily be an inextricable part of how such authority is exercised.

36. When one has regard to the facts *in casu*, then on the evidence of the various prosecutors who testified, the various appearances by the plaintiff during the period in question related mainly to the bringing of a bail application. On his first appearance what was already evident to Ms Reddy who read the docket including the arrest statement and warning statement was a link between the plaintiff and the offence. At that stage it would also have been evident from the profile in the docket which was produced on the 20th of May 2010 that the plaintiff was on bail in respect of several other charges including robbery, possession of a firearm and attempted murder. Under such circumstances it is understandable and certainly, on the face of it, justifiable why the State elected to oppose bail.

37. The various appearances after the 24th of May 2010 were directed towards disposing of the bail application and the fact that no formal bail application was heard before the 30th of July 2010 was due in part to a number of factors including the non-availability of the docket on one occasion and the absence of the plaintiff's legal representatives on others.

38. Under such circumstances the question arises as to whether on considering the docket, the various prosecutors who dealt with the matter were remiss in not concluding that there was a lack of sufficient and probable cause to justify the further prosecution of the plaintiff.

39. While the benefit of hindsight is always a wonderful source of learning, one must be mindful to examine and interrogate decisions in the context in which they occur and on the basis of the information then and there available. In the ***DU PLESSIS*** case, the docket consisted of an exculpatory statement by the arrested person as well as a statement by an independent person in support of

that from which the Court concluded it would have been clear that the arrested person was no more than an innocent bystander.

40. The facts in this matter are considerably different and clearly distinguishable. What was available to the prosecutors was:

i. The statement by the arresting officer linking the plaintiff to the crime in question;
ii. A warning statement by the plaintiff in which he elected to exercise his right to make a statement at Court;
iii. A profile of the plaintiff indicating he was on bail in respect of charges of robbery, attempted murder and unlawful possession of a firearm; and
iv. The SAP69 of the plaintiff showing that he was convicted of robbery on the 24^{th} of November 2001 and he was sentenced to fifteen years' imprisonment.

41. Without in any manner suggesting that the profile of the plaintiff as well as his previous conviction by themselves only would serve as a basis for his continued detention, my view is that the link between the plaintiff and the crime taken together with such other factors as his profile and previous conviction, would have justified the postponement of the matter for a bail hearing.

42. Another factor that requires consideration is that despite taking an exculpatory stance at the time of his arrest, the information the plaintiff provided to Officer van der Werken about the existence of the other Sipho 'Small' Ndlovu, the attempts by Officer van der Werken to follow up and verify without success the existence of such other person as well as the plaintiff's election not to make a warning statement (which of course was his right) all meant that the exercise of the prosecutorial discretion was

based on limited material and on that basis I cannot come to the conclusion that there was a failure on the part of the various prosecutors to properly apply their mind to the matter in justifying the further detention of the plaintiff from the 24th of May 2010 to the 30th of July 2010 .

43. Of course by the 30th of July 2010 matters had developed to a stage where the State's case did not look strong, with the plaintiff providing an affidavit for the first time with regard to his knowledge of the robbery and the identity of those involved. This in its totality represented an opportunity for a change in stance with regard to the prosecution and was ultimately what led to the withdrawal of the charges. While it may well be that what existed by way of evidence on the 30th of July 2010 was fundamentally the same as what existed on the 24th of May 2010, it does not necessarily follow that charges should have been withdrawn on the 24th of May 2010 or at some stage before the 30th of July 2010.

44. A criminal investigation and prosecution is a dynamic process that may well have various contours in its trajectory as it proceeds to finality. Many of those factors may be unanticipated while others may arise as the result of investigation and further information becoming available.

45. *In casu*, I am not persuaded that the conduct of the second defendant and its employees fell short of the standard required. For the reasons I have already given, their actions are not wrongful and unlawful and the conclusion I reach is that the detention of the planitff from the 24th MAY 2010 until the 30th of July 2010 was not unlawful.

ORDER

46. I make the following order:

- The plaintiff's claim is dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

30007/2013

HEARD ON: 28, 29 & 30 October 2014

FOR THE PLAINTIFF: Adv. J H v d B LUBBE

INSTRUCTED BY: NIEL DIPPENAAR ATTORNEYS (ref: Le Grange 58/13)

FOR THE DEFENDANTS: Adv. O L R MUDAU

INSTRUCTED BY: THE STATE ATTORNEY (ref: 3563/2012/Z47/MC)