

THE MININSTER OF SAFETY AND SECURITY **1st Defendant**
POLICE OFFICER (MR TILE) **2nd Defendant**

JUDGMENT

GRIFFITHS, J.:

[1] The plaintiff has sued the defendants for damages arising out of his arrest and detention. The first defendant is the Minister of safety and Security and the second defendant is the arresting officer, one Warrant Officer Tile. The plaintiff's precise cause of action is not clear from the particulars of claim but appears to be based on a form of malicious legal proceedings in that it is alleged therein that his detention was "malicious, unlawful and without probable cause or reason." It was further alleged that:

"The second defendant improperly used the legal machinery of the state to deprive the personal liberty of the plaintiff unjustly and with malice."

[2] The facts of the matter are, save for one important exception, common cause between the parties. Sometime before 5 March 2012 a minor female of between 15 and 16 years of age laid a charge of rape against the plaintiff. The matter was investigated by the second defendant who, on 4 March 2012, telephoned the plaintiff. The plaintiff was then in Durban and the second defendant informed him that he was to be arrested on this charge. On 5 March 2012 the plaintiff, accompanied by his attorney Mr. Mhlawuli, attended at the offices of the second defendant during the late afternoon. The matter was discussed and the second defendant duly completed two forms, one being a warning statement and the other a form headed "Bail Information Form". At the end of the latter form, after having received information and submissions from the plaintiff and/or his attorney, the second defendant as the investigating officer in the case indicated that he would not oppose bail and recommended that it should be fixed in the sum of R1000.

[3] Resulting from this, Mr. Mhlawuli attempted to arrange for a bail application to be heard in F court, Mthatha Magistrates' Court without success. It is common cause that F court is the court where unopposed bail applications are apparently heard. The F court prosecutor indicated that there was insufficient time to have the matter heard. He thereafter managed to arrange with a regional court prosecutor for the matter to be heard in K Regional Court. He informed the second defendant of this arrangement. The second defendant was apparently dismissive of this as he had never in all his years as a detective

heard of such an application being heard in the regional court, and the matter ended there on that day.

[4] On 6 March 2012 the prosecutor of F court was duly furnished with the criminal docket which she perused. She indicated to the court that the bail application was to be opposed and that it was to be postponed for a formal bail application to be heard in the court which dealt with such matters. Ultimately, the matter was adjourned to 8 March 2012 for such purpose. It appears that the matter was then adjourned to 14 March 2012. On both occasions the investigating officer was not present. The reason for the adjournment on each occasion was apparently that the plaintiff's "criminal profile" was not available. Such criminal profile referred to documentation to be obtained from the Local Criminal Record Centre reflecting the plaintiff's previous convictions, or lack thereof, pending matters and other relevant information. On the 14th, the plaintiff's evidence in support of his application for bail was heard by the court. Thereafter, the case was again adjourned to 19 March 2012.

[5] On 19 March 2012, the investigating officer indicated to the court that although he had not been able to obtain the criminal profile of the plaintiff, he was nonetheless withdrawing his opposition to the bail and bail was granted in the sum of R1000.

[6] The only "disputed" factual matter which has relevance to this case is the evidence of the second defendant to the effect that when he attended court on 6 March 2012, and after the prosecutor had perused the criminal docket which included the aforementioned "Bail Information Form", he was informed by her that he was not entitled not make the decision not to oppose bail in in a case such as this as the question of whether or not to oppose bail rested with her. It appears that it was her view that this matter was sufficiently serious, being an

alleged rape of a minor girl, for her to intervene and overrule the investigating officer's opposition to bail. He had to attend another matter in Port Elizabeth and the prosecutor informed him that she would contact him in due course. It was because of this approach of the prosecutor that he changed his stance and opposed the bail application based, in particular, on the fact that he needed the criminal profile in order to ascertain whether the plaintiff had been truthful with regard to his previous convictions, or lack thereof, and pending proceedings etc.

[7] This evidence of the second defendant is of crucial importance to this case because, if it is true, it explains why the second defendant changed his stance and opposed bail when he had initially indicated that he would not.

[8] As I indicated at the outset of this judgment it appears from the particulars of claim that the plaintiff relied on a form of malicious legal proceedings and this stance was indeed confirmed by Mr. Luzipho, who appeared for him, in argument before me. However it appears that the heads of argument put up by Mr. Luzipho contradict this in that Mr. Luzipho seems in those heads to argue for a claim based on the *actio injuriarum* and on what was said by Swain JA in the matter of *Woji v Minister of Police*¹ to the effect that a claim would lie against the Minister of Police in circumstances where there had been a failure on the part of a policeman to disclose relevant information to a magistrate hearing a bail application. He said:

“The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies

¹ 2015 (1) SACR 409 (SCA).

Intervening) 2002 (1) SACR 79 CC (2001 (4) SA 938; 2001 (10) BCLR 995; [2001] ZACC 22) para 44. On the facts of this case, Insp Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public duty was wrongful in private law terms." ²

[9] Although such a claim appears not to have been pleaded, I am prepared to accept that such a claim may be advanced by the plaintiff more especially as the defendants bear the onus in this matter to establish justification for the admitted detention of the plaintiff from the evening of 5 March 2012 to approximately midday on 19 March 2012. I shall refer to this as "the alternative claim".

[10] From this, it will become clear as to why the evidence tendered by the second defendant becomes of importance. If it is accepted, it amounts to a reasonable explanation as to why he changed his mind and opposed the bail application. It also has relevance to the alternative claim because it explains why the second defendant required the matter to be postponed as it was important to obtain relevant and independent information as to the plaintiff's criminal record in the form of his criminal profile, which had an obvious bearing on the question of bail.

² At paragraph 28. See further on the distinction between these two causes of action: *Sibuqashe v Minister of police and Another* (unreported Eastern Cape High Court, Bhisho, case No. 527/2011 at paragraphs 4 and 43).

[11] Mr. Luzipho has argued strenuously that I should reject this evidence of the second defendant. He has submitted that I should do so on two bases, firstly, that it was not put to the plaintiff's attorney, Mr. Mhlawuli, when he testified and secondly, that the second defendant was somewhat evasive in his evidence.

[12] As to the first submission, I beg to disagree. Mr. Qitsi, who appeared on behalf of the defendants, put two things to Mr. Mhlawuli, namely that the investigating officer had, on 6 March 2012, handed the bail information form to the public prosecutor and that the second defendant had been told by the prosecutor about the seriousness of the case. Mr. Mhlawuli, in both instances, was unable to dispute this evidence. It is clear that Mr. Qitsi had been instructed about the evidence which the second defendant would tender in this regard but was somewhat remiss in not taking the matter further by putting to Mr. Mhlawuli that the prosecutor had further informed the second defendant that because it was a serious charge it was her decision as to whether bail should be opposed or not. On the probabilities, there clearly had to be a reason as to why the second defendant changed his mind, apparently overnight. It was either because he was a deeply malicious person who decided for his own ulterior reasons to oppose bail so as to ensure that the plaintiff languished in custody simply because he had a minor dispute with the plaintiff's attorney as to which court should hear the application³, or the reason given by him. That he acted with malice is so improbable in all the circumstances bearing in mind that he had candidly indicated on 5 March that he would not oppose bail and, indeed, on 19 March had, despite apparently what the prosecutor had advised, again capitulated and withdrawn his opposition even though he still had not obtained

³ See in this regard: *Van Litzenberg v Louw & De Beer* (1899) 16 SC 283 at 286 where de Villiers CJ said: "In order to prove malice some evidence has been led as to previous quarrels between the plaintiff and defendant. Really, these quarrels were of the most trivial description, and amounted to nothing, and it is wholly incredible that the defendants would have preferred these charges by reason of those petty little quarrels."

the criminal profile. Such an injunction from the prosecutor gives a clear and probable reason for the investigating officer to change his mind, bearing in mind furthermore the fact that there was an onus on the plaintiff in terms of section 60(11)(a) of the Criminal Procedure Act⁴ to produce evidence "*which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.*"⁵ There was also no evidence to gainsay the evidence given by the second defendant in this regard.

[13] The investigating officer did appear to be somewhat uncertain about some aspects but I did not find him to be evasive and his demeanour in the witness box did not indicate that he was being untruthful. In my view, he was a little perplexed about the entire matter particularly because of the fact that his initial decision (the decision of an experienced detective) not to oppose bail had been overruled by a prosecutor who probably did not have all that much experience and his decision was ultimately vindicated when bail was subsequently granted. To add insult to injury, he was thereafter drawn as a second defendant into this matter.

[14] I am satisfied that the investigating officer was telling me the truth in this regard and I accept this evidence.

[15] As I have indicated earlier, once one accepts this as being the truth it cannot be argued with any force that the second defendant acted with malice in opposing the bail application during the period 6 March 2012 to 19 March 2012. If anything, his evidence in this regard coupled with the fact that he ultimately withdrew his opposition despite the injunction by the prosecutor and despite the

⁴ No. 51 of 1977

⁵ This applies to offences which fall within schedule 6 of the Act, it being common cause that the plaintiff was charged with such an offence.

fact that he had not yet obtained the criminal profile of the plaintiff, tends to indicate the precise opposite.

[16] What then about the alternative claim? The only basis upon which the plaintiff could succeed in this regard would be if the defendants failed to place sufficient evidence before the court to establish that the second defendant had failed in his duty by opposing the bail application or by misleading the court with regard to relevant information such as previous convictions and pending matters. In my view, the defendants succeeded in establishing that the opposition to bail for a period of some 14 days was reasonable in the circumstances. The main objection raised seems to have been with regard to previous convictions and pending matters. These would be revealed by the criminal profile. The criminal profile, according to the evidence of the second defendant which was not seriously challenged, could not be obtained expeditiously from the Local Criminal Record Centre as there had been difficulties with their systems in this regard resulting in a backlog.

[17] Mr. Luzipho has argued that the investigating officer ought to have accepted the plaintiff's say so in this regard when he was interviewed and gave information as to these issues. Again I beg to disagree. Whatever the second defendant may have thought of the plaintiff, experience teaches us that many an accused has attempted to pull the wool over the eye of an investigating officer in this and many other regards. An experienced investigating officer should never simply accept the accused's word in this regard and ought to verify such information by independent means, such as his criminal profile.

[18] Finally, Mr. Luzipho referred me to the case of *Minister of Safety and Security and Another v Never Ndlovu*⁶. This case is clearly distinguishable on a number of counts. In Ndlovu's case the court found that damages ought to be awarded to the respondent in circumstances where a prosecutor had failed to read the criminal docket which had resulted in the matter being adjourned and the respondent being detained in custody. Because it was admitted that the initial arrest and detention prior to the matter coming to court was unlawful, it was found that this unlawfulness was perpetuated when the prosecutor failed to ensure a proper evaluation of the matter before the first court in which the respondent appeared. In addition, the police officers had not told the court the truth with regard to whether or not the respondent was of fixed abode. The appeal court dismissed the appeal but, tellingly, it altered the order of the court *a quo* which had simply ordered the respondent to pay damages (there having been two respondents, the Minister of Police and the Minister of Justice and Constitutional Development) and awarded damages as against the Minister of Police for the period prior to the matter coming to court and as against both ministers for the subsequent period of detention.

[19] In this matter, not only was the initial detention of the plaintiff never assailed, but the Minister of Justice and Constitutional Development was not joined as a party.

[20] In the circumstances I am satisfied that the defendants have discharged the onus resting on them to establish a justification for the plaintiff's detention.

Accordingly the plaintiff's claim is dismissed with costs.

⁶ (788/11) [2012] ZASCA 189 (30 November 2012)

JUDGE OF THE HIGH COURT

HEARD ON : 18 November 2015

DELIVERED ON : 26 November 2015

COUNSEL FOR PLAINTIFF : Mr Luzipho

INSTRUCTED BY : SR Mhlawuli & Associates

COUNSEL FOR DEFENDANTS : Mr Qitsi

INSTRUCTED BY : State Attorney