

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

25/06/2012
CASE NO: 53948/2008

In the matter between:

ROSLIND JOAN FLETCHER-MORGAN	1 ST PLAINTIFF
CHRIS MORGAN	2 ND PLAINTIFF
GARTH SCHUTTE	3 RD PLAINTIFF

And

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
25/06/2012	
Date	Signature

GABOR VICTOR COST	1 ST DEFENDANT
(ID:)	

MINISTER OF SAFETY AND SECURITY	2 ND DEFENDANT
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JUDGMENT

BAQWA J

The parties

[1] The first plaintiff is the daughter of the second plaintiff and the third plaintiff is the grandson of the second plaintiff. The plaintiffs instituted action against the first defendant who is a former lover of the first plaintiff. The second defendant is the Minister of Police who is sued in his capacity as such.

[2] The action is premised on three subheads, namely, malicious prosecution, unlawful arrest and monies lent and advanced.

[3] Malicious Prosecution

3.1. The Plaintiffs claim that on 4th January 2008 first defendant wrongfully and maliciously laid charges of attempted murder, robbery and theft of his motor vehicle and furniture against them.

3.2. The charges were initially lodged at Sinoville Police Station where first plaintiff was initially detained. The plaintiffs claim that the first defendant laid the charges well knowing that they were false and with the intention that members of the South African Police would react thereon and imprison them.

3.3 The plaintiff's case is contained in the evidence of the eight witnesses who were the three plaintiffs, a police officer from Douglasdale Police Station, Andre Thomas Dalton, Jane Eleanor Morrison, who was an employee of Tracker, Matthew Green, Dr Francois Trutter, a clinical psychologist and Constable Violet Sehloho who was the investigating officer also from Douglasdale Police Station.

[4] The background to the case is briefly as follows:

First plaintiff and first defendant had been lovers and they had co-habited for a period of about eighteen months. They ran separate businesses with the first plaintiff operating a carpet cleaning business

whilst first defendant operated a bathroom renovation business. During this period, first plaintiff owned or was in possession of an Opel motor vehicle whilst first defendant was the owner of a Colt bakkie. Both parties had brought various household items such as microwave, washing machine and furniture for utilisation in the common household. During the period of cohabitation they had agreed to sell the Opel motor vehicle for the sum of R9 500-00 (nine thousand five hundred) which by agreement was utilised as part payment for a deposit for the purchase of a Mazda- Drifter bakkie. It is common cause that the Mazda bakkie was utilised by the first plaintiff whilst the first defendant utilised the Colt. It is also common cause that the relationship between the two parties was volatile as a result of this volatility they had experienced a period of separation and thereafter re-uniting. The incident which led to this case represents another episode when the parties once more reached a point where they had to go their separate ways.

- [5] The testimony of plaintiffs is an account of the events during the night of 4 January 2006, on which the first plaintiff called the second and third plaintiff to assist her to remove items which belonged to her from the premises which were owned by the first defendant at 218 seven Oaks, Chartwell.
- [6] On that night of 4 of January the three plaintiffs, a person called Hein and another removed items from first defendant's aforesaid residence which were pointed out by the first plaintiff as her property. These were loaded into two vehicles which had been brought by second and third plaintiff and into the Mazda bakkie which was ordinarily used by the first plaintiff. During the loading process, Hein had slapped first defendant with an open hand and he was restrained and warned by second plaintiff to desist from further assaulting first defendant as they had not come there to assault anyone

[7] On Monday 7 January, first defendant consulted an attorney to whom he made a statement exhibit A 213 in these proceedings

7.1. A most perfunctory reading of the statement A 213 narrates the stormy relationship between first plaintiff and second plaintiff. It is a three page typed statement which according to first defendant was written by the attorney.

7.2. In paragraph 3 first defendant states as follows:

" I depose to this affidavit in order to bring criminal charges of robbery and assault with the intent to do grievous bodily harm against the following people :

3.1. Ms Rosalind Fletcher Morgan

3.2. Mr Chris Morgan

3.3. Mr Garth Schutte

3.4. Two other gentlemen whose full and further particulars are presently unknown to me. One of these unknown gentlemen I have come to know by his first name namely Hein."

7.3. The rest of the statement details the volatile relationship the break up, the rekindling thereof and the resumption of co-habitation. No where does it allege any violent acts by any of the plaintiffs except Hein as aforesaid.

7.4. Paragraph 11 of A213 further states as follows:

"At approximately 12 o'clock noon on the 5th of January 2008 Ms Fletcher- Morgan and her son Garth returned along with the gentleman known as Hein to my residence and returned the keys to my other vehicle, a Mitsubishi light delivery vehicle and cellular telephone and the keys to the residence"

7.5. It is worth noting that on this Saturday the 5th of January first defendant did not go to the police station to lay any charges nor did he

do so the following day which was a Sunday. He confirmed that nothing would have prevented him from doing so

7.6. It is only after consultation with his attorney on Monday the 7 January that he lay these charges and reported his vehicle as stolen.

This he did whilst knowing who was in possession of the vehicle in question, namely, the first plaintiff. He also had the cell phone number of the first plaintiff but he did not call her.

7.7. He further telephoned the investigating officer Constable Mavhungu on the 8 January and discussed the recovery of the motor vehicle and apprehension of first plaintiff.

7.8. Quite clearly the first defendant did not just make a statement to his attorney and hand over same to the police. He was in his actions doing something more to ensure that the persons he had fingered were put behind bars.

[8] In order to establish the claim of malicious prosecution the plaintiffs have to prove that:

8.1. The law was set in motion

8.2. Against the plaintiffs

8.3. Without reasonable and probable cause

8.4. Maliciously or with **animus injuriandi**

8.5. The prosecution or civil action must have failed

The plaintiff must prove that the proceedings were instituted at the instigation of the first defendant. Setting the law in motion or instigating a prosecution is the making of an accusation of a criminal offence to a police officer with the intention of causing the prosecution of a particular person. The test is whether the first defendant did more than to present A 213 to the police and leave them to act on their own.

See Lederman vs Moharal investments(Pty) Ltd 1969(1) 190(A) at P191.

Principles of Delict by Jonathan Burchell at p206

- [9] From the evidence presented in these proceedings it is patently clear that:

9.1. The plaintiffs never assaulted first defendant. It was Hein who slapped first defendant and a strange factor is that Hein has not been apprehended nor was there any attempt to bring him to court. There was no proof of any common purpose between the actions of Hein and the plaintiffs as far as the assault was concerned.

9.2. There was no evidence of a robbery whatsoever. Even though there was clearly a disagreement between the first plaintiff and first defendant this did not result in a violent deprivation of property. This is borne on by the return of certain items by first and third plaintiff to the first defendant on the following day.

9.3. Similarly, the vehicle in question, a Mazda Drifter Bakkie had been purchased jointly by first defendant and first plaintiff in that the latter had contributed to the deposit paid for the vehicle. This was not disputed by the first defendant. Even when she came back to return items on the following day first plaintiff was driving the Mazda bakkie. These can hardly be said to be the actions of a thieves or robbers and other remedies were available to the first defendant other than laying the charges of theft and robbery which he preferred against the plaintiffs.

- [10] In the light of the considerations stated above, I am driven to conclude that the plaintiffs have proved that the first defendant instigated the prosecution against them.

Unlawful arrest and detention

- [11] Regarding the first plaintiff it is common cause that the arrest was on the 7th of January 2008. The liability for that arrest, if any, would lie against the Metro Council concerned and not the second defendant. The Metro Council was not cited as a party in these proceedings and therefore I say no more in that regard.

[12] On the 8th of January 2008 it is the evidence of Constable Mavhungu, the investigating officer that first plaintiff was transferred from Sinoville and taken to Douglasdale Police Station where she was charged and detained. This was confirmed by a police officer from Douglasdale, Andre Thomas Daiton.

[13] I have already analysed the nature of the statement A213 which was submitted by first defendant on the basis of which the first plaintiff was arrested. It would indeed seem that the police in Douglasdale did not apply their minds when detaining the plaintiffs on the different days on which they were charged and detained.

[14] What appears to have happened is that upon reading paragraph 3 of A213 the police read that as a schedule 1 "red flag" which had to lead to one consequence, namely, arrest and detention.

In my view, the police ought to have paid a closer look at the statement especially as it was recorded elsewhere by a person who was not a member of the police force. I re-iterate that even a cursory reading of the statement would have indicated that this was a domestic or civil dispute which did not merit a criminal sanction. This the police did not do. They did not do this on the 7th on the 8th and 9th of January 2008.

[15] What we have to do with here is the so called Wednesbury Principles which were referred to in the judgment of Greene MR in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 2 All ER 680**.

[16] These principles are also discussed to in the case of **Minister of Safety and Security v Sekhoto 2011(5) SA367 at page 381 (SCA)** where his lordship Harms DP expressed himself as follows.

*"[34] These principles are in substance no different from those formulated by Innes ACJ in **Shidiak v Union Government (1912 AD 642 at 651-652)**. Now it is settled law that where a matter is left to the*

discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgement bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie, and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion for his own There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motive, if he has not applied his mind to the matter or exercise his discretion at all,..... in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion inequitable or wrong".

[17] **In casu** I am of the view that the police officers concerned acted in a robot like fashion. They allowed the mere statement of schedule 1 offences in a statement written by a civilian to dictate the course of action they had to take. In other words, they did not apply their minds to the matter and totally and negligently failed to exercise a discretion.

[18] Counsel for second defendant has relied on the presence of four jurisdictional facts contained in Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (" the Act") for the arrest of the plaintiffs namely:

18.1. The arrestor must be a peace officer

18.2. The arrestor must entertain a suspicion

18.3. The suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1 and;

18. 4. The suspicion must rest on reasonable grounds (my underlining)

As regard 18.4 the criterion is, of course objective and is "not whether a policeman believes that he has reason to suspect, but whether, on an

objective approach, he in fact has reasonable grounds for his suspicion.”

See Duncan v Minister of Law and Order

1986 (2) SA 805 (A) at 818

Principles of Delict by Jonathan Burchell at p204

[19] On a conspectus of the facts referred to above and a proper reading of A213 paragraph 18.4 above did not exist. In other words, if there was a suspicion on the part of the police officers concerned, such a suspicion did not rest on reasonable grounds. There was simply no schedule 1 offence committed despite the glib mention thereof in paragraph 3 of A213.

[20] The police officers concerned thereof simply took the contents of A213 at face value and super imposed the injunction emanating from schedule 1 to arrest and or detain the plaintiffs.

[21] I have come to the conclusion that such arrest and/or detention in respect of the plaintiffs was in the circumstances outlined above wrongful and unlawful.

See Gellman v Minister of Safety and Security 2008(1) SACR 446 at paragraph 82-83

[22] If the situation was viewed differently, it would imply that police officers should act in a robot-like fashion. Any person would simply bring a statement to a police station alleging robbery or a similar schedule 1 offence and a police officer, purely on the strength thereof would proceed to arrest and/ or detain whomever would be fingered in that statement. That would, in my view, lead to gross injustice.

[23] In the **Sekhoto** decision (supra) his lordship justice Harms DP at para 50 of that judgement states as follows:

*'Onus in the context of civil law depends on the circumstances of policy, practice and fairness, and if a rule relating to onus is rationally based, it is difficult, to appreciate why it should be unconstitutional. Hefer JA also raised the issue of litigation fairness and sensibility. It cannot be expected of a defendant, he said, to deal with unsubstantiated averments of **mala fide** and the like, without specific facts on which they are based being stated. So much the more can it not be expected of a defendant to deal effectively with a claim as in this case in which no averment is made, save a general one that the arrest was "unreasonable". Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged, may ensue. Such a state of affairs said Hefer JA, is quite untenable.*

- [24] The current case can be easily distinguished from the set of facts outlined by Hams JA. The unreasonable nature of the actions of members of the South African Police is not being alleged in general terms. It hinges squarely on the manner in which they dealt with the plaintiffs and A213. They completely failed to apply their minds. Their thinking simply locked onto the fact that the allegations made in A213 concerned Schedule 1 offences and to them, that seemed to be the end of the matter.
- [25] The fact is that the police did not investigate the allegations levelled by the first defendant and had they done so, it would have been ascertained that the entire incident was a civil dispute as was later ascertained when the charges were withdrawn against the plaintiffs.
- [26] I accordingly find that even though the initial arrest of the first plaintiff was not effected by members of the South African police the subsequent charging of the plaintiffs at Douglasdale Police Station and detention was unlawful.

Money lent and advanced (first Plaintiff's Third Claim)

- [27] First plaintiff testified that she lent certain monies to the first defendant which were to be repaid in due course.
- [28] First defendant denied owing the said monies and stated that the monies paid into his account were in fact monies owed to him in terms of an agreement entered into between the parties. Such an agreement was denied by first plaintiff. First defendant did not deny that first plaintiff had a carpet cleaning business which she had built from the ground prior to meeting first defendant. It does therefore seem rather improbable that within the short period that they had go together first plaintiff would donate fifty percent of the proceeds from her business to the first defendant.
- [29] First defendant admitted that an amount of R109 500-00 was paid into his bank account by the first plaintiff. First plaintiff supported her testimony by producing the relevant bank statements. She could not prove monies allegedly paid in cash. In his plea first defendant admits that an amount of R6000-00 was paid to him. This does however not reflect the bank statements.
- [30] In the circumstance I find that the first plaintiff has proved her claim but only to the extent of R115 500-00.
- [31] First defendant instituted a counterclaim. In these proceedings he was unrepresented and despite assistance lent to him by the court to enable him to present his case in a cogent manner, he appeared to experience some difficulties. This is evidenced by the fact that he **mero motu** abandoned all the claims when he testified under oath.
- [32] In any event he had dismally failed to prove a case with regard to the monies he was claiming against first plaintiff's business and Mr Green, the buyer, testified to the effect that first defendant was not the cause of the sale of first plaintiff's business to him and that he proved to be an impediment in that transaction. In the circumstances, first defendant

could not have been entitled to fifty percent of the proceeds from the subsequent sale.

Assault claim.

- [33] First defendant also claimed damages following an assault. He however conceded in his testimony that none of the plaintiffs assaulted him; but rather a person called Hein who was never arrested and against whom no civil claim was pursued.

Legal costs claim and wrongful arrest

- [34] Lastly first defendant claims legal costs from first plaintiff for wrongful arrest. He however conceded that first plaintiff did not lay any charges against him. Quite clearly he brought the wrong party to court.
- [35] I accordingly find that first defendant had failed to prove his counterclaim against the plaintiffs.

Quantum:

- [36] Whilst it is useful to have regard to awards made in previous cases, the correct approach is to have regard to all the facts of each particular case and to determine the quantum of damages in such facts.

See Minister of Safety and Security v Seymour 2006(6) SA 320 SCA at 325 par 17
Rudolf and Others v Minister of Safety and Security and Another 2009(5) SA 94 SCA at para 29

- [37] **In casu** first plaintiff was charged at Douglasdale Police Station and thereafter detained for three days. Second and third plaintiffs were taken to Douglasdale Police Station, arrested and charged and

detained overnight. They appeared in court the following day and were released on warning.

As Van Rensburg J said in

Thandani v Minister of Law and Order 1991(1) SA 702 (E) at 707B

"..... Sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual."

[38] It was the evidence of constable Violet Sehloho that first plaintiff had upon being admitted to detention, fingerprinted, had her personal effects removed, undressed and body searched. The search included search of her clothing, bags and cavities.

[39] According to the psychologist, Trutter, plaintiffs had been humiliated and traumatised by their experiences, to varying extents according to their treatment and duration of the period of detention.

Stearer J in **Ngcobo v Minister of Police 1978 (4) SA 930 (D)** stated **obiter**,

"..... I would have been disposed to hold that while a cause of action accrues at the moment of the commencement of unlawful detention, that cause of action changes and enlarges in scope as the detention continues; that any given moment during detention there is only one cause of action for damages for the period of detention up to that moment; and that at the conclusion of the period of detention there exists only one cause of action which has assumed its final and complete form at the moment of the release."

[40] In the result, judgment is given in favour of the plaintiffs and the following order is made:

40.1. In regard to malicious prosecution the first defendant shall pay the first plaintiff the sum of R100 000-00 with costs.

40.2. In regard to unlawful detention the second defendant shall pay the first defendant the sum of R200 000-00 with costs.

40.3. In regard to wrongful arrest and unlawful detention the second defendant pay the second and the third plaintiff the sum of R25 000-00 each with costs.

40.4. In regard to monies lent and advanced, first defendant shall pay the first plaintiff the sum of R115 500-00 with costs.

40.5. The first defendant's counterclaim is dismissed with costs.


S.A.M. Bala
Judge of the North
Gauteng High Court

Counsel for the plaintiffs:	Adv B.D Stevens
Attorneys for plaintiffs:	J.W Wessels Theron Inc
Counsel for the first defendant:	In person
Attorneys for the first defendant:	In person
Counsel for second defendant:	Adv J Motepe
Attorneys for second defendant:	State Attorney