

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **11580/2016**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
16 April 2024	
DATE	SIGNATURE

In the matter between:

SIMON NTSIKELELE NTJINGA

Plaintiff

and

MINISTER OF POLICE

First Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 16 April 2024.

JUDGMENT

JANSE VAN NIEUWENHUIZEN, J

Introduction

- [1] The plaintiff's claim is for damages that he suffered as a result of his wrongful arrest and prosecution by the first and second defendants.
- [2] At the commencement of the trial, an order in terms of rule 33(4) of the Uniform rules of court for the separation of the merits and quantum of the plaintiff's claim was granted and the trial only proceeded in respect of merits.

Pleadings

- [3] It is common cause between the parties that the plaintiff was arrested on 31 July 2004 by inspector Colyn on a charge of, *inter alia*, robbery with aggravating circumstances. It is, furthermore, common cause that the plaintiff was thereafter prosecuted by various prosecutors in the employ of the second defendant, The National Director of Public Prosecutions ("NDPP") on the charge until 15 October 2015 when the prosecution was stopped.
- [4] The plaintiff alleges that the defendants, in acting as aforesaid, wrongfully and maliciously and/or with *animus injuriandi*, set and kept the law in motion against him. According to the defendant, he was falsely charged.
- [5] In respect of the first defendant, the Minister of Police ("the Minister"), the plaintiff alleges that inspector Colyn:
 - 5.1 arrested him without a warrant of arrest;
 - 5.2 detained him as a suspected robber;
 - 5.3 charged him with, *inter alia*, robbery;
 - 5.4 brought him to court on the charge, and
 - 5.5 partook in the bail proceedings against him.
- [6] The allegations against the prosecutors in the employ of the NDPP are:

- 6.1 that he was placed before court and his case was enrolled without sufficient evidence;
- 6.2 that the matter was postponed numerous times from 31 July 2004 to 15 October 2015 without sufficient evidence against him in the case docket;
- 6.3 that the prosecutors partook in the bail proceedings against him; and
- 6.4 that the prosecutors failed to stop proceedings and/or failed to grant him bail during all the court appearances from his arrest until 14 October 2015.

[7] According to the plaintiff, the officials in the employ of the Minister and the NDPP acted, at all relevant times, without reasonable and probable cause.

[8] The Minister and the NDPP deny all the aforesaid allegations.

Background

[9] The events leading to the arrest and prosecution of the plaintiff are common cause between the parties.

[10] On 28 May 2004, a cash-in-transit vehicle belonging to Fidelity Guard Services (FGS) picked up cash at ABSA Bank in Pretoria and was robbed whilst on its way to deliver the cash at various auto banks in Atteridgeville, Pretoria.

[11] The plaintiff, a security guard in the employ of Fidelity, was a crewman in the vehicle and he was accompanied by a Mr Labuschagne ("Labuschagne"), the driver and a Mr Hutchinson ("Hutchinson"), the marksman. According to the plaintiff, the cash-in-transit vehicle overturned during the robbery. The plaintiff testified that he lost consciousness and only awoke in the ambulance that transported him to Eugene Marais hospital. The plaintiff, furthermore, testified that he sustained a cut on his right front skull, which required two stitches and a scratch on the bottom of his right upper arm.

Inspector Colyn

- [12] Inspector Colyn ("Colyn") testified that he was the investigating officer in the cash-in-transit heist case and that he received a warning statement made by one Aarons Sello Malatje ("Malatje") on 1 July 2004. The salient portion of the statement reads as follows:

"A friend of mine named Straw Ngobeni, used to work at FGS. He knew a guy still working at FGS named Ntsiki.....They also told me that they got an inside man Ntsiki at FGS who gave them information.

The same evening George, Straw and Enoch came to my house at 20h00 and told me that we needed to go and meet the fingerman. We met Ntsiki at his house and he showed us a list of all the cash drops that he had to make. He told us we must hit the car so that it capsizes or else they would suspect him at work.

We arranged to meet on Friday at about 8:00 in Kwaggas rank. ..Ntsiki told me that he would come to me at the outside of the base of ABSA to give me the Fleet No of the FG vehicle he would be travelling in. Ntsiki was the marksman in the same vehicle. Ntsiki came outside with another FG guard named Skhosi who also worked with him. Ntsiki gave me the fleet no, but I cannot remember it now. Ntsiki told me that if he got delayed inside Skhosi would come outside and inform me. So I continued to wait. After a while the FG vehicle came out. I phoned the guys and informed them that the vehicle was coming.

I followed the FG vehicle until Kwaggas rank. I told them that it didn't go to Kwaggas rank but to Hartbees. I followed it until Atteridgeville. .. At that time we knew that Hloni had already hit the FG vehicle....As we were going towards the FG vehicle we noticed the V6 bakkie pass us on the opposite direction. At that stage we did not know whether they took the money or not so we went straight to the FG vehicle. We stopped at the FG vehicle and got off and noticed that the roof of the vehicle opened and the guards lying on the floor. Jewel went into the vehicle and checked inside. At that stage Ntsiki got up and told us that we must go because they already got the money.

Stalliano shot Ntsiki in the shoulder but he was not aware that he shot him. Straw screamed to Stalliano "Straw don't shoot" but by then Ntsiki fell to the ground.

On Sunday I took my taxi to Ntsiki's house with Enoch and we gave him his R 70 000, 00. It was only there that we realised that Stalliano shot him when we saw his injuries.

We phoned Stalliano and informed him that he nearly killed Ntsiki. Stalliano then spoke to Ntsiki and apologised.”

[13] Armed with the warning statement of Malatje, Colyn contacted Mr Pretorius (“Pretorius”), the internal investigator of FGS and enquired whether they had a security guard by the name of Ntsiki in their employ. Mr Pretorius informed him that they have a security guard named Ntjinga in their employ and that Ntjinga is sometimes referred to by his nickname Ntsiki. Colyn asked who the crew in the FGS vehicle on the day of the robbery were and was informed by Pretorius that it was Ntjinga, Labuschagne and Hutchinson.

[14] Having confirmed that the plaintiff’s nickname is Ntsiki and that he was the only black male in the FGS vehicle on the day of the robbery, Colyn took the decision to arrest Ntsiki. Colyn attended at the premises of FGS on 31 July 2004, and arrested the plaintiff after the plaintiff confirmed that he is also referred to as Ntsiki.

[15] The plaintiff appeared in court on 2 August 2004 and brought a bail application. Colyn did not oppose the bail application and the plaintiff was granted bail on 17 August 2004.

[16] The cross-examination of Colyn mainly focussed on the steps Colyn should have taken prior to the arrest of the plaintiff, to wit, he should have:

16.1 conducted an identity parade;

16.2 conducted a pointing-out of the residence of the plaintiff;

16.3 ascertained whether the plaintiff was shot in the shoulder during the robbery by, *inter alia*, examining his body;

16.4 determined whether the plaintiff left the ABSA building when the cash was collected.

[17] It was put to Colyn that the warning statement of Malatje was a confession and inadmissible against the plaintiff in terms of the provisions of section 219 of the Criminal Procedure Act 51 of 1977 (“CPA”). Colyn duly conceded as much.

[18] Colyn testified, during cross-examination, that he was informed by Pretorius that the plaintiff was shot during the robbery and that he received a written report/medical certificate from FGS in this regard. He further testified that Pretorius informed him that only the three crewmen had knowledge of the route that the vehicle would travel on the day in question. It was pointed out to Colyn that he did not testify about these important facts during his evidence in chief. It was put to Colyn that the plaintiff denies that he was shot during the robbery.

[19] The medical certificate was, furthermore, not discovered, which, according to the plaintiff, places a question mark on Colyn's evidence in this regard. Colyn testified that the medical certificate should be in the case docket, that he was replaced as the investigating officer during the trial and that he does not know what happened to the certificate.

Ms Carla Germishuis

[20] Ms Germishuis ("Germishuis") the public prosecutor who prosecuted the plaintiff from 15 March 2005 until prosecution against him was stopped on 15 October 2015, testified that the only evidence against the plaintiff was the warning statement of Malatje, a statement by Phillemon Maako (accused 3) which implicated "Ntsiki" and the verbal statement by Labuschagne and Hutchinson that only the three guards in the cash-in-transit vehicle know the route that would be travelled on a specific day. Germishuis testified that, since her involvement in the matter in 2005, no new evidence against the plaintiff come to the fore or was requested.

[21] Germishuis admitted that neither Malatje's warning statement nor the statement by Maako was admissible against the plaintiff. Maako, in any event, passed away before 20 February 2006.

[22] Prior to 15 October 2015, Mr Human ("Human"), an attorney, came on record for the plaintiff. When the matter was in court on 15 October 2015, Human wanted to know from Germishuis why the trial against the plaintiff is proceeding when there is no evidence implicating the plaintiff in the commissioning of the offense.

Germishuis considered the position, agreed with Human and a decision was taken to stop the prosecution against the plaintiff.

- [23] Lastly, Germishuis conceded during cross-examination that the charges against the plaintiff should have been withdrawn at an earlier stage.

Legal principles and discussion

Malicious arrest and detention

- [24] Malicious arrest was distinguished from unlawful arrest by Margo J in *Newman v Prinsloo and Another*¹ as follows:

“The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the plaintiff’s cause of action, which must be alleged and proved by him, that a defendant procured or instigated the arrest by invoking the machinery of the law maliciously.”

- [25] The first question is therefore whether the arrest was justifiable.

- [26] Ms Hartman, with reference to *Mabona and Another v Minister of Law & Order and Others*,² contended that the arrest was not lawful. She, more specifically referred to the following extract that dealt with an arrest in terms of section 40(1)(a) of the CPA at 658 E – H:

“The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

¹ 1973 (1) SA 125 (W) at 127H-128A.

² 1988 (2) SA 654 (SE).

[27] Ms Hartman contended that Colyn's reliance on Malatje's warning statement and that of Mooka, which were both inadmissible, did not satisfy the test set out in *Mabona*. According to Ms Hartman, Colyn should have investigated and verified the aspects pointed out in cross-examination before he could form a reasonable suspicion that would justify the arrest of the plaintiff.

[28] Mr Van Zyl SC, counsel for the defendants, did not agree. Mr van Zyl referred to the more recent Supreme Court of Appeal judgment in *Biyela v Minister of Police*,³ to wit:

"[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulated facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence." (footnotes omitted)

[29] I respectfully agree with the test formulated by the Supreme Court of Appeal in *Biyela* and proceed to apply the test to the facts in *casu*. Colyn had "*specific and articulated facts or information*" indicating that the plaintiff was involved in the cash-in-transit heist prior to the plaintiff's arrest. Having regard to the similarities between the version in Malatje's warning statement and the circumstances in which the heist occurred, the information in the statement appeared to be credible and trustworthy. The information was, furthermore, confirmed by Pretorius insofar as the plaintiff was known by the nickname "*Ntsiki*".

³ 2023 (1) SACR 235 (SCA).

[30] Ms Hartman's contention that Colyn had to verify each and every allegation in Malatje's warning statement, prior to arresting the plaintiff, does not accord with the test set out *supra* and I am satisfied that the arrest of the plaintiff was justifiable and therefore lawful.

[31] Insofar as malice is concerned, malice and/or *animus injuriandi* was defined in *Moaki v Reckitt & Colman (Africa) Limited and Another*⁴ as follows:

"Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*)."

[32] In this regard, the plaintiff pleaded that Colyn arrested him on a false charge. During cross-examination, it was not put to Colyn that he intended to injure the plaintiff by the arrest. The facts, in any event, point in the opposite direction. Colyn had enough evidence in his possession to justify the arrest of the plaintiff, which militates against a finding that he intended to injure the plaintiff.

[33] In the result, the plaintiff has failed to establish, on a balance of probabilities, that the plaintiff's arrest by Colyn and his subsequent detention was malicious.

Malicious prosecution

[34] The requirements for a successful claim based on malicious prosecution were set out in *Minister for Justice and Constitutional Development and Others v Moleko*⁵ ("*Moleko*") as follows:

"[8] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove -

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

⁴ 1968 (3) SA 98 (A) at 104B – C.

⁵ 2009 (2) SACR 585 (SCA).

(c) that the defendants acted with 'malice' (or *animus injuriandi*); and

(d) that the prosecution has failed.” (footnotes omitted)

[35] In finding that the plaintiff’s arrest by Colyn was not malicious, it follows that the Minister cannot be held liable for the prosecution of the plaintiff.

[36] Insofar as the NDPP is concerned, it is common cause that the NDPP set the law in motion by instituting the prosecution against the plaintiff and that the prosecution has failed.

[37] The interplay between the remaining two requisites, was explained by the Supreme Court Appeal in *Ledwaba v Minister of Justice and Constitutional Development and Correctional Service and Others*,⁶ as follows:

”[22] Although our law requires that the defendant must have acted with malice or *animus injuriandi*, that question will only become relevant when it is established that the defendant instigated the prosecution without reasonable and probable cause. The latter issue is anterior to the question of whether the defendant acted with *animus injuriandi*. To succeed on this leg of the enquiry, a plaintiff must not only prove intent to injure but also consciousness of wrongfulness. As held by this Court in *Moleko*, *animus injuriandi* ‘means that the defendant directed his or her will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent’. It follows from this that the determination of whether a defendant had reasonable and probable cause to prosecute the plaintiff, must precede the determination into whether it acted with *animus injuriandi*.” (footnotes omitted)

[38] The court defined reasonable and probable cause as follows:

“[23] It is to the issue of reasonable and probable cause that I now turn. In *Beckenstrater* this Court held that:

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play

⁶ [2024] ZASCA 17.

and disproves the existence, for the defendant, of reasonable and probable cause.’

There would, thus, be reasonable and probable cause for the prosecution where a defendant is of the honest belief that the facts, available at the time of taking the decision to prosecute the plaintiff, constituted an offence which would lead a reasonable person to conclude that the person against whom charges are brought, was probably guilty of such offence. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted. That question would ultimately be for the court, in the criminal trial, to decide at the conclusion of the evidence.”

[24] Whether there was reasonable and probable cause for the prosecution depends on the facts or material which was at the disposal of the prosecutor, at the time the prosecution was instigated, and the careful assessment of that information.”

[39] The facts that were at the disposal of the prosecutor on 2 August 2004 when the decision was taken to charge the plaintiff on a charge of robbery are common cause. A mere reading of Malatje’s warning statement coupled with the information obtained from Pretorius, Labuschagne and Hutchinson would reasonably have led to a conclusion that the plaintiff was probably guilty of the offence of robbery. The test at that stage was not whether there was sufficient evidence upon which the plaintiff may be convicted.

[40] That is, however, not the end of the enquiry. As conceded by Germishuis, a careful assessment of the evidence available at the time the decision to prosecute the plaintiff was taken, would have resulted in a conclusion that the only evidence against the plaintiff was inadmissible. In the result, there was at that stage no evidence against the plaintiff that could lead a reasonable person to conclude that he was probably guilty of the offence of robbery.

[41] It might well be that through further investigation, evidence could have been obtained against the plaintiff. This did not happen and led to the decision to stop the prosecution against the plaintiff.

[42] Consequently, I find that there was no reasonable and probable cause to prosecute the plaintiff on a charge of robbery.

- [43] The next question is whether the prosecutors acted with *animus injuriandi* when the decision was taken to prosecute the plaintiff. In this regard I am of the view that a distinction should be drawn between the prosecutor who decided to charge the plaintiff with the crime of robbery and the prosecutor who decided to proceed with the trial against the plaintiff.
- [44] At the stage that a person is charged, further investigation is still possible and enquiries may well lead to a decision not to prosecute the accused.
- [45] Once the decision is taken to prosecute an accused, the trial commences, and the law is set in motion for purposes of malicious prosecution.
- [46] From the evidence, it appears that Germishuis took the decision to prosecute and proceeded with the trial against the plaintiff.
- [47] The question then arises whether Germishuis acted with *animus injuriandi*. In *Moleko*, *animus injuriandi* was defined as follows:

“[63] *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*.'

[64] 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.

[65] In this case, I am of the view that Mr Moleko did prove *animus injuriandi* on the part of the DPP. Ms Neveling clearly intended to prosecute Mr Moleko and was fully aware of the fact that, by so doing, he would in all probability be 'injured' and his dignity ('comprehending also his good name and privacy') in all probability negatively affected. Despite this knowledge, she took the decision to prosecute without making any of the enquiries which cried out to be made, thus acting in a manner that showed her recklessness as to the possible consequences of her conduct." (Footnotes omitted)

[48] The evidence of Germishuis, and more pertinently, her admission that the evidence against the plaintiff was, at the time the decision was taken to prosecute him, inadmissible and that the prosecution against the plaintiff should been stopped earlier, is telling.

[49] Germishuis testified that she considered the evidence contained in the case docket prior to commencing with, and during the trial against the plaintiff. In the circumstances, her admission *supra* leads to the ineluctable conclusion that her conduct in this regard was reckless.⁷

[50] In the result, the plaintiff has proved on a balance of probabilities that Germishuis acted with *animus injuriandi*.

[51] Consequently, the plaintiff's claim for malicious prosecution against the NDPP must succeed.

Costs

[52] There exists no reason why costs should not follow the cause.

Order

[53] The following order is issued:

⁷ Also see: *Minister of Safety and Security N. O. and Another v Schubach* [2014] ZASCA 216; *Rudoph & Others v Minister of Safety and Security & Another* 2009 (5) SA 94 (SCA).

1. The claim of malicious arrest against the first defendant is dismissed with costs.
2. The second defendant is order to pay the proven or agreed damages suffered by the plaintiff as a result of the malicious prosecution of the plaintiff with costs.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATES HEARD:

06, 07 & 08 February 2024

DATE RESERVED:

04 April 2024

DATE DELIVERED

16 April 2024

APPEARANCES

For the Plaintiff:	Advocate N Hartman
Instructed by:	Taute Bouwer & Cilliers Inc
For the Defendant's:	Advocate D Van Zyl SC
Assisted by:	Advocate C Sevenster
Instructed by:	State attorney, Pretoria

