



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 1058/2021

In the matter between:

THATO MOLETSANE

Plaintiff

and

MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

BEFORE: **CHESIWE J**

HEARD ON: **01 DECEMBER 2023**

DELIVERED ON: **30 MAY 2024**

- [1] Plaintiff instituted a claim for damages against the Minister of Police (herein after referred to as the First Defendant) and the National Director of Public

Prosecutions (herein after referred to as the Second Defendant) for the alleged unlawful arrest and detention. The arrest took place on 11 July 2019 in Kroonstad and Plaintiff alleges that his arrest and subsequent detention were wrongful and unlawful.

Background

- [2] Plaintiff instituted action premised upon the following: causes of action: Claim 1 – Unlawful arrest and detention in the amount of R1 500 000,00 (one million five hundred thousand rand); Claim 2 – Malicious proceedings (Prosecution) in the amount of R500 000,00 (five hundred thousand rand).
- [3] Plaintiff filed a Rule 28 (10) to amend the particulars of claim as follows:
- “Ad paragraph 5.2 deleting 30 of July 2019 and replacing it with 15 July 2019.
 Ad paragraph 5.3 deleting 30 of July 2019 and replacing it with 22 July 2019.
 Ad paragraph 11 deleting R600 000,00 and replacing it with R150 000,00.
 Ad paragraph 12.2 deleting 30 July 2019 and replacing it with 22 July 2019.
 Ad paragraph 12.3 deleting 30 July 2019 and replacing it with 15 July 2019.
 Ad paragraph 13 deleting R300 000,00 and replacing it with R500 000,00.
 Ad prayers claim 1 deleting R600 000,00 and replacing it with R1 500 000,00.
 Ad prayers claim 2 deleting R300 000,00 and replacing it with R500 000,00.”
- [4] The First and Second Defendants raised a special plea that Plaintiff failed to comply with Section 3(4) of the **Institution of Legal Proceedings Against Certain Organs of State**.¹
- [5] Plaintiff filed an application for condonation for the late filing of the Statutory Notice. The Court granted the condonation on 24 March 2022. The Defendants then abandoned the application (Special Plea) after the Court had granted the condonation.

¹ Act 40 of 2002

- [6] The parties in terms of the Pre-Trial conference, had agreed that there will not be separation of issues in terms of Rule 33(4) of the Uniform Rules of Court and that the merits and quantum will be adjudicated simultaneously.
- [7] The issue for determination before this Court is, whether the Plaintiff's arrest and detention were unlawfully from 11 July 2019 to 12 October 2020; whether the prosecution was unlawful, malicious and negligent; whether the Defendants are liable in respect of both Claims 1 and 2 and the appropriate quantum of damages suffered.
- [8] Before commencement of trial, parties agreed to the admissibility of the documents contained in the docket pertaining to the criminal investigation.²
- [9] Plaintiff and one witness testified in his case, with the First Defendant calling two (2) witnesses and Second Defendant also calling two (2) witnesses.

Evidence

- [10] Plaintiff testified as follows: That he is 29 years of age. On 11 July 2019 when he was arrested, he was asleep when the police came to his house in the company of Neo (Plaintiff's friend). The police asked if he knew anything about a stolen cellphone. He informed the police about Skoloza and Senawana (Plaintiff's friends) who had approached him for a buyer of cellphones. Plaintiff then took the police to Pule's house.
- [11] Plaintiff told the police about a person named Steve, a Nigerian national who bought the cellphone. Plaintiff informed the police that he never handled the cellphone and only heard about a stolen cellphone four days after it was stolen. He was taken to the police station and put in the charge office and later was placed in a holding cell, but was not charged for the stolen cellphone. Plaintiff said at the police station, he met the Complainant and asked of the Complainant to drop the charges as he did not take the cellphone. However, the Complainant

² Exhibit "A" – Index Documents

told the Plaintiff that she only wants the cellphone and did not want to press charges.

- [12] On behalf of the Defendants, Adv. Ferreira under cross-examination, Plaintiff said on the night of 11 July 2019, he was at his home when four police officers came to ask him about Pule. Plaintiff showed the police officers where Pule resides and was arrested after showing the officers where Pule resides. Plaintiff denied taking the Complainant's cellphone or selling it. Plaintiff was extensively cross examined.
- [13] Ms. Mosa Marvellous Tsoeu (the Complainant), was called as the Plaintiff's witness. She testified as follows: She reported the incident to the police on 4 July 2019. She confirmed that she did not write a statement as it was written by the police and it was read back to her before signing it. She was able to identify two people she saw on the day she was robbed of her cellphone, with Neo being one of the people she identified. She went with the police to Neo's house. Thereafter, Neo was taken by the police and she was taken home.
- [14] On 13 July 2019, Mosa was collected by the police and taken to the police station where she found Thato (Plaintiff). Plaintiff asked her to withdraw the charges as he was not involved in the robbery of the cellphone, but only assisted in getting a buyer for the cellphone. Plaintiff apologized to her, but could not speak further as Captain Mokhele came in and told her to stop talking to the Plaintiff.
- [15] Mosa explained that the statement was typed on her laptop by Mokhele whereupon Mokhele saved the statement on a USB stick. She could not recall when she signed the statement. Mosa said Plaintiff was not present when she was robbed of her cellphone. She did not see the Plaintiff on the day of the incident, nor was the Plaintiff photographed among the photos that were shown to her by the police. She saw the Plaintiff for the first time at the police station. She further explained that, during trial the prosecutor did not consult with her and that Constable Thakeng and Captain Mokhele were not at court.
- [16] Under cross examination, Mosa testified that the Plaintiff was discharged after she told the Trial Court that the Plaintiff was not present on the day of her

robbery, further that she had been informing the police that the Plaintiff was not present on the day of the incident. She said the police told her that the Plaintiff was present however, she never said Plaintiff was present. That was the Plaintiff's evidence.

- [17] The First Defendant's witnesses were Captain Mokhele and Constable Thakeng with the Second Defendant's witness being Prosecutor Noge. Mokhele was the investigating officer and testified as follows: He received a complaint on 4 July 2019 of a cellphone robbery having taken place. He went with the Complainant to where the incident occurred. He said the Complainant told him that it was four men that robbed her of her cellphone at knife point. On 5 July 2019, Complainant called Mokhele about information she received about the suspects' photos being on someone else's cellphone. Mokhele went to look at these photos and it was photos of two male persons. Mokhele received further information after having gone to look for these two male suspects. The Plaintiff became the third suspect purported to have been part of the robbery. Mokhele then went to look for these suspects.
- [18] When Mokhele arrived at the Plaintiff's house, Plaintiff informed him that he will take him to the person and place where the phone was sold. Mokhele left the other two suspects and took the Plaintiff to where the phone was sold. Mokhele looked for a person named Steve as information given by the Plaintiff, but could not find him. He then enquired about the whereabouts of Steve from a certain boy around where Steve's shop is. The boy left and came back with the cellphone and informed Mokhele that Steve gave him the cellphone. Mokhele gave the boy his cellphone numbers and asked that the boy give the numbers to Steve.
- [19] Mokhele said he went back to the police station and on arrival, he heard the conversation between the Complainant and the Plaintiff, where the Plaintiff requested the Complainant to withdraw the charges and at that time appeared confused. Mokhele then completed a SAP 299 form in which both the Plaintiff and the Complainant signed for the cellphone to be handed over to the Complainant.

- [20] Mokhele said that the Plaintiff applied for bail and he opposed the application as the Plaintiff had previous convictions and bail was denied.³
- [21] Under cross examination, Mokhele insisted that Mosa (the Complainant) was not telling the truth that Plaintiff was not present on the day the robbery took place and that the Plaintiff was part of the three suspects that robbed her of her cellphone. Further that the Plaintiff was the person that sold the cellphone to Steve. Mokhele said according to his investigation, the Plaintiff was involved in the robbery of the cellphone and was correctly charged for robbery of the cellphone and not for possession of stolen goods/phone.
- [22] The First Defendant called its second witness to testify, Constable Thakeng. He testified that he became involved when he was called about the robbery by a Mr. Khuphe and that the Complainant had information of the suspects that robbed her of the cellphone. Thakeng met up with the Complainant and the Complainant gave the description of one of the suspects. Thakeng took two of his colleagues to the suspects house, whose name is Neo. The Complainant also accompanied Thakeng and his colleagues to Neo's house. However, Thakeng indicated that he could not recall where Complainant got the information about Neo from.
- [23] On arrival at Neo's place, Neo attempted to flee, but they were able to stopped him by the door. Neo told Thakeng that he can name the people who were involved, namely Small also known as Thato (Plaintiff), Chester who is known as Pule. Neo took Thakeng and his colleagues to the Plaintiff's house. On their arrival, the Plaintiff told them that Chester (Pule) must be collected. Plaintiff directed the police to Chester's place. There at Chester's place, Plaintiff told Thakeng that they were all involved in the robbery of the cellphone.
- [24] Under cross examination, Thakeng said Neo took the police to where the Plaintiff stayed and Neo told the police that the Plaintiff was with them when the robbery of the cellphone took place. Further that it was the Plaintiff that took the police

³ (Index Documents Bundle, page 49)

to where Chester resides. Thakeng said the Plaintiff was linked and identified by Chester and Neo including the Complainant.

- [25] The Second Defendant called Mr Noge as its witness and testified as follows: Noge is a prosecutor at the Regional Court in Kroonstad. On receipt of the file, he proceeded with the prosecution of the Plaintiff. He considered the statements of the witnesses and warning statements of the accused and decided that there was *prima facie* evidence that could stand in court.
- [26] Mr. Noge during the trial called two witnesses that is the Complainant (Mosa) and one state witness. He said during the evidence of the Complainant, he made concessions when he realized that the evidence would not take the state's case any further however disputed that he proceeded with a malicious prosecution against the Plaintiff and that the Public Prosecutor have no reasonable cause to incriminate the Plaintiff. Further that the Plaintiff had a right to apply for acquittal in terms of Section 174 of the **Criminal Procedure Act**⁴ (herein after referred to as the CPA) which the Criminal Trial Court decided to grant.
- [27] Under cross examination Mr. Noge said the Complainant failed to identify the Plaintiff and the Plaintiff's warning statement had only indicated that the Plaintiff sold the cellphone, thus linking the stolen cellphone with the Plaintiff. Moreover, the Complainant's evidence was damaging to the State's case and as a result, he did not oppose the Section 174 application. That was the Defendants case.

Issues for determination

- [28] The parties were directed to submit written head of argument on 30 October 2023 and 28 November 2023 respectively.

⁴ Act 51 of 1977

- [29] For determination by this court is the unlawfulness of the arrest as well as of the detention. Further whether the prosecution was malicious and the liability of the Defendants for the unlawfulness of their action.
- [30] In an action for wrongful arrest and detention, the Plaintiff only bears the onus of proving arrest and detention including the malicious prosecution. It is common cause that the Plaintiff was arrested on 11 July 2019 and released after his application in terms of Section 174 succeeded and was discharged on 12 October 2020.

Claim 1 – Unlawful Arrest and Detention

- [31] The First Defendant pleaded that the arrest was lawful and the Plaintiff was arrested by Constable Thakeng in terms of Section 40(1)(2) read with Section 1 of the CPA.

- [32] Section 40(1)(b) of the CPA provides as follows:

“(1) A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- (c) ... ;
- (d) ... ;

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;... .”

- [33] Section 41 of the CPA further provides that:

“(1) A peace officer may call upon any person-

- (a) whom he has power to arrest;
- (b) who is reasonably suspected of having committed or of having attempted to commit an offence;... .”

- [34] It is trite that the onus rests on the First Defendant to justify an arrest. In **Minister of Law and Order and Others v Hurley and Another**,⁵ Rabie CJ said the following:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

- [35] The Plaintiff was arrested by Constable Thakeng after the Complainant took Thakeng to Neo's place of residence, whereupon Neo told Thakeng that he was not alone and offered to take the police to the Plaintiff's house. The Plaintiff was implicated by Neo. Plaintiff not wanting to be implicated alone, took Constable Thakeng to Chester also known as Pule.
- [36] The Plaintiff's evidence that he asked for forgiveness from the Complainant and that she should withdraw the case against him, does not appear as someone who has not done nothing wrong. Thakeng's evidence that after conducting his preliminary investigation and it came to light that the Plaintiff was linked to the offence, leading to him effecting the arrest, places less burden on the First Defendant to prove the unlawfulness of its action.
- [37] Constable Thakeng at the police station when in the presence of the Complainant, Plaintiff, Neo and Chester, the Complainant informed him that it was the three men that robbed her. Thakeng followed the arresting process and detained the three and informed the investigating officer to continue with further investigation.
- [38] To succeed in an action based on wrongful arrest, the Plaintiff must show that the First Defendant or someone acting as the agent of the First Defendant deprived him of his liberty (See **Relyant Trading (Pty) Ltd v Shangwe 2007 (1) ALL SA 375 SCA at paragraph 6**).
- [39] It is trite that the onus rests on the police officer to prove lawfulness of the arrest. The reasonable suspicion of arresting officer acting under section 40 (1)(a) of

⁵ 1986 (3) SA 568 (A) at 589 E-F

the CPA, must be approached objectively. The question therefore is whether any reasonable person confronted with the same set of facts that Constable Thankeng was confronted with, would from the alleged offence and suspicion, be reasonable in arresting the Plaintiff.

[40] There is no doubt that after the preliminary investigation and after Neo implicated the Plaintiff that Thakeng acted unreasonable in arresting the Plaintiff. In **Duncan v Minister of Law and Order**,⁶ the Court dealt with the jurisdictional requirements and the discretion to exercise that power to arrest. And in my view, Constable Thakeng exercise that discretion in arresting the Plaintiff.

[41] Section 205 (3) of the Constitution of the Republic of South Africa,⁷ provides as follows:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

[42] The public relies on the police to enforce the law. The Complainant had a reasonable expectation that the Plaintiff be arrested for being part of the suspects that robbed her. Moreover, and in taking into consideration that the Plaintiff asked the Complainant for forgiveness and asked that she withdraws the case against him. Bearing in mind that the Plaintiff took Thakeng to Neo's place of residence. And under these circumstances, Thakeng exercised his discretionary powers within the limits of the authorizing statute in terms of Sections 40 and 41 of the CPA and with Section 205 (3) of the Constitution.

[43] Therefore, in my view the Plaintiff's arrest was lawful and Claim 1 ought to be dismissed.

⁶ 1986 (2) SA 805 (A)

⁷ Act 108 of 1996

Claim 2 – Malicious Prosecution

- [44] The Plaintiff's evidence is that he was charged and brought to court on 15 July 2019 at the District Court in Kroonstad, that this was his first appearance and that he had applied for legal aid. Plaintiff was thereafter kept for seven (7) days in custody. On 22 July 2019, Plaintiff appeared in court however, the docket was not in court. The matter was then remanded for 14 days. Plaintiff denied any knowledge of bail proceedings.
- [45] Mr. Noge who testified on behalf of the Second Defendant, evidenced that he was not the prosecutor during the bail hearing held in the at the District Court. He only represented the state at the trial itself. The trial bundle which consists of the docket,⁸ shows the prosecutor information in which the bail was opposed and same denied by the Court.
- [46] As per Mokhele's evidence, he completed the bail forms and considered the issue of the Plaintiff having had previous convictions. Mokhele said he was in court on the day of the bail application and gave evidence in respect of the bail hearing. The matter was thereafter transferred to the Regional Court. Mokhele did not know the Plaintiff when he completed the bail form and neither had any reason to mislead the court in completing the bail form. At the time of completing the bail form, Mokhele was following the necessary process that is done for each and every accused person that is facing a bail application.
- [47] Plaintiff in respect of malicious proceeding claims that the Second Defendant unlawfully and maliciously proceeded with the prosecution from 15 July 2019 until 12 October 2020, further that the Second Defendant had no reasonable and probable cause to incriminate him. I doubt that the Second Defendant, would aimlessly proceed to prosecute an innocent person with no reasonable cause.
- [48] In this instance the Second Defendant instigated the prosecution against the Plaintiff on the allege basis that there was sufficient *prima facie* evidence that the Plaintiff committed the offence.

⁸ Index document bundle, page 49

- [49] Mr. Noge evidence is that when he received the file, he considered the warning statements of the accused as well as the statement of the Complainant. Moreover, according to Noge the statements of the police indicated that the cellphone was recovered and how it was recovered and who were the involved parties. Upon having considered all of the above, he decided that there was sufficient evidence to prosecute the Plaintiff.
- [50] Mr. Noge during the criminal trial proceedings, called 2 witnesses, the Complainant and one other state witness. However, after calling the police officer, he realized that the state's case was not strong. A Section 174 application was brought and not opposed as the Mosa (the Complainant) during her evidence made a lot of concessions. The following is noted on the transcribed record: ⁹

“Mr Schilling: On the 4th of July 2019, during the incident, was he present.

Ms Choi [sic]: I don't think he was.

Mr Schilling: Did you see him physically there or not?

Ms Choi [sic]: The time of the robbery?

Mr Schilling: Yes.

Ms Choi [sic]: No I didn't.

Mr Schilling: His involvement subsequent to that you don't know On 4th of July he wasn't there, correct?

Ms Choi [sic]: I don't think he was because I could only recognize one the following day because I was so traumatized about what happened that day.”

- [51] There are four (4) requirements which the plaintiff must allege and prove in order to succeed with a claim of malicious prosecution.¹⁰ The said requirements are that the Plaintiff must allege and prove:

⁹ Index documents bundle, page 126.

¹⁰ Minister of Justice and Constitutional Development and Others v Moleko (131/07) [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) (31 March 2008)

- (a) That the Defendants set the law in motion (instigated or instituted the proceedings);
- (b) That the Defendants acted without reasonable and probable cause;
- (c) That the Defendant acted with malice (or *animo injuriandi*) and;
- (d) That the prosecution has failed.

[52] The person who claims malicious prosecution must not only allege, but must go further to prove if the Defendant acted maliciously and without probable cause.¹¹ As to the Plaintiff's evidence that there was a request made to the Complainant to have the charges withdrawn and with the Complainant having replied she does not wish to continue with the case and only needing her phone back, the mere fact that Plaintiff presented such evidence, does not mean there was no reasonable or probable cause for a prosecution. If this were to happen, then most prosecutions would be regarded as malicious. This alone, weighed in the light of all the evidence, could not constitute sufficient grounds on which to find that the Second Defendants could not have believed in the guilt of the Plaintiff.¹² In my view, the Plaintiff has failed to show that his prosecution was malicious and was without reasonable or probable cause.

[53] With the Section 174 having succeeded based on the concessions by the Complainant during the criminal trial proceedings, it cannot be said that prosecution failed for purposes of a civil claim for malicious prosecution.¹³

[54] Plaintiff did not succeed in proving malice on the part of the prosecution. Mr. Noge had no knowledge of the Plaintiff and had no reason to set motion a prosecution of someone unknown to him. He was performing his duties as any prosecutor would. Noge did not even oppose the section 174 as he could see that the state's case was no longer sufficient to prosecute the Plaintiff and took into considerations the concessions made by the Complainant during the criminal trial proceedings. It therefore stands that, in order for the Plaintiff to

¹¹ Mdletshe N.O and Another v Minister of Police (AR 135/2022) [2023] ZAKZPHC 106 (23 June 2023)

¹² Nogwebele v Minister of Police and Another 2016 (2) SACR 662 (WCC)

¹³ Criminal Procedure Act 51 of 1977, Section (See Nogwebele v Minister of Police & another 2016 (2) SACR 662 (WCC))

succeed with a claim for malicious prosecution, Plaintiff must prove all the four elements listed above.

- [55] The bail court proceeded with the bail application based on the information provided by the Investigating Officer that Plaintiff had previous convictions, had no permanent address, no property nor employed. The bail court cannot be faulted if information provided by the Investing Officer placed the Plaintiff in a negative light before it. Further that, Plaintiff took the police to where the phone was sold. The Plaintiff on his own version asked the Complainant for forgiveness and that she should drop the charges. This engagement by the Plaintiff with the Complainant did not assist him much, as a reasonable person who has done nothing, has no reason to ask for forgiveness and that the charges to be withdrawn against him.
- [56] In order to succeed with a claim for malicious prosecution, Plaintiff must prove that the law was set in motion, that the Second Defendant acted without reasonable and probable cause and that the Second Defendant acted with malice. The Plaintiff, in my view has failed to prove that the Second Defendant conducted a malicious prosecution against him.
- [57] In light of the above, there is no indication on the part of the Second Defendant that prosecution was malicious and it cannot be convincingly said it acted with malice and without reasonable cause. In my view, Plaintiff did not discharge the onus resting on him regarding the claim for malicious prosecution against the Second Defendant.
- [58] Therefore, there is no reason or doubt for this court to believe that that the Second Defendant conducted a malicious prosecution against the Plaintiff.

Credibility of Witnesses

- [59] The Plaintiff did not do much for his case, he could not explain to the police on the night they came for him that he was not part of the robbery instead took the police to Chester's house. Furthermore, Plaintiff assisted the police by taking

them to where the phone was sold. His version that he was approached by two people who wanted to sell the phone cannot stand as none of these people came forward to corroborate his evidence. Plaintiff in my view was not a credible witness.

[60] The Defendants' witnesses, that is Mokhele, Thakeng and Noge, came across as reliable witnesses and it cannot be said in doing their work, there was any malice, be it with the arrest or the prosecution. They were simply doing their work.

[61] Therefore, in my view, the arrest was lawful and there was no malice on the prosecution of the Plaintiff and Claim 2 ought to be dismissed.

Costs

[62] With regard to costs, I find no reason to deviate from the general rule that costs should follow the event albeit on a lower scale.

Order

[63] Accordingly, the following order is made:

1. The Plaintiff's Claim 1 and Claim 2 are dismissed with costs on a party and party scale.



S. CHESIWE, J

On behalf of the Plaintiff:

Adv. C Zietsman

Instructed by:

Jacobs Fourie Inc.

BLOEMFONTEIN

On behalf of the Defendant:

Adv. Ferreira with Adv. N M Phakama

Instructed by:

State Attorney

BLOEMFONTEIN