

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 3710/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

16 August 2024



In the matter between:

MAKHATHOLELA, NKOSI CHRIS

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] The plaintiff has instituted an action for damages against the first and second defendants on 29 January 2021. The damages arose from the plaintiff's alleged unlawful arrest and detention by members of the first defendant, and malicious prosecution by the second defendant.

[2] The defendants are defending the action and have raised the special plea of non-compliance with section 3 of Act 40 of 2002, as amended, and special plea of prescription.

[3] On 5 May 2021, the plaintiff launched an application for condonation for the late delivery of a notice in terms of section 3(2) of Act 40 of 2002, as amended. The condonation application was heard and granted by Dippenaar J.

[4] The parties agreed to a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. This Court is required to determine the special plea of prescription and the issue of liability. The issue of quantum is to be postponed *sine die*.

Background facts

[5] The background facts are common cause between the parties. On 13 January 2012, the plaintiff and other three suspects were arrested without a warrant and detained at Linden Police Station by members of the first defendant under Linden CAS 256/01/2012. They made their first appearance in the Randburg Magistrate court on 16 January 2012. The plaintiff was charged with unlawful possession of explosives, unlicensed firearms and ammunition, which are Schedules 5 and 6 offences.

[6] On 14 January 2012, the plaintiff was detained at Brixton police cells. His formal bail application was heard on 25 January 2012. He was denied bail. He was later charged with various other charges, including attempted murder, ATM bombing and car hijacking under Rabie Ridge CAS 93/01/2012. He was taken through an identification parade on 19 February 2012 under CAS 93/01/2012 and he was pointed out by one of the witnesses.

[7] His criminal trial was remanded on several occasions for various reasons, and it never commenced. He remained in custody from 13 January 2012 until 18 November 2020 when the charges against him were withdrawn due to a lack of evidence.

Special plea of Prescription

[8] The first defendant has raised a special plea of prescription in relation to unlawful arrest and detention. He contended that prescription ran from the date of arrest on 13 January 2012, and that summons was served out of time. He submitted that in the condonation application, Dippenaar J unequivocally held that the claim in relation to unlawful arrest had prescribed, and in the circumstances, this Court should uphold the special plea of prescription and dismiss the claim for unlawful arrest.

[9] The plaintiff, on the other hand, argued that for both claims A and B, prescription ran from 18 November 2020 when charges against him were withdrawn, and that summons was served in time and the claims have not prescribed. He relied on a number of cases, including *Nkosi v Minister of Police and Another*¹ where the court held that arrest and detention through to discharge is continuous. He submitted that the finding made by Dippenaar J was *obiter dictum*.

[10] In the condonation application, Dippenaar J was not required to determine a special plea of prescription. She did not make an order upholding a special plea of prescription. A court order is binding until set aside by a competent court. In this case there is no court order upholding a special plea of prescription. The special plea of prescription is before this Court for determination. This Court is entitled to make a finding and an order on this issue.

[11] In terms of section 11 of the Prescription Act 68 of 1969, read with section 12(2), a creditor must serve summons within three years of having acquired knowledge of the debt being due. Therefore, if a creditor institutes a claim for unlawful arrest and detention, he or she must first deliver a notice in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 within six months of the

¹[43325/2019]

debt becoming due, and he must serve summons within three years of knowing that such debt is due. Section 12 of the Prescription Act provides:

“12 *When prescription begins to run*

- (1) *Subject to the provisions of subsection (2) and (3), prescription shall commence to run as soon as the debt is due.*
- (2) *.....*
- (3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”*

[12] A debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place.² In *Sello Thabang v The Minister of Police N.O & Another*³, in an unlawful arrest and detention claim, Sardiwalla J in applying the aforesaid principle, held that the debt became claimable by the applicant on the date of his release from incarceration, and the complete cause of action was only established after consultation with his attorneys. Although the right to reclaim the amounts arose the day after his release from incarceration, in absence of any knowledge of the identity of the respondents, the applicant's rights in law only became enforceable after consultation with his attorneys.

[13] In *Mashaba v Minister of Police*⁴ Holland-Muter J held that the Court must distinguish between cases where the alleged unlawful arrest does not result in a continuous detaining of the person and where the alleged unlawful arrest results in a continuous detention because ‘*the proceeding from arrest to acquittal must be regarded as continuous and no action for personal injury done to the accused person will arise until prosecution has been determined by his discharge.*’

² *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 (1) SA 187 SCA; *Truter v Deyssel* 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16.

³ (89077/2016) [2022] ZAGPPHC para 15 (13 April 2022).

⁴ (54940/2012) [2023] ZAGPPHC 2023 (18 December 2023).

[14] The plaintiff was arrested and detained on 13 January 2012. His bail application was refused. He remained in custody until the charges against him were withdrawn on 18 November 2020. He consulted with his attorney on 29 November 2020. A notice in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act was sent to the defendants on 2 December 2020. The summons was issued on 29 January 2021.

[15] In applying the abovementioned principle I hold that in this case the arrest and detention through to withdrawal of the charges is continuous. I find that the prescription commenced to run from 18 November 2020 when the plaintiff was released from custody. The summons was issued and served well within three years of the plaintiff obtaining knowledge of the identity of the debtor and the facts from which the debt arises. Accordingly, the special plea of prescription must fail.

Unlawful arrest and detention

[16] The plaintiff is suing the first defendant for unlawful arrest and detention and malicious prosecution under Linden CAS 256/01/2012 and not under Rabie Ridge CAS 93/01/2012. It is common cause that the plaintiff was arrested without a warrant by a peace officer Motlalentwa Johannes Lefu at corner Judges and Republican roads, Windsor West on 13 January 2012 at about 00:32. He was detained at Linden police station. He was charged with unlawful possession of explosives, unlicensed firearm and ammunition. It is common cause that at all material times hereto, the members of the first defendant were acting in the course and within the scope of their employment with him.

[17] Section 40 of the of the Criminal Procedure Act 51 of 1977 ("the CPA"), provides that a peace officer may without warrant arrest any person, who is reasonably suspected of committing or having committed an offence listed in terms of (a) to (q) of subsection (1). Of relevance to this case, is ss 40(1)(a), (b) and (h) which provides:

"(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) *Who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;"*

[18] The Supreme Court of Appeal, in *Duncan v Minister of Law and Order*⁵, set out four jurisdictional requirements which flow from s 40(1) of the CPA, which authorises arrests without a warrant. They are that the person arresting must be a peace officer, who entertained a suspicion, that the suspicion was that the arrestee had committed a Schedule 1 offence and that the suspicion rested on reasonable grounds. Once the jurisdictional requirements are met, a discretion arise as to whether or not to arrest. The general requirement is that any such discretion must be exercised in good faith, rationally and not arbitrarily.⁶

[19] The first issue for determination is whether the arresting officer complied with the other three jurisdictional requirements which flow from s 40(1) which authorises arrest without a warrant, namely whether the arresting officer entertained a suspicion, that the suspicion was that the plaintiff had committed schedule 5 and 6 offences (as alleged by the first defendant) and that the suspicion rested on reasonable grounds.

[20] The second issue for determination is whether the arresting officer, in executing the arrest, exercised a discretion whether or not to arrest the plaintiff within bounds of rationality.

[21] The first defendant disputed that the arrest and detention were unlawful. The first defendant pleaded that both the arrest and detention were lawful in terms of section 40(1) of the CPA, in that the arresting officer was a peace officer, the plaintiff committed the offence of unlawful possession of explosives, unlicensed firearm and ammunition, which are schedule 5 and 6 offences on 13 January 2012

⁵ [1986] ZASCA 24; 1986 (3) SA 568 (A) at 589E-F.

⁶ Minister of Safety and Security v Sekhotho [2010] ZASCA 141; 2011 (5) SA 367 (SCA).

at or near Windsor West in the presence of the arresting officer. Further, the first defendant pleaded that warrant officer Hiepner, Captain Khumalo and Constable Matsobane Frans Bambo and other arresting officers exercised their discretion to arrest properly in the circumstances.

[22] Warrant Officer Hiepner was called as a witness. He testified that during the incident in question he was informed by one of the suspects, Nelson that a red Renault car was travelling together with the suspects' Volvo car. While they were searching a Volvo car, they saw a red Renault drove past. Nelson informed him that was the Renault which was travelling with them. The name of the driver and the registration numbers of a red Renault were not mentioned to him at that stage. W/O Hiepner then asked radio control to stop the red Renault. He was not present when the red Renault was stopped and searched at corner Republic and Judges roads. He was also not present when the plaintiff was arrest by his colleague Motlalentwa Johannes Lefu. He could not confirm the allegations pleaded by the first defendant that the plaintiff committed the schedule 5 and 6 offences in the presence of the arresting officer.

[23] The other arresting officers mentioned in the amended plea were not called to testify. The Court was informed that the arresting officer Motlalentwa Johannes Lefu passed away. I was referred to his arresting statement commissioned on 13 January 2012. In his arresting statement he does not confirm the allegations pleaded by the first defendant that the plaintiff committed schedule 5 and 6 offences in his presence. To the contrary, he stated that when a red Renault was stopped, the plaintiff was alone inside it. He was searched and nothing illegal was found in his possession. His identity document was the only item found in his possession. The red Renault was searched and nothing illegal was found inside it. Three cell phones and binoculars (bushwell) were found inside a red Renault.

[24] After searching the plaintiff and a red Renault car, he arrested the plaintiff and detained him at Linden police station. He did not state in his arresting statement the reason why he arrested the plaintiff. It is clear from the contents of his arresting statement that he had no legal basis to arrest the plaintiff. His conduct was arbitrary and without just cause. The Constitutional Court in *Mahlangu and Another v*

*Minister of Police*⁷ remarked that 'the police, like any other state functionary in the country for that matter, are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law. That is a basic component of the rule of law and one of the founding values of our Constitution.'

[25] The plaintiff testified in his case. He stated that he was self-employed as an uber driver. He explained that the reason he drove to Cresta in the night in question was because he transported Mcebisi. He did not know the purpose of Mcebisi's travel.

[26] In conclusion, I find that the first defendant has failed to adduce evidence proving that the arresting officer entertained a suspicion, that the suspicion was that the plaintiff had committed schedule 1 or 5 and 6 offences and that the suspicion rested on reasonable grounds. The first defendant has also failed to adduce evidence showing that the arresting officer during the execution of the arrest, exercised a discretion whether or not to arrest the plaintiff. In the result, I find that the plaintiff's arrest on 13 January 2012 was unlawful.

[27] I turn to deal with the issue of unlawful detention. It is common cause that the plaintiff was detained from 13 January 2012 until 18 November 2020. On 13 January 2012, he was detained at Linden police station. He was taken to Brixton police cells on 14 January 2012 and subsequently was remanded in custody at the Johannesburg Correction Centre by the Randburg Magistrate Court. The plaintiff contended that he was detained without any reasonable and just cause. The detention unlawfully deprived him of his freedom.

[28] The first defendant denied that the detention was unlawful and contended that it flowed from a lawful arrest. I have concluded that the arrest was unlawful. The plaintiff was detained at Linden police station following the unlawful arrest. The detention under police custody continued at Brixton police cells until 20 February 2012, and afterwards the plaintiff was remanded in custody at Johannesburg

⁷ (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

Correction Centre until the Linden CAS 256/01/2012 was withdrawn on 18 November 2020 for lack of evidence. The first defendant has failed to discharge the onus to prove that there was a justification for the interference with the plaintiff's constitutional right not to be deprived of his physical liberty. In the circumstances of this case, the unlawful arrest and detention are intertwined. They are a continuous grave wrong and a serious inroad into the freedom and rights of the plaintiff. It follows that the detention under Linden CAS 256/01/2012 was also unlawful. I hold the first defendant vicariously liable for the wrongful and unlawful conduct of his members in relation to arrest and detention of the plaintiff in Linden case.

Malicious prosecution

[29] The plaintiff contended that the prosecution was unlawful, unjustifiable and malicious on the basis that the second defendant's employee/s who handled the plaintiff's case from the first appearance until the charges were withdrawn,

[29.1] Failed in his/their duty of care to acquaint himself/themselves with the contents of the Linden CAS 256/01/2012 docket, from which it would have been apparent that there were no reasonable grounds of justification for the prosecution of the plaintiff;

[29.2] Failed to timeously withdraw the charges against the plaintiff;

[29.3] Failed in his/their duty to inform any of the presiding magistrates expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged offences; and

[29.4] Failed in his/their duty to ascertain independently that no reasonable grounds or justification existed for the continued prosecution of the plaintiff.

[30] it is common cause that at all material times hereto, the employee/s of the second defendant who handled the plaintiff's prosecution was/were acting within the cause and scope of their employment with the second defendant.

[31] The second defendant pleaded that '*the prosecutor, Randburg Magistrate's court was justified in charging the plaintiff and by law was obliged to follow and carry out the instructions of the Director of Public Prosecutions who had exercised his discretion properly and lawfully.*' Further, the second defendant pleaded the reasons why the plaintiff's case was remanded on several occasions. I do not intend to repeat same herein.

[32] The second defendant led the evidence of the Randburg senior prosecutor, Yusuf Moosa Baba. He testified that he was the head of Randburg office from July 2020 until November 2022. He became involved in the plaintiff's case in September 2020 when the representations were made on behalf of the plaintiff for the undue delay in the prosecution of his case. He provisionally withdrew the charges against the plaintiff on 18 November 2020 because the witnesses were not subpoenaed to come to court. However, his version is not consistent with the entry made on the chargesheet about the withdrawal of charges. First, it is not stated on the chargesheet that the charges were provisionally withdrawn; and second, it is stated on the chargesheet that the charges were withdrawn because of lack of evidence.

[33] He did not make a decision to prosecute the plaintiff on Linden CAS 256/01/2012. However, he submitted that there was a *prima facie* case against the plaintiff when a decision was made to prosecute in the Linden matter. Further, he submitted that the four suspects in Linden matter were charged with common purpose. He based his opinion on the statement made by W/O Hiepner and the suspect, Lebogang Legoabe.

[34] I do not agree with his submission that there was a *prima facie* case against the plaintiff at the time the decision was taken to prosecute him for the following reasons. *First*, the principles of common purpose do not apply to possession of explosives, firearms and ammunition. The state has to prove joint possession. *Second*, W/O Hiepner's statement does not implicate the plaintiff on the offences of unlawful possession of explosives, unlicensed firearm and ammunition. It also does not place the plaintiff on the scene of crime (Cresta spar shop). It simply mentions that a red Renault car was travelling together with a Volvo car, and that

he was shown a red Renault car driving past. *Third*, the statement of Lebogang Legoabe does not implicate the plaintiff in the unlawful possession of explosives, firearms and ammunition. It also does not place the plaintiff on the crime scene. Legoabe in his statement mentions the events that took place on the 5th and 6th of January 2012, and not in the night of the incident in question. Furthermore, Legoabe's statement was not available when a decision to prosecute was made on 16 January 2012, as his statement was made on 26 January 2012.

[35] The second defendant argued that there was a *prima facie* case against the plaintiff at the time the decision was made to prosecute in Linden case, because he was identified as a suspect during the identification parade, and he also made an admission implicating himself in the commission of the offences. I do not agree with this submission for the following reasons. *First*, the identification parade was held on 19 February 2012 after the decision to prosecute has been made. The plaintiff was identified as a suspect in the Rabie Ridge case and not Linden case. *Second*, the plaintiff's statement containing an admission was made on 2 February 2012, after a decision to prosecute has been made. His statement does not implicate him in the Linden case.

[36] It is clear from the Linden case docket that at the time the decision was made to prosecute the plaintiff, there were only two statements relating to him. They were W/O Hiepner's statement mentioning a red Renault, and the arresting officer, Motlalentwa's statement. Both these statements did not implicate the plaintiff on the offences he was charged with in the Linden case. There was no legal basis to charge the plaintiff with the relevant offences.

[37] I agree with the plaintiff's submissions mentioned in paragraph 29 above. There was no *prima facie* case against the plaintiff when a decision to prosecute in Linden case was made. In *Backenstrater v Rottcher and Theunissen*⁸ the Appellate Division remarked as follows:

⁸ 1955(1) SA 129 (A) 136DA-B cited more recently with approval in *Shabalala v Minister of Police and another* [2023] ZAMPMHC 6 (2 March 2023).

"[w]hen it is alleged that a defendant has 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 and disproves the existence, for the defendant, of reasonable and probable cause."

[38] I conclude that the second defendant did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offences charged with. The same reason of lack of evidence stated on the chargesheet for the withdrawal of charges almost 9 years after the decision to prosecute was made, should have been the reason for declining to prosecute the plaintiff in the Linden case. I find that the prosecution of the plaintiff by the second defendant was unlawful, unjustifiable and malicious. I hold the second defendant vicariously liable for unlawful, unjustifiable and malicious conduct of her employees in prosecuting the plaintiff in the Linden case.

Costs

[39] The general rule is that the costs follow the event. I find no reason to deviate from this rule. The plaintiff is successful in this action and is entitled to costs. I am satisfied that the involvement of two counsel for the plaintiff is justified.

Order

[40] The following order is made:

1. The issue of liability is separated from quantum in terms of Rule 33(4) of the Uniform Rules of Court.
2. The issue of quantum is postponed *sine die*.
3. The special plea of prescription is dismissed with costs.
4. The first defendant is liable for 100% of the plaintiff's proven damages for unlawful arrest and detention.

5. The second defendant is liable for 100% of the plaintiff's proven damages for malicious prosecution.
6. The defendants are ordered to pay costs of liability jointly and severally, one paying the other to be absolved.


MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 16 August 2024

Appearances:

On behalf of the plaintiff: Adv C Mokhare
 Ms V Rikhotso

Instructed by: Rikhotso MO Attorneys Inc

On behalf of the defendant: Adv FJ Nalane SC
 Adv D Linde

Instructed by: State Attorney, Johannesburg