



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 173/2022

**In the matter between
Tumelo Julias Mosia**

Plaintiff

and

Minster of Police

First Defendant

National Director of Public Prosecution

Second Defendant

Neutral citation:

Coram: Mahlatsi AJ

Heard: 29/11/2024

Delivered: 09 / 01 / 2025

Summary: Claim for damages – unlawful arrest and detention – malicious prosecution.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

Mahlatsi AJ

Introduction

[1] In this action, the plaintiff is claiming damages against the first defendant, the Minister of Police, and the second defendant, the National Director of Public Prosecutions, consequent to an unlawful arrest and detention of the plaintiff by members of the South African Police Service (SAPS) in Welkom, Free State, as in claim A, and in claim B, the public prosecutors both in the district and regional courts for having maliciously prosecuted the plaintiff by placing the matter on the roll, despite there having been no evidence pertaining to the plaintiff.

[2] The plaintiff in claim A is claiming R6 000 000, with interest, for *inter alia*, the unlawful arrest, impairment of dignity, loss of freedom, deprivation of his freedom of movement, pain and suffering, psychological trauma and humiliation he suffered as a result of the arrest and detention, with costs. In claim B, an amount of R1 430 000 is claimed for malicious prosecution, *contumelia*, deprivation of freedom and discomfort, with costs. Both the first and the second defendants oppose the claim.

The following facts are not in dispute:

[3] It is common cause that the plaintiff was arrested without a warrant of arrest on 22 April 2019 by SAPS at Thabong, Welkom, on allegations of murder, a Schedule 1 offence. He was detained at the police station and thereafter to court. The state opposed his bail

application and the matter was remanded on several occasions whilst incarcerated, prosecuted until he was ultimately discharged in July 2021.

[4] The following factors are to be decided:

- a) Was the arrest and detention of the plaintiff without a warrant of arrest lawful or not?
- b) Was the plaintiff maliciously prosecuted or not?
- c) It was agreed between the parties during their opening addresses that the plaintiff bore the onus to prove his claim for malicious prosecution and that the first defendant bore the onus to prove the lawfulness of the arrest and detention. In addition, it was also agreed during pre-trial that the plaintiff will be the first to commence with the leading of evidence since there was no separation in claims.

Evidence by the plaintiff

[5] The plaintiff testified that he was arrested on 22 April 2019 at his friend's place in Thabong, Welkom, at or around 3h00 to 4h00 in the morning. The police were looking for his friend Tefo who was asked about his whereabouts at the time of the incident. His response was that he was at church with the plaintiff. The police did not say anything to him but proceeded to handcuff Tefo and himself and took them away.

[6] The plaintiff further testified that he was only charged two days after his arrest and then taken to court. He made a warning statement to the police and confirmed his signature on it. The police man who took his statement spoke to him in Afrikaans and he did not understand the language.

[7] He further stated that he applied for bail, which was opposed on the basis that it was falling under Schedule 6. His bail application was not granted by the court. Furthermore, he failed to discharge the onus on his side to satisfy that exceptional circumstances existed for him to be released on bail. He was kept in custody until 9 July 2021 when he was discharged.

[8] He further stated that he was in custody awaiting trial and that the conditions in the cell were normal prior to the Covid-19 pandemic and the subsequent protocols that were implemented after the President of the Republic declared a state of emergency. The sleeping arrangements in the cell were in order, but after the Covid-19 pandemic, things were different as he and other inmates had to share blankets whilst others were sleeping on the floor. He did not prefer the food given to them whilst in the cell and contended that the food made him sick. He had ulcers as a result. However, he does not have any medical proof for the alleged symptoms.

The plaintiff further stated that his arrest exerted an influence on his social standing as the neighbours started calling him a killer. The people in his area lost trust in him. In addition, he denied under cross-examination that there was an eyewitness that identified him at the scene and that the police had a reasonable suspicion that he committed an offence. Furthermore, he denied that the police informed him of the reasons for his arrest. He could not give the police his alibi because he was surprised on his arrest. He consulted his attorney after his release as he realised that his position in life has changed dramatically since he was arrested.

[9] The plaintiff closed his case and no other witnesses were called.

Evidence for the first defendant:

[10] The first witness is Mashoboto Simon Masooa, who testified that he is a SAPS sergeant with twenty years' service. On 13 April 2019, he was on-duty and conducted a patrol, which ordinarily formed part of standard crime-prevention duties. He received a complaint through the radio control about a fight that was taking place at a local cemetery. He drove to the cemetery and as he was approaching, he saw people running between the trees with knives. He gave chase, but to no avail. He continued on towards the cemetery and when he arrived, he saw a man who had fallen on his face and appeared to have been stabbed. Whilst he was standing there, a Toyota sedan arrived and a person by the name of Mr Majoro alighted from the vehicle. Mr Majoro reported to him that there

was another person who was stabbed inside the cemetery. Furthermore, Mr Majoro reported that he saw one Smanga and one Senati stabbing the deceased.

[11] Sergeant Masooa also discovered that the victims who were stabbed were gang members. He then called the Vispol Commander who is a second in command at Thabong Police Station. He also called the investigating unit, the paramedics and forensic unit. The paramedics arrived and certified both victims as dead. The Public Order Policing Unit also arrived at the scene. Sergeant Masooa accompanied them to the nearby houses to obtain information about the incident. The Public Order Policing Unit managed to get information about the people involved.

[12] The second witness is Warrant Officer (W/O) Olivier, who is the investigating officer in this matter and was also involved with the arrest of the plaintiff and other suspects on 22 April 2019. When effecting arrest, the plaintiff was informed of the charges as well as the date and time of the incident.

[13] W/O Olivier testified that on the date of the incident, he was called to the scene. He was informed about the incident and about the suspects. He took a statement of one Mr Thys, which is exhibit 'B', who identified the plaintiff as 'Zebe', together with 21 other suspects. He further testified about the arrest of the plaintiff and several suspects for the double murder at the cemetery, which was effected through the involvement of an intelligence driven operation by the Tactical Response Team. This resulted in an arrest of 11 suspects including the plaintiff who was also known as 'Zebe'. Zebe is a known International Junia Portuguese gang member, who was previously arrested under that name.

[14] The plaintiff was taken to court for his first appearance on 24 April 2019 and the docket was handed over to the prosecutor. The prosecutor requested a remand in terms of s 50(6) of the Criminal Procedure Act 51 of 1977 (CPA) for further investigation.

[15] W/O Olivier further stated that, during the bail application by the plaintiff, he testified in opposing the bail. The magistrate did not grant the bail because there were no exceptional circumstances at hand.

[16] He also testified that after outstanding information was obtained, the case was transferred to the regional court for trial. He subpoenaed the state witnesses and personally transported the witnesses to court. He was informed on the last day of the trial that there was a plea agreement between the state and three of the accused, together with their legal representatives. The other accused, together with the plaintiff, were then acquitted on the charges. Furthermore, he testified that if all the state witnesses testified, all the accused would have been convicted. He continued by indicating that there was reference to 'Zebe' in the docket, such referring to one Tumelo Mosia. The document reflecting that information was an official document from the Criminal Record Centre. He drew that document from the Criminal Record Centre for purposes of the trial and it was recorded as exhibit 'D'.

[17] The first defendant closed his case. No further evidence was led.

[18] After the plaintiff's case, the second defendant made an application for absolution with costs. Counsel for the second defendant argued that there was no evidence against the second defendant and that there was no way that the court could find against the second defendant because the plaintiff's evidence was not enough to prove that the prosecution was motivated by maliciousness.

[19] Counsel for the plaintiff opposed the second defendant's application for absolution, contending that the prosecution set the law into motion after the docket was received from the first defendant's witness. Furthermore, the second defendant's application did not hold water in that in the evidence before court contained no proof about Tumelo Mosia in the witness statement.

[20] Having heard both counsels' argument on the second defendant's application for absolution, I have noted on record the evidence led by the plaintiff as well as the

authorities referred to by Counsel. I proceeded to dismiss the application for absolution from the instance.

Evidence for the second defendant:

[21] The first witness is Ms Donan, who testified that she serves as a control prosecutor for the Welkom District Court. Upon receiving the docket from the police, on first appearance, she read the docket to determine whether all the elements were present and whether the person could be, prima facie, linked to the offence, thereby justifying having the matter enrolled. After applying her mind to the facts set out in the docket, she proceeded with prosecution of the case as there were witness statements linking the accused to the offence. Furthermore, she consulted with the investigating officer for bail purposes and was satisfied that sufficient evidence existed to prosecute the matter.

[22] Furthermore, she testified that she did not know the plaintiff and had she known him, she would have requested someone else to deal with the matter. She opposed the bail as it was a Schedule 6 offence. There were about 17 accused and more than one attorney were involved.

[23] She denied ever exhibiting a malicious attitude toward the plaintiff and insisted that there was evidence linking the plaintiff to the commission of the offence. If there was something missing in the case, she would have picked it up, alternatively, the regional court prosecutor would have noticed. She testified that there was enough reason or cause to enrol the matter. She also stated that, if there had been no evidence linking the accused, the case would have been withdrawn against the accused.

[24] The second witness is Mr Radebe, who retired in July 2024. He worked for the National Prosecuting Authority as a regional court prosecutor in Welkom. He testified that he received the docket to peruse. There were multiple accused in this matter and he had to consider statements linking the accused to the incident. He cannot specifically remember each of the accused.

Similar to the position expressed by Ms Donan, he did not know the accused and if he knew him, he would not have dealt with the matter. He denied any malicious intentions against the accused and submits that he was merely guided by the docket. There was a prima facie case to proceed with prosecution. The prosecution had reasonable and probable cause to prosecute. Furthermore, he testified that there was a witness statement at p 159 of bundle which mentioned the plaintiff's name. The investigating officer, in his statement, also clarified the plaintiff's name.

[25] Furthermore, he denied that charges were withdrawn against the plaintiff stated that the plaintiff and others were found not guilty.

Applicable law:

[26] The law on unlawful arrest and detention is set out in terms of legislation. Section 12(1)(a) of the Constitution Act 108 of 1996 provides:

'Everyone has a right to freedom and security of the person, which includes the right –

a) Not to be deprived of freedom arbitrarily or without just cause;'

Furthermore, s 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that:

'A peace officer may without a warrant, arrest any person

...

whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping lawful custody'.

[27] In *Minister of Law and Order and Others v Hurley and Another*¹ the Court held: '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.'²

[28] In *Shaaban Hussein and Others v Chong Fook Kam*,³ Lord Devlin held the following:

'Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is

¹ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A)

² *Ibid* at 589E-F.

³ *Shaaban Hussein and Others v Chong Fook Kam* [1969] UKPC 26; [1969] All ER 1626.

lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end . . . *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all . . . Suspicion can take into account also matters which although admissible could not form part of a *prima facie* case.’⁴

[29] In *Biyela v Minister of Police*⁵ (*Biyela*) Musi AJA stated:

‘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. The standard of a reasonable 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 articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively. What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on the 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.’⁶

[30] In *Groves NO v Minister of Police*⁷ the Constitutional Court held:

‘The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.’⁸

The Court continued:

⁴ Ibid at 3-4.

⁵ *Biyela v Minister of Police* [2022] ZASCA 36.

⁶ Ibid paras 33-35.

⁷ *Groves N.O. v Minister of Police* [2023] ZACC 36; 2024 (1) SACR 286 (CC).

⁸ Ibid para 52.

'Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgement. Police officers exercise public powers in the execution of their duties and [r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then.'⁹

[31] Section 60(11)(a) of the CPA provides:

'Notwithstanding any provision in this Act, where an accused is charged with an offence—
(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.'

[32] In *Petersen v S*¹⁰ it was held that exceptional circumstances are indicative of something unusual, extraordinary, remarkable, peculiar or simply different.¹¹

The law on malicious prosecution

[33] In *Minister of Justice and Constitutional Development v Moleko*¹² (*Moleko*) the Supreme Court of Appeal held:

'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

1. That the defendant set the law in motion (instigated or instituted the proceedings);
2. That the defendant acted without reasonable and probable cause;
3. That the defendant acted with malice (or *animo injuriandi*); and
4. That the prosecution has failed. . . .'¹³

[34] In *Magwabeni v Liomba*¹⁴ the Court held that: 'Malicious prosecution consists [of] the wrongful and intentional assault on the dignity of a person encompassing his good

⁹ Ibid para 60.

¹⁰ *Petersen v S* [2008] ZAWCHC 11; [2008] 3 All SA 301 (C)

¹¹ Ibid para 55.

¹² *Minister of Justice and Constitutional Development v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA).

¹³ Ibid para 8.

¹⁴ *Magwabeni v Liomba* [2015] ZASCA 117.

name and privacy.¹⁵

[35] In this case, counsel for the plaintiff and counsel for both the first and second defendants submitted their written heads of arguments. Counsel for the first defendant submitted her heads of argument out of time with reasons explained as in the heads and same is condoned.

[36] Counsel for the plaintiff contended that the testimony of W/O Olivier was inadmissible hearsay and that the first defendant did not discharge the onus that the arrest and detention was lawful. Furthermore, the plaintiff has discharged the onus that the prosecution had started prosecution against him without probable cause and with malice as there was no evidence that the plaintiff was linked to the offence and, as such, the case was withdrawn against him.

[37] Counsel for the first defendant, on the other hand, submitted that all the jurisdictional factors of s 40(1)(b) were satisfied, triggering the arresting officer's discretion to arrest, which discretion was properly exercised, whilst counsel for the second defendant also submitted that the plaintiff failed to discharge the onus placed on him to prove the requirement for a claim based on malicious on balance of probabilities.

[38] In a civil case, the standard of proof is proof upon a balance of probabilities. Proof of a fact means that the court has received probative material with regards to such a fact and has accepted such a fact as being the truth for the purpose of the specific case. However, evidence of a fact is not yet proof of such fact, as the court must still decide whether or not such fact has been proved in accordance with the standard of proof required.

[39] I first discuss the issue of the unlawful arrest and detention, namely whether the first defendant discharged the onus that the said arrest and detention was lawful or not.

[40] Sergeant Masooa's evidence was formal in nature and gave a background of the incident of the two murders at the graveyard. His evidence cannot be criticised in any way. I found it credible and reliable.

¹⁵ Ibid para 9.

[41] W/O Olivier's evidence is what followed from Sergeant Masooa's evidence. He did the investigation based on that. When he was at the scene, he spoke to the witnesses about the incident and took the statement of Mr Thys that led him to the plaintiff (Tumelo Mosia) as mentioned by him as one of the perpetrators. He followed Mr Thys' information and he also knew the plaintiff from a previous incident and knew he went with the nickname Zebe. He previously arrested the plaintiff with that nickname and that nickname appeared on the records of the plaintiff. He went to the plaintiff's home searching for him. He found the plaintiff at the friend's place and arrested him.

[42] Counsel for the plaintiff submitted in his heads of argument that what W/O Olivier said about the plaintiff's nickname, Zebe, is hearsay evidence and cannot be used in court. I not agree with him because W/O Olivier testified that he knew the plaintiff by that nickname and it appears on the SAP69 admitted as exhibit 'D' to this court.

[43] With the principles set out in *Biye/a*, W/O Olivier's testimony, in my view and objectively speaking, with the information he compiled from the scene and the statement of Mr Thys linking the plaintiff to the offence within the ambit of s 40(1)(a) of the CPA, reasonably suspected the plaintiff with the commission of the offences in this matter. W/O Olivier made a good impression when testifying before this Court. He did not show any bias for or against the accused. In my opinion, his evidence is not contradictory and it cannot be criticised in any way. He based his evidence on the investigation he made. Accordingly, I find W/O Olivier's evidence credible and reliable.

[44] I have not lost sight of the fact that the plaintiff denied the allegations against him. He also testified that, he did not provide the police with an alibi because it was his first time to be arrested. If he did, as an exculpatory statement, that could be included in the investigation by W/O Olivier in his exercise of his discretion whether to arrest or not.¹⁶

[45] At the conclusion of the evidence led before the court was the issue of the lawfulness or otherwise of the arrest and detention of the plaintiff. I agree with the submission by the counsel for first defendant that all the jurisdictional factors of s 40(1)(b) was exercised properly, which triggered W/O Olivier's discretion to arrest the plaintiff. Thus, the first defendant's evidence, on balance of probabilities, succeeded in

¹⁶ Footnote 7 para 52.

discharging the onus to prove that the plaintiff's arrest and detention was lawful.

[46] The second issue of malicious prosecution was mainly directed at the second defendant. The onus of proof rests on the plaintiff to prove that the prosecution instituted the proceedings against him without probable cause and with malice.

[47] Counsel for the plaintiff submitted that for the purpose of his argument. His focus is on the second and third element or requirement, namely 'reasonable or probable cause' and 'malice', as set out in *Moleko*. He further submitted in his heads of argument (para 54) that, the plaintiff does not have to prove spite or ill will on the part of the defendant. The fact that the prosecutor had no reasonable or probable cause for the prosecution may, in the appropriate case, justify an inference that he was actuated by malice.

[48] He also submitted that on the evidence of Ms Donan and that of Mr Radebe, both could not show how the plaintiff was linked to the offence. Instead, Mr Radebe pointed out the statement of Mr Thys who did not mention the plaintiff by name nor was clarity sought from Mr Thys as to who Zebe was.

[49] Counsel for the second defendant submitted that the Plaintiff failed to discharge the onus on him to prove malicious prosecution on a balance of probability. She further submitted that counsel for the plaintiff was correct to refer to *Moleko* on the second and third requirement: 'reasonable or probable cause and malice'. Furthermore, the plaintiff's counsel appreciates there is an evidentiary burden on the plaintiff to prove an absence of reasonable or probable cause, which the plaintiff failed to do.

[50] The evidence of Ms Donan was based on her actions after receiving the docket from the investigating officer. She consulted with the investigating officer and was satisfied that a triable case against the plaintiff existed. She successfully opposed a Schedule 6 bail application by the plaintiff whereafter the matter was transferred to the regional court, and it was established that she did not bear any knowledge of the plaintiff's identity during this time.

[51] Mr Radebe also testified that after consulting with W/O Olivier, he was satisfied that the plaintiff was linked to the offence from the statement of Mr Thys. The plaintiff was separated from the other accused because of the plea agreement with the other

accused. On the directive of the senior prosecutor, the case was withdrawn against the plaintiff and others.

[73] Both Ms Donan and Mr Radebe made a good impression upon the court. They were open with the court and where necessary, both told the court what they did not recall without committing themselves on any aspect. They both explained why they did not recall some of the aspects as the matter happened a long time ago. Both Ms Donan and Mr Radebe were credible and reliable witnesses.

[74] I agree with counsel for the second defendant that the plaintiff failed to discharge the onus to prove a claim on malicious prosecution. The prosecution had probable cause to prosecute the plaintiff based on the information presented by the investigating officer which was *prima facie* proof that the plaintiff was linked to the offence as discussed above on the arrest and detention of the plaintiff.

[75] Consequently, the plaintiff's claim for unlawful arrest, detention and malicious prosecution stands to be dismissed.

[76] I accordingly make the following order:

The plaintiff's claim is dismissed with costs.



MAHLATSI AJ

Appearances

For the Plaintiff:

Adv Bahlekazi

Instructed by:

AG Sefo Attorneys
C/o Mlozana Attorneys

For the first defendant:

Adv Nhlapo-Merabe

Instructed by:

State Attorney

For the second defendant:

Adv Phakama

Instructed by:

State Attorney