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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CONSOLIDATED CASE NUMBERS: 13983/2013P

[186/2014P]

[198/2014P]

In the matters between:

SINOVUYO LISOLETHU MGOYI

First Plaintiff.

NAMHLA NOMKUCA

Second Plaintiff.

SANDILE MAPHINGANA

Third Plaintiff.

And

NATIONAL MINISTER OF POLICE

First Defendant.

NATIONAL DIRECTOR OF

PUBLIC PROSECUTION

Second Defendant.

JUDGEMENT

VAN ZYL, J.:-

[1] The three individual plaintiffs initially each instituted separate claims against the defendants, respectively the Minister of Police and the National Director of Public Prosecutions, for damages arising from alleged wrongful arrest, detention and prosecution. These actions were later consolidated into a single action on 12 May 2015 under case number 13983/2013P and the costs of the application for consolidation were ordered to be costs in the consolidated action.

[2] Prior to the commencement of the trial the parties agreed that the issue of liability be separated in terms of Rule 33(4) and be dealt with at the outset and that the determination of the quantum of any damages would be held over for decision at a later stage. An order to that effect was made by consent.

[3] At the inception of the consolidated trial the matter stood down and the parties eventually reached agreement upon certain of the factual disputes, as recorded in a document headed “Common Cause Facts” and filed off record.

[4] As a result the identities of the parties were admitted. It also became common cause that a group of six, including the three plaintiffs, were arrested by police officers during the early hours of 17 May 2013 in Anton Lembede (formerly Smith) Street, Durban, KZN. They were subsequently detained at the Westville Police station and appeared in the Pinetown Magistrate’s Court on 20 May 2013, where they were remanded in custody to 27 May 2013 when charges were withdrawn and they were released. At issue remains whether such arrest, detention and prosecution were lawful.

[5] The events which preceded the arrest of the plaintiffs occurred during the evening of May 16th at about 19h30 when armed assailants robbed householders at 2 Homestead Road, Westville, KZN. Property taken during this event included two

vehicles, being a silver grey Toyota Hilux double cab bakkie with registration number ND 7[...] and an Izuzu double cab bakkie with registration number ND 6[...].

[6] At about 00h30 during the morning of 17 May 2023 the police were contacted by, what was referred to as the “Camera room”. In context this referred to an observation post which monitored a network of security cameras in central Durban, but not being part of the South African Police service. During the course of the evidence of the defense witness Mr Miloszewski he referred to the “Metro Police”, presumably the Ethekwini Metropolitan municipal police, having identified the Toyota vehicle on the CCTV footage. According to the statement of agreed facts the information was passed on by one Cyprian Vusi Mpili, apparently the camera room operator, to Sergeant Pranesh Manilal of the police uniform branch and a member of the motor accident unit who was on patrol in the area.

[7] The information conveyed was to the effect that a suspicious Toyota Hilux, without number plates, was parked in Smith Street, across from the Caltex garage and that a group of six males had alighted from the vehicle. Because Sgt Manilal was alone, he called for assistance, as a result of which Sgt Bates of the police flying squad and who was also on patrol in the vicinity, diverted and the two police vehicles arrived at the scene in Smith Street at approximately the same time.

[8] Upon arrival Sgt Manilal said that he observed a number of males in the immediate vicinity of a silver Toyota Hilux double cab without registration number plates and a particular individual, wearing a yellow T-shirt, push or throw something under a gold coloured Volkswagen Polo, which was parked near the Toyota. He apprehended the individual concerned who, it is common cause, was the third plaintiff. Upon investigation he found the object under the Polo to be a key, or keys. He took the keys to the Toyota, found the key fitted the vehicle which he then started, using the key. Radio enquiries made by the police from the scene established that the Toyota was indeed one of the vehicles taken during the Westville robbery the previous evening.

[9] The third plaintiff's evidence regarding the finding of the keys of the Toyota differs from that of Sgt Manilal, in that he said that he was part of a group of six persons and was walking in the direction of the police, after the arrival of the latter. Whilst walking he was conversing with another person also at the scene and in the process his foot kicked something lying on the ground, although he was unaware of what the object was that he had kicked. This version contrasts with the document containing the agreed common cause facts and where, in paragraph 7, it was recorded that Sgt Manilal had arrested the third defendant having observed him "pushing" something under the gold Polo motor vehicle.

[10] The information received by the police from the camera room also indicated that the driver of the Toyota was a male wearing a blue dust coat. It is common cause that the person thus described was one Sipho Goodwill Majiya. In the circumstances the entire group of six individuals, allegedly associated with the Toyota and including the plaintiffs and Majiya, were arrested by the police without reliance upon a warrant of arrest.

[11] It is common cause that the arrestees were taken to the Westville Police Station during the early hours of Friday May 17th, charged with involvement in the Westville robbery of the previous evening and detained in custody. There they all elected to remain silent and not to make any written statements regarding the matter.

[12] On Monday the 20th May 2013 the group, including the three plaintiffs, appeared before a magistrate in the Pinetown Magistrates' Court charged with housebreaking with intent to rob and robbery with aggravating circumstances. There they were remanded in custody for one week to 27 May 2013. At that time the case docket contained no statements directly implicating any of the suspects in the Westville robbery incident, but at that early stage the matter was still under investigation.

[13] Subsequently and upon the next court appearance of the group, the charges against the three plaintiffs were withdrawn and they were released from custody. In the result they had been detained from their arrest during the early hours of Friday May 17th to Monday May 27th, 2013.

[14] Whilst the defense witnesses Sgt Manilal and Sgt Bates had given evidence on behalf of the first defendant Mr Stanley Mark Miloszewski, the relevant public prosecutor who primarily dealt with the matter, was called to the stand on behalf of the second defendant. His evidence was that on 20 May 2013 he had been present with the prosecutor Mr Dlungwane in the Pinetown reception court where the defendants appeared. He had perused the docket and prepared the charge sheet. He stated that he attended the hearing in order to retrieve the docket without delay after the matter was dealt with in court.

[15] During the court proceedings on that day the accused elected to apply for legal aid, which was granted and when the matter was postponed for one week to May 27th for further investigation they were legally represented by Ms Ndlovu. According to the court record the state was opposed to bail at that stage, but no formal bail application was made.

[16] In explaining the reasons for the adjournment requested by the prosecution Mr Miloszewski said that there were still outstanding statements to be taken from witnesses relevant to the Westville robbery, arrangements needed to be made for an identification parade to be held and the prosecution needed to review the video record, referred to as the CCTV footage, of the events upon which the camera room had based its reports prior to the arrest of the suspects.

[17] Mr Miloszewski said that, at that stage, he was of the view that there was a *prima facie* case justifying the detention of the various accused, pending the further investigations envisaged. He emphasized in this regard the fact that the accused had

been found with the Toyota taken during the robbery some four and a half hours earlier and had all declined to make any statements which might have explained their presence.

[18] He confirmed that thereafter witness statements were taken from the complainants relevant to the robbery, including an elderly parent who was a visitor at the time and that identification parades were held on May 23rd when witnesses attended. During these parades one person pointed out accused four, being the second plaintiff and one person pointed out two persons not being any of the accused.

[19] During this period the investigating officer had confirmed the addresses of the various accused. The CCTV footage apparently did not show who was in the Toyota prior to its arrival in the area of the Caltex garage. Mr Miloszewski stated that he requested access for himself to the CCTV footage, but for reasons unclear to him this was never provided. Although Mr Miloszewski said he found it suspicious that the six accused had been found in the immediate vicinity of the recently stolen Toyota and he had worked on the matter together with the investigating officer during the adjournment week, by May 27th it was clear to him that there was insufficient evidence to justify continued proceedings against all but Sipho Goodwill Majiya, who had been identified as the driver of the Toyota and who was accused 1 before court.

[20] In the result and when the matter again came before court on 27 May 2013, Mr Miloszewski himself appeared as the public prosecutor and the charges were provisionally withdrawn against the remaining accused, which included the three plaintiffs.

[21] The plaintiffs claim damages as against the first defendant based upon allegations of unlawful arrest and detention and as against the second defendant by reason of the failure of the prosecution to *“conduct an enquiry for the release of the plaintiffs on bail in order to avoid plaintiffs’ further detention subsequent to the first*

court appearance” while foreseeing that the plaintiffs would suffer harm if the matter were postponed.

[22] The first defendant pleaded that the members of its force had formed a reasonable suspicion that a scheduled offence had been committed and relied upon the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) for justification in this regard.

[23] The first defendant’s plea amounts to a defence of confession and avoidance. As such it attracts the onus to establish justification, namely for the lawfulness of the arrests in terms s 40(1)(b) of the CPA on a balance of probabilities (*Minister of Safety & Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA), para 6).

[24] The relevant portions of section 40 of the CPA reads, as follows:

40 Arrest by peace officer without warrant

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

(a);

(b) whom he reasonably suspects of having committed an Offence referred to in Schedule 1,;

[25] It is apparent that s40(1)(b) requires the following jurisdictional facts to justify an arrest without a warrant, namely that the arresting officer must be a peace officer, he or she must entertain a suspicion, which must be that the suspect (being the arrestee) committed an offence referred to in Schedule 1 of the CPA and which needs to be based upon reasonable grounds. Once these jurisdictional facts have been established the arrestor has a discretion whether or not to carry out an arrest.

[26] It was not in dispute that the arresting police members were peace officers, that they formed a suspicion, or that the offences charged against the plaintiffs fell into Schedule 1 of the CPA. What was in dispute was whether the relevant members of

the first defendant's force could, in all the circumstances, have harboured any reasonable suspicion as against the plaintiffs for having committed such offence, or any competent verdict thereon.

[27] In the present matter Sgt Manilal and Sgt Bates, the two police officers involved, had been informed by the Camera room, apparently part of the EThekweni Metro Police force, that six males had been observed alighting from a suspicious Toyota double cab without registration plates. Upon arrival at the scene where the vehicle was parked they found six males in the immediate vicinity of the Toyota. By checking details of the vehicle through radio communication from that location they had established that the Toyota had in fact been taken during the Westville robbery the previous evening.

[28] Of the six males present the police members were informed that the individual in the blue dust coat, later identified as Sipho Goodwill Majiya and who was accused 1 in the magistrates' court proceedings, had been the driver of the Toyota and another member of the group, wearing a yellow T-shirt and who it is common cause was the third plaintiff, had been observed pushing or throwing something under a gold coloured Volkswagen Polo, which was parked near the Toyota. The object thus disposed of was retrieved and turned out to be the keys of the Toyota, thus creating the impression that he was trying to hide evidence from the police.

[29] The six suspects all declined to make any statements or to explain their presence at the scene where the stolen Toyota was parked. In the result they formed the suspicion that the six individuals may have been involved in the Westville robbery and/or the theft of the Toyota and relying upon the provisions of section 40(1)(b) of the CPA placed all six under arrest and detained them pending further investigation and their appearance in the Pinetown Magistrates' court.

[30] The question then is whether the suspicion formed by the police members was reasonable in these circumstances? In *Minister of Safety & Security v Tyokwana* 2015 (1) SACR 597 (SCA) at para 11 Fourie AJA held that:

“Suspicion, by definition, means absence of certainty. As was explained in Minister of Law and Order v Kader 1991 (1) SA 41 (A) at 50H, it ‘is a state of conjecture or surmise where proof is lacking. . . . Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end’.”

[31] The reasonableness of a suspicion by an arresting officer acting in terms of s40(1)(b) should be approached objectively. At issue is therefore whether a reasonable person, faced with the same set of facts or state of knowledge, would have formed a suspicion that a person has committed a Schedule 1 offence (*Minister of Safety and Security & Ano v Swart* 2012 ZASCA 16 at para 20).

[32] The nature of the plaintiffs’ claims against the second defendant is based upon alleged malicious prosecution. As such the nature of their claim is to be found in the *actio iniuriarum*. The approach by the plaintiffs appears to rely upon the prosecution’s request to the magistrate for the postponement of the case against the six accused for one week, pending further investigation and prior to then withdrawing charges against the plaintiffs upon their second appearance, on May 27th. Instead, so it was contended, the charges should either have been withdrawn at the outset, or the plaintiffs should have been released on bail on May 20th during their first appearance before the magistrate.

[33] In terms of s35(1) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), the prosecuting authority is accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions. It follows that the position of the second defendant in relation to the plaintiffs is independent from and unrelated to that of the first defendant.

[34] It is apparent from the court record that the prosecution would have opposed any bail application, if brought on behalf of any of the accused at their first appearance on May 20th. However, no formal bail application was brought at that time, or thereafter. As indicated above, the plaintiffs' based their complaint in this regard upon the assertion that the prosecution should at that stage have conducted an enquiry into the desirability of releasing the accused persons, including the three plaintiffs, on bail in order to avoid plaintiffs' further detention and the harm that would cause them.

[35] A plaintiff in a claim based upon malicious prosecution needs to allege and prove that the prosecution, here by the second defendant, set the law in motion by instigating or instituting the criminal proceedings, that in so doing the second defendant acted without reasonable and probable cause and with malice or, put differently, with *animo injuriandi* and that the prosecution has failed. In the present matter the ultimate requirement was satisfied when the charges against the defendants were withdrawn on May 27th.

[36] There was no suggestion that in the prosecution of the defendants the prosecutor concerned, being Mr Miloszewski, had acted with any impermissible ulterior motive. His explanation for the requested postponement of the matter for one week included obtaining witness statements, arranging for identity parades and to consider the evidential value of the alleged CCTV footage of events preceding the arrest of the suspects.

[37] The charge involved housebreaking and robbery with aggravating circumstances, which was of a serious nature and upon the preliminary information available at the stage of their first appearance, the plaintiffs had a *prima facie* connection with the Toyota vehicle taken as part of the robbery less than five hours prior to their arrest. In any event, since a motor vehicle was taken within the contemplation of Schedule 6 of the CPA, s60(11) of the CPA would have required of

the defendants to have adduced evidence which satisfied the court that exceptional circumstances existed justifying their release on bail. They did not do so.

[38] It was also not in dispute that the prosecution, having considered the docket and whatever information was orally imparted by the investigation officer, instigated the prosecution by drawing the charge sheet and placing the matter on the roll for hearing. The question remaining is then whether in so doing the prosecution acted without reasonable and probable cause and with malice.

[39] In *Minister for Justice & Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) at para's 61-62 it was held, relying upon the earlier decision in *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) at para 5, that malice, in the context of the *actio iniuriarum*, effectively relates to intention and as such means *animus injuriandi*. A plaintiff therefore needs to allege and prove the defendant's intention to injure, which may take the form of an actual intention (*dolus directus*) or a legal intention (*dolus eventualis*). It follows that *animus injuriandi*, and not malice, must be proved before a defendant can be held liable for malicious prosecution as an *injuria*.

[40] It was further explained (at para 63) that *animus injuriandi* meant that the defendant directed his will to prosecuting the plaintiff, thus causing him harm, whilst knowing that reasonable grounds for the prosecution were actually or possibly absent. Accordingly, he was conscious of the actual or possible wrongfulness of his conduct in so doing. However, the defendant will not be held liable in an instance where, while reasonable grounds for the prosecution were lacking, the defendant honestly but mistakenly believed that there were reasonable grounds for the prosecution. In such an event the second element of *dolus*, namely of consciousness of wrongfulness and therefore *animus injuriandi*, would be lacking and the error would exclude the existence of *animus injuriandi*.

[41] The court concluded that a defendant must therefore not only have been aware that what he or she was doing in instituting or initiating a prosecution, but must in addition at least have foreseen the possibility that he or she was acting wrongfully. In continuing so to act the defendant would then be reckless as to the consequences of his or her conduct (*dolus eventualis*). Mere negligence, or even gross negligence, on the part of the defendant is insufficient to establish the existence of *animus injuriandi*.

[42] The National Prosecuting Authority Act 32 of 1998, is the Act of Parliament contemplated in s179 of the Constitution, 1996. In terms of s20(1) thereof members of the prosecuting authority have the power and duty, within their respective areas of authority and competence, to institute, conduct, or discontinue criminal proceedings on behalf of the State. They are in addition empowered to carry out any necessary functions incidental to the institution and conduct of such proceedings.

[43] From the evidence it was clear that Mr Miloszewski, the prosecutor *in casu*, had formed the opinion, based upon the facts and circumstances as known to him on May 20th, that there was a reasonable suspicion or possibility that the various accused, including the three plaintiffs, may have been involved in the Westville housebreaking and robbery, but that the matter needed further investigation to clarify the factual position. Hence the request for the one week postponement of the matter.

[44] It is further evident that during that postponement period Mr Miloszewski, together with the investigating officer, actively pursued the investigation, as a result of which he was able to conclude when next the matter came before the magistrate that there was insufficient evidence to justify the further detention of the plaintiffs. In the result the charges against them were then provisionally withdrawn.

[45] In terms of the case, as pleaded by the plaintiffs in paragraph 9 of the amended particulars of plaintiffs' claim, the prosecution was at fault in (1) not informing the magistrate at the outset that there was "no case against the plaintiffs", so as to enable

the magistrate to release the plaintiffs, (2) not reading the case docket and thus determining that there was insufficient information connecting the plaintiffs to the charges as preferred against them and (3) in failing to “discharge its statutory duty to conduct an enquiry for the release of (the) plaintiffs on bail in order to avoid (the) plaintiffs’ further detention subsequent to the first court appearance”.

[46] The first two averments overlap and contradict each other to some extent. The first assumes that Mr Miloszewski at the stage of the first appearance of the accused already knew that the state would be unable to establish the guilt of the defendants and the second that he had failed in his duty to read the docket prior to enrolling the matter.

[47] However, it is clear that Mr Miloszewski could not have formulated the charge without having familiarized himself with the docket contents and that he would in addition probably also have orally discussed the state of the investigation with the investigating officer. For the reasons already dealt with above he had formed the opinion that *prima facie* at that early stage there was reasonable and probable cause to initiate prosecution, subject to the need for further investigation. In the result there is no merit in the first two grounds of alleged misconduct as pleaded by the plaintiffs.

[48] The third ground as pleaded purports to place upon the prosecution the duty to conduct some form of enquiry “*for the release of the plaintiffs on bail*”. As already indicated, in terms of s60(11)(a) read with Schedule 6 of the CPA, the duty to bring any bail application rested upon them. Because the charge involved a robbery during which a motor vehicle was taken, the plaintiffs attracted the duty to persuade the Court that “exceptional circumstances” existed which, in the interests of justice, would have permitted their release on bail (*S v Mbaleki and Another* 2013 (1) SACR 165 (KZD) at par 11). In the event there is no substance in the third ground as pleaded by the plaintiffs.

[49] Where a criminal matter is in its very early stage, such as at the first appearance in court, the nature and extent of the available evidence is often mostly still unclear. It is invariably necessary to postpone the matter for further investigation. In most instances it would be unreasonable to expect of the prosecution, at that early stage, to be able to make a definitive assessment of the eventual strength of the evidence which would be available to it once the matter has been fully investigated.

[50] In the present matter there was, for the reasons dealt with above, sufficient information for the prosecution to form the opinion that *prima facie* there was reasonable and probable cause to institute and proceed with the prosecution of the plaintiffs subject, of course, to the results of the further investigations then envisaged. These investigations were efficiently and promptly pursued and resulted in the withdrawal of charges at the second court appearance.

[51] Insofar as the evidence of the first and third plaintiffs is concerned, I did not find them to be impressive witnesses. However, their evidence and the quality thereof is of lesser importance in arriving at conclusions critical to the decision of the issues in dispute in these proceedings.

[52] I was however favourably impressed by the evidence of the defense witnesses. The two police officials both presented their evidence in a confident and straight forward manner. They were both uniform members of the police force, but serving on patrol in different units and merely became involved in this matter when Sgt Bates responded to a call for assistance by Sgt Manilal. Their evidence was to the effect that they had, in the circumstances already discussed, formed a reasonable suspicion that a scheduled offence had been committed, thus giving rise to the arrest and detention of the suspects which included the three plaintiffs. I found them credible witnesses and insofar as their evidence is in conflict with evidence given by the two plaintiffs, I have no hesitation in preferring the evidence of these witnesses on behalf of the first defendant.

[53] It was not in dispute that the arresting officers were peace officers, or that an offence referred to in Schedule 1 of the CPA had reportedly been committed. At issue with regard to the first defendant is whether, objectively assessed, the arresting officers reasonably formed a suspicion that those present at or near the stolen Toyota may have been involved in the commission of the reported offence. Both Sgt Manilal and Sgt Bates claimed that they *bona fide* formed and held such suspicion and as a result, in the exercise of their discretion, arrested and detained the suspects pending further investigation and their appearance in court.

[54] I have no difficulty in accepting their evidence and consider that the suspicion they formed at the time was reasonably justified in the circumstances and in the light of the information then at their disposal. In my judgment the first defendant has successfully discharged the duty to demonstrate on a preponderance of probabilities that the arrest and detention of the suspects, including the plaintiffs, was lawful. It follows that the plaintiffs' claims for damages as against the first defendant and based upon based upon allegations of unlawful arrest and detention must fail.

[55] The public prosecutor Mr Miloszewski was the sole witness for the second defendant. I was particularly favourably impressed by him as a witness. Like the witnesses for the first defendant, he gave his evidence in a straight forward manner. He was articulate, astute and gave every impression of a public servant dedicated to performing his duties as promptly and efficiently as possible. Whilst he readily conceded that at the stage of the first appearance of the plaintiffs the available evidence was not conclusive of their guilt, he promptly identified the areas of investigation which were to be pursued and in fact efficiently pursued these during the weeklong postponement of the matter. Statements were taken, identification parades held and attempts made to access the CCTV video recording. By the end of that week he was able to critically assess the nature and extent of the available evidence, conclude that continued proceedings as against the plaintiffs were no longer justified and promptly withdrew the charges against them at their second court appearance.

[56] In terms of the evidence of Mr Miloszewski he held the view, at the time of the first appearance of the plaintiffs, that *prima facie* there was sufficient reasonable and probable cause for the prosecution of the plaintiffs, pending the postponement of the matter and subject to the results of the further investigations envisaged. I cannot fault his approach in this regard. In my view he was justified in seeking the postponement of the matter and would have been justified opposing any bail application, had any been made at that stage.

[57] Even if it were to be held that Mr Miloszewski was mistaken or negligent in his assessment of the evidence at the stage of the first court appearance, such negligence would be insufficient to establish the existence of *animus injuriandi* or malice on his part. It follows that it has not been shown that the second defendant acted without reasonable and probable cause and with malice and that the claim for malicious prosecution must likewise fail.

[58] The plaintiffs and the defendants each claimed costs against the other, in the event of their respective successes as at the conclusion of these proceedings. In my view there is no sound reason to depart from the basic approach that costs should follow the result.

[59] In the circumstances I therefore make an order, as follows:

- a. The consolidated claims by the first, second and third plaintiffs as against the first and second defendants jointly and severally, are dismissed.
 - b. The plaintiffs will pay the first and second defendants' costs of the action, including any costs previously reserved, jointly and severally, the one paying the others to be absolved.
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VAN ZYL, J.

Matter heard: 16, 17, 18, 19 November 2020

Judgment delivered: 2 December 2024

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