



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

CASE NO.: 4886/2018

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

[10 March 2025]

ACTING JUDGE G NEL

In the matter between:

DAVID BUTHELEZI

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

INTRODUCTION

1. In this matter, the plaintiff, Mr David Buthelezi, has instituted action against the Minister of Police and the National Director of Public Prosecutions for damages, arising from the alleged unlawful arrest, unlawful detention and malicious prosecution of the plaintiff.
2. Both of the defendants have defended the relief sought, denied the allegations of unlawful arrest, unlawful detention and malicious prosecution, and a trial accordingly ensued.

THE PLAINTIFF'S ALLEGATIONS

3. The plaintiff alleges that he was arrested, without a warrant of arrest, on 15 September 2016, where after he was charged with the crime of armed robbery, and detained by the South African Police Services. It is common cause that the plaintiff was indeed arrested without a warrant of arrest on 15 September 2016.
4. The plaintiff states that he ultimately remained in custody for a period of 11 months, until he was found not guilty of the offence he was charged with.
5. The plaintiff alleged that at the time of his arrest by members of the SAPS, the arresting police officer had no reasonable grounds to suspect or believe that the plaintiff had committed the offence he was arrested for and later charged with, and that therefore the arrest and consequent detention was wrongful, unlawful and without probable cause.

6. The plaintiff alleged that in the alternative, the arrest by the SAPS was not necessary, for a number of reasons, including, *inter alia*, that the plaintiff is a South African citizen, was not a flight risk, and was not a danger to the complainant or any witnesses.
7. As regards the claim against the National Director of Public Prosecutions ("the NDPP"), the plaintiff alleged that the decision of the prosecuting authority to prosecute the plaintiff was made without reasonable and/or probable cause.
8. The plaintiff alleged that the conduct of the prosecutor was malicious, alternatively negligent, as there were no reasonable grounds warranting the prosecution of the plaintiff, alternatively, there were no grounds or prospects of a successful prosecution of the plaintiff.

THE DEFENDANTS' ALLEGATIONS

9. The defendants essentially pleaded that the arrest, detention and prosecution of the plaintiff was lawful, that there was a *prima facie* case of criminal conduct as against the plaintiff, and that there was no malice or negligence on the part of any of the defendants.

THE RELEVANT BACKGROUND FACTS

10. I briefly set out the relevant facts under this heading and will deal with the particular facts and allegations relating to the issues to be determined, in more detail, under the separate headings of the issues to be determined.

11. On 14 September 2016, Mr Tiisetso Matima, the Complainant, was robbed of his cellphone, at gunpoint, by two men.
12. Mr Matima attended at the Moroka Police Station to report the crime and was advised by the member of the SAPS, with whom he interacted, to block his cellphone.
13. The following day, 15 September 2016, Mr Matima and a friend were driving around in the vicinity of where the crime occurred, in an attempt to ascertain whether any person had any information relating to the robbery. He was approached by a man, whose identity is unknown to him, enquiring whether he was the person who had been robbed the previous day. The unknown man mentioned that a person with the name of "Dezza" was involved, and advised Mr Matima that "Dezza" was always at a well-known dice gambling spot.
14. Mr Matima drove to the gambling spot, where he allegedly recognized one of the men who had robbed him, and he then proceeded to the Police Station, to inform the SAPS that he had located one of the men who had robbed him the previous day.
15. Mr Matima accompanied members of the SAPS to the gambling spot in Mphuti Street, where he pointed out the plaintiff as one of the men who robbed him.
16. The plaintiff was arrested by Constable Mokoena, who thereafter transported the plaintiff to the Police Station, where he was later charged with armed robbery.

17. The plaintiff appeared in Court on 19 September 2016, after the Control Prosecutor had elected to prosecute the plaintiff for the crime of armed robbery.

THE ISSUES TO BE CONSIDERED.

18. The Plaintiff's counsel submitted that the issues to be considered were the following:

- 18.1. whether the plaintiff's arrest and detention by members of the SAPS on allegations of armed robbery was lawful;

- 18.2. whether the subsequent prosecution of the plaintiff by the NDPP was malicious and/or constituted wrongful legal proceedings, and

- 18.3. in the event that the court finds in favour of the plaintiff in respect of the preceding two issues, to decide on the quantum of damages payable to the plaintiff.

19. The Defendants' counsel submitted that the issues to be considered by the court were the following:

- 19.1. whether the arrest of the plaintiff was lawful;

- 19.2. whether the subsequent detention of the plaintiff was lawful;

- 19.3. whether the plaintiff discharged his onus to prove malicious prosecution, and,

- 19.4. the amount of damages, if any.
20. It is common cause that the plaintiff was arrested, detained and criminally prosecuted. Having regard to the issues raised for determination by the parties, and the contents of the pleadings, it appears that it is necessary to determine whether:
- 20.1. the arrest of the plaintiff was unlawful;
 - 20.2. the subsequent detention of the plaintiff by the SAPS was unlawful;
 - 20.3. the prosecution of the plaintiff by the SAPS was malicious;
 - 20.4. the prosecution of the plaintiff by the NDPP was malicious;
 - 20.5. whether the continued detention of the plaintiff was maliciously perpetuated by the NDPP; and
 - 20.6. what quantum of damages, if any, should be awarded to the plaintiff.

THE FIRST ISSUE: UNLAWFUL ARREST

21. As already set out above, it is common cause that the plaintiff was arrested on 15 September 2016 without a warrant of arrest having been issued.
22. Plaintiff's counsel correctly submitted that any arrest without a warrant of arrest is regarded as *prima facie* unlawful, and that accordingly, the SAPS must prove the lawfulness of the arrest and subsequent detention of the plaintiff.

23. In such regard, the first defendant pleaded that the plaintiff was lawfully arrested in terms of section 40 (1) (b) of the Criminal Procedure Act, No. 51 of 1977, as amended, ("the CPA").

24. The relevant portions of section 40 (1)(b) reads as follows:

"40. Arrest by peace officer without warrant.

(1) *a peace officer may without warrant arrest any person –*

...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

..."

25. It was submitted on behalf of the plaintiff that the plaintiff had been arrested on a charge of armed robbery, and that such specified crime does not fall under Schedule 1, but rather under Schedule 6, and accordingly that Section 40 (1) (b) is not applicable.

26. Such submission is without any merit, as it is clear from Schedule 1 that the crime of robbery is a crime which would entitle a peace officer, provided that the other requirements of Section 40 (1) (b) of the CPA are present, to arrest a person without a warrant. It is therefore unsustainable to suggest that a person suspected of armed robbery cannot be arrested without a warrant of arrest.

27. A further aspect that negates such submission is that based on the evidence of the Control Prosecutor, Mr Khoza, the classification of the alleged crime as a

schedule 6 offence was only made on 19 September 2016, after Mr Khoza had perused the Police Docket. Accordingly, at the time of the arrest of the plaintiff, the offence was not regarded as a schedule 6 offence.

28. The plaintiff contended that the jurisdictional requirements for reliance by the SAPS on Section 40 (1) (b) were not present, on the basis that the peace officer, Constable Mokoena did not have a suspicion, based on reasonable grounds, that the plaintiff had committed the offence for which he was arrested.
29. The evidence of Constable Mokoena, was that he was on patrol, in the area described as White City, when he was advised by an officer from the Police Station that a complainant, Mr. Matima, was at the Police Station, and had advised the police officers there that he had been robbed at gunpoint the previous day, and that he had seen one of the persons who robbed him, at gunpoint, of his cell phone, and knew his whereabouts.
30. Constable Mokoena returned to the Police Station, where he met with Mr. Matima, who advised him of the robbery that had occurred the previous day.
31. Mr. Matima travelled with Constable Mokoena, together with other police officers, to Mphuti Street in White City, where Mr. Matima pointed out the plaintiff as one of the persons who robbed him of his cell phone.
32. Constable Mokoena accordingly arrested the plaintiff, based on the information he had obtained from Mr. Matima, and took the plaintiff to the Police Station for further processing.

33. Plaintiff's counsel referred me to the matter of *Duncan v Minister of Law and Order for the Republic of South Africa*¹ ("the Duncan matter") and submitted that the arrest of the plaintiff by Constable Mokoena did not meet the jurisdictional requirements for arrest without a warrant of arrest as set out in such matter.

34. It was stated in the *Duncan* matter, by the then Appellate Division, in considering Section 40 (1) (b) of the CPA, that the section empowers a peace officer to arrest, without a warrant, any person whom he reasonably suspects of having committed an offence referred to therein, other than the offence of escaping from custody.

35. It was stated as follows, in such regard:

*"It was common cause that the question whether a peace officer, 'reasonably suspects' a person of having committed an offence within the ambit of s40 (1)(b) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he has reasonable grounds for his suspicion, ..."*²

36. It is also stated in the *Duncan* matter³ as follows, in respect of the jurisdictional requirements:

"The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

¹ (2) All SA 241 (A) (24 March 1986); 1986 (2) SA 805 (A) at 818G-H].

² at paragraph 8, with reference to the matter of *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N).

³ at paragraph 23

- (1) *the arrestor must be a peace officer.*
- (2) *he must entertain a suspicion.*
- (3) *it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act, (other than one particular offence).*
- (4) *that suspicion must rest on reasonable grounds."*

37. It was stated in the *Duncan* matter that if the jurisdictional requirements are indeed satisfied, the peace officer may invoke the power conferred by the section, and he may arrest the suspect.

38. As set out above, the exercise of determining whether or not the peace officer's suspicion was reasonable or not, is an objective fact, based on the reasonable person test, as determined from the evidence as to the information available to the peace officer.

39. I was also referred by plaintiff's counsel to the matters of *Sibuta and Another v Minister of Police and Another*⁴ and *Minister of Safety and Security v Sekhoto and Another*⁵ both of which matters confirmed the principle as set out in the *Duncan* matter, as regards arrest without a warrant, by a peace officer.
40. In the matter of *Ntoni Jacob Hlope v The Minister of Police* ("the *Hlope* matter")⁶, the Supreme Court of Appeal confirmed the principles relating to an arrest without a warrant by a peace officer, as set out in the *Duncan* matter.
41. Constable Mokoena was summoned to the Police Station, in order to attend to a complainant, who had attended at the Police Station to inform the SAPS that he had been robbed, at gunpoint, the previous day, and that he had identified one of the persons who had robbed him of his cell phone, and that he knew of the whereabouts of such person.
42. The evidence was that Constable Mokoena was directed to where the plaintiff was, and that the plaintiff was pointed out to Constable Mokoena by Mr Matima as being one of the persons who robbed the complainant of his cell phone.
43. There is a factual dispute as to what occurred at the time of the arrest, and whether the plaintiff was advised of the offence for which he was being robbed.
44. Mr Matima testified that Constable Mokoena enquired from him, prior to the arrest of the plaintiff, whether he was certain that the plaintiff was one of the

⁴ (3709/2016;3710/2016) [2020] ZACGHC 6 (15 January 2020)

⁵ 2011 (1) SACR 351 (SCA)

⁶ (426/2023) [2024] ZASCA 68 (3 May 2024)

persons that had robbed him, as the SAPS did not want to arrest the wrong person.

45. It is accordingly objectively ascertainable that Constable Mokoena's suspicion that the plaintiff had committed the crime of which he was accused, was reasonable in the circumstances.
46. Applying the reasonable person test, it is clear that a reasonable police officer, in the position of Constable Mokoena, would have had a reasonable suspicion that the plaintiff had committed the crime of which he was accused.
47. Having regard to such evidence, I am satisfied that all of the requirements of section 40 (1) (b) were met, and that the arrest of the plaintiff was not unlawful as contended for by the plaintiff.
48. It was also submitted by the plaintiff's counsel that a peace officer always retained a discretion whether or not to arrest a person accused of a crime, as arrest was not the only method by which the attendance of an accused could be secured at a trial in due course. Such submission is certainly correct, as confirmed by the Constitutional Court in the matter of *Groves NO v Minister of Police*.⁷
49. There was no suggestion or evidence given during the trial, that Constable Mokoena exercised his discretion to arrest the plaintiff injudiciously, or for any ulterior motive. This is an aspect that was only raised during argument.

⁷ [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) at paragraphs 52 and 60 .

50. In the *Hlape* matter, it was held that a party seeking to contend that the arresting officer did not exercise a discretion has the burden to prove, on a balance of probability, that such discretion was not exercised.⁸
51. I am satisfied that the plaintiff has failed to prove that Constable Mokwena did not exercise a discretion and failed to prove that Constable Mokoena exercised his discretion to arrest the plaintiff improperly or injudiciously.

THE SECOND ISSUE: THE DETENTION OF THE PLAINTIFF BY THE SAPS

52. The plaintiff's contention that the detention of the plaintiff by the SAPS was unlawful is based on the fact that at the time, after the arrest had been effected, and the plaintiff was being detained at the police station, no arrest statement had been taken.
53. The plaintiff contends that the arrest statement was only prepared approximately two hours after his arrest.
54. The contention that the detention of the plaintiff for two hours, in order to effect the arrest statement was unlawful, is without merit, as it is certainly not unreasonable, although not desirable, for a period of two hours to elapse between the arrest of an accused, and the finalisation of an arrest statement.
55. There was no suggestion that the plaintiff should have been released on "police bail", or that such release was contemplated, discussed, raised or refused.

⁸ at paragraph [14]

56. As I have found that the arrest of the plaintiff was not unlawful the issue of harm arising from the continued detention of the plaintiff, as considered in the matter of *De Klerk v Minister of Police*⁹ does not arise.
57. In the circumstances, I am of the view that the detention of the accused at the police station was reasonable, having regard to the nature of the crime and the plaintiff's decision not to make any form of statement, and was not unlawful.
58. There is some overlap between this issue and the fifth issue, but as I have found that the arrest of the plaintiff was not unlawful, the fifth issue need not be considered.

THE THIRD ISSUE: MALICIOUS PROSECUTION OF THE PLAINTIFF BY THE SAPS

59. In paragraph 9 of the plaintiff's amended particulars of claim, it was alleged that the members of the SAPS maliciously prosecuted the plaintiff.
60. There were no submissions made on behalf of the plaintiff in closing argument, in such regard, and the aspect was not raised at all in the heads of argument prepared on behalf of the plaintiff.
61. It was contended that the prosecution of the plaintiff by the NDPP was, however, malicious.

⁹ (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019)

62. The SAPS, after the arrest and detention of the plaintiff, took the plaintiff to the Magistrate's Court, after which the plaintiff was detained, pending a criminal trial.
63. It was the evidence of Constable Mokoena that the purpose of the arrest was, inter alia, to take the plaintiff to Court, to enable the Court to "*make a decision*".
64. In the circumstances, I am satisfied that the SAPS did not elect to prosecute the plaintiff, and certainly did not elect to maliciously prosecute the plaintiff, and that the SAPS carried out their obligations in terms of the CPA, pursuant to the complaint of armed robbery raised against the plaintiff.

THE FOURTH ISSUE: MALICIOUS PROSECUTION BY THE NDPP

65. The plaintiff contends that the decision taken by the NDPP to prosecute the plaintiff was malicious and was an arbitrary decision.
66. In the matter of *Minister for Justice & Constitutional Development v Moleko*¹⁰ the Supreme Court of Appeal set out the requirements for succeeding with a claim for malicious prosecution at paragraph [8] as follows:

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

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

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

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

¹⁰ (131/07) [2008] ZASCA 43 (31 March 2008)

(d) that the prosecution has failed.”

67. The requirements have been restated and confirmed in a number of subsequent matters.¹¹
68. It is only necessary to determine whether the plaintiff has proven the second and third requirements, as the first and fourth requirements have clearly been established and are common cause.
69. As regards the second requirement, the plaintiff must prove that the NDPP set the prosecution in motion without reasonable and probable cause. The concept of “reasonable and probable cause”, in the context of an action for malicious prosecution, means “*an honest belief founded on reasonable grounds that the institution of proceedings is justified*”.¹²
70. In the *Moleko* matter it was held¹³ that in determining whether there was “reasonable and probable cause”, a court must consider both a subjective and an objective element, and must determine whether the decision-maker subjectively had an honest belief in the guilt of the accused, but must also consider whether the decision-maker’s belief was objectively reasonable.

¹¹ See: *Magwabeni v Liomba* (198/2013) [2015] ZASCA 117 (11 September 2015) at paragraph [9] and *Rudolph and Others v Minister of Safety and Security and Another* (380/2008) [2009] ZASCA 39; 2009 (5) SA 94 (SCA) ; 2009 (2) SACR 271 (SCA) ; [2009] 3 All SA 323 (SCA) (31 March 2009) at paragraph [16].

¹² *Minister for Justice & Constitutional Development v Moleko* at paragraph [20]

¹³ at paragraph [20]

71. In the matter of *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*¹⁴ the Supreme Court of Appeal held that the test for reasonable and probable cause is an objective one, and that it is not based on the subjective beliefs or motives of the prosecutor. The Court held that “reasonable and probable cause” exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time of making the decision to prosecute.

72. I was referred by plaintiff’s counsel to the test set out for the absence of “reasonable and probable cause” in the matter of *Beckenstrater v Rottcher and Theunissen*¹⁵ as being the following:

"Where it is alleged that a defendant had no reasonable cause of 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 plaintiffs guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

73. It was submitted on behalf of the plaintiff that Mr Khoza’s decision to prosecute the plaintiff was unreasonable, in that what was placed before Mr Khoza amounted to “scanty evidence”. It was submitted that the conduct of Mr Khoza in deciding to prosecute the plaintiff in the face of such lack of real evidence amounted to negligence.

¹⁴ (194/2023) [2024] ZASCA 85; 2024 (2) SACR 331 (SCA) (3 June 2024) at paragraph [20]

¹⁵ 1955 (1) SA 129 (A) at 136 A - B.

74. Having regard to the evidence of Mr Khoza, being that he was convinced that a crime had been committed by the plaintiff, and the contents of the police docket placed before Mr Khoza, I am satisfied that Mr Khoza (and the NDPP) had a reasonable and probable cause for the prosecution of the plaintiff.
75. The plaintiff has accordingly failed to establish that there was no reasonable and probable cause for the prosecution of the plaintiff.
76. Insofar as I have found that the plaintiff has not proven the second requirement for a claim of malicious prosecution, I am theoretically not required to determine whether the plaintiff has proven the third requirement, being whether the NDPP acted with malice in deciding to prosecute the plaintiff.
77. It was submitted on behalf of the plaintiff that the NDPP did not have a prima facie case against the plaintiff, that it acted unreasonably, and that it prosecuted the plaintiff in the hope that the plaintiff would incriminate himself. There was no evidence supporting any of these allegations, and there is no evidence that the NDPP acted with malice.

THE FIFTH ISSUE: MALICIOUS DETENTION

78. This issue is entirely dependent on it being found that the plaintiff was unlawfully arrested.
79. As already set out above, I have found that the arrest was not unlawful, and accordingly the fifth issue falls away.

SIXTH ISSUE: QUANTUM OF DAMAGES

80. As I have found that the plaintiff's arrest was not unlawful, and that the subsequent prosecution of the plaintiff by the NDPP was not malicious, there is no need to or entitlement to give consideration to the issue of quantum.

CONCLUSION

81. Having regard to what is set out in this Judgment, it follows that the plaintiff's action must be dismissed.

COSTS

82. There is no reason to depart from the established principle that costs should follow the result, and I accordingly find that the plaintiff should pay the costs of the action.

ORDER

83. I accordingly make the following Order:

83.1 The Plaintiff's claim is dismissed.

83.2 The Plaintiff is to pay the taxed costs of the Action on the party and party scale.



G NEL
[Acting Judge of the High Court,
Gauteng Division,
Johannesburg]

Date of hearing: 23 September 2023

Date of Judgment: 10 March 2025

APPEARANCES

For Plaintiff: Mr N Gumede

Instructed by: Ndou Attorneys Inc.

For Defendants: Adv FF Opperman

Instructed by: The State Attorney