



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23795/2012

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15 JULY 2025

In the matter between:

MHLOMISI TSHALIBE

Plaintiff

and

MINISTER OF HOME AFFAIRS

First Defendant

MINISTER OF POLICE

Second Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

MINISTER OF JUSTICE

Fourth Defendant

JUDGMENT

LABUSCHAGNE J

- [1] The plaintiff instituted an action against the first and second defendants for unlawful arrest and detention and for malicious prosecution against the third and fourth defendants.

THE PLEADINGS

- [2] The gist of the plaintiff's case is that, on Thursday 12 August 2010 between 23:20 and midnight the plaintiff was returning from Zimbabwe and attended at the Beitbridge Border Gate. He handed an Immigration officer on the South African side his passport. He was told to wait. He was then arrested by members of the South African Police Service without a warrant. He was taken to a holding cell at the border gate and was unlawfully detained and interrogated and later told that he had an outstanding unspecified criminal case pending against him in Johannesburg.
- [3] The plaintiff advised the Police officers that there was no criminal case pending as the only criminal case that was once laid against him was on investigation found to be unfounded and the charges were withdrawn against him. The Police officers however kept the plaintiff in detention.
- [4] The next morning at approximately 04:00 he was transferred to the Musina Police Station where he was wrongfully and unlawfully detained further in the Police holding cells.
- [5] The plaintiff was kept in the Musina Police Station holding cells until he was brought before the Musina Magistrates' Court on Monday 16 August 2010 after 17:30 in the evening.

[6] The plaintiff pleads in respect of his arrest and detention that the South African Police Service acted unlawfully in three respects.

6.1 He was not as soon as possible brought to a Police Station after his arrest, in breach of section 50(1)(a) of the Criminal Procedure Act, 51 of 1977 (“the CPA”).

6.2 Further, that he was not as soon as possible informed of his right to institute bail proceedings after his arrest, in breach of section 50(1)(b) of the CPA.

6.3 Thirdly, that he was not as soon as possible brought before a lower court after his arrest, in breach of section 50(1)(c) of the CPA. The latter was based on the fact that he was brought before the Musina Magistrates’ Court long after the 48 hour period contemplated in section 50(1)(d)(i) of the CPA had expired, and thus in breach of section 50(1)(c) of the CPA.

[7] The plaintiff pleaded that, irrespective of the legality of his initial arrest and detention, his detention had become unlawful due to the expiry of the 48 hour period before he was brought to court. After the expiry of that period the Prosecutor at the Musina Magistrates’ Court applied for a postponement of the matter and the Magistrate postponed the proceedings and transferred the matter to the Johannesburg Magistrates’ Court, remanding the plaintiff in custody.

[8] The plaintiff contends that he was not advised of his right to apply for bail.

- [9] On 17 August 2010 the plaintiff was transferred to Johannesburg Central Police Station by the SAPS.
- [10] On 18 August 2010 the plaintiff was taken to the Johannesburg Magistrates' Court by the SAPS. He was only called to appear at about 16:30. The plaintiff was remanded in custody to 19 August 2010 for appearance before the Hillbrow Magistrates' Court.
- [11] The plaintiff contends that, as there was no docket, neither the Public Prosecutor nor the Magistrate knew anything about the matter and there was no charge sheet.
- [12] On 25 August 2010 the plaintiff, after a further appearance was given bail of R500.00 and he was released on 26 August 2010.
- [13] The matter was called in the Johannesburg Magistrates' Court on 8 September 2010, 5 October 2010 and 14 October 2010. On 14 October 2010 the matter was struck from the roll due to the absence of a criminal docket.
- [14] It is contended that the third defendant had a duty to review evidence of the *prima facie* commission of a criminal offence. It is contended by the plaintiff that as there was no docket, there was no basis on which to continue with the prosecution. As there was no *prima facie* case against the plaintiff, he pleaded that his prosecution was malicious. He pleaded, in the alternative, that the third defendant was grossly negligent.

- [15] A similar allegation is made against the Magistrate.
- [16] The first defendant pleaded that there was an outstanding Warrant of Arrest Number 34/181/90 in respect of the plaintiff. The warrant was issued when the plaintiff failed to appear in the criminal court on 17 December 1990.
- [17] The third and fourth defendants pleaded that the plaintiff had failed to appear in the criminal court on 17 December 1990 at the Johannesburg Magistrates' Court under case number 5/9366/90, which resulted in a warrant for his arrest being issued.
- [18] It is pleaded that the Magistrate in Musina was advised that there is a criminal case pending against the plaintiff.
- [19] The third and fourth defendants further plead that the Magistrates' Court did not have jurisdiction to deal with the warrant of arrest which was issued by the Johannesburg Magistrates' Court. It is pleaded that both the Public Prosecutor and the Magistrate properly applied their minds and correctly remanded the plaintiff in custody and transferred the matter to the Johannesburg Magistrates' Court to deal with the warrant of arrest.
- [20] It is admitted that there was no docket available at the Johannesburg Magistrate's Court on 18 August 2010 and 19 August 2010.
- [21] It is pleaded that on 14 October 2010 the matter was struck from the roll due to the absence of the case docket.

- [22] The third and fourth defendants plead that, what was placed before them, was a warrant of arrest issued by the Johannesburg Magistrates' Court. As they did not have jurisdiction, the matter was transferred to Johannesburg and the plaintiff was remanded in custody.
- [23] The defendants further deny that there was a withdrawal of the criminal proceedings or a finalisation of the criminal proceedings.

THE EVIDENCE

- [24] The sole witness was the plaintiff. He testified that he was on his way to Zimbabwe when he was arrested. This conflicts with his particulars of claim. While it does not matter as far as his cause of action is concerned, it does raise the fact that his recollection has been affected by the passing of 15 years since the arrest.
- [25] He recounted the events at the Beitbridge Border Post where he was arrested. He confirmed that he was not read his rights. According to him, he was arrested without a warrant.
- [26] Having been arrested on the evening, around about midnight on 12 October 2010, he was only brought before court on the following Monday afternoon, after hours (17:30). The Magistrate transferred the case to Hillbrow.
- [27] The Magistrate was on his way out of court when he was stopped in the passage. He went back to court to hear the plaintiff's matter. He referred the matter to Johannesburg and the plaintiff was collected by SAPS from

Johannesburg and taken to Sun City prison from court. He spent the night of 18 October 2010 in a cell.

[28] On 19 October 2010 he spent the day at court waiting for his matter to be called, but it wasn't. He was taken back to his cell where he spent the weekend and the following Monday.

[29] On Tuesday, 24 October 2010 he was called by a detective in Hillbrow. He was asked why he did not appear on 19 October 2010. He advised that he was there, but that his name was not called. He was then given a date for 25 October 2010 to appear in court in Westgate. On that day he was given bail of R500.00. He contends that he was still not told by then why he had been arrested. As he did not have bail money with him, he spent another day in Sun City and was only released on 26 October 2010.

[30] Thereafter, he attended court on three dates, ie at the end of September 2010, 5 October 2010 and 14 October 2010. On 14 October 2010 the matter was struck from the roll.

[31] The plaintiff has not been charged or prosecuted with the criminal matter since it was struck from the roll.

[32] In cross-examination a number of discrepancies were pointed out in the plaintiff's case. For example, he pleaded that he had urged the Police officials in Beitbridge to make enquiries about any pending case against him. In evidence, he stated that the Police offered to contact the Johannesburg Police Stations. During cross-examination it became apparent that the plaintiff was

oblivious as to why he was arrested. He was told it is about an old matter, but his contention is that he was not told what the matter was about. He contends that the only case against him is a matter in which the charges were withdrawn.

[33] In cross-examination he also stated that Home Affairs had advised him that there is a warrant when they kept his passport. Those officials were however not the arresting officials.

[34] A charge sheet from 1990 was put to the plaintiff during evidence in cross-examination. It is matter 5/9366/19 (State v Tshalibi). It is apparent that the plaintiff was out on bail. While the document reflects that he was out on bail of R400.00, the plaintiff states that he was out on free bail (i.e on his own recognisances). The warrant of arrest was in Afrikaans, as were the notes made by the Magistrate. According to those notes the Magistrate was satisfied that the plaintiff had been warned to appear on 17 December 1990 in Johannesburg on a charge of possession of stolen goods. As he failed to appear, a warrant for his arrest was signed on 18 December 1990. That is the reason why the plaintiff was arrested.

[35] If the warrant of arrest was valid, which on the face it was, then the plaintiff's claim that he was arrested without a warrant cannot be accepted.

[36] While the existence of a warrant was established in evidence, there was no evidence that the warrant had been shown to the plaintiff at the time of his arrest or that he had been provided with a copy of it.

- [37] The Magistrate's notes indicate that the matter had been postponed to 17 December 1990 for judgment on a charge of possession of stolen goods.
- [38] The plaintiff contends that the case was finished. He also says the case was "cancelled".
- [39] There has been no movement since 1990 to finalise the matter.
- [40] The plaintiff denied that he had failed to appear. His memory is however not trustworthy as he himself could not give any details as to when the matter was finalised. The existence of the warrant is evidence that he did not appear on 17 December 2010.
- [41] On the question as to why he would not remember these details, but remember the arrest, he responded that he was traumatised by the arrest and that is why he could remember the details after 15 years.
- [42] The warrant of arrest indicated that the plaintiff was to be apprehended and taken to the court in Johannesburg which issued the warrant.
- [43] The plaintiff's contention that he attended the trial until it was finalised is not borne out by the records. It is apparent that he did not return for judgment on 17 December 1990. The plaintiff could advance no reason as to why the Magistrate or the Prosecutor in Musina or in Johannesburg would harbour him any ill will or demonstrate malice as far as his prosecution is concerned.
- [44] The docket indicates that he had been arrested on 25 September 1990 and that he pleaded not guilty on 2 October 1990. There was an appearance on

12 December 1990 where a note was made in Afrikaans that reads: “*Skuldig*”. That may explain why the matter was postponed to 17 December 1990 for sentencing.

[45] There is no note that the matter was struck from the roll or was finalised in any other way.

[46] The accused denies that he had been found guilty.

Legal Principles

[47] The fact of the plaintiff’s arrest and detention is common cause. The onus is on the State to justify the arrest and detention (see: **Minister of Law and Order v Hurley** 1986 (3) SA 568 (A) at 589 E – F.

[48] Where an accused fails to appear at a hearing, the court before which the matter is pending may declare that bail be provisionally cancelled and bail money provisionally forfeited to the State and issue a warrant of arrest for the accused (section 67(1) of the CPA).

[49] Such non-appearance without good cause constitutes an offence (section 67A of the CPA).

[50] A person who is arrested with or without a warrant for commission of an offence shall, as soon as possible, be brought before a Police Station, or in

the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant (section 50(1)(a) of the CPA).

[51] In this instance the warrant was issued by the Magistrate's Court, Johannesburg. That is where the accused should have been taken on arrest.

[52] A person in detention shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings (section 50(1)(b) of the CPA).

[53] Where bail has not been granted, the accused in detention shall be brought before a lower court "*as soon as reasonably possible, but not later than 48 hours after the arrest*" (section 50(1)(c) of the CPA).

[54] If the period of 48 hours expires outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day (section 50(1)(d)(i) of the CPA). In this instance, the 48 hours after the arrest expired over the weekend and the plaintiff should have been brought before a court, by not later than the end of the court day on the following Monday. This did not occur.

[55] The evidence establishes that the plaintiff was arrested in terms of a lawful warrant. Such warrant was however not produced, or a copy was not produced, and he was not advised of his right to bail. Further, he was not brought before a lower court within 48 hours as required by section 50 of the CPA.

[56] The effect of the aforesaid is that, by the time the plaintiff appeared before the Magistrate after hours on Monday, 16 October, his detention was unlawful, or had, even if the arrest were good, become unlawful.

[57] This is consistent with the principle that the lawfulness or unlawfulness of an arrest does not by implication render subsequent detention lawful or unlawful.

[58] In **De Klerk v Minister of Police** [2019] ZACC 32 the Constitutional Court stated the following at paragraph [62]:

“[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not

extended too far. The conduct of the policy after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.”

DISCUSSION

- [59] The only evidence of the arrest is that of the plaintiff. It is apparent from his evidence that he was not shown an arrest warrant, although there was a valid warrant for his arrest. Whilst the warrant of arrest provides objective justification for the act of an arrest, that arrest has to be effected procedurally in accordance with the prescripts of section 50 of the Criminal Procedure Act.
- [60] The plaintiff was not advised of his right to apply for bail. The fact that he disputed that there was a valid warrant for his arrest required that a copy thereof had to be shown to him, which was not done. To argue that the Act provides for a copy of the writ being produced upon request, and that there was no formal request is to put form over substance.
- [61] The contention that he never asked for a copy of the warrant is dispelled by the fact that he was disputing the fact that there was a valid cause for his arrest - that implies that there was a duty on the arresting officials to show him a copy of the warrant of arrest, that being the justification for the deprivation of his liberty.

- [62] On these facts the arrest was unlawful in that it was executed in a procedurally unlawful manner.
- [63] It follows that the detention of the plaintiff until his court appearance in Musina at 17:30 on Monday, 16 October 2010 was unlawful. Even if the arrest was valid and if I am mistaken in the assessment of the facts, he was not brought before court within 48 hours of arrest. He was brought before a court which did not have jurisdiction as the warrant of arrest required him to be brought before the court in Johannesburg. That perpetuated the unlawfulness of his detention until he was granted bail.
- [64] The detention of the plaintiff was not rendered lawful by a subsequent remanding order by the Magistrates' Court in Johannesburg. Had the plaintiff been advised of his right to apply for bail, he would have done so forthwith. The fact that he was at all material times unrepresented underscores the fact that he ought to have been advised of his rights- but was not.
- [65] The evidence of the plaintiff is not without criticism. I have alluded to the fact that he contradicted himself on whether he was entering or leaving Zimbabwe.
- [66] Further, the evidence establishes that he was at some stage advised of the fact that there is a pending criminal trial against him in Johannesburg. Although he disputed this, there was objectively a valid warrant for his arrest.
- [67] His evidence that that case had been concluded is not borne out by the docket. He ought to have appeared on 17 December 2010- for sentencing.

[68] However, these matters are not material in determining the validity of the arrest and subsequent detention.

[69] On the facts of the plaintiff's claim against the South African Police Services, he therefore succeeds on the claim for unlawful arrest and unlawful detention.

[70] The plaintiff's case for malicious prosecution fails at the first hurdle.

[71] There are four requirements for a claim for malicious prosecution, the first of which is that the prosecution was instigated maliciously. In this respect the finger is pointed at the Magistrate and the Prosecutor in Musina. However, it is apparent that they were not the drivers or the instigators of the proceedings. There was a valid warrant of arrest. They at best were used as part of the process of securing a transfer of the plaintiff from Musina to Johannesburg. This is not sufficient to constitute the instigation of criminal proceedings. There is no evidence of malicious intent on the part of the Magistrate and the Prosecutor. In any event, there is no cogent evidence that the prosecution failed. It was struck from the roll due to the absence of a docket. That does not constitute the termination of the proceedings even in the face of no further action thereafter.

[72] The claim for malicious prosecution has therefore not been established.

[73] This brings me to the issue of costs. The plaintiff succeeds against the South African Police Service for his unlawful arrest and detention. The Department of Home Affairs merely notified the Police of the presence of the plaintiff at the border post where he was arrested. There was nothing unlawful in that

conduct. In fact, it is a normal reporting duty on the border post officials. The first defendant is not liable to the plaintiff. However, the first and the second defendants were represented by the State Attorney and by the same counsel.

[74] The plaintiff should bear the costs of the third and fourth defendants as the claim for malicious prosecution fails.

[75] In the premises I make the following order:

1. The second defendant is held liable for the unlawful arrest and detention of the plaintiff from 12 October 2010 until he was granted bail on 25 October 2010 (13 days).
2. Costs of suit against the second defendant on Scale B.
3. The plaintiff is liable for the costs of the first, third and fourth defendants.



LABUSCHAGNE J

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant : Adv Nkabinde

Instructed by : Dudula Incorporated Attorneys

Counsel for First and Second Respondent : Adv Janse Van Rensburg

Instructed by : State Attorney

Counsel for Third and Fourth Respondent : M.S Mangolele

Instructed by : State Attorney