



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MBOMBELA (MAIN SEAT)

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

CASE NUMBER 829/2023

06 August 2025
DATE

SIGNATURE

ZETHU FLORENCE MKHABELA

PLAINTIFF

And

THE MINISTER OF POLICE

1ST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND DEFENDANT

JUDGMENT

SHAI AJ

Introduction and Background

[1] This is a claim for damages arising from an unlawful arrest and detention and malicious prosecution.

[2] The plaintiff herein was arrested on 23 July 2020.

[3] She was then detained at Kanyamazane Police Station. She was taken to court on 27 July 2020 for her first court appearance where bail was fixed at R1000-00.

[4] She was unable to post bail and was further remanded in custody where she was released on 24 August 2020 when bail was posted by her parents.

[5] On circumstances of her arrest, Plaintiff testified that she was arrested after she was found on the premises of one Dumisani Mdluli.

[6] She was on these premises as she wanted to ask for water. On her arrival she found Mr Mdluli in the presence of an unknown male.

[7] As she was there some people arrived, spoke to Mr Mdluli and went into the house with him. It was at this stage that the unknown male left the premises.

[8] An argument later ensued between Mr Mdluli and these people and that is when she fathomed that items were found in the house and somehow these items were linked to a crime commission.

[9] She was taken to various places with Mr Mdluli where items were pointed out and they were later taken to the police station where she was also detained. It was said that she committed housebreaking.

First Defendant's case

[10] The first defendant called Mr Shiba, who testified that on the date of arrest Plaintiff was brought to the police station by a group of individuals. He then detained the Plaintiff so that further investigations could take place.

[11] The Plaintiff was arrested for burglary/housebreaking. It was said that items were found in a house the yard whereof the Plaintiff was found.

[12] There was no evidence that Plaintiff was involved in the burglary and that she was found in possession of any stolen items.

[13] The second witness testified that he was the investigating officer in the matter for which the plaintiff was arrested. He saw the Plaintiff and other suspects on the morning of 27 July 2020.

[14] There was no evidence in the docket linking the Plaintiff to either the crime of housebreaking or possession of suspected stolen property.

Second Defendant's case

[15] Mrs Msimango testified that upon perusal of the docket she could not enrol the case for housebreaking against the Plaintiff as there was no evidence to that effect.

[16] She enrolled it for possession of suspected stolen property as it was stated by witnesses that Plaintiff was found on the premises where the suspected stolen property was found.

[17] She later withdrew the charges as there was insufficient evidence to prosecute the Plaintiff on.

Issue

[18] The issues for determination are whether:

18.1 the plaintiff was lawfully arrested and detained in terms of s 40(1) (b) of the CPA;

18.2 the defendants are liable for the plaintiff's continued detention post-court appearance until the matter was withdrawn.

18.3 the second defendant, acting in concert with the first defendant, maliciously prosecuted the plaintiff.

Arrest

[19] It is trite that an arrest or detention is *prima facie* wrongful. Section 40(1) (b) of the CPA 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 from lawful custody. The arrest would be lawful if the arresting officer successfully establishes the jurisdictional factors, and he/she may invoke the power conferred by s 40(1) (b) to arrest the suspect unless the plaintiff demonstrates that the discretion to arrest him/her was exercised unlawfully.

[20] Before a person could be arrested without a warrant, the jurisdictional facts provided for in section 40 (1)(b) should be present.¹

[21] A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements:

- (a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally.
In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;²
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;³ and

¹ De Klerk v Minister of Police (329/17) [2018] ZASCA 45 (28 March 2018)

² Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) at 154H-J.

³ Zealand v Minister of Justice and Constitutional Development and Another [2008] ZACC 3; 2008(2) SACR 1 (CC), at paras 24-5.

(d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.⁴

[22] It should be borne in mind, against all the aforesaid, that the eventual conviction or acquittal of a person previously arrested is not of itself proof that the arrest was lawful or unlawful⁵.

[23] *In casu*, the Plaintiff was apprehended by members of the community and taken to the police station. Mr Shiba states in his testimony that he arrested and detained the plaintiff despite the plaintiff not being linked to the commission of the offence. He further states that the detention was for further investigations. It is as clear as daylight from Mr Shiba's testimony that the jurisdictional factors laid down in section 40(1)(b) have not been met.

[24] Consequently, I find the arrest to have been unlawful.

Detention

[25] Detention is, in and by itself, unlawful. The *onus* rests on the detaining officer to justify it.⁶ The Constitutional Court remarked that the question whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in s 12 of the Constitution, is a constitutional matter. S 12(1) of the Constitution guarantees that everyone has the right to freedom and security of the

⁴ Loubser above n 15 at 27.

⁵ R v Moloy 1953 (3) SA 659 (T) at 662E

⁶ Zealand above, at paragraph 24

person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[26] Even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto. Failure by a police officer properly to do so is unlawful.

[27] The aforesaid means that even where the arrest is lawful, the police officer should make an enquiry on whether the arrestee should be detained or not. In this case.

[28] I have, *in casu*, already found that the arrest is unlawful. No lawful detention can follow from an unlawful arrest of the nature herein where, by the evidence of the police officer and the prosecutrix, the plaintiff could not be linked in any way to the commission of the offence.

[29] Even if it were to be found that the plaintiff was lawfully arrested, the police officer is enjoined to, before detaining the plaintiff, apply his mind to the arrestee's detention. It is not stated as to why the police officer deemed detention necessary.

[30] In therefore follows that the detention was unlawful.

Detention post-court appearance

[31] It was held in the *De Klerk*⁷ case that “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

⁷ De Klerk v Minister of Police [2019] ZACC 32

considerations. This may include a consideration of whether the post-appearance detention was lawful.

[32] It was held in the *De Klerk* case that both factual and legal components of causation should be looked at. One is therefore bound to look at whether the act or omission caused or materially contributed to the harm.⁸ Factual causation is determined by applying the “but-for” test (*conditio sine qua non*). In this case, for instance, the application would be as follows: If, but for the conduct of the police, the plaintiff would not have been detained, then it would be the conduct of the police that factually caused the detention. Furthermore, if it is found that but for the arrest by the police, the magistrate would not have fixed the unaffordable bail and remanded the plaintiff in custody the conduct of the police would be found to have occasioned the further detention.

[33] The Court in *mCubed International (Pty) Ltd*⁹ held that legal causation entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. A wrongdoer is not liable for harm that is too remote from the conduct concerned¹⁰ or harm that was not foreseeable.¹¹

⁸ *Minister of Police v Skosana* 1977 (1) SA 31 (A); [1977] 1 All SA 219 (A) at 34F-G:

⁹ *mCubed International (Pty) Ltd v Singer N.O.* [2009] ZASCA 6; 2009 (4) SA 471 (SCA) at paragraph 22

¹⁰ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) at paras 30-2

¹¹ *Country Cloud Trading CC v MEC: Department of Infrastructure Development* [2013] ZASCA 161; 2014 (2) SA 214 (SCA) at para 27.

[34] Theron J in *Bryan James De Klerk v the Minister of Police*¹² remarked:

“[81] Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant’s further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala’s knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain.”

[35] A remand of a case after first appearance is a natural concomitant where an accused fails to post bail. It should be a known fact to any trained police officer. Mr Shiba should have foreseen the eventual further detention of the plaintiff in the event that bail is not posted.

[36] The police set the wheel in motion. Their conduct is closely linked to the further detention to attract liability. But for the unlawful arrest, the plaintiff could not have been detained and be further detained after the first court appearance. The first defendant

¹² Bryan James De Klerk v Minister of Police [2019] ZACC 32 at paragraph 81

should be held liable for detention pre-court appearance and detention post-court appearance.

[37] The prosecutrix testified that she determined that the plaintiff was not linked to the commission of housebreaking. It is not disputed that the plaintiff was not found in possession of any property involved in the alleged housebreaking. It boggles one's mind in understanding on what basis the prosecutrix decided on charging the plaintiff for possession of suspected stolen property.

[38] Had the prosecutrix exercised due diligence in assessing or screening the docket, charges would not have been preferred against the plaintiff. At most, the plaintiff would not have been further detained after the first appearance. The failure by the prosecutrix to exercise due diligence and properly screen the docket led to the plaintiff's further detention.

[39] I therefore find that both the second defendant's conduct caused the plaintiff's post-court appearance detention.

[40] I find that the second defendant should also be held liable for detention post-court appearance detention.

Malicious prosecution

[41] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy¹³.

[42] To succeed with a malicious prosecution claim, the plaintiff must allege and prove that-

¹³ Heyns v Venter 2004 (3) SA 200 (T) 208B

- 42.1 the defendants set the law in motion (instituted or instigated the proceedings);
- 42.2 the defendant acted without reasonable and probable cause;
- 42.3 the defendant acted with malice (or *animo iniuriarum*); and
- 42.4 that the prosecution failed. In this instance, the plaintiff bears the *onus* of proof to establish each, as alluded.¹⁴ It is the evidence of the second defendant's witness that plaintiff's case was struck off the roll due to lack of evidence.

[43] In *Waterhouse v Shields*¹⁵ Gardiner J remarked:

"The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge".

[44] The police official gave a fair and honest statement of the relevant facts to the prosecutrix, leaving it to her to decide whether to prosecute or not.

[45] The prosecutor should have reasonable and probable cause to prosecute. Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. In *Beckenstrater v Rotter and Theunissen*¹⁶ Schreiner JA laid down the test for reasonable and probable cause and said:

"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the

¹⁴ Minister of Safety and Security v Lincoln 2020 (2) SACR 262 (SCA)

¹⁵ 1924 (CPD) 155 AT 160

¹⁶ 1955 (1) SA 136 (A) 136A-B

offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

Animus iniuriandi

[46] However, to succeed in this claim, the plaintiff must allege that the defendant intended to injure him (either *dolus directus* or *indirectus*). *Animus iniuriarum* includes not only the intention to injure but also the consciousness of wrongfulness. Van Heerden JA in *Minister of Justice and Constitutional Development and Others v Moleko*¹⁷ remarked:

"[63] In this regard *animus iniuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus iniuriandi*, will be lacking. His mistake therefore excludes the existence of *animus iniuriandi*."

¹⁷ [2008] 3 All SA 47 (SCA) at 63

[47] It is the evidence of Mrs Msimango that she could not link the plaintiff to the commission of housebreaking. She decided to charge her with possession of suspected stolen property as plaintiff was found on the premises where the property was found. She, however, decided at a later stage not to proceed with the prosecution. I cannot find that she genuinely believed that there was a reasonable and probable cause to proceed with the prosecution. Her decision to withdraw the charges should have been taken even before bringing the plaintiff to court. Her wanton disregard for facts not warranting prosecution should be regarded as indirect malice or *animus iniuriandi*.

[48] I am satisfied that the plaintiff established that there was malicious prosecution and it is so found. Consequently, the claim for malicious prosecution should succeed.

Quantum

[49] Past awards can be used for guiding the Court in determining what a fair and reasonable compensation is.

49.1 It was held in *Minister of Safety and Security v Seymour*¹⁸ that “The assessments of awards of general damages with reference to awards in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are useful guide to what other courts have considered to be appropriate but they have no higher value than that”.

¹⁸ 2006(6)SA 320(SCA) para 17

49.2 In *Maphalala v Minister of Law and Order (WLD, Case No. 29537/93, 10 February 1995)*, the Plaintiff therein was detained for approximately three (3) months and assaulted. He was awarded an amount of R145 000 (presently R300 000).

49.3 In *Sibuta and Another v Minister of Police and Another*¹⁹ the Plaintiff therein was awarded R470 000 for unlawful arrest and detention, he having been detained for fifteen (15) days.

49.4 In *Oriyomi v Minister of Police*²⁰ the Plaintiff therein was awarded R120 000, he having been in detention for about four days

49.5 In *De Klerk v Minister of Police*²¹ the plaintiff was granted R30 000 for having spent almost an hour in detention.

[50] I have herein considered the circumstances of the arrest, the nature and duration of the detention and the fact that the charges were eventually withdrawn.

[51] Plaintiff testified that while in custody she was humiliated, inmates were taking her food, she was not getting enough toiletry and had to use T-shirts during her ovulation; her good name is tainted in the community; her trade as a traditional leader had been affected as she is now labeled a criminal.

[52] I compared previous awards in similar cases like this one, which serve as a useful guide, cognisance of the fact that each case must be treated according to its own merits.

¹⁹ (3709/2016; 3710/2016[2020] ZAECHGHC 6(15 January 2020)

²⁰ (14132/13) [2020] ZAGPPHC 224 (6 April 2020)

²¹ (329/17) [2018] ZASCA 45 (28 March 2018)

[53] In my view, a fair and appropriate award of damages for the plaintiff's unlawful arrest is R250 000; for her pre-court appearance detention is an amount of R150 000 (one hundred and fifty thousand rand). For the post-court appearance detention till her release the award for damages is an amount of R650 000-00 (six hundred and fifty thousand rand). For malicious prosecution, a fair compensation is R100 000-00.

Conclusion

[54] Consequently, the following order is made:

1. The First Defendant is ordered to pay to the Plaintiff a total amount of R250 000-00 for unlawful arrest;
2. The First Defendant is ordered to pay the plaintiff a total amount of R150 000 for pre-court appearance detention;
3. The first and second defendants are ordered to pay, jointly and severally the one paying the other to be absolved, to the plaintiff an amount of R650 000-00 for the post-court appearance detention.
4. The second defendant is ordered to pay to the plaintiff an amount of R100 000 for malicious prosecution.
5. The first and second Defendants are ordered to pay costs of suit, including costs of Counsel, on a party and party Scale C.



SHAI AJ

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be **11h00** on **06 August 2025**

FOR THE PLAINTIFF: TP Radebe Attorneys

Mbombela

tpradebeattorneys03@gmail.com

FOR THE DEFENDANT: THE STATE ATTORNEY-MBOMBELA

C/O Chigo Attorneys

MBOMBELA

info@chigoattorneys.co.za

DATE OF HEARING: 25 March 2025

DATE OF JUDGMENT: 06 August 2025