



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 1655/2020

06 August 2025
DATE

SIGNATURE

SABELO ARMY NDHAMINI

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 based on an unlawful arrest and detention.

[2] The first defendant defends same on the basis that, *inter alia*, its employees were not responsible for effecting arrest. It is further alleged by the first defendant that security officers effected the arrest.

[3] The second respondent raised a special plea of non-service which was summarily dismissed. The reasons for dismissal of same are dealt with hereunder.

Plaintiff's case

[4] The plaintiff testified as follows:

4.1 He was arrested by security officers on 21 January 2019. He was taken to Hazyview Police station, where his arrest and detention rights were read to him by a female officer. He was then detained.

4.2 The conditions in the cells were unbearable as he was detained in a small, dirty cell. In the cell he found about fifteen inmates who demanded smoke from him. He lied and promised he would give them smoke. After a moment they hit him with fists.

4.3 He initially appeared in White River Court and had to be transferred to Hazyview for his next appearance. Nothing happened in White River, other than bail discussions. In Hazyview, the matter was postponed several times before his bail application was heard and denied. The matter was then transferred to the Regional Court, where it was withdrawn.

4.4 He spent 6 months at the police station. The remainder of his detention was at Nelspruit Prison. The conditions in prison were not ideal, but he was not assaulted in prison. Collectively, he was in detention for a period of nine months.

4.4 From the pleadings, it is common cause that the plaintiff was arrested on 21 January 2019, appeared in court on 22 January 2019 and the charges were withdrawn on 16 October 2019.

First defendant's case

[5] Sindhi Miranda Mkhabela ("Sergeant Mkhabela") testified and her testimony can be summarised as follows:

5.1 She is employed by the SAPS as a police officer stationed at Bushbuckridge. She was stationed at Hazyview before 2022, where she was from 2005 to 2018. She held the rank of Sergeant, working as an investigator.

5.2 She started knowing the plaintiff during his arrest. He was arrested by security guards who handed him over to Sergeant Sibuyi, an officer who was attached to Hazyview Police Station.

5.3 A case has been earlier opened before and assigned to her as an investigator. When the plaintiff was arrested, the police officers at the police station established that she was the investigator of the docket. She was then phoned by Sgt Sibuyi. She later went to the police station and interviewed the plaintiff. She informed him that she was placing him under arrest.

5.4 The circumstances of the case are that there was a burglary and the burglar was captured on video footage. The video footage was circulated and a former owner of the plaintiff identified him as the person on the footage. The plaintiff was arrested at a garage after the former owner saw him and alerted security guards. She also saw the footage.

Second Defendant's case

[6] Nomagugu Priscilla Ngomane testified for the second defendant and her evidence can be summarised as follows:

6.1 She has been employed as a control prosecutor since 2006. She is stationed at white River.

6.2 She screens new cases and decides on whether same should be enrolled or not. These cases would be coming from the SAPS.

6.3 In January 2019, during the course of her employment, she received about two dockets involving the plaintiff. She decided on the enrolment of the matter after reading a witness's statement in the docket (A1).

6.4 She gathered from the contents of the docket that the plaintiff was arrested for having broken into a pub. He was linked through a video footage. She concluded that there was a prima facie case and the matter should be enrolled. There was a case the plaintiff should give answers to. She, however, did not see the footage.

6.5 It was discovered that he had a case whereon he was on bail. The matter herein was postponed to the date whereon he would be appearing in court. He was kept in custody as the matter became a Schedule 5. Legal Aid later abandoned his bail application.

6.6 The matter was postponed several times in the district court and investigations were completed. The matter was then transferred to the Regional Court where it was withdrawn.

6.7 The matter was withdrawn for lack of prospects of successful prosecution but she does not agree therewith as she concluded that there was a prima facie case.

Issue

[7] The issues for determination are whether:

7.1 the plaintiff was lawfully arrested and detained in terms of s 40(1) (b) of the Criminal Procedure Act ("CPA");

7.2 the first defendant is liable to compensate the plaintiff for the entire period of his detention following his unlawful arrest, including the period following his first appearance in court, from 21 January 2019 to 16 October 2019; and

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

Arrest

[8] It is trite that an arrest or detention is *prima facie* wrongful. S 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.

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

[10] 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

[11] 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.

[12] *In casu*, the Plaintiff was apprehended by security officers and taken to a police station. Sergeant Mkhabela, however, stated in her testimony that after she was called to the police station, she interviewed the Plaintiff and informed him that she was putting him under arrest. In my view, this is where the formal arrest for the purposes herein should be held to have been effected. No indication is given as to whether she was satisfied that the jurisdictional facts laid down in section 40(1)(b) had been established before effecting her arrest.

[13] Even if this court were to accept that the apprehension was effected by the security officers, Sergeant Mkhabela does not state in her evidence whether she verified the jurisdictional facts as to whether the arrest, if found to have been effected by the security officers, warranted such arrest. From the evidence of the police officer, an impression is created that the police officer had the discretion to detain the plaintiff based on the arrest by the security officers or to effect a formal police arrest. From her evidence, it is apparent that she chose to interview the plaintiff and effect a formal arrest. Apparently, she did not see the complainant before her interview with the plaintiff and no identification parade was held by the investigating officer for the

⁴ Loubser above n 15 at 27.

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

identification of the plaintiff. No jurisdictional facts are laid for her formal arrest. Without a warrant, the arrest remains *prima facie* unlawful. In my view, it would be a sad day for our judicial system if a citizen's arrest could be deemed to be the point of reference for purposes of litigations of this nature. The course taken by Sergeant Mkhabela is comprehensible in matters of this nature. The formal arrest is eventually laid on the doorsteps of the police.

[14] I find that the formal arrest effected by, in her own words, Sergeant Mkhabela, was unlawful

Detention

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

[16] 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.

[17] 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.

⁶ Zealand above, at paragraph 24

[18] *In casu*, it is stated by the first defendant that the arrest was effected by the security officers. This does not assist the first defendant as no evidence was led rebutting the prima facie assumption that an arrest without a warrant is unlawful. This would have led to the police officer detaining an arrestee who was unlawfully arrested.

[19] Even if it were to be the case that the plaintiff was, whether lawfully or unlawfully, arrested by security officers, the police officer should have, before detaining the plaintiff, applied her mind to the arrestee's detention. It is not stated as to why the police officer deemed detention necessary. Even where the arrest is lawful, the police officer is still expected to apply their mind to the detainee's detention.

[20] In the absence of any explanation as to why it was necessary to detain the plaintiff, the detention is found to have been unlawful.

Detention post-court appearance

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

[22] 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

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

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

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 an unaffordable bail or denied bail and remanded the plaintiff in custody the conduct of the police would be found to have occasioned the further detention.

[23] 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

[24] 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

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.

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

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.”

[25] A remand of a case after first appearance is a natural concomitant where bail is not fixed or, if fixed, an accused fails to post bail. For a police officer, Sindi Mkhabela, of more than ten years’ experience, this is a known fact. She should have foreseen the eventual further detention of the plaintiff in the event that bail is not posted.

[26] The police set the wheel in motion by effecting the formal arrest.. 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 should, therefore, be held liable for detention pre-court appearance and detention post-court appearance.

Malicious prosecution

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

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

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

- 28.1 the defendants set the law in motion (instituted or instigated the proceedings);
- 28.2 the defendant acted without reasonable and probable cause;
- 28.3 the defendant acted with malice (or *animo iniuriarum*); and
- 28.4 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.

[29] 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".

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

[31] 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

[32] 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

[33] It is the evidence of Nomagugu Priscilla Ngomane that she genuinely believed that there was a reasonable and probable cause.

[34] I am not satisfied that the plaintiff succeeded in proving malice or animus iniuriandi, or that the prosecution did not genuinely believe that there was reasonable and probable cause to prosecute.

[35] Consequently, the claim for malicious prosecution should fail.

Non-service

[36] In dismissing the special plea of non-service I considered two decisions by the Supreme Court of Appeal¹⁸. In the *Miya* case, where process was served on state attorney but not on head of department, it was held that the fact that summons was not served within the prescripts of provisions was on the facts not fatal. In *casu*, the summons was served on the state attorney. In *Molokwane* it was held that failure to serve on state attorney was not fatal.

Quantum

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

37.1 It was held in *Minister of Safety and Security v Seymour*¹⁹ 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

¹⁸ Minister of Police and others v Samuel Molokwane (730/2021) [2022] ZASCA 111 (15 July 2022); Minister of Police v Miya (1250/2022) [2024] ZASCA 71 (6 May 2024)

¹⁹ 2006(6) SA 320(SCA) para 17

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”.

37.2 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).

37.3 In *Sibuta and Another v Minister of Police and Another*²⁰ the Plaintiff therein was awarded R470 000 for unlawful arrest and detention, he having been detained for fifteen (15) days.

37.4 In *Oriyomi v Minister of Police*²¹ the Plaintiff therein was awarded R120 000, he having been in detention for about four days

37.5 In *De Klerk v Minister of Police*²² the plaintiff was granted R30 000 for having spent almost an hour in detention.

[38] 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.

[39] 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.

[40] In my view, a fair and appropriate award of damages for the appellant's unlawful arrest is R100 000; R150 000 for the pre-court appearance detention and

²⁰ (3709/2016; 3710/2016[2020] ZAECGHC 6(15 January 2020)

²¹ (14132/13) [2020] ZAGPPHC 224 (6 April 2020)

²² (329/17) [2018] ZASCA 45 (28 March 2018)

R600 000 for the post-court appearance detention from 22 January 2019 to 16 October 2019.

Conclusion

[41] Consequently, the following order is made:

1. The First Defendant is ordered to pay to the Plaintiff a total amount of R100 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 defendant is ordered to pay to the plaintiff an amount of R600 000-00 for the post-court appearance detention.
4. The first Defendant is ordered to pay costs of suit, including costs of Counsel, on a party and party Scale B.



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**

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