



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NUMBER A20/24

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

03/09/2025
DATE


SIGNATURE

SIBUSISO SIMONE MALAZA

1ST APPELLANT

INNOCENT THULANI MDLULI

2ND APPELLANT

And

THE MINISTER OF POLICE

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

JUDGMENT

SHAI AJ

Introduction

[1] This is an appeal against the whole of the judgment and order of Judge Ratshibvumo, on 1 November 2023.

[2] Leave to appeal to the full court was granted on 13 February 2024.

[3] The appeal is opposed by the respondents, who were the defendant in the trial court.

Brief litigation history

[4] The appellants had warrants of arrest issued against them. The warrants were issued as a result of statements filed by various complainants, including a sworn statement by Zinhle Phepile Bhembe (“Bhembe”)

[5] In her statement, Bhembe implicated both appellants.

[6] After the arrest of the appellants, a bail application was made for the appellants and same was opposed by the respondents. For this bail opposition, the second respondent made use of counsel who were not the same counsel who represented the second respondent in the criminal proceedings.

[7] Adv Thenga, the prosecutor in charge of the bail testified that bail was refused.

[8] Adv Sihlangu testified that the first appellant was prosecuted and convicted of kidnapping. He was, however, acquitted on others. However, the first appellants testified that he was acquitted. The acquittal or conviction of the appellants is immaterial in making findings relating to the issues herein.

[9] The investigating officer in the matter testified that he is the one at whose instance the J50 warrant was issued. He was of the view that the appellants had committed the offences they were charged with, including kidnapping. He further stated that he had made a mistake when he preferred the murder charge against the appellants at the time

of applying for the warrants. This was so as from Bhembe's statement, there was no evidence that the appellants were there when assault and murder were committed.

[10] Johannes Lusenga is the prosecutor who applied for the warrant. He stated in his testimony that the prosecution was of the view that they had a strong case. He hoped to convict the appellants on common purpose.

Issue

[11] The issue for determination is whether the trial court misdirected itself in finding as it did.

The law

[12] In an appeal of this nature, the court should consider the available testimony and evidence produced at court during the trial.

[13] This court is barred from setting aside the decision of the trial court where it exercised its discretion, merely because this court would on the facts before the trial court have come to a different conclusion¹. It may interfere only when it appears that the trial court failed to exercise its discretion judicially, or that it had been influenced by wrong principles or misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.²

Arrest

[14] It is trite that an arrest or detention is *prima facie* wrongful. Section 43 of the Criminal Procedure Act authorizes a magistrate or justice to issue a warrant for the arrest

¹ Naylor v Jansen 2007 (1) SA 16 (SCA) at 23G-24B; MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 SCA at 624E-H.

² National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14B-D.

of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of the police. It was held in *Minister of Safety and Security v Sekhoto* and another³ that an officer who is in possession of a warrant of arrest is not obliged to effect an arrest but has a discretion as to whether to effect the arrest or not.

[15] 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;⁴
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;⁵ and
- (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.⁶

[16] It should be stated, 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 unlawful.⁷

³ 2011 (1) SACR 315 (SCA).

⁴ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154H-J.

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

⁶ *Loubser* above n 15 at 27.

⁷ *R v Moloy* 1953 (3) SA 659 (T) at 662E.

[17] *In casu*, the appellants were arrested after a warrant of arrest was issued. The police officer was not obliged to arrest the appellants. The warrant of arrest was applied for based on, inter alia, the sworn statement of Bhembe. The statement implicated the appellants in, at least, kidnapping.

[18] In my view, from the aforesaid, one cannot fault the police officer for concluding that the two appellants were involved in the commission of a crime, the least being kidnapping. I find that the police officer was justified in applying for the warrant and subsequently arresting the appellants.

[19] consequently, I find that the trial judge was correct in finding that the arrest was lawful.

Detention

[20] Detention is, in and by itself, unlawful. The *onus* rests on the detaining officer to justify it.⁸ 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.

[21] 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.

⁸ Zealand above, at paragraph 24.

[22] 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.

[23] I have, *in casu*, already found that the arrest was lawful. The facts are that the appellants were linked to, at least kidnapping. The police officer cannot be faulted for having decided to detain the appellants for their release to be determined by a court. I cannot find that this discretion was not properly exercised.

[24] I, therefore, find that the trial judge did not misdirect himself in finding that the detention was not unlawful.

Detention post-court appearance

[25] It was held in the *De Klerk*⁹ 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.

[26] It was held further 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.¹⁰ 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 appellants would not have been detained, then it would be the conduct of the police that factually caused

⁹ De Klerk v Minister of Police [2019] ZACC 32.

¹⁰ Minister of Police v Skosana 1977 (1) SA 31 (A); [1977] 1 All SA 219 (A) at 34F-G.

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.

[27] *In casu*, in light of what has been stated above, I am of the view that based on the seriousness of the offences the appellants could possibly be charged with, a further detention was unavoidable should bail not be fixed by the court. Although further detention was occasioned by the police, it could not be held to have been occasioned by any wrongdoing on the part of either the police or the prosecution.

[28] In my view, the trial judge was not misdirected in holding, either expressly or impliedly, that this further detention was not unlawful.

Malicious prosecution

[29] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.¹¹

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

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

30.2 the defendant acted without reasonable and probable cause;

30.3 the defendant acted with malice (or *animo iniuriarum*); and

¹¹ Heyns v Venter 2004 (3) SA 200 (T) 208B.

30.4 that the prosecution failed. In this instance, the plaintiff bears the *onus* of proof to establish each, as alluded.¹² It is the evidence of the second defendant's witness that plaintiff's case was struck off the roll due to lack of evidence.

[31] In *Waterhouse v Shields*¹³ Gardiner J remarked:

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

[32] The statement by Bhembé warranted a prosecution of the appellants as they were implicated in, at least, kidnapping. For prosecution to ensue 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.

[33] In *Beckenstrater v Rotter and Theunissen*¹⁴ 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 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."

¹² Minister of Safety and Security v Lincoln 2020 (2) SACR 262 (SCA).

¹³ 1924 (CPD) 155 AT 160.

¹⁴ 1955 (1) SA 136 (A) 136A-B.

Animus iniuriandi

[34] 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*¹⁵ 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*.”

[35] It is the evidence of Adv Sihlangu, the prosecutor in the criminal trial, that Bhembe linked the first appellant to the commission of the offence¹⁶ and the first appellant was consequently found guilty on kidnapping and acquitted on others. Adv Sihlangu does not know the outcome of the prosecution of the second appellant. Both appellants testified that they were acquitted of all charges. The claim does not, however, depend on the successful prosecution or not of the appellants. I find no malice on the part of the prosecution.

¹⁵ [2008] 3 All SA 47 (SCA) at 63.

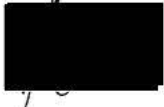
¹⁶ Bundle 1, page 87, line 17 – page 88, line 23.

[36] In light of the aforesaid, I cannot find that the trial judge was misdirected in finding that the appellants failed to establish that there was malicious prosecution. Consequently, the claim for malicious prosecution should fail.

Conclusion

[37] In the premise, the following order:

1. The appeal in respect of both appellants is dismissed.
2. The appellants are ordered to pay costs of this appeal, including costs of Counsel, on a party and party Scale C.



SHAI AJ

I agree and it is so ordered.



LANGA J

I agree



TSHETLO AJ

DATE OF HEARING: : 14 MARCH 2025

DATE OF JUDGMENT : 03 September 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 03 September 2025.

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