IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case no: 218/2013

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:

ANDRIES JACOBUS BESTER Plaintiff

and

MARIUS DEON VAN DER WESTHUIZEN First Defendant

THE MINISTER OF SAFETY AND SECURITY Second Defendant

LUYANDA NGWEVELA Third Defendant

Coram: Mamosebo J

Heard: 17 – 19/06/2025.

Delivered: 05/09/2025

Summary: *Action – damages – delictual claim for wrongful arrest and detention – Merits and Quantum separated – First and Second Defendants admit liability – Claim under actio iniuriarum – Four requirements must be met: (a) plaintiff must establish that his liberty has been interfered with; (b) this interference occurred intentionally on the defendant's part; (c) the deprivation*

of liberty must be wrongful; and (d) the conduct of the defendant must have caused both legally and factually, harm for which compensation is sought.

ORDER

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1. The arrest and detention of the plaintiff on 23 November 2011 was wrongful.

2. The first to third defendants are jointly and severally liable to the plaintiff, the one paying the other to be absolved, for such damages as the plaintiff may prove he suffered in consequence of the wrongful arrest and detention.

3. The costs of the action on merits are reserved for later determination.

JUDGMENT

Mamosebo J

[1] The plaintiff instituted action for damages for unlawful arrest and detention arising out of his arrest on a charge of fraud and his subsequent detention for one night in a police cell.

[2] The plaintiff is Andries Jacobus Bester, a pensioner who worked for a single employer as an electrician for 38 years. He has been resident at Vierfontein in the Free State Province for the past thirty years.

[3] The first defendant is Marius Deon van der Westhuizen, in his representative capacity as the investigating officer in the fraud case the plaintiff was arrested and detained on suspicion of, under case number 40/09/2011. The second defendant is the Minister of Safety and Security in his official capacity as the first defendant's employer. The third defendant is Luyanda Ngwevela in his representative capacity as a public prosecutor. Mr Ngwevela is stationed at Springbok in the Northern Cape at the Port Nolloth circuit court and was responsible for the prosecution of the said fraud case.

[4] At the commencement of the trial, Mr MC Davis from the Office of the State Attorney submitted that the first and second defendants are conceding the merits of the plaintiff's claim. Their participation in the trial was therefore rendered redundant and they were excused. Accordingly, reference to the first and second defendants in this judgment shall be out of necessity for purposes of completing the picture with what transpired in this case.

[5] The third defendant abandoned his special plea that the plaintiff did not comply with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 but proceeded with the trial to defend the plaintiff's claim against him.

[6] The parties agreed from the onset that the trial would dispose of the issue of liability only and that the issue of *quantum* would be decided later either by settlement between the parties or by way of the court hearing evidence and making an order. Accordingly, this judgment relates to the issue of delictual liability on the third defendant's part.

[7] In order for the plaintiff to succeed in this claim, he must satisfy the following requirements as enunciated by the Constitutional Court in *De Klerk v Minister of Police*[1]:

[1] 2020 (1) SACR 1 (CC) para 14.

'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;

(c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; 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.'

Background

[8] The salient facts surrounding the plaintiff's arrest and detention are as follows. A complaint was lodged with the Police in Port Nolloth that, a person who identified himself as Burger (the suspect), using the cell number 0[...]…, contacted the complainant (Mr Nicolas Petrus Kotze of Port Nolloth) purporting to sell him animal feed for R2 500. The suspect provided the complainant with a cell number of 0[...]…, said to be that of a certain Mr Nagel who could be contacted to verify the credentials of the suspect. The complainant contacted the said Mr Nagel who confirmed that the suspect was a businessman but would not provide full details thereof.

[9] The complainant eventually paid the R2 500 purported selling price to a bank account provided by the suspect but never received the animal feed or a refund. Instead, the plaintiff could not reach the suspect again. Realising that he had been defrauded; the complainant lodged a complaint of fraud with the police.

[10] During the investigation of the complaint, the 0[...]… cell number was found to have been RICA'd[2] under the name of the plaintiff on 01 April 2011 while the 0[...]… cell number which the suspect had provided to the complainant for the verification of his credentials was found to be linked to a certain Ms Letitia Paul. It was also found that the bank account into which the money for the purported sale of feed was received belonged to a Ms Letitia Paul. Based on the above and related factors that will be detailed below, the third defendant successfully sought a warrant for the plaintiff's arrest on suspicion that the plaintiff had committed the said fraud.

[11] The plaintiff was arrested on 23 November 2011 after he was telephonically contacted in the afternoon by Det. Boshoff from Orkney Police Station summoning him to a location close to the plaintiff's premises. She then asked him to accompany her to the Orkney Police Station and the plaintiff obliged. At that stage, he was not aware of the investigation and the fact that a warrant for his arrest had been authorized. Det. Boshoff mentioned the name of Letitia Paul to the plaintiff as she was relating details of the investigation. He informed her that Letitia Paul stayed with a certain Mr RA Boshoff.

[12] The plaintiff was afforded an opportunity to speak to his instructing attorney, Mr Senekal, before he was detained in a cold, dark cell with four other detainees. He was not served any food and he struggled to

[2] The recording of the personal particulars of a person by a telecommunication service provider before entering into a telecommunication service contract with the said person in terms of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002.

fall asleep. He was detained for one night, appeared in court the following morning, and was released at around 13h00.

[13] The plaintiff and his instructing attorney telephonically spoke to a correspondent attorney in Port Nolloth who informed them that the matter against Mr Bester had been withdrawn. Mr Bester received information from the corresponding attorney that a certain Mr RA Boshoff was charged, prosecuted and sentenced as he had used the stated 0[...]… cell phone number to communicate and defraud a victim.

Plaintiff's evidence

[14] The plaintiff confirmed that he willingly RICA'd the sim card with the 0[...]… cell number in his name, ID number and address on behalf of Mr RA Boshoff. The records reflect that the plaintiff only used the phone for about six hours but he cannot explain how that happened. The plaintiff and Mr Boshoff had started a scrap metal business together having grown up, played and even attended school together. They were neighbours.

[15] Further, the plaintiff accepted that when a person RICA's a sim card, it is linked to his identity number and address. On the other hand, according to the contents of the docket, the complainant was unknown to the plaintiff. The plaintiff neither spoke nor sold any animal feed to the complainant. Further, the plaintiff was never contacted by the Vierfontein Police regarding this fraud case until his arrest. The first defendant also never contacted the plaintiff. The arrest and detention have caused the plaintiff trauma and sleepless nights. He paid the corresponding attorney a fee of R2 500 for his appearance in the criminal case.

[16] More pertinently to the plaintiff's case are his submissions that:

(a) The complainant never identified the plaintiff as the person who had made the telephone call to him;

(b) The first defendant failed to investigate the report and never called the 0[...]… cell phone number to ascertain in whose possession the phone was when the complainant was called;

(c) The first defendant neither contacted the plaintiff for an explanation regarding what was reported to him, nor did he establish the plaintiff's residential or employment address;

(d) In addition, no warning statement was obtained from the plaintiff, instead, the first defendant falsely represented to the third defendant and the magistrate that the plaintiff was identified as a suspect by the complainant and that the plaintiff was a fugitive from justice with no fixed address and had to be traced throughout the entire country; and

(e) The first defendant also furnished an inaccurate account (to the third defendant) that he had made enquiries with the Vierfontein Police about the whereabouts of the plaintiff and was told that they were unknown.

[17] The plaintiff's main contention is, that the third defendant still relied on the above information to secure a warrant of the plaintiff's arrest, thus flying in the face of the identified discrepancies or issues which he could have easily recognised merely by giving due consideration to the docket at his disposal. The suspicion that the third defendant had in securing the warrant of arrest of the plaintiff was therefore unreasonable, so argued the plaintiff.

[18] Mr Eillert for the plaintiff did not call any further witnesses, the plaintiff was the only factual witness in his cause.

The third defendant's evidence

[19] The third defendant was on duty on 08 November 2011 when he was approached by the first defendant to sign a section 205 application[3] for the subpoena of people in the said fraud case. This is the information sketched to the third defendant by the first defendant to substantiate the issuing of the s 205 request:

(a) The suspect had contacted the complainant telephonically and offered him cattle feed for an amount of R2 500;

(b) The complainant was to pay the money into a furnished bank account so that the suspect would have fuel money to deliver the said feed;

(c) Despite the complainant having done so he neither received the feed nor his money back. The suspect also did not answer the complainant's calls after the money was deposited into the said account.

[20] The third defendant signed the s 205 request which was authorised by the Magistrate. The s 205 request was utilised to establish that the 0[...]... cell number belonged to the plaintiff. Positive feedback from the network service provider established that the owner of the said number was Mr Andries Bester, the plaintiff, giving his ID number, RICA date and residential address.

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[3] Section 205 of the Criminal Procedure Act 51 of 1977 stipulates: -
[M]agistrate may take evidence as to alleged offence
(1) A… magistrate may, … upon the request of … a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other … magistrate, for examination by the Public Prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: . . .
(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).
(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the … magistrate.

[21] The third defendant could not recall whether he had the docket with him when he signed the s 205 request. According to him, the complainant identified the suspect as Burger, not Bester. The third defendant conceded that the statement written by the first defendant in the docket – that the plaintiff had contacted the complainant, was incorrect.

[22] The third defendant submitted that he applied for the warrant of arrest in order to have Burger, who had communicated with the complainant from the RICA'd cell phone number, arrested. Further that he was told by the first defendant that the efforts to find the plaintiff were unsuccessful. Mr Ngwevela maintained that he based his decision for the arrest of the plaintiff on the RICA identification of the ownership of the cell phone number. He explained that the first defendant had told him that he had contacted the Vierfontein Police and that they could not locate the suspect. Further that the first defendant suggested to him that, in light of the fact that the suspect could not be located, it would be best to circulate the warrant of arrest so that the suspect can be arrested anywhere in the country when located. The third defendant claims that he was under the impression that Burger and Bester could be the same person. He relied on what he was told by the first defendant as he believed and trusted him having known him since 2003.

[23] It is common cause that the plaintiff was arrested following the warrant of arrest secured by the third defendant. Before the arrest, there was another s 205 application brought in respect of the bank records pertaining to the bank account furnished by the suspect. The s 205 application specifically requested the bank to provide the name and address of the account holder as well as the bank statement for 09 September 2011. The third defendant had signed the s 205 application for the bank records. The bank confirmed that the account holder was Ms Letitia Paul. This was the bank account into which the

complainant’s money was deposited. The bank also furnished the account holder’s residential address.

[24] On whether or not Mr Ngwevela had the docket when he made the decision for the plaintiff to be arrested, the following was put to him after his response that he could not recall whether the docket was placed before him. That the first and second defendants pleaded that they had provided him with the docket. In Part C of the docket, namely, the investigation diary which captures the investigative communication between the investigating officer, his seniors and the prosecutor, there is an entry that the docket was provided to the prosecutor. He conceded, only after being confronted in cross-examination, that he was placed in possession of the docket.

[25] The third defendant explained that he did not question the investigating officer on whether investigations had located Ms Letitia Paul. He was referred to the investigation diary where Sgt. Theteletsa of Ottosdal informed the investigating officer that Ms Letitia Paul had relocated to a farm in Leeudoringstad but her cell phone number was 0[...]… This cell phone number is the same as the one Burger furnished to the complainant as belonging to one Mr Nagel. According to the third defendant, he assumed, without any verification, that Ottosdal, the address where Ms Letitia Paul’s bank account was held, was in the same vicinity as Vierfontein. When told that Vierfontein is in the Free State and Ottosdal is in the North West Province and were one and half hours’ drive apart, he maintained that, even so, his suspicion was reasonable considering all factors at play.

Ms Snyders, for the third defendant, did not call any further witnesses and closed the case for the third defendant.

<u>Analysis</u>

[26] The arrest and detention of the plaintiff is not in dispute. What is disputed is their lawfulness or otherwise. This aspect is analysed against the backdrop of s 43(1) of the Criminal Procedure Act 51 of 1977 which stipulates:

'43 Warrant of arrest may be issued by magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath **there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence**.' (own emphasis added).

[27] It is common cause that the third defendant is an experienced prosecutor. On the application for the arrest of the plaintiff, he based his decision on the following, while maintaining that he had complied with the requirements of s 43(1)(c):

(a) The network service provider, MTN, furnished information that the 0[...]… cell phone number was registered to the plaintiff and that the complainant was called from that same number;

(b) That the person who communicated with the plaintiff was a male;

(c) That the accountholder's address was in the same vicinity as the address of the plaintiff;

(d) That the investigating officer verbally informed him that the plaintiff was untraceable, i.e, could not be located at the given address.

[28] Had the prosecutor paid more attention to the contents of the docket, as he ought to have done, he would have focused on the following:

(a) That the investigating officer deposed to an affidavit stating that the plaintiff's residential address had been established. There was no entry in the investigation diary that the Vierfontein Police were contacted to ascertain the plaintiff's whereabouts and that the plaintiff could not be traced at his given address.

(b) He should have established whether there was a link between the bank records held by Ms Letitia Paul, the telephone call by one Burger using the 0[...]… number, the 0[...]… number and the complainant. Mr Ngwevela also conceded that there was no ascertainable link between the plaintiff and Ms Letitia Paul.

(c) There was no factual basis for the prosecutor to assume, without more, that 'Burger' may be an alias for 'Bester', and that 'Ottosdal' and 'Vierfontein' were in the same vicinity. Desktop research would have supplied an instant answer.

(d) It was a far stretch of the imagination to conclude that the plaintiff was the suspect who had defrauded the complainant merely because the cell phone number 0[...]… was RICA'd under the plaintiff's details. It is wrong to arrest first and investigate thereafter as was done in this case.

(d) That the name Burger was an alias for Boshoff, who was ultimately successfully prosecuted for the crime.

(f) Mr Ngwevela should very well have realised that the first defendant's affidavit supporting the application for a warrant for the arrest of the plaintiff did not accord with the allegations contained in the docket.

[29] Musi AJA, writing for a unanimous court, in *Biyela v Minister of Police*[4] said:

'The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. **It must be based on specific and articulable facts of information.** Whether **the suspicion** was reasonable, under the prevailing circumstances, **is determined objectively**.' (own emphasis added).

[30] The third defendant was a single witness but based on the concessions of the first and second defendants, the crux of this case pivots around the burden of proof having shifted to him. It must be determined whether he has discharged the onus reposed upon him to show that the deprivation of liberty was not wrongful.

[31] In my view, the third defendant's conduct failed to display the required standard of a diligent public prosecutor. It cannot be objectively argued

[4] [2022] ZASCA 36; 2023 (1) SACR 235 (SCA); [2022] JOL 52757 (SCA) para 34.

that he had a reasonable suspicion that the plaintiff was the person who had defrauded the complainant. On a conspectus of the evidence before me, there is no doubt in my mind that no reasonable suspicion existed. The third defendant's decision to obtain the warrant was not premised on reasonable grounds that, when the plaintiff was arrested, he had committed fraud. I therefore find that the plaintiff has made out a case of unlawful and wrongful arrest and detention, and accept his version as probable and credible. I am satisfied that the plaintiff's arrest was not justified and therefore unlawful. It also follows that his detention was also not justified, resultantly causing him some form of harm.

[32] In the result, I make the following order:

1. The arrest and detention of the plaintiff on 23 November 2011 was wrongful.

2. The first to third defendants are jointly and severally liable to the plaintiff, the one paying the other to be absolved, for such damages as the plaintiff may prove he suffered in consequence of the wrongful arrest and detention.

3. The costs of the action on merits are reserved for later determination.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the plaintiff:	Adv A Eillert
Instructed by:	Dawid Senekal Inc

	c/o Elliott Maris Wilmans & Hay
For the 1st & 2nd defendants:	Mr MC Davis
Instructed by:	The State Attorney
For the 3rd defendant:	Ms JA Snyders
Instructed by:	Engelsman Magabane Inc