

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 23944/2020

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

28 OCTOBER 2025
DATE


SIGNATURE

In the matter between:

JOSEPH BHEKIZITHA DUBE

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL DIRECTOR

SECOND DEFENDANT

JUDGMENT

Mahomed J

Introduction

- [1] The plaintiff, Mr Joseph B Dube, instituted seven claims against the Minister of police and the NDPP as second defendant, however he subsequently withdrew his claim against the second defendant as its prosecutors did nothing wrong. In May 2024, three of his claims to the value of R200 000 were settled and his claim D for further detention, from 31 November 2017 to 26 March 2019 (R1 500 000) and a claim E for malicious prosecution (R300 000) was by agreement postponed sine die.
- [2] He seeks a judgment against the first defendant, by default, after the first defendant failed to comply with an order compelling further particulars for trial, its defence was struck. Furthermore, interest is sought from service of summons on 14 September 2020, and party party costs on scale B, including the reserved costs for the default judgment application and for a hearing on 13 August 2024, when the matter was postponed by Windell J.
- [3] Advocate L Kalase appeared on behalf of the first defendant and reminded the court that albeit his client's defense is struck, his client continues to enjoy a right to be heard, and it must be permitted to continue to test the plaintiff's version. I agree that the striking out of a defence, cannot deprive the defendant of its constitutional right to fair trial. The matter proceeded on the understanding that the defendant had no version to put to the plaintiff but sought to test his version for the court to be fully apprised of the circumstances of the plaintiff's further detention and the proof of his claims D and E.
- [4] This court was to determine his claims for further detention from 31 October 2017 until his release on 26 March 2019 after the stated decided it had insufficient evidence to proceed with its prosecution.

The Evidence

[5] On 30 October 2017 upon his arrival at his workplace the plaintiff was arrested on suspicion of theft of guns from his place of employment. He was employed as a supervisor in a private security company and claimed that he was unlawfully arrested. A part of his claim was settled at an earlier hearing. Advocate Kalase, counsel for the Minister of Police, the first defendant, submitted that he was lawfully arrested on a reasonable suspicion, after the police were informed by his co-workers that he knew of the theft of guns. This the plaintiff conceded, during cross examination.

[6] In his evidence in chief the plaintiff emphatically denied any knowledge of the theft at his workplace. He maintained that he knew nothing of the theft, he ought never to have been arrested nor taken into custody, he claimed his continued custody, was malicious.

[7] According to counsel for the Minister, his coworkers, who were arrested with him on the day informed the police that he knew where the guns were, it was argued that the police held a reasonable suspicion and therefore acted lawfully when they arrested him and placed him in custody with the others.

[8] During cross examination the plaintiff denied that the magistrate informed him about his right to bail on 31 August 2017 the day after he was arrested. He testified that he said nothing on the day. However, he conceded that he learnt of his right to bail only later that day when he met an attorney in the holding cells, but he could not afford his services and therefor could not apply for bail. His evidence is that he had no money on him whilst in prison, the police had taken his money on the date he was arrested. After his arrest he was taken to the Alexandra Police station and questioned, and he testified that he was

brutally assaulted and forced to speak. His evidence is that the assault was so brutal that he thought if he told the police he could lead them to the buyer's home, the torture would cease. Therefore, he signed a statement which the police prepared, he maintained he was forced to sign it. He was taken to court on the next day, he testified that the judicial officer did not tell him anything about his right to bail, he only learnt of his right later that day when he met a private lawyer, who told him about bail and that he charged R10 000. He declined the service as he did not have the money. During cross examination he testified that even if he had the money he would not have applied for bail, because he wanted his day in court to prove his innocence. He was detained at the Johannesburg prison "sun city" for the period 3 November 2017 until 26 March 2019, when the matter was remanded on several occasions, without any explanation on his continued detention.

[9] Counsel for the defendant put it to him that he was misleading the court as the procedures followed was recorded by the magistrate in the court file and it was recorded that all accused together, were informed of their right to bail.

[10] The plaintiff insisted that the judicial officer had never informed him of his right to bail and he would not have applied in any event. Mr Kalase put it to him that he "preferred to remain in prison" to prove his innocence at his trial. Counsel submitted that the contents of the court file, admitted as exhibit A, is common cause. The file does not include any notes of an opposed bail application, he submitted that the plaintiff chose to remain in prison to have his day in court, and that he cannot justify his claim D, he remained there of his own volition.

[11] The plaintiff testified that he was so poorly treated and tortured whilst at the Johannesburg prison, he had to purchase a mattress to sleep on, he had no

money, and his sister had sent him some money. He testified that the matter was remanded over months, that he had missed the birth of his 5th child, he saw her only after her first birthday, he was forced to sell his car because he was in prison for such a long time, he needed to support this family.

[12] He appeared in court several times and each time he was told the matter was postponed for further investigations. He was kept at the Johannesburg prison, sun city all the while and suffered serious humiliation at the instance of other prisoners. He testified that whilst there he awaited the arrival of an attorney from legal aid, but he failed to arrive. All the while his matter was remanded and he was not given any reasons for his continued imprisonment.

[13] He testified that he is South African but on the charge sheet he is noted as Zimbabwean. The police did nothing to verify his identity, and the confession was the only way the first defendant could link him to the crime. The plaintiff testified that since his arrest, his community views him as a criminal, after his long absence from home. He remained in custody until charges were withdrawn 26 March 2019. He testified that as a result of this unlawful detention, he lost his job, and has had trouble securing one since, he is unable to support his family.

[14] In cross examination he conceded that he was arrested based on information given to the police by his co-workers and not only on the content of his confession.

[15] Counsel for the defendant argued that that it is reasonable to draw the inference that the plaintiff had aligned himself with the circumstances of his arrest, the conditions in prison which he chose to endure until the date of his trial when he would prove his innocence. The evidence is that he spent 480 days in custody,

when the charges were withdrawn. Advocate van Rooyen for the plaintiff, submitted that the defendant is incorrect in placing the onus on the plaintiff, to have applied for bail and argued that his failure to apply for bail must not be viewed as wilful, to deny him damages, he suffered at the hands of the police. He argued that plaintiff had no money and did not know of his rights. Furthermore, he submitted that the plaintiff's failure to apply for bail is not an intervening act breaking the chain of causation, his failure to apply for bail cannot be a valid defence for the state.

[16] In **JE Mahlangu and Another v Minister of Police**¹, the Constitutional Court, after a consideration of a long line of cases was clear that:

“ the police, like any other state functionary ... are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by the law. That is the basic component of the rule of law and one of the founding values of our Constitution.

[17] The court continued,

“our Constitution recognises the aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.”

[18] Later in the judgment, the court confirmed

“the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s12

¹ (CCT88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC) 2021(2) SACR 595 (CC) (14 May 2021)

(1) of the Constitution. ... the defendant is ...to establish before detaining the person, the justification and lawfulness of such arrest and detention.”

[19] It was common cause that the plaintiff was arrested on information obtained initially from his co-workers, they threatened him if he cooperated with the state. The further evidence is that he was desperate to end his traumatic time in prison, and risked implicating himself, when he signed a confession. It was not disputed that the document he signed was presented to him by his captors, they knew they had no other evidence which they could rely on, they ought to have informed the prosecutor of their weak case way back when they drafted the confession.

[20] It is clear to me that the police failed and in fact refused to investigate his many protestations of his involvement in the theft. To my mind the police may well have exacerbated his case when they recorded him as a national of Zimbabwe, when in fact he is South African. The investigating office is obliged to inform a prosecutor of all details regarding progress in his/her work. He/she is the person on the ground, interfacing directly with the public and events on the ground. The police fail dismally at appreciating the import and impact of their employment as peace officers. Our history must serve as our reminder on what can never be acceptable to our people, this cycle of disrespect for humanity must stop. The plaintiff was taken into “custody” he is entitled to respect for his dignity, and the police are always accountable for him, *whilst he is in their custody.*

[21] Counsel for the minister contended that liability cannot be imputed to the defendant where there was direct evidence by the plaintiff during cross examination that *“even if he had the money he would not have applied for bail.*

The plaintiff remained in custody by his choice, and this must constitute a break in the chain of causation. Mr Kalase argued that the plaintiff failed in his evidence in chief to demonstrate that his continued detention was due to the false confession, he testified he chose to await his trial to prove his innocence. Mr Kalase argued that the confession was secondary evidence and further that if the court found that the plaintiff was held in custody at the instance of the first defendant, it would effectively constitute an unlimited imputation of liability, against the established principles in the Mashongwa judgment². Counsel argued that the issue of a just cause for the later deprivation of liberty is not a relevant consideration in casu, given that the plaintiff *chose* not to apply for bail, and to remain in prison, until his trial date.

[22] In Mahlangu, supra, the Constitutional court held that the plaintiff's failure to apply for bail is not an intervening act, breaking the chain of causation. I agree with counsel for the plaintiff who argued that the conduct of the police and investigating officer, led to the continued deprivation of his liberty. The plaintiff whilst incarcerated, was on the "backfoot", he left home one morning to earn a living to support his family and never returned for over a year. Nothing positive happened for him despite his numerous efforts to persuade the investigating officer of his innocence, throughout his stay in prison.

[23] The police were wrong even with his nationality, which in our times in our country is a grave error for many of our people. In *De Klerk v Minister of Police*³, the court stated "*what matters is that there was a just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant*

² 2015 ZACC 36, 2016 (3) SA 528 (CC)

³ (CCT 95/18) [2018] ZACC 32;2019 (12) BCLR 1425 (CC), 2020 (1) (CC) (22 August 2019) par 62

to a remand order is lawful, regard can be had to the manner in which the remand order was made." No just cause for his continued detention was before me. It is probable that the mix up with his identity could have led to the longer time in detention.

[24] There is no evidence before this court on whether the police and the prosecutor applied their minds regarding the reasons for the plaintiff's continued detention having granted his co accused bail without any opposition. I agree with counsel that had the prosecutor known of the circumstances in which the confession was made and the mix up with his identity, the prosecutor would probably never have enrolled the matter. Instead, the matter was remanded several times for further investigations and the plaintiff testified that he was never told why he was still in custody. *"Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case and the law casts an obligation on the police official to do so."*⁴ In my view his continued detention was unlawful and the first defendant is liable to compensate him for depriving him of his liberty any further without any just cause.

Malicious Prosecution

[25] It was common cause that the first defendant arrested and detained the plaintiff on the information the police obtained from the plaintiff's co accused, and therefore the police held a reasonable belief that the plaintiff knew of the theft of the guns. There was no evidence before me that the first defendant was malicious when it arrested and detained the plaintiff, but then, this court has also not had the benefit of cross examination of the first defendant's witnesses,

⁴ Mahlangu supra, Botha v Minister of Safety and Security 2012 (1) SACR, 305 (EPC) at [29-30]

none were led, the first defendant failed to comply with an order of court and risked a default judgment, it proceeded without a version, a risk it must bear.

[26] In *Minister of Justice and Safety and Security NO v Schubach*⁵, the court confirmed that a plaintiff in a claim for malicious prosecution must allege and prove that the NDPP set the law in motion and instituted the proceedings, that it acted without reasonable and probable cause, that it acted with malice or with the intention to injure the plaintiff (*animus iniuriandi*) and that the prosecution failed. The plaintiff conceded that the police were informed by his co workers and that they acted on their information, in terms of which his co-workers were also arrested and detained. In my view the first defendant acted with reasonable and probable cause, the charges were for aggravated robbery, a schedule 6 offence, the plaintiff conceded that the first defendant had a *prima facie* case at his arrest, and therefore it can be found that the first defendant did not act with malice, in his continued detention. In my view the plaintiff failed to adduce sufficient evidence for a claim for malicious prosecution, and on his own version, this claim must fail. There was no evidence led that there was deliberate intention to harm him or injure him, Mr van Rooyen in heads of argument contended that the prosecutor laboured under the belief that there was evidence to prosecute the plaintiff, the first defendant withheld the evidence. This fact is speculative and unreliable.

Quantum

[27] In *casu* the plaintiff was compensated for his initial arrest and detention, and in assessing his damages in regard to his continued detention, the court must

⁵ 2914 ZASCA 216

consider, the circumstances under which he was further detained, the duration of his deprivation of liberty, the presence or absence of malice and whether the first defendant offers a reasonable explanation for the continued detention. The defendant failed to present this court with a reasonable explanation for his continued detention and Mr Kalase made of meal of his concession that he would not have applied for bail even if he could afford the money. In my view the witness under cross examination, was somewhat argumentative, but he was also still in pain about his treatment by the police, more so because they failed to secure evidence against him. For several months he had tried to convey his innocence and was ignored. His behaviour is understandable in the circumstances. He may not have anticipated a long wait for a trial or no trial at all and the period of his custody simply passed by which resulted in 480 days in detention. I cannot think that anyone who faces such oppressive and torturous conditions, as was the plaintiff's testimony, which remains unchallenged, would have preferred to await a trial date if he knew it would take as long as it did, for the first defendant to simply withdraw charges. The first defendant could have properly assessed the strength of its case much earlier.

[28] The evidence is that the long period in detention, was at great personal cost to the plaintiff as mentioned earlier in this judgment, he must be fairly compensated. Mr van Rooyen referred the court to similar cases. Having regard to the conspectus of the evidence, I am of the view the plaintiff was further unlawfully deprived of his liberty, by members of the first defendant who failed to respect his rights to liberty and have any regard for his continued detention. The first defendant is liable to compensate him for his further detention. The award of compensation must be fair to both parties. I am of the

view that an amount of R900 000 for his continued detention is fair compensation in the circumstances. The plaintiff's claim for malicious prosecution is dismissed for having failed to prove animus injuriandi, on the part of the police.

[29] The costs of the action is awarded according to the usual practise of the successful party wins costs.

I make the following order:

- 1) The first defendant is liable to the plaintiff for his unlawful further detention in the amount of R900 000
- 2) Interest on the amount at 7% per annum, from date of service of summons
- 3) The plaintiff's claim for malicious prosecution is dismissed
- 4) The first defendant is to pay the costs on a party party basis on scale B, including the reserve costs of 13 August 2021.

A handwritten signature in dark ink, appearing to be 'S Mahomed', is written over a black rectangular redaction box.

S MAHOMED

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Date of Hearing: 29/07/2025

Date of Delivery: 27/10/2025

Appearances:

For Plaintiff: Adv van Rooyen

Instructed by: Ndebele Attorneys

Email: thembi@ndebeleinc.co.za

For 1st Defendant Adv Kalase

Instructed by: State Attorney

Johannesburg