

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 46355/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
2026-03-03	
DATE	SIGNATURE

In the matter between:

HENDRIK LODEWYK OOSTHUIZEN

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

POTTERILL J

[1] The plaintiff, Hendrik Lodewyk Oosthuizen [Oosthuizen], is seeking damages from the defendant, the Minister of Police [Minister] for malicious, alternatively unlawful arrest and detention. A further claim for malicious prosecution by SAPS without any reasonable or probable cause was instituted also seeking as relief damages.

[2] The Minister pleaded that it admitted that Oosthuizen was arrested on either the 3rd or 4th August 2018, without a warrant, at Boschkop. It pleaded no warrant was necessary as Oosthuizen was arrested for "driving under the influence of alcohol and reckless or negligent driving". It further pleaded that the Minister was not vicariously liable for any action as alleged for the South African Police Services [SAPS] members. The Minister also denied that the SAPS members wrongfully and maliciously set the law in motion by unreasonably laying a false charge against Oosthuizen.

[3] At the commencement of the trial it was admitted on behalf of the Minister that the arrest of Oosthuizen was unlawful, but denied that the arrest or prosecution was malicious. It was also agreed between the parties that the quantum of the claim for the legal fees of Oosthuizen is R20 000.000. Vicarious liability was also not in dispute. The matter was to proceed on merits and quantum.

The evidence

[4] In argument on behalf of the Minister it was graciously conceded that Oosthuizen and his witness, Chris van der Westhuizen were credible witnesses, whereas the evidence of the investigating officer was unreliable and not credible. The circumstances surrounding the arrest is thus based on the evidence of Oosthuizen and Van der Westhuizen as common cause.

[5] Oosthuizen testified that he has an honours degree in chemical engineering and at the time of the incident he was a Control Engineer. On the date of the incident they were on their way to a venue namely Weiveld. He was with his wife and one other passenger, Mr Chris van der Westhuizen [Van der Westhuizen]. He was driving in Lynnwood Road and was approaching Boschkop Road. He was slowing down to turn left and as he was approaching the corner another vehicle came from the front and hit his vehicle on the right front. The oncoming vehicle had swerved to his side of the road and collided with him in his lane. This accident occurred around 9 o'clock in the evening. He immediately stopped, however the other vehicle continued to drive away from the scene. He ran to the other vehicle and it came to a stop. The driver was in his seat but was non-responsive to any of their questions. Another bystander asked whether the driver was aware of the accident. The other driver did not answer, and his vehicle that was idling all along was then switched off by someone else. The

other driver got, out, he stumbled from the vehicle, was clearly under the influence of alcohol, smelled of liquor and was struggling to walk. He fell down in attempting to sit next to a wall of the shopping mall.

[6] The police was called and the policemen arrived. They took in the scene and thereafter they took the other driver, now identified as Mr Bierman [Bierman], on the back seat of the van to the police station. Van der Westhuizen was asked to report the incident at the police station and he went to the station with his friends, including Van der Westhuizen. His wife stayed behind at the scene with other friends with the car that needed to be towed away.

[7] When he and Van der Westhuizen arrived at Boschkop police station he noted that Bierman was escorted out of the building by the members of the police who was at the scene of the accident. There was also another person who indicated he is a family member of Bierman.

[8] He and Van der Westhuizen tried to report the incident. The SAP members in the charge office were reluctant to take the report. A further unknown police officer, who was not on the scene, entered the charge office and he engaged in the conversation accusing Oosthuizen of being drunk. It was clear this officer had some authority over the others because they followed his orders. The family member of Bierman told them that tonight they would have a big problem. One of the other officers accused Oosthuizen of being drunk and they instructed him to go to the back of the desk and told him he was now in police custody. The police officer escorted him to the back of the desk and they were aggressive. Oosthuizen volunteered to take a Breathalyzer test but it was ignored and the policeman indicated that he is highly trained to identify drunk people. Oosthuizen testified he was not allowed to leave and were still trying to talk to the police while insisting to complete the accident report. Van der Westhuizen was standing on the opposite side of the desk and was arguing with the Police that they were not drunk. Neither Van der Westhuizen nor Oosthuizen had drunk anything.

[9] Oosthuizen was then instructed to get into the back of a police van and was locked up to take him to Mamelodi Hospital to draw blood. The police drove at a reckless high speed and his friends in the BMW behind the van could barely keep up.

They were swerving and going over pavements and the vehicle broke down on the way. They had to wait for another vehicle to arrive. He was not let out of the van and his friends were denied the right to go and check if he was "ok" in the van. The police again drove very fast and reckless to the Mamelodi Hospital. His wife was still not allowed to go in with him.

[10] Upon arrival at the Hospital waiting area he found the SAPS members who were at the scene of the accident waiting with Bierman. The blood samples were taken from Bierman and Oosthuizen. The doctor who performed the procedure indicated to the member of SAPS that he did not believe Oosthuizen was under the influence. The blood sample was taken four hours after the accident. Oosthuizen asked whether he could leave, but the members informed him he was arrested and could not leave. Bierman was then locked up with him in the back of a police van. Bierman asked Oosthuizen why he was there. It was clear Bierman did not recognise Oosthuizen. Back at Boschkop Oosthuizen was provided with a document setting out his rights and he was asked to sign it.

[11] Nobody told Oosthuizen what was going on and he was only later informed that he was arrested on a charge of drunken driving. Nobody explained his rights or the process of applying for bail. He was taken to Welbekend Police Station around approximately 01h00-01h30. He was kept in the cells where he was scared as he did not know what was happening.

[12] The police laid a charge against him and they falsely accused him of drunk driving. He indicated that Bierman's family member was also intimidating. He threatened his wife. Later the morning an inspector arrived and he opened the docket and granted bail at approximately 11h30 the 4th of August 2018.

[13] Oosthuizen was in custody from around 22h00/22h30 on 3 August 2018 until 11h30 the following morning on 4 August 2018. He was warned to appear in court as soon as possible on 8 November 2018. They were escorted back to Boschkop with a police vehicle. On the 8th of November 2018 at court his bail money was returned and the case was not placed on the roll. This was after he approached an attorney, Mr Van der Merwe, who made presentations to the prosecutor.

[14] Oosthuizen consulted a psychiatrist to assist him with trauma counselling and stress counselling. He is now doing better, but is still uncertain as to why and what happened and till today he is scared of interaction with police.

[15] His blood results came back negative it was 0.0 % and he thinks Bierman's result was 2.00 %. He was unnecessarily detained. He testified that the case was *nolle prosequid* and that no further prosecution took place. He indicated that he was not arrested by the member on the scene and he was not accused of being under the influence at the scene. Oosthuizen testified Mashimbye's A1 statement was false.

[16] Van der Westhuizen testified at the scene of the accident they stopped and they were concerned that the other driver later known as Bierman, would leave the scene. He drove quite a distance before he stopped. The other driver was clearly drunk and had driven into their vehicle. Bierman said he phoned his lawyer and when he eventually got out of the vehicle, he was slouching and smelt of liquor. He was lying next to the wall in an effort to sit. They contacted the SAPS to come to the scene. The Police then came at approximately 22h00.

[17] Two police officers arrived at the scene and spoke to him, Oosthuizen and Bierman. They took Bierman with them and Bierman complained that he did not want to be in the back of the van and they then put him on the back seat. The SAPS members took Bierman to the police station.

[18] Friends, Keith and Simone, took Van der Westhuizen and Oosthuizen to give statements at the SAPS in Keith's BMW.

[19] A relative of Bierman was at the station and said that Oosthuizen will have problems. They approached the police standing at the desk and were given the police report forms to complete. According to Van der Westhuizen, there was a slight misunderstanding between him and Oosthuizen regarding a detail of the accident and according to him the two police officers then went crazy. They accused them of being under the influence of alcohol. They said that they are going to arrest them. They said: "You are going to sleep in jail tonight." Van der Westhuizen tried to argue and confirmed to SAPS that he was sure that Oosthuizen was not under the influence. Another police official entered the charge office and this man was clearly the other SAPS member's supervisor. The SAPS supervisor said Oosthuizen should come to

the back of the counter. Oosthuizen offered to do a Breathalyser test, but his request was denied. Oosthuizen was taken to hospital in the back of the van. The members who arrested Oosthuizen was not the members attending the scene of accident, it was other members. The policeman on the scene was very friendly, but these were aggressive.

[20] They all drove in the BMW behind the SAPS who took Oosthuizen. They were very concerned about Oosthuizen. It was evident that the SAPS vehicle tried to get rid of the BMW they followed them in. He testified it was crazy driving by the SAPS member and they struggled to keep up. The SAPS vehicle broke down. They all stopped. SAPS indicated they waited for another vehicle. They wanted to speak to Oosthuizen but this request was refused by the SAPS. They said he was under arrest. They all then went to hospital when a further SAPS vehicle arrived. They were not allowed to see him, only Oosthuizen's wife was allowed. They did not have any access to Oosthuizen. They were told that he was arrested and that he was going to sleep in jail that night.

[21] Van der Westhuizen testified that the police did not have any right to arrest Oosthuizen. When they went to report the accident, they went out of their own free will and they could have chosen to have gone home as they had 24 hours to report the accident.

[22] Pertaining to the malicious prosecution Sergeant Lekagothi testified that he just did his job and did so as effectively and quickly as he could. He received the docket on Sunday morning at 4 August 2018. He had on the docket the A1 statement and accident report, but there was no other complaint. He took Oosthuizen's warning statement and at 08:30 he interviewed Oosthuizen.

[23] He persisted that he was compelled to charge Oosthuizen and agreed that the SAPS set the law in motion against Oosthuizen. The procedure had to be followed: if a person is under the influence you must charge and then release. He admitted that in the A1 statement a bald averment was made that Oosthuizen was suspected to be drunk, but no reasons for this conclusion was provided. He testified he did consider the evidence, but did not revert to the accident report. The lacking evidence in the A1 statement he could not answer to, but he was compelled to charge. He saw that the

bail document also referred to negligent or reckless driving, but Oosthuizen was not on the system charged with this, although the docket did reflect this.

[24] He testified that the SAPS member that wrote A1 must be confronted. He did not exercise any discretion in charging, he just followed the prescribed procedure. He did not notice that the blood was drawn 4 hours, instead of 2 hours, after the incident. He acknowledged that from the entries in the SAP10 it was reflected that he was first released before he was charged. He said it was a mistake. He confirmed that the prosecutor *nolle prosequi* the charge due to a lack of evidence in the A1. This officer could not testify as to what the elements of drunken driving is and could not relate the section of the offence in the Act. He was just waiting for the forensic evidence.

[25] If the evidence in the A1 statement was not sufficient he would ask a supplementary affidavit. He agreed that a statement of a "suspicion of drunkenness" is insufficient, reasons must be provided. He conceded that Oosthuizen's blood alcohol result was 0,0 %. He denied that he acted recklessly, he was just following procedure.

Was there a malicious arrest?

[26] A plaintiff must prove that the defendant instigated the arrest by acting without reasonable and probable cause. Furthermore, that the arrest was activated by malice and *animus iniuriandi*. Thus; Oosthuizen must prove that his deprivation of liberty occurred with his arrest without justification and with the intention to injure.¹

[27] Accepting the version of Oosthuizen and Van der Westhuizen that Oosthuizen was unlike Bierman, who was clearly drunk, and was taken to the police in the van, they voluntarily drove to the police station. The intention was to report the accident within 24 hours, but he could also have done so the next day. It is improbable that a person who had drunk would voluntarily attend to the police station.

[28] He was arrested by an unknown police officer on instruction of a supervisory police officer. There was no reasonable and probable cause to do so. Neither of these police members attended the scene or knew the circumstances, that while Bierman was patently drunk for all to see. Oosthuizen did not drink, did not smell of liquor and

¹ *Minister of Police v Nontsele* (547/2022) [2024] ZASCA 137 (11 October 2024)

offered to do a breathalyser test. Once again supporting his version that he had had nothing to drink. There was simply no evidence of reckless or negligent driving.

[29] Neither of these two members testified and from their conduct it is clear that they lacked an honest belief that Oosthuizen had committed a wrong. It is suspicious that a supervisor arrived from outside the building and started giving orders that Oosthuizen is to be arrested because he is drunk. It seems that the family member of Bierman who warned them that Oosthuizen was in trouble had some pull over the supervisor. I find that the member of the Minister had an improper motive, i.e. an absence of a purpose to arrest for drunken driving, let alone reckless or negligent driving.

[30] The maliciousness is compounded by how Oosthuizen was forced back into the van when taken to hospital versus the leniency shown to Bierman, the true offender, by transporting him on the back seat of the van, not in the back of the van. The uncontested evidence of excessive reckless speed the van drove, so much so that Van der Westhuizen in the BMW could not keep up with the van, is further testament to the malicious deprivation of his liberty.

[31] The members of the police had no honest belief that Oosthuizen had committed the wrong. In the A1 no grounds are set out as to why Oosthuizen was guilty of any offence. The arresting officer, who did not testify had set out no solid grounds for any suspicion. They were not even at the scene of the accident. The "suspicion of drunkenness" is not supported by a single fact, and is therefore arbitrary.²

[32] Taking all the evidence into consideration the action of arresting was done with *animo iniuriandi*. The plaintiff has proven malicious arrest.

Was there malicious prosecution?

[33] In *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) par [41] the Supreme Court of Appeal reiterated the elements that a plaintiff must prove to succeed with a claim for malicious prosecution; the defendant set the

² *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 659E-H

law in motion in that it instigated and instituted the proceedings without reasonable and probable cause acting with *animus iniuriandi* and the prosecution failed.

[34] On behalf of the defendant it was conceded that the actions of Sergeant Lekogathi set the law in motion and that the prosecution failed. The defendant in essence also did not dispute that there was no reasonable and probable cause to prosecute.

[35] The only issue in dispute is whether Sergeant Lekogathi acted with *animus iniuriandi*. This witness testified that he was just following police procedure and this proved an absence of *animus iniuriandi*.

[36] The defendant must disprove that he foresee the possibility that he was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his conduct.

[37] The Sergeant herein charged the plaintiff on the basis of the information supplied by the SAPS complainant in the A1. In the A1 there was no evidence of any alleged crime committed by Oosthuizen. He testified that that is the problem of the member of SAPS who wrote the A1, not him. He just did his job and did so effectively. Under cross-examination he conceded that there was no as he called it, "preliminary evidence" of an offence or offences committed, but it could later be supplemented by means of an affidavit. These facts prove that the Sergeant foresaw that he was possibly acting wrongfully, exercised no discretion and thus automatically charged Oosthuizen. He saw this action as just doing his job. The Sergeant as the investigation officer was aware that by just doing his job Oosthuizen's good name and dignity would be injured. Objectively it is quite alarming that no discretion is exercised and the public could willy-nilly be charged as a matter of procedure.

[38] The defendant did not prove that it did not act with *animus iniuriandi*.

Quantum on the malicious arrest

[39] Oosthuizen was deprived of his liberty from 3 August 2018 at 10h00 until 4 August 2018 at 11h30. This deprivation of liberty directly infringes the constitutional fundamental rights to freedom and dignity, honour and security.

[40] Oosthuizen is entitled to be compensated in full measure for the humiliation, indignity and fear that resulted from this malicious arrest. "Where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice."³

[41] In assessing the damages for malicious arrest and detention a Court has regard to the plaintiff's personal circumstances, the manner of arrest, the duration of detention, the degree of humiliation affecting his reputation and standing and other relevant factors peculiar to the case under consideration. A comparison with the other rewards can serve as a guide. The purpose of the award is twofold; the damages awarded must be commensurate with the injury inflicted and to ensure that the awards made for deprivation of freedom reflect the importance of the right to personal liberty and the seriousness thereof.⁴

[42] Oosthuizen hold two degrees and is an engineer. He was traumatised in plain sight of his friends and wife. He went to fulfil his duty, as expected from a good citizen, to report an accident within 24 hours and with no cause whatsoever is tugged from in front of the police station to the back, as an offender. This is done by members of the SAPS who was not on the scene. Without any evidence of being drunk, or any evidence of reckless or negligent driving, he is charged with these offences.

[43] He is humiliated by being thrown into the back of the police van and with absolute high speed reckless driving driven to the Mamelodi Hospital. At the hospital the doctor tells the members that this man is not drunk. They drive him to the hospital despite the 2 hours threshold for blood to be drawn long having expired. His personal circumstances and the manner of arrest far outweigh the duration of the detention.

[44] On behalf of Oosthuizen an amount of R150 000 was submitted as being fair compensation and on behalf of the Minister the amount of R70 000 was argued for. Most of the caselaw relied upon related to unlawful arrest and detention and not malicious arrest and detention. In the circumstances of this matter I find that R150 000 is a fair amount of compensation for this traumatic event.

³ *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP)

⁴ *Minister of Safety and Security and Others v Tyulu* 2009 (2) SACR 282 (SCA)

Quantum for malicious prosecution

[45] Oosthuizen was not informed that the prosecutor would not prosecute and endorsed the docket with "*nolle prosequi*". He attended court only for his bail to be refunded pursuant to a successful representation made by his attorney.

[46] I take into account that he would still carry the fear of being prosecuted especially in the surreal experience Oosthuizen experienced with the arrest. I also take cognisance of the fact that the Minister has agreed to pay R20 000 of his legal fees pertaining to this matter. I also take into account that it is a malicious prosecution, but that he did not have to appear in court. I find that an amount of R85 000 is reasonable compensation.

The Minister also must pay the amount of R7 453.20 for medical expenses pertaining to psychological treatment received due to the actions of the members of the police.

Costs

[47] On behalf of Oosthuizen attorney and client costs were sought, while on behalf of the Minister costs on a party and party scale was sought.

[48] Attorney and client costs constitutes a punitive costs order. A court will only grant such costs order where special grounds are present. The purpose of such order is to not leave the successful litigant out of pocket.

[49] I am satisfied that the circumstances of the malicious arrest, the fabricated evidence of Constable Mashimbye and the unreliable A1 statement render defending this matter opportunistic showing bad faith. It was open to the Minister to oppose the quantum, but not the merits. A punitive costs order is thus reasonable and appropriate.

[50] I make the following order:

[50.1] The defendant is to pay the plaintiff an amount of R150 000 (Hundred and Fifty Thousand Rand) in respect of malicious arrest and detention from 3 August 2018 to 4 August 2018.

[50.2] The defendant must pay the plaintiff an amount of R85 000 (Eighty Five Thousand Rand) for malicious prosecution; R20 000 (Twenty Thousand Rand) as

legal costs and R7 453.20 (Seven Thousand Four Hundred and Fifty Three Rand and Twenty Cents) for medical costs.

[50.3] The defendant is to carry the costs on an attorney and client scale.



S. POTTERILL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 46355/2019

DATE OF HEARING: 11-13 February 2026

FOR THE PLAINTIFF: ADV. M. BARNARD

INSTRUCTED BY: GP van der Merwe Attorneys

FOR THE DEFENDANT: ADV. J. BARNARDT SC

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 3 March 2026