

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

Case Number: 14220/2016

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

DATE

SIGNATURE

In the matter between:

MOYO LAWRENCE

Plaintiff

And

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION

Second Defendant

JUDGMENT

MALINDI, J

Introduction

[1] The plaintiff has instituted a damages claim for unlawful arrest, unlawful detention and malicious prosecution in terms of the summons and amended particulars of claim as follows:

- 1.1. Unlawful arrest in that the plaintiff had not committed the offences for which he was arrested and that the police arrested the plaintiff without first entertaining any reasonable suspicion that the plaintiff had committed any offences.
- 1.2. Unlawful detention in that the detention was predicated upon the police's unlawful arrest and that the servants of the defendants acted arbitrarily and in flagrant and intentional disregard to the plaintiff's rights to dignity, personality and physical integrity.
- 1.3. Malicious prosecution in that the prosecution was instigated or instituted by the defendants' servants and that the prosecution was predicated on malice and *animus injuriandi*, which prosecution was terminated in favour of the plaintiff.

[2] Initially the defendants filed a special plea and plea in which the defendants averred that the plaintiff had not complied with statutory requirements in terms of section 3 of the Litigation Against Certain Organs of State Act 40 of 2002, and proffering bare denials in respect of the merits.

[3] At a pretrial conference held on 22 May 2023 the parties agreed that the defendants will bear the duty to begin as the arrest and detention of the plaintiff was admitted and that the onus of proof reverted to the defendants in that respect. At the beginning of the hearing counsel for the defendants , Mr Zondi, indicated that the defendants are of the view that the plaintiff should bear the duty to begin since one of the claims is that of malicious prosecution which the defendants have denied and that therefore the plaintiff bore the onus of proof and duty to begin in respect of this claim. I ruled that the defendants should begin as was agreed at the pre-trial meeting since the defendants bear that duty in the two main claims.

[4] Mr Zondi indicated further that the defendants had filed an amended plea which he sought to be allowed. The court adjourned in the late afternoon of the first day to afford the defendants to call a witness to explain why the amended plea had not been delivered to the plaintiff as Mr Zondi informed the

court that he had settled it in June or July of 2023. When the matter was called on the next day the parties indicated that the special plea and plea may be admitted.

- [5] The late filing off the notice in terms of Act 40 of 2002 was condoned by order of Ismail J on 16 August 2017.

Background

- [6] The plaintiff was born on 18 April 1990, and is therefore currently 34 years old.
- [7] The plaintiff is charged with robbery at the business premises of Protech Khuthele, being business premises where he was deployed as a member of Danga Security. The robbery took place on the night of 21/22 September 2014. He was arrested on 23 September 2014. Charges against him were withdrawn on 27 March 2015, some six months after his arrest.
- [8] As a result of the withdrawal of the charges the plaintiff launched the current damages claims.
- [9] The plaintiff was questioned at the Muldersdrift police station, and an arrest was effected after the police had presented certain facts or evidence to him that had led them to believe that he was involved in the robbery that had involved four assailants on the night of 21/22 September 2014. He was then moved to Krugersdorp police station where he was kept until his first appearance in court on 25 September 2014.

Common cause facts

- [10] The plaintiff was born on 18 April 1990. He is currently 34 years old.
- [11] His address is 1[...] L[...] Street, R[...], Johannesburg.

- [12] He is married with three children. He has been married from 2007. The children are aged 4, 10 and 14 years old.
- [13] At the time of his arrest he had been staying at the address for two year.
- [14] He has passed Form 4 in Zimbabwe, an equivalent of grade 12 in south Africa.
- [15] He was employed by Danga Security as a supervisor at the time of his arrest, with responsibilities to deliver security personnel at various sites where Danga Security was deployed.
- [16] He had been working for the security company for four years at the time of his arrest. On 21 September 2014 he was not working in the evening but was at home sleeping shortly before the robbery took place.
- [17] In the evening of 23 September 2014, the plaintiff was driving with his boss, Gavin De Agrella, when De Agrella received a call which caused him to follow a police vehicle that happened to be driving slightly ahead of them. They followed the vehicle to Muldersdrift Police Station where they arrived about 20h00. When they reached the police station De Agrella took the plaintiff inside the police station premises where, as the plaintiff testified, he told the plaintiff he will see his friends with whom he stole the trailer.
- [18] Of the two persons pointed out to him the plaintiff knew Lunga Sibanda, who is married to the plaintiff's younger sister.
- [19] Inside the police station Sergeant Nkuna took him to a separate room to question him. He was questioned about having stolen goods at Protech. Sgt Nkuna, with another six police officers, told the plaintiff that Sibanda told them that the plaintiff called him to tell him to come and steal electronic goods at Protech premises and that the plaintiff gave Sibanda directions to the premises.

- [20] The plaintiff's evidence was to deny having given Sibanda directions to the company premises on 21 September 2014 but said that he gave the address and directions to the premises a month before the incident when Sibanda was collecting an amount of R200 from the plaintiff which the plaintiff was lending to Sibanda.
- [21] The plaintiff testified that on the night of 21 September 2014 he was called by Sibanda at about 23:00 while he was asleep and that Sibanda asked him if there were panic buttons at the company premises and how many they were. The plaintiff told him that there were four. He testified that after giving this information he went back to sleep. About midnight the plaintiff was called by the security guards at the company premises who informed him that there was a robbery at the premises and that two guards were taken away by the robbers.
- [22] The version that Sibanda had called the plaintiff to borrow money and that he had to collect it at the company premises was not put to the three police witnesses.
- [23] The plaintiff testified also that when he was being transferred from Muldersdrift to Krugersdorp police station while he was next to the police van that was to transport him, Sergeant Nkuna asked him what he had in his pocket. Sgt Nkuna took those items away from him. Those were his passport, traffic register, licence and cellphone. This was not put to the police officers, particularly Sergeant Nkuna. The plaintiff's version regarding the cell phone was consistently put that it was not taken from him for investigation purposes or safe keeping upon his arrest.
- [24] He was taken to the cells at Krugersdorp police station on 23 September 2014.
- [25] On 24 September 2014 Sergeant Nkuna and Sergeant Moraba fetched him from the police station cells and took him to his place of residence. When they

arrived at his house his wife, and the last-born child who was one year and three months old at the time, and his wife's sister with her one-year-old child were present. The house was searched but nothing was found or confiscated.

[26] His first appearance in court was on 25 September 2014, and he was taken to a court where he applied for bail. The verdict on their bail application was postponed to 2 October 2014.

[27] The plaintiff testified that he was never taken to his house again after 24 September 2014.

[28] At his second appearance at court, he was detained further without bail in order to afford the investigators time to conclude their investigations.

[29] Asked about Moiane Laurencio José's belongings that were found at his place the plaintiff testified that Jose had given those items to him for safekeeping before he went home to Mozambique. He testified that they did this each time he had to be away and ask him to look after his belongings.

[30] The bail verdict was delivered on 14 October 2014 when he was denied bail on the basis that he is Zimbabwean and that he may evade trial.

[31] On 12 February 2015 his legal representative, Mr Madzara told him that the public prosecutor has indicated that two of the three accused would be tried and that one will be discharged. after this information was given to him his attorney left the holding cells and went up into the court and returned with a document that he asked him and Lunga Sibanda to sign. He signed that document believing that it was for his release as indicated by the public prosecutor to his attorney that one of the three accused would be released.

[32] The plaintiff was shown exhibit G, the guilty plea prepared on his and Sibanda's behalf. He testified that he does not remember the document although his signature appears at CaseLines 014 – 23. The plaintiff testified that when the plea was read out to the magistrate he protested that he had

signed a guilty plea believing it to be a discharge, and as a result the court entered a plea of not guilty on his behalf and a separation of trials was ordered.

[33] A day after the plaintiff had appeared in court on 5 March 2015, on 6 March 2015 the public prosecutor, Mr Tikalisi Jacob Masangwany, made an entry in the investigation diary¹ to the effect that charges be withdrawn against the plaintiff as there were no prospects of a successful prosecution. He was only released on 27 March 2015

[34] The control prosecutor, Botlhasitse Lucas Mothibi, currently a senior public prosecutor at Roodepoort testified that he cannot explain why the plaintiff was only released on 27 March 2015 when it had been recommended that he be released on 6 March 2015. This might have been an oversight on his part for not requisitioning the plaintiff to be brought to his court in order to withdraw the charges formerly.

Claim A

[35] The plaintiff claims that his arrest was unlawful in that the police did not have any reasonable suspicion that he had committed the crime that he was eventually charged with. As indicated above, the police acted on the information from the first two suspects, Jeffery Ndlovu and Lunga Sibanda, to the effect that the plaintiff had provided directions to the business premises and had also provided information that there were four panic buttons on the premises. In addition, Sibanda indicated that it was the plaintiff who had called them to come and steal the goods from Protech.

[36] When Sergeant Nkuna and others questioned the Mr Ndlovu, he provided information that the plaintiff called them to come and steal electronic goods. Jeffrey Ndlovu's house was searched and items that form part of the stolen

¹ Exhibit F: Caselines 013- 44

goods (under docket number 233/09/2014) were found. He further informed the police that the stolen goods were to be shared with the plaintiff.

[37] Ndlovu took the police to the place of another suspect, Lunga Sibanda. The police found similar goods at Lunga Sibanda's place and he was also arrested

[38] On the night of 23 September 2014 about 20:00 the plaintiff's employer, Gavin de Agrela, brought him to the police station where the plaintiff confirmed that he had communicated with Lunga Sibanda on the night of the robbery and had divulged to him that there were four panic buttons on the premises.

[39] Sergeant Nkuna testified that he effected the arrest of the plaintiff on 24 September 2014 at about 8:30. His statement which was commissioned on 25 September 2014 states that he read the plaintiff his rights at the time of arrest.

[40] In his evidence the plaintiff denied that he had given instructions of how to get to the business premises on the night of the robbery. He alleges that he gave instructions to the premises a month earlier when Sibanda came to his workplace in order to collect R200 that he had lent to him.

[41] From the above facts available to Sergeant Nkuna, coupled with the plaintiff's admission that he had communicated with Sibanda on the night of the robbery, and further that he lied about having given directions to the premises on the night of the incident, I conclude that the arrest was lawful. The evidence that he had given instructions to the premises a month before the incident was not put to Sergeant Nkuna or any of the police officers. It was conveniently fabricated while he was giving evidence.

[42] Although the stolen property found in his house was not the items that were stolen at the business premises but property from the caravan home of one of the employees, Mr Moiane Laurence José, this added to the police forming a suspicion that the plaintiff is implicated in the business robbery. The plaintiff was cross examined at length regarding his evidence that Jose had given these items to him for safekeeping during his absence when he was in Mozambique between 16 and 30 September 2014, and that he had made

similar arrangements each time he had to work away from his home or his caravan home, that is, on the company premises. He was unable to explain why in particular he was given items to keep at his house on this occasion whereas before he had just been asked to keep an eye on the caravan. This evidence was also not consistent with his evidence in chief when he testified that items were given to him for safekeeping on previous occasions. Furthermore, and more adverse to the plaintiff's version is that Jose pointed out the items as stolen when he was taken by the police to the plaintiff's house to assist with the investigation into the theft of his property. Jose was surprised to find his goods at the plaintiff's house which he had considered stolen while he was away in Mozambique. In his statement, Mr Jose laid a complaint to the police that his belongings had been stolen, contrary to the plaintiff's evidence that the items had been given to him for safekeeping. He states in his statement that he could not confront the plaintiff as the plaintiff had already been arrested when he (Mr Jose) returned from Mozambique on 29 September 2014.

- [43] The statement of Ms Nelly Moyo was also put to Sergeant Nkuna. She is the girlfriend or partner of Mr Lunga Sibanda. The statement explains why he pleaded guilty to the charges because Ms Nelly Moyo was going to testify against him to the effect that on the night of 21/22 September 2014 he had slept out and returned on 22 September 2014 at 12h00 with goods that were later identified as stolen from the business premises. Ms Nelly Moyo's statement was admitted as exhibit E and was commissioned on 23 September 2014.

Detention

- [44] It was put to Sergeant Nkuna that the effect of the guilty plea which was originally prepared on behalf of both Sibanda and the plaintiff was altered by deletion of any reference to him and that a plea of not guilty was entered on his behalf, resulting in a separation of trials, was indicative of his innocence. However, Sergeant Nkuna could not testify thereon because he had not been at court on the day the plea was drafted and dealt with at court. The guilty

plea is relevant to the question whether the plaintiff was maliciously prosecuted and whether his further detention from the date of appearance on 12 February to 27 March 2015 or 6 March to 27 March 2015 was justified.

[45] As testified by the then prosecutor in the matter, Ms Nthabiseng Mamokete Sihlangu, the prosecutors believed at the time that there was a prima facie case to be answered by the plaintiff hence a separation of trials was ordered and he was remanded in custody.

[46] Ms Sihlangu proceeded with the prosecution of the plaintiff on the basis that the matter had been enrolled by the control prosecutor, Mr Van Staaden, on the basis that the case had to be prosecuted subject to certain further investigations that were outstanding and noted in the docket. Furthermore, on the face of it, the plaintiff had been refused bail, a factor to be considered in a prosecution of a criminal matter.

[47] Furthermore, Ms Sihlangu testified that in her opinion the prosecution had to go ahead against the plaintiff based on the evidence contained in the docket, that is, that he had been implicated in the crime by the two co-accused.

[48] She testified that the evidence or the statements of the other co-accused were subject to investigation but not worthless. It was important to her that the plaintiff had, through the assistance of an attorney, indicated an intention to plead guilty. She further testified that although the plaintiff was found with property belonging to Mr Jose, and not property from the business robbery, it was still not clear that the property found in his house was not linked to Protech.

[49] In a statement dated 30 September 2014 Sergeant Ditshaba Enos Maraba, states that he went to the plaintiff's home in order to verify his residential address. The landlord let him in in the company of Jose. According to the landlord the plaintiff's wife had left the place on 27 September 2014 and had not returned. It was on this occasion that Jose identified the items which he reported to the police as stolen when he returned from Mozambique on 29 September 2014.

Malicious prosecution

- [50] The question that arises is whether the period from 6 March 2015 when the prosecutor, Mr Tikalisi Jacob Maswanganyi, ordered the withdrawal of charges against the plaintiff and 27 March 2015, when the plaintiff was released, should be regarded as representing unlawful detention and malicious prosecution. I am not convinced that it is so. The period for malicious prosecution the period from arrest to the period of release from gaol. It does not take into consideration continued detention because of administrative decisions in the process of prosecution. In any event, it cannot be argued that the prosecutor was malicious in his failure to requisition the plaintiff to appear before open court for the withdrawal of the charges. The plaintiff had appeared before Mr Maswanganyi on 15 March 2015 when he discovered that at that stage the only evidence against the plaintiff was the statements implicating him by the co-accused Mr Lunga Sibanda.
- [51] The defendants led the evidence of Botlhasitse Lucas Mothibi in further substantiation of the defence of lack of malice in prosecuting the plaintiff. Mothibi was in the same office as Van Staaden as a control prosecutor from 2009 to 2020. The essence of his evidence is that Van Staaden had formed a prima facie view to prosecute the plaintiff as appeared in his report at paragraph 2. This report does not form part of the record and none of the parties called for it. However, Mothibi testified that the responsibilities of a control prosecutor is to review a docket and decide whether a matter should be enrolled for trial. this decision is based on a prima facie view that there are reasonable prospects of success in the prosecution even when there are outstanding investigations. He testified that in his view there was enough evidence to justify an enrolment of the matter subject to further investigations. When exhibit H, being a Statement Regarding Interview with a Suspect, was put to him he stated that the warning of a suspect about his constitutional rights is an ongoing process including in this statement. He referred to paragraphs 3 and 4 thereof. This warning statement was taken from the plaintiff on the day of his arrest, 24 September 2014, at 12h00. He was of the

view therefore that even though a notice of rights statement was not available the plaintiff knew of his rights on the same day through this statement. At the time he had not had sight of the guilty plea which had been altered to exclude the plaintiff.

Conclusion

[52] The evidence discloses that the arrest was lawful, the detention, save for the period dealt with above, was lawful, and that the prosecution of the plaintiff was not malicious. The police entertained a reasonable suspicion that the plaintiff had committed a crime of theft of the property belonging to Protech Khuthele, and that he did so by informing Jeffrey Ndlovu and Lunga Sibiya to come to the premises to steal the items. As the co-accused with him did not know the place, he gave them directions to the premises and advised them of security features such as the number of panic buttons on the premises. According to Mr Jeffrey Ndlovu the plaintiff was to receive a share of the loot. After his arrest he appeared in court within 48 hours, the Wednesday having been a public holiday, and the bail application was heard. Judgment on bail was given on 14 October 2024 and was refused. He appeared in court several times thereafter including 12 February 2015 when a guilty plea in terms of section 112 of the Criminal Procedure Act was prepared on his and Sibanda's behalf. However, according to the evidence of Ms Sihlangu, before the plea was read out to the presiding magistrate he reneged from the plea of guilty and indicated that he would be pleading innocent.

[53] According to the plaintiff during the time that the plea was being read to the Magistrate he indicated that he was not pleading guilty anymore at which stage his plea was changed to not guilty and he was remanded to the regional Court to face a separate trial. At this stage his case had been enrolled for trial by the control prosecutor who believed that there was a prima facie case against the plaintiff subject to certain further investigations to be conducted.

[54] The prosecutor who handled the matter on 12 February 2015, Ms Sihlangu, also believed that there was a case to answer by the plaintiff from the evidence appearing in the docket to the effect that his co-accused had

implicated him in the commission of the crime and that his attorney had indicated an intention to plead guilty.

[55] Regarding whether the prosecution was malicious, the evidence points in the opposite direction. The prosecution was satisfied that he had to meet a case of robbery and the evidence supported his continuing prosecution until the prosecution decided not to continue on the statement of Mr Sibanda implicating him in the commission of that of the crime. This decision was properly taken by Mr Maswanganyi who applied the law as enunciated in *S v Molimi*² and *S v Litako and Others*³ that a statement by one accused implicating the other in the commission of a crime is inadmissible as against that suspect.

[56] In the circumstances, the plaintiff failed to discharge the onus that he was maliciously prosecuted, and the defendants have discharged the onus of proof that the arrest and detention were lawful, except for the period of 6 to 27 March 2015.

[57] Therefore, the following order is made.

1. The claim for unlawful arrest and detention is dismissed except as stated in paragraph 2 below.
2. In respect of Claim B for unlawful detention, for the period of 6 to 27 March 2025, the first and second defendants shall, jointly and severally, the one paying, the other to be absolved, pay to the plaintiff damages in the sum of R100,000.00 (One Hundred Thousand Rand);
3. Interest shall accrue on the sum aforesaid at the rate of 10.5% per annum from 1 February 2023 to date of final payment.
4. The first and second defendants shall, jointly and severally, the one paying, the other to be absolved, pay the costs of suit including costs of counsel on Scale B.

² 2008 (3) 608 (CC)

³ 2014 (2) SACR 431 (SCA)

G MALINDI

Judge of the High Court,
Johannesburg

Appearances

For the Plaintiff:

Adv J van Rooyen

Instructed by:

N Ndebele Inc

For the Defendants':

Adv MM Zondi

Instructed by:

The State Attorney, Johannesburg

Date of Hearing:

21, 22, 23 February 2024 & 9 April 2024

Date of order:

6 November 2025

Date of reasons:

31 March 2026