



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 4526/2019

In the matter between:

ZWELETHU NDAMASE

Plaintiff

and

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd

Defendant

JUDGMENT

MHAMBI AJ

[1] This is a two-pronged action for damages by the plaintiff. In the first claim, the plaintiff, Mr. Zwelethu Ndamase, claims damages against the first defendant, "*the Minister*", as a result of the alleged unlawful arrest which occurred on 22 September 2017, and subsequent detention from 22 September

2017 until 26 September 2017. In the second claim, the plaintiff claims damages for malicious prosecution against the second defendant, *the Director of Public Prosecutions*, which occurred between 26 September 2017 and 08 February 2019, found not guilty.

[2] The background to the arrest and detention of the plaintiff is as follows: On 6 September 2017, Mr. Zamile Cameron Funani, obtained a protection order in the Magistrates court against the plaintiff in terms of section 6 of the Domestic Violence Act, 116 of 1998, “*the Act*”. For convenience ,I shall refer to Mr. Funani as the complainant.

[3] The protection order was served by the police on the plaintiff personally on 11 September 2017. The protection order, amongst other things, directed the plaintiff to refrain from assaulting and or threatening to assault, in any manner whatsoever the plaintiff.

[4] In the particulars of claim, the plaintiff has alleged that on 17 September 2017, he was threatened by the plaintiff by uttering the words;

“YOU CALLED THE POLICE FOR ME. I WILL CATCH YOU”.

[5] It is common cause that consequent to the alleged threat, the complainant laid a criminal case against the plaintiff at Ngqeleni, reported under Ngqeleni CAS 130/09/2017. The plaintiff was charged with breach of the protection order.

[6] In justifying the arrest, the Minister had pleaded that the plaintiff was arrested on the basis of the warrant of arrest issued in terms of section 8 (1) (a) of the Domestic Violence Act. The police witness testified on behalf of the Minister that she had no option but to arrest the plaintiff on the basis of the issued warrant of arrest. I will deal with the analysis of the evidence by the police later in this judgment. Below, I deal with the legal framework relevant to arrest in terms of the Act.

The statutory position

[7] Arrests with a warrant in terms of the Domestic Violence Act are dealt with in section 8 (4), which in the relevant part reads as follows:

- “(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complaint may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in Section 17(a). (Emphasis added).
- (c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which:
 - (i) specifies the name, the residential address and the occupation or status of the respondent;

(ii) calls upon the respondent to appear before a court, and on the date and at the time specified in the notice, on a charge of committing the offence referred to in Section 17(a); and

(ii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent. (Emphasis added).”

[8] The mere breach of a protection order is insufficient to justify an arrest. An additional requirement, namely the possibility that the complainant could suffer imminent harm should the arrest not be effected, has to be present.

[9] The existence of imminent harm to the complainant has to be based on reasonable grounds. The arresting officer consequently must have had evidence to the effect that not effecting the arrest would place the complainant in imminent danger.

[10] The following factors are worth noting in an arrest based on the warrant issued in terms of the Act:

“(a) Where a respondent has contravened any prohibition, condition, obligation or order contained in a protection order, a complaint may hand the Warrant of Arrest together with an affidavit, wherein it is stated that the respondent contravened such protection order, to any member of the police.

(b) If, upon receipt of the Warrant of Arrest with the affidavit, referred to in subparagraph (a) (above), it appears to the member that there are reasonable

grounds to suspect that the complaint may suffer imminent harm as a result of the alleged breach of the protection order, the member must arrest the respondent for contravening the protection order on the strength of the warrant.

- (c) In considering whether or not the complaint may suffer imminent harm, a member must take the following into account:
 - (i) the risk to the safety, health or well-being of the complainant;
 - (ii) the seriousness of the conduct comprising the alleged breach of the protection order; and
 - (iii) the length of time since the alleged breach has occurred;
- (d) If the member is of the opinion that there are insufficient grounds to arrest the respondent, he or she must immediately hand a Notice to the respondent as provided for in Form 11 to the Regulations. The member must insert the first court day thereafter as date of appearance on the form and complete the certificate, provided for in the Notice.” [emphasis added].

[11] I have observed the warrant of arrest as per Form 8 of Regulation 9 of the Act. I observed that the warrant of arrest contains a proviso mirroring the provisions of the Act, as well as the instruction, reading as follows:

“Therefore, you are hereby authorized and ordered to forthwith arrest the respondent in terms of the Domestic Violence Act, 1998, if there are reasonable grounds to suspect that the claimant may suffer imminent harm as a result of the alleged breach of the protection order by the Respondent. ”

[12] The Act uses the phrase “*imminent harm*”, which has been defined as:

“... the danger of harm of a certain degree of immediacy that activates the protection. That is to say a harm which is impending threateningly, ready to overtake or coming on shortly.”¹

[13] This court has to determine whether, objectively viewed, the arresting officer assessed the complaint as recorded in the affidavit by the complainant, and satisfied themselves that the complainant was faced with imminent danger. From the evidence of the police, they did not assess whether the complainant was faced with imminent danger; they simply acted on the basis of the issued warrant. The justification provided for that was that the presiding officer or magistrate criticised the police for not effecting or executing the warrant in cases of domestic violence. I disagree with that narrative. The presence of the warrant does not deter the police from assessing whether the complainant runs the risk of imminent harm, taking into account the factors I have tabulated in paragraph 10 above.

[14] The findings in the following judgment are underscored, even though the judgment deals with the Domestic Violence Act : *Khanyile vs Minister of Safety and Security*².

“[28] However, the responsibility to conduct the investigation and enquiry prior to the execution of the warrant lies with the member to whom the complainant hands the

¹ *Seria v Minister of Safety and Security and others*. 2005 (5) SA 130

² (7079/08)[2012] ZAKSDHC 12; 2012 (2) SACR 238 (KZD):

affidavit, as he/she may execute the warrant only if satisfied that the alleged contravention of the interim order as set out in the affidavit sustains the execution of the warrant.....

[30] The warrant refers to the ‘attached’ protection order and affidavit and authorizes and orders the police to forthwith arrest the respondent ‘if there are reasonable grounds to suspect that the complaint may suffer imminent harm.’ The execution of the warrant is therefore constrained by the annexures thereto. The protection order sets out the nature of the interdict against the respondent and the affidavit must contain details of the alleged contravention of the interdict by the respondent. Only after a perusal of the annexures will a ‘member’ to whom the warrant is handed, be able to exercise his/her discretion as allowed in terms of Section 8(4)(b) of the Act read with Subsection (5), and decide if there are reasonable grounds that the complaint is at risk which justifies his arrest alternatively whether a notice in terms of Section 8(4)(c) should be served on the respondent.

[31] Although it is apparent from the warrant, that the warrant was authorized and that there was an allegation that the order had been breached by the plaintiff, it was nevertheless incumbent upon Gumede before executing the warrant to satisfy himself of the terms of the order and of the nature of the alleged breach before executing the warrant. He failed to apply his mind to the proviso that the arrest should only be effected ‘if there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent.

[32] However, as a result of Gumede’s failure to peruse the documents and to satisfy himself as aforesaid, there were no grounds to suspect the complaint may

suffer imminent harm. Clearly, the threshold of ‘reasonable grounds’ could not be reached given the lack of information at his disposal.

[33] Even though Gumede had not been presented with a warrant of arrest in terms of the Act previously or received any training on the implementation of the provisions of the Act, in particular the execution of a warrant of arrest issued in terms of the Act, as an experienced member of the South African Police Services, he ought to have known that the arrest of an individual is a drastic infringement of the arrestee’s constitutional rights to freedom and security of person (Section 12 of the Constitution of South Africa No 108 of 1996) and a warrant should therefore not be executed in haste and without due consideration of all the pertinent facts, particularly as there was only an allegation, not conclusive proof, that the order had been breached.”

[15] In my view, the absence of the assessment of imminent harm by the police before the arrest was effected is the end of the enquiry relating to lawfulness or otherwise of the arrest by the police in this case. The arrest under the circumstances becomes unlawful, so is the subsequent detention.

[16] What the court said : In *Minister of Law-and-Order vs Hurley and Another*³, as the consequence of an arrest beares repeating. The court said:

“An arrest constituted an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

³ 1986 (3) SA 568 (A) at 589-F:

[16] In *JE Mahlangu and Another v Minister of Police*,⁴ the position was reiterated as follows:

“It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established the deprivation is unlawful and the defendant bears the onus to prove that there was a justification for interference.”

[17] In *Mabona and Another v Minister of Law and Order and Others*⁵, the following was stated regarding suspicion:

“the reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at this disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based on solid grounds.”

[18] In *J E Mahlangu and Another v Minister of Police*⁶ It was stated:

“The unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity, has always been regarded as a particularly grave wrong and a

⁴ 2021 ZACC 10 at para 32.

⁵ 1988 (2) SA 654 (SE).

⁶ [2021] ZACC 10 at parA [27].

serious inroad into the freedom and rights of a person. In Thandani, the Court said that:

“sight must not be lost of the fact that the liberty of the individuals is one of the fundamental rights of a [person] in a free society which should be jealously guarded at all times, and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.”

[19] In considering the previous award made, I am mindful of what was held in *Minister of Safety and Security v Tyulu*⁷:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solace for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all of the facts of the particular case and to determine the quantum of damages on such facts.”

⁷ 2009 (5) SA 85 (SCA).

[20] In *Minister of Safety and Security v Seymore*,⁸ it was held:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole, and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that.”

[21] I now turn to deal with the claim against the second defendant as follows: in so far as claims of that kind are concerned.

[22] In *Koji v Director of Public Prosecutions*,⁹ Reddy J states as follows in paragraphs 17 and 18:

“[17] The National Director of Public Prosecutions derives its mandate from section 179 of the Constitution. Section 179(2) expressly empowers the prosecuting authority to institute criminal proceedings on behalf of the State. This constitutional imperative must be exercised without fear, favour, or prejudice. This constitutional edict should not be construed to mean that a prosecution can be initiated without a proper consideration and application of the relevant law to justify unfounded prosecutions.

[18] What is demanded in a constitutional on is that when a decision is made to prosecute, prosecutorial oversight accompanies such decision to continuously assess

⁸ 2006 (6) SA 320 (SCA).

⁹ 628/2018 [2024] ZANWHC 297 (5 December 2024).

the process to determine whether the prosecution is justified or not.” [my emphasis added]

[23] The jurisdictional requirements for a successful claim of malicious prosecution have been restated in *Minister for Justice and Constitutional Development v Moleko*¹⁰, as follows:

“In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove:-

- (a) That the defendants set the law in motion (instigated or instituted the proceedings);
- (b) That the defendants acted without reasonable and probable cause;
- (c) That the defendants acted with malice (or *animo injuriandi*); and
- (d) That the prosecution has failed.”

[24] It is not in dispute that the proceedings were so instituted and that the prosecution failed. The aspect of reasonable and probable cause, and malice (or *animo injuriandi*) is in dispute.

[25] In *Moleko*, the following was stated regarding the consideration of reasonable and probable cause:

¹⁰ (131/07) [2008] ZASCA 43 (31 March 2008)’ at para 8.

“Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore, involves both a subjective and an objective element-‘Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.’”

[26] In *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*¹¹, the following was stated in paragraphs 20 and 21:

“[20] In **Prinsloo and Another v Newman**, this Court discussed the concept of reasonable and probable cause for prosecution in the context of malicious prosecution. The Court held that the test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor.

[21] It follows that a prosecutor need not have evidence establishing a prima facie case or proof beyond a reasonable doubt when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done in light of the information available at the relevant stage.”

[27] In *Moleko* the following was stated regarding the malice:

¹¹ Case No. 194/2023) [2022] ZASCA 85 (03 June 2024).

“[61] In the Relyant case, this court stated the following in regard to the third requirement: Although the expression “malice” is used, it means, in the contest of the action iniuriarum, animus iniuriandi. In *Moaki v Reckitt & Colman (Africa) Ltd* and another, Wessels JA said: ‘Where relief is claimed by this action the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *Indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.....

[63] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness: ‘In this regard *animus injuriandi* (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 injuriandi*.

[64] The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.”

[28] The prosecutor who testified for the second defendant stated that she enrolled the matter for prosecution, taking into account the affidavit by the

complainant filed in the docket, together with the protection order and the consequently issued warrant of arrest. She was convinced that there was indeed a prima facie case against the plaintiff. The fact that the prosecution has failed does not in any manner suggest that there was malice in the prosecution of the plaintiff. In this case, I am not satisfied that the plaintiff has proved malice in its prosecution; therefore, the claim against the second defendant should fail.

Order

In the result, I make the following order;

1. The first defendant is held to be liable to compensate the plaintiff for damages for the wrongful and unlawful arrest of the plaintiff on 22 September 2017, and the subsequent unlawful and wrongful detention from 22 September 2017 until 26 September 2017.
2. The first defendant is directed to pay the plaintiff an amount of R200 000 for his unlawful and wrongful arrest and detention.
3. The first defendant is directed to pay the plaintiff's costs of suit relating to unlawful and wrongful arrest and detention, such costs to include the costs incurred for the employment of two counsel on scale B.

4. The plaintiff's claim against the second defendant is dismissed
with no order as to costs.

M. MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : S. Mzileni with Ms Z. Ndlovu

Instructed by : NA Magqaza Attorneys
Mthatha

Counsel for the Defendants : N. Gumede

Instructed by : the State Attorneys, Mthatha

Heard on : 20,21,22 April 2026

Judgment Delivered on : 07 May 2026