REPUBLIC OF SOUTH AFRICA

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

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

20/06/2018
DATE

SIGNATURE

APPEAL CASE No: A3109/17

In the matter between:

SIMON MMAPHUTI MAPHOTO	**1st Appellant**
MAPETU PHILEMON MAKWENG	**2nd Appellant**
MLUNGISI VINCENT MNGADI	**3rd Appellant**
BUSISIWE GLADNESS ZIKALALA	**4th Appellant**
FIKILE CONSTANCE MBONGWE	**5th Appellant**
ALLOCIOUS OLEBOGENG NTULI	**6th Appellant**
PHADI SHAUN LENCWE	**7th Appellant**
BEN BUOANG NTSHOLANE	**8th Appellant**
NOMZAMO CYNTHIA NTETH	**9th Appellant**
VUSUMUZI SYDNEY KUNENE	**10th Appellant**
MLUNGISI NTETHO	**11th Appellant**
SIPHO ALFRED SHOZI	**12th Appellant**
HLABEKILE MAHLANGU	**13th Appellant**
MASEGO SHADRACK MEGALANYANE	**14th Appellant**
THOBILE CYNTHIA MOLOI	**15th Appellant**

KEITUMETSE HARRIETTE MONCHUSI	16th Appellant
MBALI PATIENCE MCHUNU	17th Appellant
WEZIWE EDITH MAGWANYA	18th Appellant
BUYELWAJINI FIKILE NDLOVU	19th Appellant
LESPHORO ERNEST MAKWENG	20th Appellant
KHOLISWA ZIMBI	21st Appellant
KHAZAMULA JEFFREY MASHALI	22nd Appellant
PHYLLIS HLEZIWE NXUMALO	23rd Appellant
KAGISO JAFTER MATLHARE	24th Appellant
MORAKANE MARY MOSAKA	25th Appellant
HLENGANI DANIEL MALULEKE	26th Appellant
MAROPENG EMMANUEL MAPHOTO	27th Appellant
JOSEPH MNGOMEZULU	28th Appellant
KHAZAMULA RECKSON MALULEKE	29th Appellant
MBONISENI LUSHOZI	30th Appellant
JAMES MEFOLO	31st Appellant
BONGEKILE HLENGIWE ZULU	32nd Appellant
TRINITY BALESENG MEGALENYANE	33rd Appellant
SAKHILE DANIEL ZWANE	34th Appellant
SLINDILE PIYOSE	35th Appellant
KHULANI NDLOVU	36th Appellant
SFISO NGUBANE	37th Appellant
CELSA VICENTE FONDO	38th Appellant
JOHANNES MEHLAPE	39th Appellant
DAZA LUSHOZI	40th Appellant
FLORENCE MTHIMKHULU	41st Appellant
AGOSTINHO ANTONIO CHALE	42nd Appellant
MATLOU MAPHOTO	43rd Appellant
XOLISILE WINLOVE MBONANI	44th Appellant
DELIWE NYANDU	45th Appellant
THEMBISILE MTUNGWA	46th Appellant

and

THE MINISTER OF POLICE **1st Respondent**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **2nd Respondent**

JUDGMENT

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1. This is an appeal from a judgment of the Johannesburg Magistrates Court (Learned Magistrate Beharie) dismissing with costs two claims instituted by the appellants against the respondents, in which they claimed damages arising out of their alleged unlawful arrest, detention and prosecution.

2. The first claim arises out of the unlawful arrest of the appellants on 28 May 2015 at a building known as Erf 498 and 499 Bellevue Hillcrest Mansions, situated at 85 Becker Street, Bellevue ("the property"), and the subsequent unlawful detention of the appellants. The arrest took place at about 22h30. The appellants were taken to the Hillbrow police station and detained until their court appearance in the Hillbrow magistrates' court the following morning. On that day they appeared before a magistrate where they were released on warning. The case was postponed for further investigation.

3. The arrest has a history that gave rise to the "unlawfulness" of the appellants' occupation of the property. In order to place this appeal into proper perspective, it is important to provide a background to the arrest and detention.

4. On 26 August 2008, and under case number 2008/19472 issued out of this court, 17 respondents and "further unlawful occupiers of Erf 498 and 499 Bellevue Hillcrest Mansions" (cited as the 18th respondent) were ordered by Malan J to be evicted from the property within 30 days. The eviction order was

granted in favour of Abraham Aubrey Levert, the owner of the property ("the owner").

5. About four years and seven months later, on 22 March 2013, the deputy sheriff evicted all of the occupants of the property, including all their belongings. The deputy sheriff deposed to an affidavit on 18 March 2015 stating that the eviction was pursuant to the court order dated 26 August 2008. The evicted occupants of the property were no longer 17 plus "further unlawful occupiers of Erf 498 and 499 Bellevue Hillcrest Mansions" but rather all the occupants of the property. Because people come and go in places like the property in question, there are discrepancies in respect of the persons who were evicted from the property and those who were cited as respondents in the original order of 26 August 2008.

6. On the same day, 22 March 2013, the appellants obtained an order by Satchwell J in the urgent court of this division, restoring peaceful and undisturbed occupation of the property and interdicting and restraining the owner from evicting the appellants pending the finalisation of the eviction application. Satchwell J gave further directives on how the eviction application was to be prosecuted.

7. About seven months later, on 18 November 2013, the appellants obtained an order before Vally J rescinding the eviction order of 26 August 2008. This order, however, rescinded an eviction order under case number 32404/08, a case number different from the original order made on 26 August 2008.

8. In this appeal, the respondents, particularly the second respondent, took issue with the second claim for malicious prosecution contending that the rescission order on 18 November 2013, because it rescinded a different order, was defective. Counsel for the respondents contended further that it was as a result of this defect that it took the second respondent almost a year to withdraw the charges against the appellants because the matter had to be investigated and the defect corrected first.

9. On or about 28 May 2015 Captain Bila ("Bila"), a police officer, purportedly received an instruction from the investigating officer in the matter, Constable Mbombi ("Mbombi"), to gather manpower and arrest the appellants. This arrest, according to Bila, was effected pursuant to the 26 August 2008 eviction order and a complaint laid by the owner against the appellants for trespassing. Apparently the owner of the property had, approximately three months prior to the arrest, complained about the appellants trespassing on the property. The record contains what purports to be an affidavit by the owner requesting that the matter be investigated. This affidavit is however undated and, without oral evidence as to when it was made, a determination cannot properly be made that it in fact was made three months before the arrest. In any event, nothing turns on it because its existence, in the context of my finding, has no bearing on the determination of the merits of this appeal.

10. According to Bila, he was given a docket by Mbombi which contained the 26 August 2006 order and was told by Mbombi that it was valid because she (Mbombi) had investigated this aspect and the order was extant. The restoration order of 22 March 2013 was missing from the docket. Bila was accompanied by the owner when he made the arrests.

11. The appellants were arrested, detained, taken for a court appearance and released on warning the following afternoon. They attended court on numerous occasions thereafter until the charges were withdrawn on 6 April 2016.

12. During the court appearances the appellants were not required to plead because the charges, either of contempt of court or trespassing, were not formally put to them. The prosecutor in the matter persisted that the State had a *prima facie* case against the appellants for trespassing. The prosecutor also made enthusiastic statements regarding the prosecution of the appellants, to the effect that he does not like to see criminals go free and that he always ensures that he gets a conviction in his cases. Counsel for the respondents, in this appeal, argued that these comments show that the appellants were in fact

maliciously prosecuted. I nevertheless find, for reasons set out in this judgment hereunder that in spite of the enthusiasm contained in the statements made by the prosecutor, the statements in themselves are not an indication of malice on the part of the prosecutor and, vicariously, the second respondent.

13. There is a patent discrepancy between the number of respondents in the 26 August 2008 order and the number of persons arrested and detained on 28 May 2015 (the appellants herein, who are 46 in all). The discrepancy between the numbers becomes academic in light of the fact that the contempt of court charge (the trespassing charge also) was not pursued by the second respondent.

14. The appellants, in their particulars of claim, pleaded that the police acted unlawfully and/or wrongfully in arresting and detaining them, for the following reasons:

    14.1. that the police were not armed with a warrant of arrest and/or detention;

    14.2. that the appellants had not committed an offence for which they were allegedly arrested and detained;

    14.3. that the police failed, neglected and/or refused to conduct reasonable investigations prior to arresting and detaining them; and

    14.4. that the police arrested them without any reasonable suspicion that they had committed an offence.

15. The second claim, for damages for malicious prosecution, is based on the fact that the second respondent brought charges against the appellants without properly applying his mind to the charges.

16. The appellants pleaded specifically that the second respondent unlawfully and wrongfully prosecuted them because:

16.1. the prosecutor unreasonably failed, neglected and/or refused to properly apply his mind in endorsing the prosecution; and

16.2. no grounds both in fact and/or in law existed to justify the prosecution;

16.3. further that, as a result of the prosecution, the appellants' good reputation was "unreasonably soiled" and the appellants also endured severe emotional and mental anguish both during and after the prosecution.

17. The arrest and subsequent detention of the appellants is not in dispute. What is disputed is the lawfulness of the arrest and detention. During argument counsel for the respondents contended that, in relation to the arrest and subsequent detention, a trespassing offence was committed because the appellants unlawfully occupied the property. Counsel further contended that the appellants were required to inform Bila when he came to arrest them that they were lawfully in occupation of the property pursuant to a restoration order of 22 March 2013. During the debate on this point with the court the respondents' counsel correctly conceded that there was no duty on the part of the appellants to inform Bila of the lawfulness of their occupation because he did not ask for any explanation and, in any event, it was clear to them that he had made up his mind about the arrest.

18. During the trial Mbombi was not called as a witness. It was Mbombi who commanded the arrest of the appellants and therefore, in law, the superior who carries out the arrest[1].

19. The requirements for a lawful arrest without a warrant are set out in sections 40(1)(a) and 40(1)(b) of the Criminal Procedure Act, 51 of 1977("CPA, 1977").

20. Section 40(1)(a) and (b) of the CPA,1977 provides:

"(1) A peace officer may without a warrant arrest any person-

[1] **Minister of Justice v Ndala 1956 (2) SA 777 (T)** at 780; Also **Du Toit, Commentary on the Criminal Procedure Act (Volume 1) at 5-14B**

(a) Who commits or attempts to commit an offence in his presence;

(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody;

(c) ....."

21. In order to prove that the arrest and detention was lawful it was important for the first respondent to call Mbombi as a witness. A failure to do so was fatal to its defence because she was the peace officer who formed the reasonable suspicion that the appellants had committed an offence.

22. Bila gave evidence that he was instructed by Mbombi who had satisfied herself that the 28 August 2008 eviction order was still valid. The restoration order of 22 March 2013 was missing from the documents in the docket that was given to him by Mbombi.

23. The onus of justifying the arrest and detention of the appellants lies upon the first respondent. In concluding that because the appellants failed to produce a court order validating their occupation of the property, they had committed a crime of trespassing in terms of the Trespass Act, 6 of 1959, the court below clearly erred. There was no obligation in law for them to prove to a peace officer, who himself had to form a reasonable suspicion of the commission of an offence, that they were lawfully occupying the property. Apart from a contravention of the court order of 26 August 2008, no other offence was alleged to have been committed.

24. As regards the detention of the appellants at the Hillbrow police station from their arrival there and their release the following day in the afternoon, it was not seriously contended that such detention could be justified. In my view, therefore, the first respondent must be held liable for this period of unlawful detention.

25. I will now deal with the appellants' claim for damages for malicious prosecution. The requirements for a successful claim for malicious prosecution have been discussed in *Minister of Justice and Constitutional Development v Moleko*[2], and the court stated as follows:

"In order to succeed with a claim for malicious prosecution, the claimant must allege and prove-

(a) that the defendant set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without a reasonable and probable cause;

(c) that the defendants acted with malice (or animo injuriandi); and

(d) that the prosecution has failed.

26. Regarding the meaning of malice the court stated that *"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 will not suffice".*

27. It is therefore necessary, in order to sustain this claim, to reach a finding that in all probability the appellants were "injured" and their dignity negatively affected. No case was made out, either in the pleadings or during evidence, that the appellants' dignity was violated as a result of the prosecution.

28. For malicious prosecution, an important aspect to determine is whether the matter was prosecuted. Counsel for the appellants heavily relied on the case of *Minister of Police and Another v Du Plessis*[3]. He strongly contended that it is not a necessary requirement for a malicious prosecution to be sustained

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[2] [2008] 3 ALL SA 47 (SCA)
[3] 2014 (1) SACR 217 (SCA) at paragraphs [28] – [33]

that the charges should be formally put to the appellants; only that the accused persons must be summoned to appear in court. This proposition is untenable because matters must be adequately investigated and postponements for further investigation are a part of the proper administration of justice; as long as accused persons are not unreasonably held in custody. Reliance on this authority was, further, misplaced because in that case there was a determination of fact regarding exactly when the prosecution knew that the accused person was not involved in the commission of the offence but was a mere bystander; and therefore had to be released, meaning the persistence with the prosecution of him was therefore unlawful. In this case it is unclear as to when the prosecutor got to know that the appellants were not in unlawful occupation of the property.

29. As stated herein, the order by Vally J on 18 November 2013 rescinded an eviction order with a different case number, this defect had to be rectified and only on 18 March 2016 Weiner J varied the order and corrected it. About two weeks thereafter, charges were withdrawn. It was contended by counsel for the second respondent that it was from that date that the prosecution "knew" that the appellants were not unlawfully occupying the property and withdrew the charges at their next appearance. Therefore there was no unreasonable delay in prosecuting the matter. I agree with the submission.

30. The court a quo found that the prosecutor was passionate about his work. He did not know the appellants personally and thus there could be no suggestion that he held a resentment for them. It found that the second respondent instituted the proceedings on probable and reasonable cause. This finding cannot be faulted.

31. Another question that arose in this appeal was whether the criminal case was prosecuted or not; in order to determine whether such prosecution was malicious or not. The court a quo found that prosecution was not malicious because the second respondent instituted the proceedings on probable and reasonable cause. In the context of the finding of the court a quo, I find that

there was no error in judgment, whether or not the case was prosecuted because nothing turns on that point.

32. In the circumstances, the appeal must succeed in respect of the unlawful arrest and detention but cannot in respect of the malicious prosecution.

33. The respondents, as required by the Rules, did not deliver heads of argument, timeously. This is always an inconvenience for the judges hearing matters. The matter was set down for hearing on Monday, 28 May 2018. On 23 May 2018, we communicated with the State attorney advising him that we had not received any heads of argument on behalf of the respondents and sought clarity on whether the state attorney was opposing the appeal. Two days later and on Friday, 25 May 2018, he responded by email advising that due to administrative problems in his offices the heads of argument had been served on 15 May 2018 (1 day late) and only filed on 22 May 2018. He requested to send the heads of argument to us electronically. The request was granted on the express understanding that he was to formally apply for condonation. This did not occur. To compound matters, at the hearing of the appeal, the attorney was not even present.

34. We intend expressing our displeasure at the manner in which the issue relating to the heads of argument was dealt with. The attorney failed to deliver the heads on time and then failed to provide an explanation as requested but more importantly, as is required by the rules of this court.

35. On 28 May 2018 we informed counsel to instruct the attorney to provide an explanatory affidavit why the matter was not properly prosecuted. He filed such an affidavit.

36. In the result the appeal succeeds in respect of Claim A, the unlawful arrest and detention claim.

37. The finding of the court a quo in respect of Claim A is set aside and replaced with the following order:

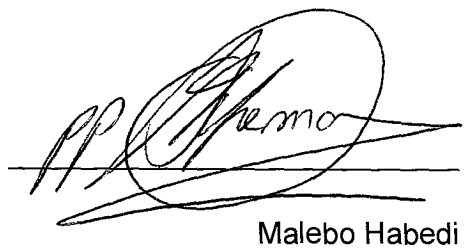
37.1.1. 'Claim A – the first respondent is liable for 100% of any damages which the plaintiffs may prove.

37.1.2. The first respondent is to pay the costs of suit'

37.2. The matter is remitted back to the Magistrates' Court for a hearing on the quantum of damages in respect of Claim A.

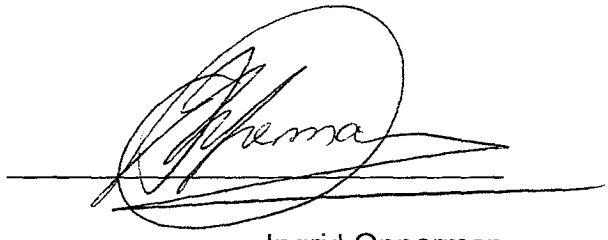
37.3. The first respondent is ordered to pay the costs of the appeal in respect of Claim A on the party/party scale, save for the costs of the hearing on 28 May 2018, which is to be paid by the first respondent as between attorney and client.

37.4. The appeal is dismissed with costs in respect of Claim B - the malicious prosecution claim;



Malebo Habedi
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I agree



Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 28 May 2018

Judgment delivered: 20 June 2018

Appearances:

For Appellant: Adv. Van Rooyen

Instructed by: N Ndebele Incorporated Attorneys

For Respondent: Adv. Buthelezi

Instructed by: The State Attorney