REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42216/2015

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

28/06/19
.....
Date

.....
ML TWALA

In the matter between:

MOGABI: PETRUS SIMONE **PLAINTIFF**

AND

NATIONAL PROSECUTING AUTHORITY **FIRST DEFENDANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTION **SECOND DEFENDANT**

MINISTER OF POLICE **THIRD DEFENDANT**

JUDGMENT

TWALA J

[1] The plaintiff sued the defendants out of this Court for damages arising out of his arrest and detention by members of the South African Police Service on the 4th of April 2014. The plaintiff was held in detention as he was prosecuted until he was released on bail on the16th of April 2014. He appeared in Court on numerous occasions until the 6th of August 2014 when the State withdrew the charges against him due to lack of evidence.

[2] The defendants filed a special plea that the plaintiff did not comply with the provisions of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002. The defendants however pleaded over to the plaintiff's particulars of claim admitting the arrest and detention of the plaintiff but alleging that it was lawful and justified. Further, the defendants denied that the prosecution subsequent to the arrest was malicious. Only the plaintiff testified in support of its case and the defendants called two witnesses to testify in their defence.

[3] At the commencement of the hearing it was agreed that, since the defendants admit the arrest and detention of the plaintiff but allege that it was lawful and justified, the duty to begin lies with the defendants. Further, the defendants abandoned their special plea and proceeded to lead evidence.

[4] The first witness for the defendant was Captain Matome Stanley Mokhubidu (*"Mokhubidu"*) who testified that he was the investigating officer in the

theft case against the plaintiff. On the 4th of April 2014 he received the docket with instructions to obtain a statement from Messrs Sekgobela, Mokgabi and Bafana Gwebu. Further, he was instructed to obtain and view the video footage, the serial number of the machine and to circulate same.

[5] Mokhubidu testified further that he drove to the construction site where the offence is alleged to have been committed and requested the complainant, Mr Mandlaza to call Messrs Sekgobela, Mokgabi and Raboroko for him to interview. He interviewed Messrs Sekgobela and Raboroko first before interviewing the plaintiff. Plaintiff informed him that he was accosted by two people at gunpoint and was robbed of the machine. These people gave him a cellphone number and promised to bring back the machine. After these people had left, he then reported the incident to Raboroko who reported the matter to the supervisor the next morning. This did not make sense to him – hence he took the plaintiff to the Norwood Police Station after he had read him his rights in terms of the law.

[6] Mokhubidu testified under cross examination that he arrested the plaintiff because he made a statement that did not make sense to him. He did not write the statement of the plaintiff and the plaintiff refused to sign the warning statement. He did not obtain the video footage nor did he follow all the instruction as per the docket. He did not approach the service provider to check the cellphone details of the cellphone number which he alleges to have received from the plaintiff as a number given to him by the people who held him at gunpoint and robbed him the machine. He locked up the plaintiff at the police station at about 10H36 in the morning but only charged him at 16H30 because he was continuing his investigation and obtaining statements from the witnesses he was interviewing.

[7] Mokhubidi testified that he did not oppose bail on the first appearance of the plaintiff at Court on the 7th of April 2014 and the matter was postponed for seven (7) days to the 14th of April 2014 for further investigation and to allow him an opportunity to verify the address of the plaintiff for he gave him an address in Rustenburg. Because the address of the plaintiff was in another province, he had first to obtain permission from his commander to go to Rustenburg to verify the address for he has to physically verify the address and interview the people who reside there. He did not know that the plaintiff was employed by a security company and did not approach plaintiff's employer to verify his employment address. However, between the 7th of April 2014 and the 14th of April 2014 he could not physically verify the Rustenburg address for there were service delivery protests in that area. He only called the plaintiff's wife on her cellphone which was given to him by the plaintiff and confirmed the address – hence the plaintiff was admitted to bail on the 14th of April 2014.

[8] According to Ms Sugendha Mudaly (*"Mudaly"*), who was the control prosecutor in the employ of the prosecuting authority on the 7th of April 2014, she received the docket on the morning of the 7th April 2014. She perused the statements in the docket and had an informal but informative discussion with the investigating officer and came to the conclusion that there was a prima facie case for the plaintiff to answer – thus she enrolled the matter. The statements in the docket were that of the colleagues of the plaintiff with whom he was on duty when the machine disappeared. There was no statement from the plaintiff – thus the matter was postponed with further instructions to the investigating officer.

[9] Mudaly testified under cross examination that she formed a view that there was a prima facie case for the plaintiff to answer based on the statements she

found in the docket and the informal discussions she had with the investigating officer. She placed the matter on the roll since there was a prima facie case for the plaintiff to answer as the witness statements placed him on the scene of the crime. She is aware that the State withdrew the charges against the plaintiff on the 6th of August 2014 due to lack of evidence.

[10] It was then the turn of the plaintiff to testify. He was at his room at the site where he was stationed as a guard. His supervisor called him and informed him that the police would like to talk to him. He was then introduced to Mokhubidu who was in the company of Sekobela, a colleague of the plaintiff. Mokhubidu then informed him that he should accompany him to the police station regarding a machine that has gone missing. At the police station he took him to a separate room and asked him about the machine. He told him that they were three security guards on the day doing night shift and each one had his own area to patrol. The machine was in the area guarded by Raboroko. He wanted to stretch his legs and get some water which was only supplied in another area and that is when he went past the area guarded by Raboroko only to notice that the machine was missing. He then woke up Raboroko whom he found sleeping on site and informed him that the machine has gone missing and Raboroko reported the matter to the supervisor the next morning.

[11] He testified further that he was detained in the police cell with two other persons until he appeared in Court on the 7th of April 2014. The cell was filthy and had a dirty open toilet. He had to sleep on the floor with dirty blankets. After his appearance in Court on the 7th of April 2014, he was remanded in custody at the Johannesburg prison where he found the conditions to be much better than the police cell in Norwood. He received

bail on the 14th of April 2014 when bail was fixed at an amount of R3000 which he only managed to pay on the 16th of April 2014. After paying the bail amount, he went back to work but his employer refused to engage him saying that he does not employ criminals. He took the matter up with the department of labour and was paid only his UIF. He was earning R4 500 per month at the time excluding overtime pay which normally would put his salary to between R5 200 and R5 400 per month. He managed to secure another employment in September 2016. He passed matric and dropped out in his third year at the technical college.

[12] He testified under cross examination that he stayed on the property where he was station as a guard. The police officer was not interested in hearing his side of the story but just told him that he is responsible for the theft of the machine and he was arresting him. He denied having informed the police officer that he was accosted by two men and robbed him the machine at gunpoint. He denied having furnished Mokhubidu with a cellphone number which he alleged to have received from the robbers. He was guarding the third floor of the building and Raboroko was guarding the ground floor and the machine was stationary almost on the pavement next to the main road. He was on his way to collect water and stretching his legs when he discovered that the machine was not where it was parked.

[13] It is trite law and in terms of the bill of the rights enshrined in the Constitution of the Republic of South Africa Act, 108 of 1996 that, everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. Further, it is a trite principle of our law that for judgment to be given for the plaintiff, the Court must be satisfied that sufficient reliance can be placed on his story for there exist a probability that his version is true

[14] Section 12 (1) (a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (*"the Constitution"*) provides as follows:

> *"(1) Everyone has the right to freedom and security of the person, which includes the right-*
>
> *(a) Not to be deprived of freedom arbitrarily or without just cause*
>
> *(b) ……*
>
> *(2) Everyone has the right to bodily and psychological integrity, which includes the right-*
>
> *(a) ……*
>
> *(b) to security in and control over their body;*
>
> *(c) ……*

[15] Section 35 of the Constitution provides as follows:

> *"(1) Everyone who is arrested for allegedly committing an offence has the right:-*
>
> *a) To remain silent;*
>
> *b) To be informed promptly –*
>
> *I. Of the right to remain silent; and*
>
> *II. Of the consequences of not remaining silent;*
>
> *c) ……*
>
> *(2) Everyone who is detained, including every sentenced prisoner, has the right –*
>
> *a) to be informed promptly of the reason for being detained;*
>
> *b) ……*
>
> *e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at*

stated expense, of adequate accommodation, nutrition, reading material and medical treatment

(3) Every accused person has a right to a fair trial, which includes the right –

a) ……

d) to have their trial begin and conclude without unreasonable delay;

e) ……"

[16] Section 40 of the Criminal Procedure Act, Act 51 of 1977 (CPA) provides as follows:

"Arrest by peace officer without warrant:

(1) A peace officer may without warrant arrest any person –

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

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

(c) ……

[17] In *Van Wyk and Another v The Minister of Police and Another (A617/15) 2016 ZAGPPHC 942 (17 November 2016)* (Unreported) the court stated the following:

"I consider it to be good policy that the law should be as there stated. An arrest constitutes 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."

[18] In *Minister of Safety and Security and Another v Mhlana 2011 (1) SACR 63 (WCC)* the court stated the following:

"…… In order for a peace officer to be placed in a position to rely upon s40 (1) (a) it is not necessary that the crime in fact be committed or that the arrestee be later charged and convicted of the suspected offence."

[19] In *Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG)* the court said the following:

"The test is an objective one and the question to be answered is in our view whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the arrestee had prima facie committed an offence in his presence. Stated differently, did the arresting officer have knowledge at the time of arrest of the arrestee, of such facts which would, in the absence of any further facts or evidence, constitute proof of the commission of the offence in question. The aim is not to determine whether the arrested person is guilty of the offence on which he was arrested. It accordingly matters not that the arrestee was not prosecuted or was acquitted at a subsequent trial on the basis of evidence other than what the arresting officer had in his possession at the time when he executed the arrest. An acquittal simply means that the prosecution failed to prove the guilt of the arrested person beyond a reasonable doubt on the evidence available to it at that time and placed before the trial court.

To hold otherwise is, as a matter of public policy, undesirable. It would mean that knowledge is ex facto attributed to the arresting officer, of the facts he did not have actual knowledge of at the time of effecting the arrest. It requires the search for a balance between two equally important aims of public policy, namely the liberty of the individual on the one hand, and the maintenance of law and order on the other. Arrests under s 40 (1) (a)

usually take place in circumstances where prompt and decisive action is called for, and which is of necessity founded on the circumstances of the moment, such as public order offences. The arresting officer cannot be expected to determine the guilt of the arrestee in such circumstances in advance, and to hold otherwise would unnecessarily discourage peace officers from arresting offenders who are in the act of committing an offence. The arrest of a person in flagrante delicto without a warrant is a necessary power to effectively maintain order and combat crime and should not be unduly curtailed."

[20] I am unable to agree with counsel for the defendants that no reliance should be placed in the evidence of the plaintiff with regard to what happened when he was arrested. The plaintiff appeared to be an unsophisticated person who was not in a position to resist the might of the police. It is my respectful view that, if the plaintiff made the statement as testified by Mokhubidu, Mokhubidu would not have hesitated to write it down. I am inclined to accept the version of the plaintiff as credible in that Mokhubidu, after he spoke to Sekhobela and Raboroko did not want to hear the version of the plaintiff and decided to arrest him. Mokhubidu testified that, the reason to arrest the plaintiff was because he had to act quickly as there was a word that the machine was in Diepsloot and he suspected that the plaintiff knew where it was. However, he did not take the plaintiff to Diepsloot to point out the machine.

[21] I understand the above authorities to say that, when the arresting officer effects an arrest without a warrant, he must have knowledge at the time of the arrest of such facts which would, in the absence of any further facts or evidence, constituted proof of the commission of the offence in question by the arrestee. I find myself in agreement with counsel for the plaintiff that,

since Mokhubidu conceded that he did not follow the instructions as contained in the docket, he arrested the plaintiff before taking a statement from Sekgobela and Bafan Gwebu and did not obtain and viewed the video footage, he did not have knowledge or sufficient facts which constituted proof that the plaintiff committed the offence. According to the instruction on the docket he was to interview Gwebu for Gwebu alleged that there were people who wanted to bribe him to get the machine. The ineluctable conclusion is therefore that Mokhubidu arrested the plaintiff without investigating the matter properly.

[22] Further, it is not clear from Mokhubidu's testimony why he did not verify the cellphone number with the service provider. It is my considered view therefore that, Mokhubidu was never in possession of such cellphone number as the plaintiff says he never gave him such. According to the docket, Gwebu had valuable information about people who wanted to bribe him to obtain this machine but Mokhubidu did not bother to obtain a statement or simply interview Gwebu. The irresistible conclusion is that Mokhubidu did not investigate the matter and rushed to arrest the plaintiff. The conduct of the arresting officer in this case cannot be said to have been reasonable and therefore the arrest of the plaintiff was unjust, wrongful and unlawful.

[23] I do not agree with counsel for the defendants that the defendants were entitled in terms of the law to postpone the case of the plaintiff for 7days on his first appearance in Court. There is a plethora of authority that the Constitution of the Republic guarantees the freedom and liberty of an individual to the extent that an arbitrary detention of a person, even for a minute, is wrongful and unlawful. The plaintiff was arrested on a Friday morning and Mokhubidu had the whole weekend to verify his address but

chose not to do so. He failed to contact the employer of the plaintiff, although he knew that he was employed as a security guard, to verify his details and his address. Ms Mudaly testified that the police have access to the technology of verifying and obtaining information online whether the person arrested has a criminal record and to profile such person, however Mokhubidu did not do so.

[24] In *De Klerk v Minister of Police (329/17) [2018] ZSCA 45; [218] 2 ALL SA 597 (SCA); 2018 (2) SACR 28 (SCA) (28 MARCH 2018)* the Supreme Court of Appeal, differentiating between the detention by the police and by order of Court, stated the following:

> *"It is well established that the purpose of arrest is to bring the suspect to court for trial. I agree with what Harms DP said in Sekhoto, that the arresting peace officer has a limited role in the process that takes place in court. In my view presiding officers in courts of first appearance must ensure that the rights in s35(1)(e-f) of the Constitution are not undermined. It is imperative for a presiding officer to enquire from the prosecution why it is necessary to further detain a suspect. In that enquiry the reasons for further detention will emerge as to whether or not it is in the interests of justice to further detain or release the suspect. This I say, mindful of the provisions of s12 (1) of the Constitution which deals with freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause. Failure to enquire at the first appearance of the reasons for further detention is clearly a contravention of the above constitutional imperatives and therefore the further detention of a suspect without just cause would be arbitrary and unlawful. In my view the police cannot be held liable for the further detention, even if*

the arrest if found to have been unlawful. What is critical is that, the justice department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person."

[25] I am unable to comprehend the attitude of the Magistrate in ordering the continued detention of the plaintiff without enquiring as to the reasons therefore. He did not seem to be bothered by the fact that the plaintiff has been in detention for three days already but postponed the matter without any consideration to admitting the plaintiff to bail. I understand the above authority to mean that there arises a duty upon the presiding officer when a person appears before him to enquire why he should not be admitted to bail. He would be clearly contravening the constitutional imperatives if he were to order the continued detention of a person without any just cause and that would render the detention arbitrary and unlawful. I therefore find that the continued detention of the plaintiff was wrongful and unlawful.

[26] I am unable to disagree with counsel for the plaintiff that the evidence of the plaintiff was unchallenged with regard to the salary of R4500 he was earning at the time of his arrest and that he lost his employment as a result of his arrest. He was uncontroverted in his evidence when he testified that he only regained employment in September 2016. I therefore hold that the plaintiff is entitled to be fairly compensated for his loss of earnings for a period of 16 months with the necessary contingencies to be applied.

[27] For the plaintiff to succeed in a case of malicious prosecution, which is the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy, the onus is on him to prove that:

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

(b) the defendant acted without reasonable and probable cause;

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

(d) the prosecution failed.

These requirements were set out by the Supreme Court of Appeal in *Minister of Justice and Constitutional Development & others v Moleko [2008] ZSCA 43; [2008] 3 All SA 47 (SCA) PARA 8* and were stated with approval in *Minister of Safety and Security N.O & another v Schubach (437/13) [2014] ZSCA 216 (1 December 2014).*

[28] I am unable to disagree with counsel for the defendants that the evidence of Mudaly was clear, plain, simple and credible. She could not be challenged on her simple and plain evidence that she received the docket with statements on the morning of the 7th April 2014. After considering the statements and having had an informal but informative discussion with the investigating officer, she concluded that there was a prima facie case which warranted the matter to be enrolled on the Court roll. The two statements which she found in the docket were those of the colleagues of the plaintiff. The irresistible conclusion is that the plaintiff has failed to establish that the prosecution was malicious in prosecuting the case against him and therefore his claim falls to be dismissed.

[29] In *Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)*, the Supreme Court of Appeal stated as follows:

"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 solatium 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 which any arbitrary deprivation of personal liberty is viewed in our law."

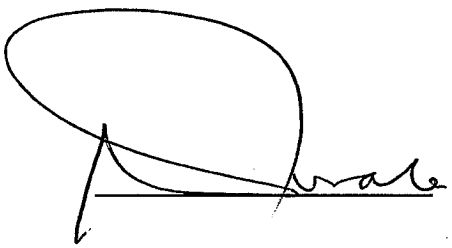
[30] I agree with the plethora of authorities that action for damages against the State should not be used as a *get rich quick scheme* since taxpayers fund these kinds of damages. However, it is not in dispute that the plaintiff suffered the arbitrary deprivation of personal liberty and human indignation by virtue of his unlawful arrest and detention. He was detained in the filthy cell at the police station which had an open toilet which had no privacy whatsoever when in use. He slept on the floor with blankets that were dirty and stinking. He was only fed with bread on his first day. He continued to be detained at Johannesburg prison. Further, he lost his employment as he was branded a criminal by his employer and only obtained employment in about September 2016.

[31] I am mindful that, in considering a fair and reasonable compensation for the plaintiff for the damages he suffered at the hands of the employees of the defendants, the loss of his earnings whilst he was attending to the criminal case and him only regaining employment in September 2016, I should not lose sight of the fact that this is not a get rich quick scheme and that the compensation comes from the fiscus. However, the plaintiff must be compensated fairly and reasonably.

[32] In considering the award of costs in this case, I do not find it inappropriate for the costs to follow the result. However, I am of the view that this matter was not complex and did not warrant to be heard by the High Court since the quantum of damages suffered by the plaintiff is within the jurisdiction of the Magistrate Court. I am therefore inclined to award costs on the Magistrate Court scale.

[33] In the circumstances, I make the following order:

1) The arrest and detention of the plaintiff on the 4th of April 2014 up to his release on bail on the 16th of April 2014 is wrongful and unlawful;
2) The defendants are liable to pay damages in the sum of R200 000, jointly and severally, the one paying the other to be absolved, to the plaintiff within 30 days from the date of this order, made up as follows:
   I. Arrest and detention in the amount of R140 000
   II. Loss of earnings R 60 000
3) The defendants are liable to pay interest at the rate of 9.5% per annum on the said sum of R200 000 from the date of summons to date of final payment;
4) The defendants are liable, jointly and severally the one paying the other to be absolved, for party and party costs on the Magistrate Court scale.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:	**20th and 21st June 2019**
Date of Judgment:	**28th June 2019**
For the Plaintiff:	**Adv. M W Sekgatja**
Instructed by:	**Sekgatja Attorneys** **Tel: 011 492 2640**
For the Defendants:	**Adv. J Cordier**
Instructed by:	**THE STATE ATTORNEY** **Tel: 011 3307656**