



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

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

SIGNATURE

DATE: 2 November 2021

Case No: 21697 / 2019

In the matter between:

JONATHAN LEFATSI MAROKO

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

WILSON AJ:

- 1 The plaintiff, Mr. Maroko, seeks damages for what he claims was his wrongful arrest, detention and subsequent prosecution on a charge of drug possession. The trial of these claims proceeded before me remotely on 27 July 2021, but one of the parties' witnesses or legal representatives, to whom both parties' counsel were exposed, tested positive for COVID-19 on the evening of 27 July

2021. By that time, I had heard the parties' opening statements, and the first defendant ("the Minister") had led his first witness, Constable Mokoena, who was the principal arresting officer. Constable Mokoena had been cross-examined, re-examined and then excused. The trial was accordingly postponed part-heard to allow various people involved in the matter to self-isolate.

- 2 I heard the remainder of the evidence in open court on 27 and 28 September 2021. This was evidence from Constable Ledwaba, who was with Constable Mokoena when Mr. Maroko was arrested; from Xolani Frank, the duty prosecutor who handled Mr. Maroko's first appearance; from Wendy Govender, who was the prosecutor ultimately required to run Mr. Maroko's trial; and from Mr. Maroko himself.
- 3 The parties agreed to submit their closing argument in writing, subject to my discretion to direct the presentation of oral argument. I received heads of argument from Mr. Sondlani, who appeared for Mr. Maroko, on 4 October 2021, and from Ms. Mabuza, who appeared for the Minister and for the second defendant, the NDPP, on 6 October 2021. Given the fairly narrow issues in dispute, which had been well-matured in the evidence, I did not consider it necessary to hear oral argument. I would like to record my gratitude to the parties' legal representatives, and particularly to counsel, for the calm and professional way in which they discharged their duties in what was a very difficult set of circumstances created by the COVID-19 pandemic.

The arrest

- 4 On 17 August 2018, Constable Mokoena and Constable Ledwaba were on patrol in Mapetla, Soweto. They came across Mr. Maroko and his companion, Mr. Marcus Tseke, walking along Moroka Street near the Morafe Hostel. Constable Mokoena and Constable Ledwaba were on what Constable Ledwaba called “stop and search” duties, aimed at combatting the possession and sale of illegal drugs. There is some confusion in the evidence about whether Constable Mokoena and Constable Ledwaba were parked at the side of the road when Mr. Maroko and Mr. Tseke passed them, or whether the police officers were driving by Mr. Maroko and Mr. Tseke, and then stopped the car to engage with them. This ambiguity is not material, however.
- 5 The material dispute in this case is what caused Constable Mokoena and Constable Ledwaba to stop and arrest Mr. Maroko. Constable Mokoena’s evidence in this respect was particularly unimpressive. Ms. Mabuza asked Constable Mokoena at least three times why he stopped Mr. Tseke and Mr. Maroko. His first two answers appeared to presume that this was just something he was entitled to do whenever he felt it was necessary. His third answer was that he could read it in a man’s face when he used drugs.
- 6 Having apparently identified either Mr. Tseke or Mr. Maroko, or both of them, as proper subjects of a stop and search operation, because he could see in their faces that they used drugs, Constable Mokoena testified that he introduced himself to both men, and asked to search them. At that point, Constable Mokoena says, Mr. Maroko reached into his pocket and dropped a small clear plastic bag on the ground. Constable Mokoena says that he

conducted a body search on Mr. Maroko, and then picked the plastic bag up from the ground, which he suspected of containing drugs. He then arrested Mr. Maroko on suspicion of drug possession.

7 When Ms. Mabuza reminded Constable Mokoena that Mr. Maroka was with Mr. Tseke at the time they were stopped, Constable Mokoena stated that both men were found in possession of drugs, that he saw not one, but two, packets of drugs dropped on the ground, and that he arrested both Mr. Tseke and Mr. Maroko for drug possession.

8 This account of the incident seemed incredible when it was given in court. The introduction of the second bag of drugs appeared tagged-on to explain why both men were arrested. As Mr. Sendlani pointed out in his cross-examination, Constable Mokoena's statement on the police docket relating to Mr. Maroko's arrest mentioned only one bag of drugs. That statement was entered by agreement as Exhibit A before me. The relevant part of the statement reads that "one" of the men "dropped a visible parcel on the ground". An almost identical statement on Mr. Tseke's docket (entered as Exhibit C before me) repeats that only "one" of the men dropped a bag on the ground.

9 When pressed on this in cross-examination, Constable Mokoena tried to suggest that, in each statement he gave, he was concerned only with the particular arrest to which the statement was addressed. As I understand his evidence, Constable Mokoena did not mean to convey that only one bag of drugs was dropped, but that each one of the men he stopped dropped a bag of drugs. This explanation falls to be rejected on its face. That is simply not

what the statements say. They both say that Constable Mokoena approached two men, and that only “one of them” dropped a bag.

10 In both her statement and in her oral evidence, Constable Ledwaba replicated Constable Mokoena’s evidence in every material respect, including the awkward confusion about which of the two men arrested dropped a bag of drugs, and the equally awkward explanation of why her statement on Mr. Maroko’s docket stated that only “one of them” did.

11 Mr. Maroko’s evidence was that Mr. Tseke dropped the bag. Mr. Maroko said he was searched but that nothing was found on him. He said that was not in possession of any drugs, and that the only reason he was arrested was that he had tried to intervene when the police arrested Mr. Tseke. Mr. Maroko said that Constable Mokoena called him “very talkative”, presumably meaning that he was being cheeky.

12 It was put to Constable Ledwaba and to Constable Mokoena on Mr. Maroko’s behalf that this was the real reason for Mr. Maroko’s arrest. He had nothing on him, but his attempt to stick up for his friend, Mr. Tseke, was taken as a challenge to the police officers’ authority, to which they responded by detaining him. Both police officers denied this, and stated that Mr. Maroko put up no resistance at all to his arrest or that of Mr. Tseke.

13 Mr. Maroko and Mr. Tseke were taken to Moroka Police Station, where they were detained over the weekend. Mr. Maroko said that he was detained in a twenty square metre cell, which, at times, accommodated up to 30 men. There were rats in the cell, and the blankets the prisoners were given stank. On

Saturday, 18 August 2021, Mr. Maroko was formally charged with drug possession.

- 14 Notwithstanding Constable Ledwaba and Constable Mokoena's confused evidence regarding the number of plastic bags recovered from the scene, the SAP 13 register at Moroka Police Station contains entries for two plastic bags, one allegedly recovered from each of the two men arrested. An entry for a bag allegedly recovered from Mr. Tseke was logged under entry number 2302. The forensic bag number allocated was PA4001958949. A plastic bag allegedly recovered from Mr. Maroka was logged under entry number 2303 and allocated a forensic bag number PA4001958947. The content of each bag was later tested. Each bag was found to contain just over a tenth of a gram of methamphetamine, a controlled substance listed in Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992.
- 15 The SAP 13 entries were handed in as Exhibits F1 and F2 before me. Affidavits from the investigating officer who took the bags for testing, and the forensic laboratory officer who tested them were not formally handed in as exhibits. They were, however, part of a bundle of documents provided to me, the contents of which both parties accepted were what they purported to be. Mr. Sendlani merely recorded that it was not accepted that the forensic bag registered against Mr. Maroko's name was, in fact, recovered from Mr. Maroko at the time of his arrest, or at all.

The prosecution

- 16 Mr. Maroko appeared in the Protea Magistrates' Court on Monday 20 August 2018. He informed the duty prosecutor, Mr. Xolani Frank, that he intended to

plead not guilty. The matter was postponed for further investigations, and Mr. Maroko was released. There is some confusion in the evidence about whether Mr. Maroko was released on warning, or on R500 bail, but that is of little consequence.

17 On 22 October 2018, Mr. Tseke paid an admission of guilt fine, the record of which was entered as Exhibit E before me.

18 If Mr. Maroko was ever given the opportunity to pay such a fine, he did not take it. His case was postponed to 30 April 2019 for plea and trial. It was then postponed on a further 3 occasions, before the charge against him was finally withdrawn, on 12 June 2019. The charge was withdrawn by the Control Prosecutor in response to written representations made to him on Mr. Maroko's behalf. The Control Prosecutor was not called as a witness before me, but the representations made to him were entered as Exhibit D. The representations stated that "Marcus Tseke acknowledged possession of the drugs found on the ground. The accused person [Mr. Maroko] was only arrested because he was in the company of Marcus Tseke". It was on that basis that the Control Prosecutor was asked to withdraw the charge against Mr. Maroko.

The wrongful arrest claim

19 Constable Ledwaba spoke of the "stop and search" operation of 17 August 2018 as if it was a routine and banal feature of her crime prevention work. In his statement entered as Exhibit A, Constable Mokoena, too, described his duties on the 17 August as a "stop and search" operation. It is of some concern to me that police officers appear to be routinely sent out on duties of this

nature. It ought not to be presumed, in my view, that police officers will be sent out with the express purpose of stopping and searching individuals in the community. While the ability to stop and search within the bounds of their legal authority to do so is obviously a perfectly appropriate part of a police officer's toolkit, a police operation with the sole purpose of using searches of the person to combat crime sits uncomfortably with the general constitutional prohibition on searches of persons and property. As the Constitutional Court has recently been constrained to point out, the right to privacy in section 14 of the Constitution, 1996, presumes that all searches of the person are unlawful unless justified in terms of a law of general application that is itself constitutionally valid (*Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37 (22 October 2021)).

20 In this case, both Mr. Tseke and Mr. Maroko were said to have consented to the search that allegedly resulted in the recovery of methamphetamine from them. But there must, in my view, be serious doubt about the validity of such consent. I have some difficulty accepting that meaningful consent can be given in the coercive environment created by a police operation the express purpose of which is to stop and search those whose culpability, can, to paraphrase Constable Mokoena, be read "in their faces".

21 Be that as it may, Mr. Maroko's case was not based on the legality or otherwise of the search, and I do not think that it would be right to make anything of it, as unsatisfactory as the facts are in this respect.

- 22 Mr. Maroko instead contended that only one bag was recovered from the two men arrested on 17 August 2021, and that bag belonged to Mr. Tseke. Mr. Maroko was only arrested because he challenged Mr. Tseke's arrest.
- 23 The wrongful arrest claim accordingly turns on a narrow factual issue: how many bags were recovered during the arrest, and to whom did they belong? If there were two bags – one recovered from Mr. Tseke and one from Mr. Maroko – the claim for wrongful arrest must fail, and the claim for malicious prosecution must fail with it.
- 24 On a balance of probabilities, I am satisfied that there was, in reality, only one bag of drugs, and that bag was recovered from Mr. Tseke. It follows that there was no basis on which Mr. Maroko could lawfully have been arrested, and that his arrest was probably in retaliation for his attempts to remonstrate with Constable Mokoena on Mr. Tseke's behalf. I have already adverted to the wholly unsatisfactory evidence of Constable Mokoena and Constable Ledwaba, and the fact that it cannot be reconciled with their statements. Had that been the only basis on which to doubt the version put on the Minister's behalf, I would have had to weigh the defects in the police officers' testimony with the facts that two evidence bags were logged at the police station – one in respect of each of the arrested men – and that they were both found to contain methamphetamine.
- 25 It is trite that the onus in this case is on the Minister to prove the legality of Mr. Maroko's arrest (See, for example, *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714). If the only two sources of evidence before me were the confused and contradictory versions given by the police officers, on the one

hand and the SAP 13 Register on the other, the probabilities would be evenly balanced. In that event, the wrongful arrest claim would only have succeeded on the slender ground that the Minister bore the onus, which had not been discharged.

26 However, I think the facts of this case support a positive finding for Mr. Maroko on the probabilities. This is because the prosecution against him was discontinued on the basis of Mr. Maroko's version that the drugs "found on the ground" were Mr. Tseke's and not his. If that had been a sham defence, which could have been shown up as demonstrably false by the fact that two evidence bags were preserved at the scene, logged on the SAP 13 Register, tested and found to contain methamphetamine, then there was clearly no basis on which the Control Prosecutor could have accepted Mr. Maroko's representations, and the prosecution would have pressed on.

27 But Mr. Maroko's representations caused the prosecution to be discontinued. There must have been a reason why. Prosecutors should not be assumed to make arbitrary decisions. In the absence of the Control Prosecutor's evidence of how he assessed the representations made to him, I can only conclude that – for some or other reason – the version put in the representations was likely enough to exclude the reasonable prospect of Mr. Maroko's conviction.

28 It is hard to reconcile this outcome with the proposition that the contents of the SAP 13 Register can be accepted on their face. The fact of the SAP 13 Register does not, on its own, establish that one bag of drugs was found in the possession of each of Mr. Tseke and Mr. Maroko. But the failure to rely on it in the face of Mr. Maroko's representations called for an explanation. In the

absence of such an explanation, the probable inference is there was some defect in the forensic evidence logged on the SAP 13 Register that forestalled Mr. Maroko's prosecution, and tended to support the version advanced in his representations.

29 Mr. Maroko was in every respect an impressive witness. His version was clear, consistent, and not in any way shaken in cross-examination. He could not explain why two evidence bags were recorded on the SAP 13 Register, and he did not try to do so. He stuck to his version, which has been the same throughout, and is the version on which the prosecution against him was discontinued.

30 Finally, it weighs with me that the Minister has not established what happened to the bags of drugs allegedly seized from Mr. Maroko and Mr. Tseke between the men's arrest and the logging of the bags in the SAP 13 register. Ms. Mabuza gave Constable Mokoena and Constable Ledwaba multiple opportunities to set out exactly how the two bags they say they seized were handled. Despite several valiant attempts from Ms. Mabuza to elicit a version on the evidence bags with non-leading questions, Constable Mokoena could not confirm that two separate bags of drugs were placed, at the scene, in two separate evidence bags. Eventually, Ms. Mabuza was able to elicit from Constable Ledwaba that two bags of drugs were put in separate evidence bags, but this was only after Constable Ledwaba appeared at first to suggest that only one bag of drugs was dropped on the ground. In these circumstances, I find the police officers' evidence relating to the chain of

custody of the bag of drugs they say they seized from Mr. Maroko to be wholly unsatisfactory.

- 31 For all these reasons, I accept Mr. Maroko's version, and I reject the version advanced by Constable Mokoena and Constable Ledwaba. It follows that the wrongful arrest claim must succeed.

The malicious prosecution claim

- 32 In order to uphold the malicious prosecution claim, I must find that one or both of the defendants set the law in motion against Mr. Maroko; that they did so without reasonable and probable cause; that they did so maliciously; and that the prosecution has failed (see *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) ("*Maleko*"), paragraph 8).
- 33 In light of my conclusion on the wrongfulness of Mr. Maroko's arrest, the only one of these elements capable of sustaining any controversy is that of malice. The defendants clearly set the law in motion; they did so without reasonable and probable cause; and the prosecution of Mr. Maroko failed when the charges were withdrawn.
- 34 Insofar as the Minister is concerned, malice can be inferred from the facts that the police officers must have known that Mr. Maroko's prosecution lacked probable cause, and that Mr. Maroko's version of the motive behind it – that he was arrested for remonstrating with the police officers, and for no other reason – is probably true. These facts satisfy the elements of malice required in this context: the consciousness that the prosecution was wrongful, and an intent to injure the plaintiff (see *Maleko*, paragraph 64).

- 35 In respect of the NDDP the picture is not so clear. It emerged from Mr. Frank's and Ms. Govender's evidence that they acted in good faith on information supplied by the police. They did not consider themselves required to go behind it: there was a *prima facie* case against Mr. Maroko on the documents supplied to them. The difficulties arising from the written statements given by Constable Mokoena and Constable Ledwaba would not, in themselves, have been enough to dissuade them from being satisfied that there was a case to answer. The fact that the charge against Mr. Maroko was withdrawn on the basis of his representations is also inconsistent with malice on the NDPP's part. I do not know when a decision not to rely on the forensic evidence was taken, but it is probable that the extracts from the SAP 13 Register were accepted on their face until they were evaluated in light of Mr. Maroko's representations.
- 36 In any event, I can find no evidence of intent to injure or consciousness of wrongdoing on the NDPP's part. The claim against the NDPP must accordingly fail.

Damages

- 37 Mr. Maroko testified that, as a result of his arrest, his detention over the weekend of 18 and 19 August 2018, and his prosecution, he lost his job as a plumber. His employer told him that he could not be trusted in a job that required him to enter people's homes. He has since found a new job as a merchandiser at an Engen garage. He was ostracised and became estranged from his partner, his mother and his children. He moved out of the home in which he resided with his mother and partner, and now rents a room in which he lives alone.

- 38 In cross-examination, Ms. Mabuza put to Mr. Maroko that he was exaggerating the effect that his arrest and prosecution had on him. I was constrained to intervene and point out to Ms. Mabuza that this was not a proper question to put to Mr. Maroko, unless a factual basis for the alleged exaggeration was laid. Ms. Mabuza declined to lay such a basis, and withdrew her question.
- 39 Mr. Maroko's characterisation of the effect of his arrest and prosecution accordingly stands undisputed.
- 40 Mr. Maroko seeks R350 000 in general damages against the Minister. This is a consolidated amount covering both claims brought. Claims for unlawful arrest and detention, and for malicious prosecution, are species of the *actio iniuriarum*. General damages awarded in the action are meant to offer solace for injured feelings. It is accordingly not possible to determine the amount awardable with "mathematical accuracy". It is helpful to have regard to amounts awarded on similar facts, but the determination of quantum must always hew closely to the particularities of any given case (see *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA), paragraph 26).
- 41 Although the period of detention in this case was relatively short – three nights over a weekend – the conditions in which Mr. Maroko was held, and which were not placed seriously in dispute, were truly appalling. There were periods in which 30 men were packed together in a twenty square metre space. Even short periods in that state represent a significant affront to dignity, and this must be reflected in the damages awarded. The loss of Mr. Maroko's job and his estrangement from his family are also aggravating features of this case, which tend towards a higher than usual award.

- 42 On the unlawful arrest and detention claim, I take as my starting point the decision of the Constitutional Court in *De Klerk v Minister of Police* 2021 (4) SA 585 (CC), in which the plaintiff was awarded R300 000 in general damages in respect of 7 nights' detention. This works out at just over R40 000 per day. There is nothing said in *De Klerk* about the conditions of the plaintiff's detention. But it is on the strength of the appalling conditions in which Mr. Maroko was held that I intend to increase the award in this case. It seems to me to be fair and reasonable in the circumstances to award Mr. Maroko R60 000 for each night he spent in detention. In respect of the arrest and detention claim, then, I will award R180 000 in general damages.
- 43 Guidance on the appropriate quantum in malicious prosecution proceedings is harder to come by. However, in *Ngcele v Minister of Safety & Security* [2019] ZAECHMC 43 (20 August 2019), Nhlangulela DJP awarded R100 000 in respect of a malicious prosecution on a charge of rape. It was not clear from the judgment in that case what impact the prosecution had on the plaintiff's work, home and family life. Here, the evidence is that the prosecution had a devastating impact on Mr. Maroko's work and family life. This, in my view, justifies an enhanced award. I will award R150 000 in general damages for malicious prosecution.
- 44 Accordingly, I will give judgment for Mr. Maroko in the sum of R330 000, plus interest, payable by the Minister.

Costs

- 45 Mr. Maroko is obviously entitled to his costs in the action against the Minister. Although the claim against the NDPP fails, both defendants were represented

by the same counsel and attorney. The evidence led in respect of the prosecution was relevant to the claims made against the Minister and the NDPP. In these circumstances, and given also the degree of success Mr. Maroko has achieved, I think it would be artificial to make any costs order in favour of the NDPP.

Order

46 For all these reasons, I make the following order –

46.1 The claims for wrongful arrest, wrongful detention and malicious prosecution against the first defendant succeed.

46.2 The claim for malicious prosecution against the second defendant is dismissed.

46.3 The first defendant is directed to pay to the plaintiff the sum of R330 000, plus interest at the prescribed rate, which will run from 25 June 2019 to the date of payment.

46.4 The first defendant is directed to pay the plaintiff's costs.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and

by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 2 November 2021.

HEARD ON: 27 and 28 July 2021; 27 and 28 September 2021

WRITTEN SUBMISSIONS ON: 4 and 6 October 2021

DECIDED ON: 2 November 2021

For the Plaintiff: D Sondlani
Instructed by Ndou Attorneys

For the Defendants: T Mabuza
The State Attorney, Johannesburg.