




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

**CASE NO: 41848 / 2018**

1) Reportable: No
2) Of Interest to other Judges: No
3) Revised
<u>1 06.2022</u>
Date

Signature

**IN THE MATTER BETWEEN:**

**LUNGISANI KHELE**

**PLAINTIFF**

**AND**

**MINISTER OF POLICE**

**FIRST DEFENDANT**

**NATIONAL DIRECTOR OF PUBLIC**

**PROSECUTION**

**SECOND DEFENDANT**

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**JUDGEMENT**

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**Strijdom AJ**

**INTRODUCTION**

1. This is an action for unlawful arrest, detention and malicious prosecution brought by the plaintiff against the Minister of Police and the National Director of Public Prosecution for actions taken by their members acting within the course and scope of their employment with the defendants.
2. The action against the defendants arises out of the warrantless arrest on 30 October 2015 of the plaintiff.
3. The plaintiff claims for the unlawful detention at the Daveyton Police Station from 30 October 2015 until his appearance at Daveyton Magistrate's Court on 2 November 2015.
4. The plaintiff was arrested by the first defendant without a warrant of arrest, detained and subsequently prosecuted on allegations of stolen Pioneer products. The matter was placed on the Courts Roll on 2 November 2015 and eventually withdrawn on 27 January 2016.

**BACKGROUND FACTS**

5. On 30 October 2015 upon arriving at work in the morning, the plaintiff was confronted by his former employer's agent about alleged stolen Pioneer products that were found at Daveyton in the custody of the people who were subsequently arrested and detained at Daveyton Police Station. The plaintiff was then taken to Daveyton Police Station so that the said persons arrested for the said alleged stolen Pioneer products could point him out. On arrival at the Police Station the plaintiff was arrested by Warrant Officer Sibeko without a warrant of arrest and detained for three days.

## **THE ISSUES**

6. The issues of arrest and detention are not in dispute. The issues in dispute are the issues of unlawfulness of the arrest, detention and the malicious prosecution.

## **COMMON CAUSE FACTS**

7. The following facts are common cause between the parties:
  - 7.1. The plaintiff was arrested on 30 October 2015;
  - 7.2. The plaintiff was arrested without a warrant;
  - 7.3. The plaintiff was detained in the Daveyton Police cells from 30 October 2015 to 2 November 2015;
  - 7.4. The plaintiff appeared on 2 November 2015 in Daveyton Magistrate's Court and on 27 January 2016 the case was withdrawn against him by the second defendant.

## **THE SALIENT FACTS**

8. The plaintiff testified that on the morning of 30 October 2015 upon arrival at work, he was questioned by an agent of his erstwhile employer about alleged stolen Pioneer products found at Daveyton in possession of some individuals who according to the said agent were at that time at Daveyton. The plaintiff informed the said agent that he knew nothing about the said goods or arrested persons.
9. The plaintiff further testified that he was taken to Daveyton to be pointed out by the persons who were found in possession of the said Pioneer products. To his surprise, he was taken to Daveyton Police Station where on arrival he was arrested by Warrant Officer Sibeko and he was detained in the Police cells. He was held at the cells from 30 October 2015 when he appeared in the Magistrates Court where he was granted bail.
10. He testified that as a result of him not having money to pay bail, he was transferred to Modderbee Prison where he was detained until 3 November 2015 when his bail was paid and he was released. He continued, to appear in the Magistrates Court until the matter was withdrawn on 27 January 2016.
11. Warrant Officer Sibeko testified on behalf of the first defendant that on 30 October 2015 he arrested the plaintiff at Daveyton Police Station and that the plaintiff was detained in the Police cells.
12. He testified that he read the docket before making the arrest however he could not remember who opened the case or laid the charges against the plaintiff.

13. He testified further that he arrested the plaintiff on the strength of his name mentioned on a complaints statement, which statement he does not remember who made it.
14. He further testified that he was informed that two suspects were arrested at Daveyton for possession of alleged stolen Pioneer products. He testified that he did not see the said persons and could not link the plaintiff with the arrested two people. He further confirmed under cross-examination that he had no information or evidence linking the plaintiff to any alleged stolen Pioneer products.

## **EVALUATION OF THE EVIDENCE**

15. In my view the plaintiff made a favourable impression on the Court as an intelligent witness whose account was truthful and reliable. He impressed me as a good witness and there is nothing to cast doubt on his veracity concerning his arrest and detention. There are also no inherent improbabilities in the version of the plaintiff to reject his evidence.
16. The defendants failed to put their version to the plaintiff. In the first defendant's pleading, they denied ever arresting the plaintiff.
17. The plaintiffs' version was not seriously contested in cross-examination.
18. Warrant Officer Sibeko conceded under cross-examination that he arrested the plaintiff without a warrant and that at that stage he did not see the said persons who were suspected of having stolen the said Pioneer products and could not link the plaintiff with the arrested two people. He further conceded that he had no information or evidence linking the plaintiff to any alleged stolen Pioneer products or crime.

19. The evidence of the plaintiff was in my view corroborated by the evidence of Warrant Officer Sibeko on material aspects.

20. The defendants' failed to call the agent of the plaintiff's erstwhile employer and the prosecutor who withdrawn the case against the plaintiff.

## **UNLAWFULNESS OF THE ARREST AND DETENTION**

21. It is trite that any arrest or detention without a warrant is prima facie unlawful. It is therefore the duty of the arrestor to allege and prove the lawfulness of the arrest and detention.<sup>1</sup>

22. It is the duty of the arrestor to show and prove the presence of the essential jurisdictional requirements to justify an arrest without a warrant; namely: (i) that the arresting officer must be a peace officer, (ii) the arresting officer must entertain a suspicion that the plaintiff has committed an offence, (iii) the suspicion must be that the arrestee committed a Schedule 1 offence; and (iv) the suspicion was reasonable.

23. In the present matter, the arresting officer did not entertain a suspicion that the plaintiff had committed the alleged offence as the evidence proved that no investigation was done prior to arresting the plaintiff and the statement of the plaintiff was not taken which would enable the arresting officer to entertain a suspicion and whether that suspicion was reasonable. Warrant Officer Sibeko conceded that he had no evidence to link the plaintiff with a crime. It is also common cause that the plaintiff was not pointed out by the alleged suspects who were allegedly found in possession of the said stolen goods.

24. A reasonable man in the first defendant's position would 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

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<sup>1</sup> Vide: JE Mahlangu and Another v Minister of Police [2021] ZACC 10.

which will justify an arrest. The suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion. A reasonable police officer would have analysed the situation; assessed and ascertained whether theft did actually take place by the plaintiff and the circumstances surrounding the alleged theft.

25. It is clear through the testimonies given in this matter, that all the jurisdiction requirements for affecting an arrest in terms of Section 40 (1) of the CPA were not met. Accordingly, I am of the view that the arrest and detention were unlawful.

## **MALICIOUS PROSECUTION**

26. The plaintiff maintains he was maliciously prosecuted as there was no evidence linking him to the stolen Pioneer products. He testified that he appeared in court on 2, 16, 20 November 2015 and on 2 and 8 December 2015. On 27 January 2016 the case was withdrawn against him.

27. The 2<sup>nd</sup> defendant failed to call the Prosecutor to show cause as to why the National Prosecution Authority initiated the prosecution against the plaintiff. The plaintiff has denied the allegation against him and no statement was ever obtained from him.

28. The second defendant instituted prosecution against the plaintiff despite knowingly that there was no evidence linking the plaintiff to the alleged stolen Pioneer products.

29. The plaintiff testified that upon returning to work, the employer questioned him about his absent from work and he informed the employer that it was because of the case they had opened against him of which the employer replied that they were unaware of it, and he was eventually dismissed from work.

30. In **Patel v NPA** and other (4347 / 15) [2018] ZAKZDHC 17 (13 June 2018), the court stated that “In my view, the duty of a prosecutor is to carefully consider all the versions of the witnesses, statements and determine whether the contradictions therein are material or not before a decision to prosecute is made”.

31. In **Patel** supra the court further stated that “the Second Defendant should have been satisfied that there was reasonable and probable cause not just a prima facie case against the plaintiff. The prosecutor should interrogate the docket in its entirety and apply his / her mind properly before taking a decision.”

32. In my view the prosecutor after having read the docket should have foreseen that there was no evidence linking the plaintiff to the stolen Pioneer products as confirmed by Warrant Officer Sibeko and ought to have declined to prosecute.

33. In conclusion I am of the view that malice can be inferred from the prosecutors’ conduct and failure to decline to prosecute. The prosecutor acted wrongfully to the detriment of the plaintiff.

## QUANTUM

34. The plaintiff testified that he was detained in the Daveyton Police cells for three days. He testified that the cell was stinking as the toilet was in the same cell. He could not sleep as there were no blankets. He was not given food except tea and bread on Saturday. Later he was taken to Modderbee Prison, likewise it was stinking in the cell, it was overcrowded, and he could not sleep as there was no blankets. He further testified that he was also assaulted by other inmates in the cell, he sustained a retracted hole of a tennis ball size on the left side of his head as a result of the assault.

35. 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<sup>2</sup>.

36. In deprivation of liberty the amount of satisfaction is in discretion of the court and calculated ex aequo et bono. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendant; the nature and duration of the deprivation of liberty; the status; standing; age; health and disability of the plaintiff; an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases and the high value of the right to physical liberty.

37. It was stated in **Minister of Safety and Security v Seymour** <sup>3</sup> that;

"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 being appropriate, but they have no higher value than that."

## CONCLUSION

38. Having considered the evidence in this matter I am persuaded that the plaintiff proved on a balance of probabilities that his arrest and detention was unlawful and his subsequent prosecution was malicious.

39. Having further considered the circumstances under which the plaintiff was arrested and detained as well as awards in previous comparable cases, I am

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<sup>2</sup> Minister of Safety and Security v Tyulu 2009 (5) SAC 85 SCA

<sup>3</sup> Vide: 2006 (6) SA 320 SCA

of the view that the following award would be a fair and reasonable assessment of the damages.

- 39.1. Unlawful arrest      R150 000.00
- 39.2. Unlawful detention   R150 000.00
- 39.3. Malicious prosecution      R100 000.00
- 39.4. Interest at the rate of 10% from date of judgement,
- 39.5. Cost of suit which include the wasted cost occasioned by the postponement on 4 October 2021.



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**JJ STRIJDOM**

**ACTING JUDGE OF THE HIGH COURT**

**Matter heard on: 22.04.2022**

**Judgement delivered:**      *1.06.2022.*

**Counsel for Plaintiff:**      **Adv L Tshigonmana**

**Instructed by:**      **Kubayi Attorneys**

**Council for Defendant:**      **Adv M Ramaili**

**Instructed by:**      **State Attorney**