

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2335/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) NOT REVISED.

16/11/22

DATE

A handwritten signature in black ink, appearing to read "Francis", written over a horizontal line.

SIGNATURE

In the matter between:

FRANS MOROPANA

PLAINTIFF

And

CITY OF JOHANNESBURG

FIRST DEFENDANT

KGOTSANE TSIETSI DENNIS

SECOND DEFENDANT

MINISTER OF POLICE

THIRD DEFENDANT

The judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to Caselines. The date and time for the hand down is deemed on 16 November 2022 at 12H00.

J U D G M E N T

FRANCIS-SUBBIAH, AJ

Introduction

[1] The Plaintiff, Mr Moropana seeks compensation for delictual damages arising from wrongful and unlawful detention and an incorrect and misleading record kept by the third defendant, the Minister of Police. The incorrect and misleading record kept by the Minister of Police relates to Mr Moropana being charged and is awaiting trial for reckless and negligent driving and failing to produce his licence. He claims that this record is being maintained by the third defendant against his name and therefore it is an impediment on him seeking employment as a Bus Driver and as a result has diminished his earning capacity and has caused damages to him.

Procedural requirements in terms of Institution of Legal Proceedings against Certain Organs of State

[2] At the commencement of the trial the third defendant raised that its special pleas had not been adjudicated upon and the court extended an indulgence in this regard and heard both special pleas. The third defendant complains that the notice of the intention to institute legal proceedings for recovery of a debt against the third defendant is out of time. However, it became evident that the notice was sent to the defendant by registered mail on 10 August 2017 and not 23 January 2018 as raised in the defendant's second special plea. The Plaintiff made representations to the National Prosecuting Authority during August 2016 regarding the criminal case. He was invited to attend at their offices on 3 March 2017 at Protea Magistrates Court in Soweto. At this meeting he was given a letter informing him that he is not charged in relation to the matter. The proceedings were instituted within six months in compliance with the procedural requirements. Accordingly, this special plea was dismissed.

Special plea of Non joinder of first and second defendants

[3] Mr Moropana maintains that he was unlawfully detained by employees of the third defendant, being members of the South African Police Services (SAPS) and withdrew his claim against the first and second defendants as joint wrongdoers. Subsequent thereto the third defendant objected to the non-joinder of the first and second defendants on the basis that the arrest and detention of the Plaintiff was affected by the first and second defendants and not the third defendant. The third defendant maintains that it is duty bound by legislation in terms of section 64H of the South African Police Service Act 68 of 1995 to provide detention services and did not exercise any discretion in the arrest and subsequent detention of Mr Moropana, the Plaintiff.

[4] Section 65 H provides:

‘A person arrested with or without warrant by a member of a municipal police service shall as soon as possible be brought to a police station under the control of the Service ...’

and similarly, section 50 of the Criminal Procedure Act 51 of 1977(CPA) also provides for detention at a Police Station subsequent to arrest.

[5] The Plaintiff’s legal team had replicated to the third defendant’s special plea of non- joinder of the first and second defendants. The Plaintiff pursues a claim for unlawful detention which was at the instance of the third defendant after the Metro Police Kgotsana (second defendant) had left the police station. The Plaintiff’s claim for loss of income is a result of an entry of a record created and maintained by the South African Police Service through its Criminal Record Systems.

[6] According to the Plaintiff’s counsel the first and second defendants’ have no legal interest in the subject matter of the litigation and therefore they are no longer being joined. Plaintiff relies on the Constitutional Court judgment of ***De Klerk v Minister of Police*** 2020 (1) SACR (CC) where potential and concurrent wrongdoers were not joined to the proceeding, and where the court was not barred from determining the liability, if any, of the party or parties before it. I therefore ruled that the matter may proceed to trial on the basis that non-joinder is at the peril of the Plaintiff who has to prove its case on a balance of probabilities with no onus upon the third defendant to prove lawfulness of arrest and

detention in the current circumstances. On that basis the Plaintiff proceeded to trial against the third defendant only.

Background of the Claim

[7] Mr Moropana testified that on 3 June 2015 at 06h00 a taxi bumped into the back of the Putco Bus that he was driving. The Metro Police arrived on the scene and after preliminary investigations arrested him for reckless and negligent driving and driving without a licence. The Metro Police took him to the police station where he was warned of his constitutional rights, formally charged and detained overnight.

[8] Mr Moropana was not in agreement with the Metro Police Officer, Dennis Kgotsane (second defendant) over the charges that he was being charged with. Around midday his supervisor from Putco Bus Services arrived at the Police Station with his driver's licence. It was given to Kgotsane in the presence of SAPS members. Despite this Kgotsane wrote numerous statements and together with two Metro Police Officers escorted him to the police cells where they detained him.

[9] At 20h00 another police officer from SAPS took his warning statement and his fingerprints. The next day on 4 June 2015 he was taken by the SAPS to the Magistrate Court. Subsequently he was released around 15h00 without appearing before the Magistrate. He was informed that the charges were dropped. He went back to work after a day off. However, three weeks later he fought with a colleague who called him a 'bandit' because he had been arrested. As a result of the fighting his colleague and him were

suspended. A disciplinary enquiry was conducted, and both were subsequently dismissed from their employment at Putco Bus Services in July 2015 because the company maintains a zero-tolerance fight policy. Mr Moropane concedes that his dismissal was due to his own conduct and not that of SAPS. He agrees that had he not fought with his colleague he would still be employed.

[10] In ***Mvu v Minister of safety & Security and Another*** 2009 (6) SA 82 at para 10, the court referring to ***Hofmeyer v Minister of Justice and Another*** 1992 (3) SA 108 (C) held:

‘that even where an arrest is lawful, a police officer must apply his mind to the arrestee’s detention and the circumstances relating thereto and that the failure by a police officer properly to do so, is unlawful... It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person’s detention, this includes applying his or her mind to the question of whether detention is necessary at all.’

[11] Whether the detention was necessary at all, places an onus on the first and second defendant who exercised a discretion in this regard and against whom the Plaintiff withdrew charges. Advocate Dlamini for the Plaintiff submitted that the conduct of the police was harsh in continuing the further detention of the Plaintiff. The police could have opted for less intrusive measures to secure the Plaintiff’s appearance at court because the Plaintiff had provided the police with his physical address and his identity. Moreover, his employer was known, and his supervisor was there with him when he was detained. If the police had applied their mind, he could have been released on bail or warning.

[12] To what extent should a duty rest on the third defendant to exercise a discretion regarding the continued detention of the Plaintiff? Mr Moropane argues that the third defendant is equally liable for his detention in that SAPS members took his warning statement at 20h00 and it was SAPS official who escorted him to the Court. He had asked the SAPS official why he was arrested and was told that he was arrested for reckless and negligent driving. He protested that he cannot be reckless and negligent because he was bumped from the back. Although he did not have his licence while driving a public bus, it was brought to the police station later. In response the police officer told him that he can tell his version to the Court on the next day. The third defendant argued that the process of preparing the Plaintiff for court appearance by completing a warning statement should not be construed as recharging and detaining the Plaintiff all over again.

[13] Mr Moropane testified that his family contacted his lawyer around 20h00 to apply for bail. However, no evidence is led before this court on a bail application or any appearance by an attorney or anyone else. Whether it was brought to SAPS attention is unknown. It is further unknown what steps were taken, if any, and at all. There is no evidence that a consideration of bail was sought and refused.

[14] In ***National Commissioner of Police & Another v Coetzee*** 2013 (1) SACR 358 (SCA) at [16] the court cautioned that:

‘Courts must guard against and resist the temptation to impose duties on police officials under the guise of an alleged protection of rights guaranteed in the Bill of Rights, which existing law in this case the CPA, does not impose.

[15] Colonel Mbotho for the defendant testified that a cell register is used to record details relating to the detainee and that the investigating officer has a discretion to release suspects after making recommendations to a senior officer for approval.

[16] It is clear that in accordance with s35(1)(f) of the Constitution, it provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permit, subject to reasonable conditions including those set out in terms of s59 of the CPA. The relevant part of s 59(1)(a) reads as follows:

“An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.” (my underlying)

[17] However, there is no evidence before this court that the investigating officer was appointed at that stage and consulted. It is understood that the decision to release the Plaintiff after arrest and detention must be made in consultation with the investigating officer prior to the Plaintiff being taken to court.

[18] This legislation, s59 is instructive and is prescribed by the legislature and cannot be developed by the courts in protecting the liberty of individuals. The police in this regard retains a proper exercise of its lawful powers under legislation. This precedent is entrenched by the Supreme Court of Appeal in ***Minister of Safety and Security v Sekhoto and Another*** 2011(1) SACR 315 (SCA) where it was held that ‘and because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.’

[19] The evidence is undisputed that the officials of the Metro Police exercised the discretion to arrest. Whether it was harsh, or they should have opted for less infringing means to secure the Plaintiff’s appearance at court because the Plaintiff had provided his physical address, his identity and details is left unanswered. Metro officers had interacted with the Plaintiff’s supervisor before he was detained. This court cannot assume the grounds the arresting officer considered when effecting the arrest of the Plaintiff.

[20] Whether the Metro police had applied their mind, to release the Plaintiff on bail or warning cannot be imputed to the SAPS officials who were custodians in terms of S65H of the Police Act and s50 of the CPA and did not exercise the initial discretion to arrest and detain the Plaintiff. The Plaintiff’s arrest and detention by the Metro police was not tested and was not declared unlawful due to the Plaintiff withdrawing his claim against them.

[21] However when the Plaintiff protested about his continued detention the police officer told him that he can tell his version to the Court on the next day. SAPS cannot exercise a discretion to continue the detention without exercising their mind for the continuous detention of the Plaintiff. The Plaintiff's continued detention for a charge of reckless and negligent driving was simply not considered. He was released at Court on the next day around 15h00, without any charges being put to him and he did not appear before a Magistrate.

[22] On a balance of probabilities, the Plaintiff has shown that his protest not to be detained because he was not negligent or reckless was dismissed without any consideration. I find that the police officer failed to take reasonable steps in considering the release from detention of the Plaintiff after it was brought to his attention at 20h00. There is a duty on the SAPS in accordance with s35(1)(f) of the Constitution, to consider the release of a person from detention who is arrested for allegedly committing an offence if the interest of justice permit, subject to reasonable conditions. It follows therefore that the Plaintiff's continued detention from 20h00 until his release at 15h00 was unlawful.

[23] For the quantification of damages suffered as a result of the continued detention for 19 hours. The Supreme Court of Appeal held in ***Diljan v Minister of Police*** Case no 746/2021 [2022] ZASCA 103 (24 June 2022) that a balance should be struck between the award and the injury inflicted. It was cautioned that a defendant should not be treated as a 'cash-cow' with infinite resources and the purpose is not to enrich the aggrieved

party. I am therefore satisfied that a fair and reasonable amount is R50 000.00 under these circumstances.

[24] I now turn to consider the claim pertaining to the incorrect and misleading record kept by the Minister of Police, the third defendant. In this regard Mr Moropana testified that in January 2016 he looked for employment and was shortlisted for the position of a driver by the Matodi Bus Company (Matodi). He was interviewed and conducted the required driving test after which he and three others were informed that they will be contacted within two days. He did not hear from Matodi and therefore went to them to enquire about the employment. He was informed that he was not considered for employment because he has a criminal record.

[25] Mr Moropana went to several police stations to verify the information. He was given a print-out from the Criminal Administration System (CAS) that indicated that he has a pending case awaiting trial for reckless and negligent driving and driving without a licence. Eventually he obtained a Police Clearance Certificate from the Pretoria Local Criminal Record Centre (LCRC), CRIM system, that indicates that he has no criminal record. However, he maintains that the LCRC is keeping incorrect information about him which was made available to prospective employers, such as Matodi Bus Company which caused him not to be employed. On the basis that he had a record indicating, that he is awaiting trial for reckless and negligent driving when the charges were already dropped.

[26] The evidence led by the Minister of Police indicate there is a difference between the CAS system and the CRIM system. This evidence was given by Colonel Mbotho and Brigadier Baloyi. The CAS system is an internal database used by SAPS to store and keep information from a docket. The data is captured at the police stations and is not a public document. The information in this system cannot be removed or deleted but any new result obtained can be added to the record on the system. For instance, information from the prosecutor that charges have been withdrawn against the Plaintiff can be added onto the system.

[27] Colonel Mbotho referred to exhibit "C" and explained that this printout was generated from the CAS system and what is reflected there is not a criminal record. He also considered additional print outs from the CAS system issued at the Alexandra Police Station and at the Makweng Police Station and confirmed that these printouts are not issued to prospective employers. These print outs are for internal processing and information and not for public issue. According to him only a prosecutor can get this information. And if it was in public hands this information was stolen or through the incorrect actions in the police force.

[28] Instead a Police Clearance Certificate referred as Exhibit "E" is issued to prospective employees. The Police Clearance Certificate is a public document and is generated from the CRIM system. He further explained that the downside of obtaining a Police Clearance Certificate can take about 2 to 3 months. For this reason, there is an arrangement with prospective employers to verify information about prospective

employees much quicker. In this regard Brigadier Baloyi, testified that companies like Afiswitch in partnership with SAPS provide such service.

[29] Brigadier Baloyi is stationed at the Local Criminal Record Centre (LCRC) in Pretoria. She explained that one of the differences between the CAS and CRIM systems was that the former was based at the police station while the latter was kept at the LCRC in Pretoria. She explained that Exhibit “D” was a report produced by Afiswitch which is a private company that can do a search on the police system and produce a report. It however cannot amend anything on the system.

What is a Criminal Record?

[30] The third defendant denies that there is a record reflecting that the Plaintiff has previous convictions and denies creation and or maintenance of any criminal record of the Plaintiff. The defendant denies that the Plaintiff has suffered any loss of earnings as a result of the said record. It is common cause that the Plaintiff was never charged and does not have a criminal record which is evident from the Police Clearance Certificate marked Exhibit “E”. It was issued at the Mankweng Police Station on 1 May 2017.

[31] The information on both the CAS and CRIM systems are maintained by SAPS. If charges are withdrawn, and the Plaintiff is involved in the matter as a witness, such an update or information captured to keep the record accurate is for internal use and

information and will follow internal protocols. The CAS system feeds into the CRIM system, which produces Clearance Certificates which is a Public Document. Whereas a printout from the CAS system is not a public document, it forms part of police records and should not have found its way into the hands of prospective employees and members of the Public.

[32] It is understood that what is captured on the CAS system cannot be deleted. So, the information remains on the system however it can be updated. Once the Plaintiff came into the unauthorized possession of the report from the CAS system, and after obtaining the letter dated 3 January 2017 (which was provisionally accepted) from the National Prosecuting Authority he should have requested SAPS to update their internal CAS system. The Court upon canvassing this issue between the parties received confirmation from Brigadier A Wepener, the Acting Head of Criminal Record and Crime Scene Management that the internal system has been updated. However, no duty can be imposed on SAPS to update its internal records, especially when its Public Document in the form of a clearance certificate is correct and reflects the status of the Plaintiff not having any previous criminal record.

[33] Brigadier Baloyi testified about the history of requests and types of enquires generated by the CRIM system. In relation to the Plaintiff she found requests made in 2003, 2006, 2008, 2017 and 2021. However, there is no request on the system in 2016 when the Plaintiff contends that Matodi checked the system. There is no letter from the

company confirming that it checked the CAS or CRIM system and any evidence confirming its reason for not employing the Plaintiff.

[34] In ***Luvhengo v Minister of Police*** (14445/2019) [2021] ZAGPPHC 762 (12 November 2021) the court held that only correct and true facts are to be recorded on the LCRC which deals expressly with an accused person's previous convictions. The current matter is consistent with the view held in *Luvhengo*, on the basis that the LCRC records generate a certificate of clearance that the Plaintiff has no previous convictions. The LCRC records are correct.

[35] According to the Plaintiff the potential employer Matodi informed him that he has a criminal record. Matodi was wrong. The Plaintiff does not have a criminal record. Even if a witness from Matodi told this court that the CAS records that was not updated was the reason for the Plaintiff not being employed by them, the Minister of Police cannot be blamed because printouts from the CAS system are for internal information and is not a public document. There is no connection with SAPS records to the loss of earnings of the Plaintiff. Harm must be sufficiently linked to the probabilities. On a balance of probabilities, the Plaintiff has failed to make out a case that the LCRC maintains a record that has caused him harm giving rise to a claim for delictual damages.

[36] The Plaintiff failed to prove that the third defendant keeps an incorrect criminal record relating to them.

[37] The Court Orders as follows:

1. **The Plaintiff's claim on continued unlawful detention succeeds.**
2. **An award in the sum of R50 000.00 is granted with costs.**
3. **The Plaintiff's claim relating to the keeping of an incorrect criminal record is dismissed with costs.**



Francis-Subbiah, AJ

Acting Judge of the High Court

Gauteng Division: Johannesburg

Appearances:

Plaintiff: Adv Dlamini
Instructed by Seloane-Vincent Attorneys

Defendant: Adv N M Mtsweni
Instructed by the State Attorney

Date Heard: 9-12 and 20 October 2022

Date Judgment: 16 November 2022