

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

CASE NO.:16923/2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 5 JUNE 2023

In the matter between:

TINYIKO GIVEN NGOBENI

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS

Second Defendant

Neutral Citation: *TINYIKO GIVEN NGOBENI v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS* (Case No. 16923/2018) [2023] ZAGPJHC 663 (08 May 2023)

JUDGMENT

MAZIBUKO AJ

Introduction

1 The plaintiff claims damages in the amount of R7 215 000 against the defendants arising from his arrest and detention from 11 November 2016 to 29 November 2016, by members of the first defendant, as well as malicious prosecution on allegations of theft of a cellphone by the second defendant.

Common cause

2. On 4 July 2014, a certain Given Tinyeko Ngoben, (hereinafter referred to as “the accused”) was arrested at the complainant’s residence on allegations of theft of a Samsung cellphone following a phone call to the police by the complainant. The cellphone was found in his possession and the complainant was restored of its possession. He was taken to Olifantsfontein Police Station. A docket was opened with the address of the accused as number 2[...]... [WM..., Zone...], Tembisa.
3. On 7 July 2014, he appeared before the court. The matter was postponed for further investigation. He was warned to appear before the court on 24 July 2014. He failed to appear, and a warrant of arrest was issued against him for contempt of court.
4. On 11 November 2016, the plaintiff was arrested under a warrant of arrest referred to in paragraph 3 above at his residence number 2[...]... [WM..., Zone...], Tembisa, which is the same address as the one in paragraph 2 above. He appeared before the court on the same day and his matter was postponed to 18 November 2016. He was detained at Modderbee Correctional Services on the same day, pending an inquiry into the failure to appear before the court on 24 July 2014.
5. On 18 November 2016, the matter was postponed to 21 November 2016 for fingerprint analysis and confirmation of his identity. It was further postponed to 29 November 2016 for the fingerprint analysis report (the report).
6. On 29 November 2016, the second defendant was furnished with the report. The fingerprint results did not match that of the plaintiff, he was then released

from custody on warning. The matter was postponed to 14 December 2016 for a section 212 statement. There were subsequent appearances on various dates until his trial day, on 5 May 2017. On the trial day, the complainant testified that the person who stole his Samsung cell phone was not in court. The plaintiff was discharged in terms of section 174 of the Criminal Procedure Act.

7. In September 2017, the plaintiff instituted legal proceedings against the defendants for unlawful arrest, detention and malicious prosecution.
8. The parties informed me that the plaintiff will assume the duty to begin, though it is common cause the first defendant does not dispute arresting the plaintiff.

Plaintiff's case

Given Ngobeni

9. The plaintiff testified that on 11 November 2016, he was sleeping at his place of residence. The police knocked, waking him up. They introduced themselves and stated that they wanted Given Tinyeko Ngobeni. He indicated that he was Given Ngobeni. They asked for his Identity Document (ID) and he showed them. They caused him to sign on a blank paper. They matched his signature with another in their possession. One police officer said the signatures were not the same, and the other one said he was the correct person they were looking for. They asked him to put on clothes and arrested him.
10. He appeared before the court on the day of his arrest. He was taken to various police stations before being transferred to Modderbee Correctional Services, where he was kept until 29 November 2016.
11. His fingerprints were taken by the police on his second court appearance, and the results came out negative. On 5 May 2017, the complainant testified, and he was found not guilty and discharged.

12. Under cross-examination, he testified that he had a Government lawyer, which was understood to mean a legal practitioner in the employ of Legal Aid South Africa. He could not identify the warrant, and the police never informed him of his rights during the arrest. The magistrate explained to him that he was facing a charge of theft of a Samsung cellphone. He responded but was informed it was not time for him to give his side of the story yet. He could not recall specific dates and some of the events leading to the trial.
13. During re-examination, he testified that he had difficulty remembering the events and their sequence as he was testifying on events that occurred about 7 years ago. For instance, he indicated there was no trial held and yet he was discharged after the complainant testified to the effect that his assailant was not in court.

Dr M J Ndhlovu

14. The plaintiff called his second witness, Dr Ndhlovu who testified that he holds a degree and is a Clinical Consultant and Psychologist. He described the plaintiff's condition after the incident as being moderate, but severe trauma which requires therapeutic intervention, and referred to specific sections in his report indicating the age and family background of the plaintiff, as well as the type of treatment the plaintiff experienced from fellow inmates whilst in detention, which included physical threats and bullying.
15. Dr Ndlovu referred to his assessment report dated, which he stated contained a pre and post-arrest assessment. He stated that the plaintiff needed medication from a Psychiatrist for psychological trauma as his symptoms were moderate.
16. Under cross-examination, he testified that he needed to make further recommendations for follow-up sessions to be attended by the plaintiff for remedial purposes. The plaintiff had neither hallucinations nor delusions. He

testified that he did not know if the plaintiff attended any remedial treatment after the incident.

Defendant's case

Thapelo Cean Baloyi (Sergeant Baloyi)

17. Sergeant Baloyi testified that he is a sergeant with 15 years of experience within the South African Police Service ("SAPS"). He is presently based at the Olifantsfontein Police Station in Tembisa. On the night of the arrest of the plaintiff, he was with his colleague, whose name he did not remember.
18. He stated that they went to the plaintiff's place of residence, knocked and introduced themselves as police. The plaintiff appeared to have been sleeping. He informed him of his purpose which was to arrest him for the crime of theft of a Samsung cellphone. He informed the plaintiff of his rights. He requested the plaintiff to produce his identity document, and the plaintiff was unable to as he did not have it with him. He was guided by the warrant when arresting the plaintiff at his home. They brought him to Olifantsfontein Police Station. Later on that day, the plaintiff appeared before the court.
19. He took his fingerprints on his second court appearance, which came back negative in favour of the plaintiff. He discussed the issue of the fingerprint results with the public prosecutor, which resulted in the plaintiff being released on warning on the same day. The matter was postponed several times until 5 May 2017 for trial. On 5 May 2017, the trial proceeded and the plaintiff was acquitted.

Issue

20. Whether the plaintiff's arrest and detention were unlawful and prosecution malicious.

Discussion

Arrest

21. The defendants defend the claim as they argue that the arrest and detention were lawful with no malice concerning the prosecution. They deny liability and placed their reliance on sections 46 (1) and 331 read with section 43 of the Criminal Procedure Act¹, (hereinafter referred to as “the CPA”). Further that the plaintiff admitted his identity in court.
22. The defendants pleaded that the arrest was effected pursuant to a warrant in terms of Section 43 of the CPA. The Plaintiff was arrested on 11 November 2016 by Sergeant Baloyi acting within the course and scope of his employment in terms of Sections 43 and 44 of the CPA. The execution of the warrant of arrest was in accordance with sections 43 and 44 of the CPA in that at the time of arrest, the identity of the accused arrested was described in the warrant of arrest as per the case docket for case number T1727/14.
23. The following sections as relied upon provide:

“Section 43(1) Any magistrate or justice may issue a warrant for the arrest of any person upon written application of an attorney-general, a public prosecutor or a commissioned officer of police - a) which sets out the offence alleged to have been committed

b) which alleges that such offence was committed within the area of jurisdiction of such magistrate...

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.”

“Section 46 (1) Any person who is authorized to arrest another under a warrant of arrest or a communication under section 45 and who in the

¹ The Criminal Procedure Act, Act 51 of 1977

reasonable belief that he is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest.”

“Section 331 Any person who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were good in law.”

24. It is important not to read the provisions of sections 46(1), 331 and 43 of the CPA in isolation. They must be read with the provisions of section 55 of the South African Police Services Act² (“the SAPS Act”), which provides: *“Any member who is authorised to arrest a person under a warrant of arrest and who, in the reasonable belief that he or she is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest.”*
25. Sections 46(1) of the CPA and 55(1) of the SAPS Act exempt the arresting officer from personal liability, which exculpates them in their personal capacity as employees of the SAPS. However, the same cannot be said about their employer, as the arrest remains unlawful, and the employer is vicariously liable for the actions of the arresting officer and the consequences thereof. The first defendant’s reliance upon the provisions of sections 46(1) and 331, read with section 43 of the CPA, is misplaced in relation to their liability for the unlawful arrest. If the arresting officer effects arrest on a warrant and such arrest is effected on the wrong person, such officer will not be held personally liable in terms of sections 46(1) and 55 respectively. However, the SAPS as an employer may still be found liable.
26. In terms of section 44 of the CPA, *“a warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.”* It is common cause between the parties that the warrant on which

² South African Police Services Act, Act No. 16731 of 1995

the plaintiff was arrested was not bad in law on account of a defect in its substance or form. There were no issues relating to the regularity or the validity of the warrant of arrest. It was correctly issued by the presiding officer on 24 July 2014 following the accused person's failure to appear as warned on 4 July 2014.

27. The obligation to conduct any inquiry prior to the execution of the warrant rests with the peace officer in possession of the warrant as they may execute the warrant only where satisfied that the alleged contravention as set out in the warrant sustains the execution of the warrant.
28. In the matter of Minister of Safety and Security v Sekhoto and Another³, Harms DP stated:

"Para [6] "As was held in Duncan v Minister of Law and Order, the jurisdictional facts for a section 40 (1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

[Para 28] Once the required jurisdictional facts for an arrest, whether in terms of any paragraph of s40(1) or in terms of s43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest." This was made clear by this court in relation to section 43 in Groenewald v Minister of Justice (1973 (3) SA 877 at 883G-884B)."

³ (2011 (1)SARC 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; 131/10 (19 November 2010)

29. To justify the plaintiff's arrest, the defendant is required to prove that Sergeant Baloyi entertained a suspicion, based on reasonable grounds, that the plaintiff committed the offence of theft and did not return to court after he was warned. The question to answer is whether a reasonable man in the position of Sergeant Baloyi and possessing the same information would have considered that there were suitable and sufficient grounds for suspecting that the plaintiff committed the offence of theft and did not return to court after being warned.
30. Sergeant Baloyi had information that a Given Tinyeko Ngobeni was arrested on allegations of theft of a Samsung cellphone and did not appear in court as warned. The plaintiff responded that he was Given Baloyi. It is common cause that the identity of the accused was described in the warrant of arrest as per the case docket. At the time of arrest, the police informed the plaintiff that they were looking for Given Tinyeko Ngobeni, and the plaintiff responded by saying he was Given Ngobeni. The plaintiff was at house number 2[...]... [WM..., Zone...], Tembisa, the address provided by the accused as it appeared on the case docket. Sergeant Baloyi with his colleague went to the said address found the plaintiff sleeping and effected an arrest on him.
31. The plaintiff shares his name and surname with the accused. The difference is that the accused is also Tinyeko. According to the docket, the residential address furnished by the accused was 2[...]... [WM..., Zone...], Tembisa which is the same as the address where the plaintiff was found sleeping and later arrested.
32. I cannot find any fault on the part of Sergeant Baloyi in how he exercised his discretion in effecting the arrest of the plaintiff. In my view, he took reasonable care by establishing the plaintiff's particulars. There was a contention by the plaintiff that Sergeant Baloyi should have perused the plaintiff's identity document though it is not clear whether or not the plaintiff showed it to them at the time of the arrest. Even if Sergeant Baloyi had perused the ID and found that Tinyeko was not part of the names of the plaintiff. I found no fault in the police taking him along for further investigation of his identity. Any

reasonable person with the same facts, information and documentation, under the circumstances, would have believed that the plaintiff was the person named in the warrant. The plaintiff was not able to prove on a balance of probability that the first defendant wrongfully and unlawfully arrested and detained him. Consequently, the claim of wrongful arrest cannot succeed.

Detention

33. When a court orders further detention, its decision must conform to s 12(1)(a) of the Constitution.

Section 12(1) provides: “*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;*”

34. Mogoeng CJ, as he then was, had the following to say in the matter of De Klerk vs Minister of Police⁴:

[173] It must be emphasized that on the accused person’s first appearance, the Judiciary or courts are under a weighty obligation to understand and satisfy itself that there is justification for the past and continued detention of a suspect or else release her if the interests of justice so dictate. This personal liberty-inclined obligation cannot be passed on to another arm of the State - it remains under the exclusive domain of the Judiciary. It is a constitutionally-imposed new intervening act that must always break the chain of possible abuse, arbitrariness, illegality or error in the arrest or detention of an accused person, and by extension of legal causation. The duty to fulfil that obligation cannot be shared by the police just because they would have initiated the chain of events that culminated in the suspect being brought to court, which then ordered a further detention in flagrant disregard for its obligations in terms of section 35(1)(e) and (f) of the Constitution.”

⁴ CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC)(22 August 2019), at paragraph 173

35. Sergeant Baloyi brought the plaintiff before the court on the same day of arrest. He was remanded in custody to 18 November 2016 pending an enquiry into why he did not appear in court on 24 July 2014. It was upon the court before which the plaintiff appeared for the first time after his arrest to ensure that he was not further detained unnecessarily. Before granting a remand in custody, the court needed to satisfy itself that the plaintiff was to be kept in custody for a just cause, besides the fact that he was rearrested on a warrant after failing to appear before the court.
36. On 18 November 2016 the matter was postponed further to 21 November 2016 for fingerprint analysis and confirmation. The fingerprint analysis followed the issue raised by the plaintiff that he was never arrested and never appeared and warned to appear on 24 July 2016 by the court. The plaintiff's next court appearance on 21 November was postponed to 29 November 2016.
37. On 29 November 2016 following fingerprint analysis, Mr Shidzinga, the prosecutor at the time was informed that the fingerprints do not match. Only after the fingerprint analysis report it became clear that the plaintiff was the wrong person arrested by the police at the said address.
38. He was not released despite his contention of identity. I could not find any fault on the part of the second defendant in investigating the true identity of the plaintiff through fingerprints as the name and surname as well as the address of the plaintiff and that provided by the accused were the same. He could not be released on warning or bail due to the previous default.
39. The plaintiff did not plead detention to be unlawful in the particulars of claim and during their evidence in this court. Where an accused is arrested on a warrant following their failure to appear they are kept in custody pending the inquiry. The plaintiff placed his reliance on the verification of the identity through the ID at the time of the arrest. It was not clear whether or not the ID was presented to the police as the plaintiff struggled to remember the details of that morning in question. The same goes for Sergeant Baloyi in this regard.

40. In my view none of Sergeant Baloyi's conduct led to the further detention of the plaintiff post-first appearance. In the premises, the defendants can not be delictual liable for the further detention of the plaintiff from his first day of the court appearance to the day the fingerprint analysis report was presented to the court. Consequently, the plaintiff's claim for unlawful detention cannot be sustained.

Prosecution

41. The second defendant denied any liability. It was argued on behalf of the second defendant that they believed there was a *prima facie* case against the plaintiff and thus decided to prosecute. The question to determine is whether the plaintiff managed to prove malice on the part of the second defendant.
42. In the matter of Minister for Justice and Constitutional Development v Moleko,⁵ it was stated:

"[8] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove – (a) that the defendants set the law in motion (instigated or instituted the proceedings); (b) that the defendants acted without reasonable and probable cause; (c) that the defendants acted with "malice" (or animus injuriandi); and (d) that the prosecution has failed....."

[64] 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 (or, I would say, even gross negligence) will not suffice."

⁵ 2008 (3) ALL SA 47 (SCA), para 8, 64

43. The evidence is that the fingerprint analysis report was provided to the second defendant, which indicated that the plaintiff was not the accused Sergeant Baloyi thought he arrested.
44. On 29 November 2016 following the fingerprint analysis report, the plaintiff was released from custody on warning. He appeared several times before his trial date when he was acquitted after the complainant testified that the person who stole his cell phone was not before the court. It is not clear why the charges were not withdrawn against the plaintiff on 29 November 2016, on the realization that the wrong person as proven by the fingerprint analysis report was before the court.
45. There is no record of the court inquiring from the second defendant why the matter is further postponed. The presiding officer granted the postponement for the second defendant to prosecute the person whose report already indicated he was not supposed to be prosecuted as he was not the accused. The court appears to have had no proper regard for the plaintiff's Constitutional rights, as it granted the state an unwarranted postponement. Whilst I appreciate the different roles that are played by the stakeholders during the court proceedings, nothing prevented the presiding officer to inquire of the prosecutor what the postponement was for after the submission of the report. Such pertinent inquiry to the state whilst avoiding interfering with the prosecution's duties and domain was of importance.
46. It is never in the interest of justice and cannot be permissible to prosecute a person without just cause where the prosecutor is already aware that they do not have evidence to prove their case. In *casu*, identity was in issue.
47. In *Patel v NDPP*⁶, *Ledwaba DJP stated:*

⁶ 2018 (2) SACR 420

"[24] Courts are not overly eager to limit or interfere with the legitimate exercise of the prosecutorial authority. However, a prosecuting authority's discretion to

prosecute is not immune from scrutiny of a court which can intervene where such discretion is improperly exercised."

[27] A prosecutor should assess whether there sufficient and admissible evidence to provide a reasonable prospect of successful prosecution, otherwise, the prosecution should not commence . . . "

48. It was submitted on behalf of the second defendant that, it cannot be said by the plaintiff that the prosecution was wrongful and acted with malice when prosecuting and placing the matter on the roll for a hearing. Furthermore, they did not act wrongfully when instigating prosecution against the plaintiff. I find it difficult to agree with that proposition because even before 29 November 2016 the prosecution had doubts about whether the plaintiff was the accused before the court, hence the fingerprint investigation. Upon receipt of the report, the state knew they had the wrong person before the court as per the independent evidence of the fingerprint analysis report sourced by them with the assistance of the first defendant.
49. The plaintiff's prosecution after the fingerprint analysis report had everything to do with the second defendant and the court's dereliction of their Constitutional obligations. Had the second defendant applied their mind to the contents of the docket, especially the report, they would not have proceeded with the prosecution. Therefore, the plaintiff's claim for malicious prosecution against the second defendant stands to succeed. *In casu*, based on the evidence presented before me, I am persuaded the State had no prima facie case against the plaintiff in the first place. It is common cause that the prosecution failed. The plaintiff was discharged.
50. In my respectful view the plaintiff has shown that the second defendant was malicious when they, regardless of the evidence and report at their disposal, proceeded to prosecute the plaintiff. I find that the plaintiff proved on a

balance of probabilities that the second defendant acted with malice. The requirements of malicious prosecution have been met and the plaintiff's claim against the second defendant must succeed. Accordingly, this court finds for the plaintiff that the second defendant is liable to the plaintiff, under the *actio iniuriarum*, for the damages caused to the plaintiff's personality and *dignitas* through the malicious prosecution by the second defendant.

Quantum

51. Now that the plaintiff has satisfactorily proved the second defendant's liability in relation to the malicious prosecution, I turn to quantum. In assessing damages for the prosecution, it is crucial to appreciate that the primary purpose is not to enrich but to offer the aggrieved party some much-needed solatium for their injured feelings.
52. Therefore, damages awarded must be passable to the injury inflicted whilst echoing the importance of the right to dignity and the seriousness with which the illogical deprivation of same is viewed. The impact of the prosecution must be taken into account. The plaintiff has testified on the impact of this whole ordeal from the day he was arrested till his acquittal. Dr Ndhlovu opined that the plaintiff's prognosis was good, but explained further, the plaintiff's state of health was moderate with severe trauma and emphasised that the plaintiff was not psychotic or mentally ill, as he is in a position to work just like ordinary persons, the only difference being the trauma he suffered as a result of the arrest and detention.
53. Taking all the relevant factors into account, including Dr Ndhlovu's report, the attendance and appearance of the plaintiff before the court between 29 November 2016 till 5 May 2017. He was traumatized and humiliated, and his integrity was diminished. In the circumstances, it is fair, reasonable, and just to award damages in the sum of R150 000 (one hundred and fifty thousand rand).
54. For these reasons, the following order is granted.

Order:

1. The plaintiff's claim against the second defendant succeeds with costs.
2. The second defendant is to pay the plaintiff an amount of R150 000 (one hundred and fifty thousand).
3. The second defendant shall pay the costs of suit.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

Counsel for the plaintiff:

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Attorney for the Applicant:

Seshibe Attorneys

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Ms M Mashiane

Attorney for the Applicant:

State Attorneys

Last day of hearing:

9 March 2023

Judgment delivered on:

8 June 2023