

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 25669/2011

25/2/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
25 Feb 2014	
DATE	SIGNATURE

In the matter between:

MMANAKO FENCE MASHIFANE

MORRIS DIALE

and

MINISTER OF POLICE

NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICES

1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

JUDGMENT

MOLEFE, J:

[1] In this action the plaintiffs seek damages against the defendants arising out of their arrest at Marble Hall on 30 November 2010, their subsequent detention, assault and malicious prosecution initiated by the employees of the defendants, which ultimately resulted in the plaintiff's case being withdrawn on 21 December 2010. The claim is based on the principle of vicarious liability of the first defendant for the actions of the police officials acting in the course and scope of their employment. The second defendant is cited mainly for the reason that she is the chief accounting officer of the first defendant.

[2] The second plaintiff has, subsequent to the issuing of the summons died and his case was abandoned by the legal representative acting on his and the first plaintiff's behalf. For convenience, when I refer to the "plaintiff" this should be read as a reference to the first plaintiff.

[3] The plaintiff alleges that his arrest in respect of the charge of murder was unlawful if regard be had to the requirements of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, and that his subsequent detention and assault were similarly unlawful. In addition, the plaintiff avers that the prosecution in respect of the murder charge was malicious.

[4] The defendants deny that the arrest and detention were unlawful or that the prosecution was malicious and dispute the assault and the quantum of damages allegedly suffered by the plaintiff.

Issues in dispute

- i) Was the arrest and detention of the plaintiff lawful or unlawful?
- ii) Was the plaintiff assaulted whilst in detention?
- iii) Was the prosecution of the plaintiff by the defendant malicious?
- iv) The quantum of the plaintiff's damages.

Common Cause Facts

[5] The plaintiff was arrested on 30 November 2010 at Marble Hall, Limpopo Province on charges of murder and appeared in court on 1 December 2010. The matter was postponed on a couple of occasions. Plaintiff's arrest followed after the murder of Sello Madileng ('the deceased') who was shot and killed on 7 November 2010.

[6] The arresting officer, Warrant Officer Mokgomogane was appointed as the investigating officer and case docket Motetema CAS 65/11/2010 was opened.

[7] No formal complaint of assault, torture or injuries was made by the plaintiff at the police station or at Court whilst in detention and after he was released.

[8] During the investigation of the case, Warrant Officer Mokgomogane obtained a statement from Andries Madileng ("Andries") on 7 November wherein he could not identify the deceased's killers. On 29 November 2010, Andries made the second statement to Warrant Officer Mokgomogane wherein he alleged that the plaintiffs were responsible for the killing of the deceased. He stated that the plaintiffs wanted to shoot

him and that he hit the second plaintiff on the head with a bottle in his attempt to escape being killed.

[9] On 1 December 2010 before the plaintiffs' first appearance, he and the second plaintiff were pointed out by Andries on an identification parade as the deceased's killers.

[10] The docket with all the evidence and witnesses' statements were presented to the prosecutor at Motetema Court on 1 December 2010 and he decided to prosecute the plaintiffs.

[11] During his investigations Warrant Officer Mokgomogane obtained a statement from a nurse Joyce Thobejane on 8 December 2010, regarding the head injury treatment to the second plaintiff. This statement was also presented to the prosecutor and indicated that the second plaintiff was innocent of the murder. The case was later withdrawn in court against the plaintiffs.

[12] The plaintiff's version of the events leading to his arrest was that in the early hours of Sunday 7 November 2010 he and 3 other persons (including the second plaintiff) left a tavern to go to Leeuwfontein. On their way, two male persons informed them that there is a person lying on the road ahead. They indeed found a person on the road and cellphone torch was used to light the person. They identified him as the deceased who the plaintiff knew very well as they were neighbours. The plaintiff used his cellphone and phoned Sinky Malapane, the deceased's son and Prince Madileng, the deceased's nephew. The plaintiff also telephoned the police.

The plaintiff remained at the scene with the second plaintiff until the police arrived. Andries Madileng arrived at the scene and the plaintiff heard him telling the police that the deceased was killed by one Sibi Mananyetso.

[13] On 20 November 2010, Warrant Officer Mokgomogane came to the plaintiff's home and the plaintiff voluntarily gave a statement to him on how they discovered the deceased on 7 November 2010. On 29 November 2010, the plaintiff met with Warrant Officer Mokgomogane who was with the second plaintiff and he informed them that if they did not assist him in the murder case he will arrest them.

On 30 November 2010, the plaintiffs agreed to meet with Warrant Officer Mokgomogane next to the KFC at Marble Hall. Mokgomogane was with another officer Phoku and they were arrested. They were put at the back of the police Nissan hardbody vehicle with no canopy, foot cuffed and each cuff tied to the vehicle. The police drove to Spar Supermarket in Marble Hall where they bought food whilst the plaintiff remained at the back of the vehicle, where they were seen by many people who knew them.

[14] The police drove to the plaintiffs' place of employment where the officers told the security officers to report that the plaintiffs have been arrested. They were taken to Motetema Police Station where the plaintiff was taken to a thatched-roofed structure, where he was assaulted. His hands were cuffed and put over his bended knees. A \pm 1 meter long wooden plank was placed between the back of both his knees and the inside of both his elbows and he was lifted and placed in the space between two tables with the plank on both ends of the tables. He was then pushed so that his hanging body

would swing, causing him a great deal of pain. The two officers, Mokgomogane and Phoku told him to tell the truth about the person who killed the deceased. The officers left him in the structure and he was crying out loudly due to the pain. Constable Mabitsela, who is known to the plaintiff came into the room and told him that he will call Mokgomogane and Phoku to release him. After a while, Mokgomogane and Phoku came back and released him from the tables and the cuffs. He was taken to the cells where he was detained. He was rescued by Constable Mabitsela who ordered the officers to stop the assault.

[15] Plaintiff showed to the Court some marks on his wrists, allegedly from the hand cuffs during the assault. His stay in the cells was bad and he was ill-treated by the other inmates. To him the most painful aspect was having been accused and to face a charge for murder which he did not commit. His dignity was degraded by the murder charge.

[16] The Plaintiff conceded under cross-examination that he neither reported the assault to anyone nor did he lay a charge for the assault against the police officers allegedly involved. He also did not receive medical treatment for his injuries. He denied under cross-examination that he was arrested at a farm where he was hiding to evade the arrest. It is plaintiff's contention that his arrest on 30 November 2010 as well as the subsequent detention were unlawful and that when he was charged on 1 December 2010 for the charge of murder, it initiated a prosecution that was malicious and that had no prospects of succeeding.

[17] On behalf of the defendants, Warrant Officer Mokolobetsi Johannes Mokgomogane testified that he was the investigating officer in the murder case of Sello Madileng. He acted on the evidence he collected during his investigation and based on the testimony by Andries Madileng in his second statement, he arrested the plaintiff. On 30 November 2010, he received information that plaintiffs were about to flee and were at a taxi rank in Marble Hall. He arrested the plaintiff in order to take him to court for the court to decide whether he was guilty.

He testified that he had no reason to doubt the evidence of Andries Madileng and presented all the available evidence in the docket to the prosecutor for decision on the prosecution of the matter. He does not decide to prosecute as it was the function of the prosecutor.

He denies any allegation of assault and stated that no complaints regarding assault and/or injuries were ever made by the plaintiff. He did not know the plaintiff prior to the incident.

[18] Warrant Officer Mokgomogane conceded under cross-examination that he failed to ask the plaintiff where he got the deceased's relatives number as he (plaintiff) phoned them to come to the murder scene. He however denied that his failure to consider the statement made by Sinky Malapane made his suspicion unreasonable. He further conceded that he failed to obtain any clarifying statement from Andries Mabileng when there were contradictions between his two statements.

Warrant Officer Mokgomogane's view is that when he arrested the plaintiff and subsequently decided to charge him, he was satisfied that there was a reasonable basis to suspect the involvement of the plaintiff in the murder of the deceased.

[19] Constable Moloko Jeffrey Mabitsela was the defendant's second witness and in his testimony he denies that he knew the plaintiff and that he ever witnessed any assault by the police officers as claimed by the plaintiff. He stated that should he have witnessed such assault by his colleagues, he would have stopped it and reported it to his superiors. It warrants mention that Constable Mabitsela's testimony was not disputed.

Unlawful Arrest and Detention

[20] Regarding the unlawful arrest and detention, the plaintiff pleaded that his arrest and detention were unlawful in that it was effected without a warrant and did not comply with the laws regulating arrest without a warrant and furthermore that it was effected arbitrarily. There can be no doubt that the crime of murder, that was investigated and for which the plaintiff was arrested is serious and is described in Schedule 1 of the Criminal Procedure Act¹ ('The Act').

Section 40 (1) (b) of the Act provides that:

"A peace officer may without a warrant arrest any person –

a) - - - - -

¹ Act 51 of 1977

b) whom he reasonable suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.”

This section provides for the jurisdictional facts required in a defence for a lawful arrest. These facts were amplified in **Duncan v Minister of Law & Order 1986 (2) SA 805 (AD) at 818 G – H.** In this case the Appellate Division concluded that in order to be able to rely on the protection of section 40 (1) (b), it must be established that:

- a) the person who effected the arrest was a peace-officer;
- b) he must have entertained a suspicion;
- c) it must be a suspicion that the arrestee committed the offence referred to in Schedule 1 of the Criminal Procedure Act; and
- d) the suspicion must rest on reasonable grounds.

[21] An arresting officer is required to form a reasonable suspicion of a commission of an offence before arresting an individual, which arrest effectively deprives the individual of his liberty. The burden to prove that the arrest was justified and not wrongful rests upon the defendant: **Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568 (A) 589 E-F; Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 AT 321 par 7.**

[22] The question whether Warrant Officer Mokgomogane had a reasonable suspicion in the circumstances that plaintiffs committed the offence must be considered by taking into account that;

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end”.

See **Shabaan Bin Hussien and Other v Chong Fook Kam and Another**² as referred to with approval in **Duncan v Minister of Law and Order (supra)**.

[23] The arresting officer in this case had the two conflicting statements made by Andries Madileng at his disposal; in the first statement, Andries testified that he received a call from the deceased informing him that a Sibi Monanyetso was fighting with him. Visibility was bad and Andries could not see the persons who were with the deceased and did not talk to them. In the second statement Andries implicated the plaintiffs in the killing of the deceased and even spoke to them. He even hit the second plaintiff with a bottle on the head at close range.

Plaintiff admitted that he was at the scene where the deceased was killed and even telephoned the deceased’s relatives after finding the deceased lying on the ground.

[24] When considering whether the suspicion was reasonable, it must be objectively clear that a reasonable man in the circumstances wherein the arresting officer finds himself would have suspected that the plaintiff had committed the offence. See **R v Van Heerden 1958 (3) SA 150 (T) at 152 D-E**.

[25] For the purposes of this case, it is not disputed that Warrant Officer Mokgomogane is a peace officer, he entertained a suspicion and the murder

² [1969] 3 ALL ER 1627 (PC) at 1630

investigation is a schedule 1 offence. What is in dispute is whether he formulated a reasonable suspicion from the statements made to him that the plaintiff was involved in the murder of the deceased.

Warrant Officer Mokgomogane testified that he arrested the plaintiffs on the strength of the second statement made by Andries. He held the view that the fact that the plaintiff phoned the deceased's relatives from the scene of the incident was that the plaintiff stole the deceased's cellphone and obtained the relatives' numbers from the stolen cellphone. He also relied on the fact that the second plaintiff had an injury on his head, which in his view matched with Andrie's testimony in the second statement that he hit him with a bottle on his head.

On his own version, he took a statement from the nurse at the local clinic on 8 December 2010 and the nurse testified that she treated the second plaintiff for injuries on the head on 6 November 2010, prior to the murder of the deceased. When the nurse's statement was submitted to the prosecutor, the prosecutor withdrew charges against the plaintiffs.

[26] In **Mabona v Minister of Law and Order 1988 (2) SA 654 EC at 658 E-G**,

Jones J stated the following regarding section 40 (1) (b) of the Act:

"It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liability. The reasonable man will therefore analyze 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 which will justify an arrest”.

[27] It is my view in this case that Warrant Officer Mokgomogane failed to analyze and assess the quality of the information at his disposal critically before the arrest. He also failed to check it; he only took a statement from the nurse after he had arrested the plaintiffs. Two contradictory statements were made by the main witness and the arresting officer failed to verify the truth by a clarifying statement from the witness. He failed to verify from the plaintiff where he got the cellphone numbers of the deceased's relatives and to verify the statement made by Sinky Malapane. Had he taken the nurse's statement prior to the arrest, he could have avoided the arrest. This, in my view was a dereliction of duty by Warrant Officer Mokgomogane. It is my view therefore that the suspicion that the plaintiff was involved in the murder was not based on reasonable grounds.

Unlawful Assault

[28] The onus of proving that the plaintiff was assaulted rests on the plaintiff. When considering whether the plaintiff proved the alleged assault by the police officers, the evaluation must depend largely upon the evaluation of the evidence, inferences from other facts and upon the probabilities. See **Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another 2002 (4) SA 408 (SCA) at par 24.**

[29] The plaintiff gave a detailed account on how he was assaulted and demonstrated to the court that he still bears the marks of the injuries. The plaintiff however failed to lay a charge of assault against the arresting officers, especially after the charge was

withdrawn against him. He never reported the assault to the magistrate, and his attorney did nothing to ensure that he got medical treatment.

Both Constable Mabitsela and Warrant Officer Mokgomogane denied the assault. Although Constable Mabitsela denied that he knew the plaintiff nor that he ever witnessed the alleged assault, his testimony was not disputed by the plaintiff.

[30] In this regard, the Court is now faced with mutually destructive versions and credibility of the witnesses and the probabilities play an important role. On the evaluation of evidence I am not persuaded on a balance of probabilities, that the plaintiff has proved that he was assaulted by the members of the defendants.

Malicious Prosecution

[31] The essentials of a successful claim of malicious prosecution were aptly stated by van Heerden AJ in **Minister for Justice and Constitutional Development v Moleko**³ and the following has to be alleged and must be proven:

“a) that the defendants set the law in motion (instigated or instituted the proceedings;

b) that the defendants acted without reasonable probable cause;

c) that the defendants acted with “malice” (or animus injuriandi); and

d) that the prosecution has failed”.

³ [2008] 3 ALL SA 47 (SCA) p 50 d-f

[32] Malice has been described in Rudolph v Minister of Safety and Security⁴ by Mthiyane AJ and Van Heerden AJ as follows:

“The requirements of ‘malice’ have been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression ‘malice’ is used, the claimant’s remedy in a claim for malicious prosecution lies under the action injuriarum and what has to be proved in this regard is animus injuriandi. See Moaki v Reckitt and Colman (Africa) Ltd and Another [1968 (3) SA 98 (A) at 103 G-104 E]; and Prinsloo and Another v Newman [1975 (1) SA 481 (A) at 492 A-B].”

[33] Warrant Officer Mokgomogane acted in accordance with his authority by arresting the plaintiff, (even without reasonable suspicion) and brought him to court. It was the Prosecuting Authority that decided to charge the plaintiff. The court remanded the matter and the plaintiff was held in custody pending the finalization of the matter.

[34] The requirement of malice has in my view not been met in this matter. It is clear from the evidence of Warrant Officer Mokgomogane that when he charged the plaintiff on 30 November 2010, he honestly believed that the plaintiff was involved in and guilty of murder and this belief was based on the information he had gathered. Even if it can be said that it was a mistaken belief, I am satisfied that it was a belief he honestly held.

The court in Moleko (*supra*) in dealing with the requirement of malice took the view that what was required was animus injuriandi and relied in this regard on the exposition by Neethling in Law and Delict (5th Ed) that:

⁴ 2009 (5) SA 94 (SCA) at 100 e-g

The court in ***Moleko*** (*supra*) in dealing with the requirement of malice took the view that what was required was animus injuriandi and relied in this regard on the exposition by Neethling in *Law and Delict* (5th Ed) that:

"In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other word, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution was lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely consciousness of wrongfulness and therefore, animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi".

[35] In the present case it could hardly be said that Warrant Officer Mokgomogane acted with the recklessness that would satisfy the requirement of *animus injuriandi*. He honestly held a view that prosecution would succeed, which in itself would exclude the existence of consciousness of wrongfulness. Furthermore he never knew the plaintiff prior to this case. For these reasons the claim in respect of malicious prosecution must also fail.

Quantum of Damages

[36] When assessing damages in matters such as the present, the evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest and the

old when he was arrested for 21 days. Due to his arrest he lost his job as a farm worker. His stay in the cells was unbearable as he was ill-treated by the other inmates.

[37] The purpose of an award for general damages in the context of the matter such as the present, is to compensate the claimant for deprivation of personal liberty and freedom and as well as the mental anguish and distress.

In **Minister of Safety and Security v Tyulu** 2009 (5) SA 85 (SCA) at par 26 Bosielo AJA (as he was then) emphasized that the primary purpose is *"not to enrich the claimant but to offer him or her some much-needed solatium for his or her injured feelings"*.

[38] Although the determination of an appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Defendant's Counsel⁶ referred me to the relevant comparisons made in **Minister of Safety and Security v Seymour** 2006 (6) SA 320 (SCA) at 326 A-D:

*"The following awards also provide some indication of how other courts have viewed incursions upon personal liberty (they are by no meaning exhaustive of the cases that have confronted the issue). In **Solomon v Visser and Another**, a 48 year-old businessman who was detained for seven days, first in a police cell and then in a prison, was awarded R4000 (R136 000). In **Areft v Minister van Polisie**, this court awarded a 41 year old businessman who was arrested and detained for about two hours R1000 (R24 000). In **Liu Quin Ping v***

⁶ Adv. S J Coetzee

Another, a 48 year-old businessman who was detained for seven days, first in a police cell and then in a prison, was awarded R4000 (R136 000). In ***Areft v Minister van Polisie***, this court awarded a 41 year old businessman who was arrested and detained for about two hours R1000 (R24 000). In ***Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino***, a businessman who was unlawfully detained for about three hours was awarded R12000 (R16978). In ***Manase v Minister of Safety and Security and Another***, in which a 65 year old businessman was unlawfully detained for 49 days, incarcerated at times with criminals, the sum of R90 000 (R102 000) was awarded. In ***Seria v Minister of Safety and Security and Others***, a professional man who was arrested and detained in a police cell for about 24 hours, for a time with a drug addict, was awarded R50 000 (R52 000). Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss”.

[39] Having regard to the circumstances of the arrest, the duration of the detention, the personal circumstances of the plaintiff, the awards made in previous comparable cases, I deem R200 000-00 to be a just and fair amount of damages. Costs should follow the cause.

[40] In the result, I make the following order:

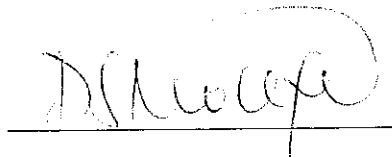
i) *The plaintiff's action against the defendants for unlawful arrest and detention succeeds;*

ii) *the plaintiff's action^{J.K.} against the defendants for unlawful assault and malicious X prosecution are dismissed;*

iii) *the defendants are ordered to pay the plaintiff an amount of R200 000-00 for the unlawful arrest and detention;*

iv) *interest on the amount a tempore morae at the rate of 15,5% per annum ^{from} ~~from~~ the date of service of the summons to date of payment;*

v) *the defendants are ordered to pay the plaintiff's costs of suit.*


 D.S. MOLEFE
 JUDGE OF THE HIGH COURT

Counsel on behalf of plaintiff : Mr. B E Mthimunya
Instructed by : Masombuka and Mthimunya Attorneys

Counsel on behalf of defendant: Adv. S J Coetzee
Instructed by : State Attorneys

Date Heard : 25, 26, 27 November 2013

Date Delivered : 25 February 2014