REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **63897/2011**

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

..... 2016-05-27
SIGNATURE DATE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG / PRIVAATSAK X67
PRETORIA 0001
2016 -05- 27
JUDGE'S SECRETARY / REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

JOYCE SITHOLE PLAINTIFF

and

MINISTER OF POLICE 1ST DEFENDANT

NATIONAL DIRECTOR 2ND DEFENDANT

OF PUBLIC PROSECUTION

J U D G M E N T

MALI J

[1] The plaintiff, an unemployed mother of two minor children residing at Magona Village in Malumelele in the Province of Limpopo instituted a claim against the defendants. The claim is for for damages arising from unlawful arrest and malicious prosecution respectively. The plaintiff was arrested on 13 October 2010 and she first appeared in Court on 14 October 2010. The claim against the first defendant has been settled between the parties at R50 000.00

[2] It is common cause that the plaintiff was arrested on an alleged charge of theft of money amounting to R430.00. The money was allegedly stolen at Tinyiko Primary School ("the school"). The said money belonged to one Tintswalo Grace Mashaba. It was in her handbag in a classroom at the school.

[3] The plaintiff was detained at Malamulele Police Station and was released on 25 October 2010.

[4] The issue to be determined is whether there was malicious prosecution and as a result damages sustained.

[5] In **Minister of Justice and Constitutional Development v Moleko** [2008] 3 All SA 47 (SCA) paragraph 8 it is stated;

"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 animo injuriandi); and

(d) that the prosecution has failed."

[6] Reasonable and probable cause has been defined as follows by Hawkins J in **Hicks v Faulkener** (8.Q.B.D. 171), cited with approval by Gardiner J in **Waterhouse v Shield 1924 CPD 155 AT 162**:

"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious men, placed in the position of the accused, to the conclusion that the person charged was probably guilt of the crime imputed"

[7] In **Mthimkhulu and Another v Minister of Law and Order 1993(3) SA 432 at 440D**, it was held: 'The deprivation of personal liberty has consistently been regarded by our courts as a serious injury.'

[8] The plaintiff is the only witness who testified. She stated that at the time of her arrest she was earning a government grant, which she still did at the time of the trial. This is because she is suffering from

epileptic fits. She was arrested on 13 October 2010 and appeared in court on 14 October 2010 when she was remanded in custody until 25 October 2010. The plaintiff further testified that on her arrival at the police station she was searched by police officers and no money was found in her possession. She stated that she was detained in a cell with 6 (six) other females. The conditions of the cell were not good because the cell and the toilets were dirty. They all slept on sponge mattresses with dirty blankets. The light in the cell was on throughout the night, resulting to the plaintiff's disturbed sleep. She stated that she did not apply for bail on 14 October 2010. On 25 October 2010 when she was released she was not told the reasons for her release. The plaintiff stated that she could not follow the proceedings and did not inform the magistrate thereof. According to her version she stated" *I felt in my heart not to ask".*

[9] The plaintiff stated that during the time of her detention she ate pap and tea for breakfast, for lunch pap and soup and for dinner pap and soup for the entire 12 (twelve) days of her detention. The food was small in quantity and did not provide enough nutrition. The plaintiff further testified that she was able to take her medication as required.

[10] Under cross examination the plaintiff stated that she did not enter the classroom at the school despite that the statement referred to annexed in the docket as A4 was signed by her.

[11] The second defendant called Mr Thapelo Mkhuwane, the state prosecutor ("prosecutor"). The prosecutor stated that on 14 October 2010 he received a docket with the statement of one Tintswalo Grace Mashaba, the complainant. Amongst other statements there was an SAP 299 signed by the plaintiff indicating that the money was found on her. He stated he also looked at the plaintiff's statement wherein she did not deny going to the school and that in her statement she did not state the name of the money lender known as Mashonisa. He said that based on the above grounds he found that there was a case for the plaintiff to answer and then enrolled the matter for prosecution.

[12] The prosecutor premised his reasonable belief on the plaintiff's statement, wherein she had admitted going to the school together with a certain Ms Mashaba. It transpired that the Ms Mashaba, with whom the plaintiff had a discussion, was one Ms Kate Mabel Mashaba and not Ms Tintswalo Mashaba the complainant. In the statement she stated that subsequent to the meeting with Ms Mabel Mashaba she went to Malamulele. She went there to a certain gentleman who is in the business of money lending, commonly known as Mashonisa. She borrowed an amount of R700.00, and Mashonisa made a record of the loan. Ms Mabel Mashaba in her statement categorically states that she never saw the plaintiff entering the classrooms and confirms having a discussion with her.

[13] The prosecutor testified that he did not arange bail for the plaintiff as the Investigating Officer informed him that he suspected that the

plaintiff was mentally disturbed. He then decided that the plaintiff was a candidate for mental observation, however he did not refer her, instead the plaintiff was remanded in police custody for 12 (twelve) days. On 25 October 2010 the Senior Prosecutor withdrew the case against the plaintiff.

[14] Under cross examination the prosecutor conceded that he did not refer the plaintiff for mental observation as he was only going to complete the relevant forms on 25 October 2010. He further conceded that what he understood to be a confession by the plaintiff at page 19, SAP 299 was the recording of the plaintiff's own money upon her detention not the money allegedly stolen.

[15] The prosecutor further stated that he remanded the plaintiff in custody for further investigations, specifically to have the school children's statements obtained. In fact the prosecutor contradicts himself as he had earlier stated that he remanded the plaintiff in custody for referral to mental observation. In fact in the charge sheet there is no entry by the presiding officer pertaining to mental observation; whilst there is a clear entry that the plaintiff's rights were explained to her.

[16] However under cross examination the prosecutor conceded that there is no investigation diary on the docket proving that the matter was remanded for purposes of obtaining statements from the school children. It appears that the prosecutor had to have the plaintiff detained at all costs. I cannot see what else can be so reckless and

malicious more so than the decision of the prosecutor, a professional in the execution of his duties in applying the law.

[17] I now turn to whether the plaintiff has proved the case of malicious prosecution. As indicated above the prosecutor's reason to enrol the matter for prosecution is based on hearsay. The hearsay being the complainant's statement who categorically stated that she did not witness anyone taking her money. She only relied on the information of the school children.

[18] One of the reasons the prosecutor stated that he believed that the plaintiff had a case to answer is because she did not name the said Mashonisa. This is rather concerning that the prosecutor saw it appropriate to base his decision to prosecute on hearsay pointing to the nameless children. The saying that *"what's good for the goose is also good for the gander"* finds application here.

[19] There can be no question that the prosecutor was aware of the fact that when he instituted prosecution and remanded the plaintiff in custody, by so doing, the plaintiff would in all probability have had her freedom violated and her dignity negatively affected. On the prosecutor's own version the plaintiff was mentally disturbed, the prosecutor could have foreseen that subjecting her to detention she would have been injured. The second defendant's case is that there was no intention on the part of the prosecutor to injure the plaintiff's integrity because he did not know the plaintiff at all. My view is that

malice cannot always be driven and or motivated by the knowledge of the person whom the prejudicial or malicious act is attended upon.

[20] Having regard to the above detention of the plaintiff for the alleged referral for mental observation and or whatever reason that suited the prosecutor then was arbitrary and unfair. There was no reason for her not to be released on 14 October 2010, despite the prosecutor's submission that the plaintiff did not ask to be released on bail. The plaintiff is not a sophisticated person, and that can be expected with her undisputed level of education being standard 4 or grade 6. She is very soft spoken and appears to be withdrawn. There is no reasonable man who would have expected her to apply for bail on her own volition.

[21] As was found in **Rudolph and Others v Minister of Safety and Security and another 2009 (5) SA 94 (SCA)** page 101 paragraph 20; "in the present matter the second defendant nevertheless continued to act, reckless as to the possible consequences of his conduct. The prosecutor thus acted with *animo injuriandi.*"

[22] Having regard to the above the plaintiff has succeeded to prove the requirements of malicious prosecution.

QUANTUM

[23] As regards the quantum for damages, the plaintiff claims an amount of R150 000.00. Willis J's clarion call to make the quantum of damages awarded in unlawful deprivation of liberty cases commensurate with the importance of the right to liberty was cautiously followed in **Olgar v The Minister of Safety and Security 2008 (JDR 15821E)** at para 16, where the judge held that:

'*In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the "horn of the plenty", at the expense of the defendant.*'

[24] When determining the quantum of damages to be awarded for unlawful deprivation of liberty, courts are essentially being asked to balance the interests of the litigant and those of the public purse. There is nothing unusual in courts playing this role. What is notable, however, in my opinion, is that courts often lean heavily in favour of protecting the public purse and thereby fail to pay sufficient attention to the constitutional rights of the litigant before court. This would seem to emanate from the *obiter dictum* of Holmes J in **Pitt v Economic Insurance Co. Ltd 1957(3) SA 284 (D) at 287E – F**, where the judge, in relation to the assessment of damages, opined:

'I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.'

[25] In the **Minister of Safety and Security v Tyulu 2009(5) SA 85 (SAC) at 93D – F** Bosielo AJA, in my view correctly, held as follows with regard to assessing quantum:

'It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of iniuria with any kind of mathematical accuracy. ... The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.'

[26] As was held in **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) [2007] 1 ALL SA 558** paragraph 17 in the assessment of general damages the facts of the particular case must be looked at as a whole. There the court dealt with the case of a 63 year old man who had been unlawfully arrested and detained for five days. He was awarded damages in the amount of R500 000 by the trial court, but the award was reduced to R90 000 on appeal.

[27] It is trite law that no two cases are always similar since it is difficult to find a comparable matter that is in all fours in respect of the facts. Past decided comparable cases, although often useful, merely serve as guidelines. The need to adjudicate each case on its own particular

merits was always present. In the present matter the plaintiff who was detained for 12 (twelve) days was afforded the opportunity to take her medication, despite taking the medication on almost empty stomach. In Rudolph the period of detention was one night and he was sick but was allowed medication The Court considered an amount of R50 000 appropriate. It has to be borne in mind that this award was made in 2009.

[28] Furthermore *in casu* the plaintiff could not attend to her minor children for 12 (twelve) days. She had to endure the harsh conditions of being incarcerated for no apparent reason. In this regard I find that an amount of R170 000 is the appropriate award.

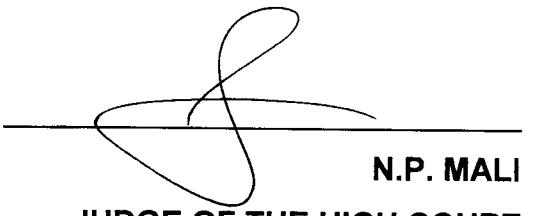
[29] In the result judgment is granted in favour of the plaintiff as follows:

29.1 The first defendant is ordered to pay the plaintiff damages in the amount of R50 000.

29.2 The second defendant is ordered to pay the plaintiff damages in the amount of R170 000.

29.3 Interest on each of the above amounts will run at the prescribed rate as from the date of judgment.

29.4 The second defendant is ordered to pay the costs of suit.



N.P. MALI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	Mr G Muller SC
Instructed by:	Loubser van der Walt Inc.
Counsel for the Defendant:	Ms K Ramaimela
Instructed by:	The State Attorney
Date of Hearing:	29 February 2016
Date of Judgment:	27 May 2016